U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 15 April 2015

CASE NO.: 2013-FRS-00043

In the Matter of:

LONNY SCHOW,
Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances: William McMahon, Esq.,
For the Complainant

Steven T. Densley, Esq.,
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

INTRODUCTION

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109 (Supp. 2011). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations. The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for engaging in certain protected activities, which include an employee's lawful and good faith notification, or attempt at notification, to the railroad carrier of a work-related personal injury or work-related illness. 49 U.S.C. § 20109(a)(4).

Lonny Schow ("Complainant") alleges that his former employer, Union Pacific Railroad Company ("Respondent" or "Union Pacific"), violated the whistleblower protection provisions of the FRSA by investigating and terminating him for reporting his coworker's on-duty injury. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on March 28, 2013, when the OALJ received Respondent's timely objections to the Occupational Safety and Health Administration's ("OSHA") findings in favor of Complainant. This case is before me *de novo*.

For the reasons stated below, I find that Complainant has established that his injury report was a contributing factor in Respondent's adverse actions against him and Respondent has failed to establish that it would have taken the same actions regardless of Complainant's protected activity. Consequently, I find that Respondent violated the FRSA, and Complainant's claims for compensatory damages and punitive damages are GRANTED as detailed below.

My findings are based on a complete review and consideration of the relevant arguments of the parties, evidence submitted, applicable statutory provisions, regulations, and precedent. Although not every exhibit in the record is discussed below, the entire record was carefully considered in arriving at this decision. Where applicable and as laid forth below, I have made credibility determinations concerning the testimony.

PROCEDURAL BACKGROUND

The Complainant filed his initial complaint with OSHA in October 2009,[1] alleging that Respondent retaliated against him for reporting a coworker's personal injury and a hazardous safety condition. (JX 1.[2]) Specifically, Complainant alleges that he was retaliated against on August 3, 2009, when Respondent initiated an investigation against him, and September 3, 2009, when Respondent assessed discipline against him. (JX 1, pp. 2–3.) Complainant contends that Respondent "has succeeded in creating a pervasive climate of fear among employees who know that they may be fired if they report on the job injuries or unsafe conditions which have led to injuries." (JX 1, p. 2.) On February 25, 2013, OSHA completed its investigation, and the Acting Secretary of Labor, through his agent, the Regional Administrator of OSHA, found reasonable cause to believe that Respondent had violated the FRSA, and accordingly awarded Complainant damages of $65,661 in back wages, $1,467 in vacation pay, $7,260.40 in interest, $50,000 for emotional distress, $25,000 for damage to his credit rating, $11,132.80 for modified mortgage payments, and $150,000 in punitive damages. (ALJX 1, pp. 12–13.[3]) In addition, Respondent was ordered to reinstate Complainant's retirement credit, expunge Complainant's discipline record, and pay reasonable attorney's fees. (ALJX 1, p. 13.) On March 28, 2013, Respondent timely appealed the Secretary's findings, requesting a hearing before an administrative law judge. (ALJX 2.)

[1] Complainant's OSHA complaint is undated. (JX 1.) The only reference to the date of this complaint is Respondent's Closing Brief, which states, "By October 21, 2009, [Complainant] had filed a whistleblower complaint." (Respondent's Closing Brief, p. 4.) The parties have stipulated that Respondent received notice of the Claimant's OSHA complaint on October 21, 2009. (Order Re: Parties' Stipulations, January 7, 2014, p. 2.)

[2] "JX" refers to "Joint Exhibit."

[3] "ALJX" refers to "Administrative Law Judge Exhibit."

The parties submitted a stipulation regarding a Track Image Recorder Video on August 30, 2013. Essentially, the parties agreed that the video would not be disclosed or distributed to anyone who is not involved in this case. On September 5, 2013, based on this agreement, I issued a protective order regarding the Track Image Recorder Video. (Protective Order for Track Image Recorder, September 5, 2013.)

On October 22, 2013, after multiple continuances, I issued an order setting the hearing for January 6, 2014, in Salt Lake City, Utah. (Notice of Hearing Location, October 22, 2013.) On December 2, 2013, Respondent filed a motion in limine and a motion for summary decision, and Complainant filed his replies on December 16, 2013. On December 18, 2013, I issued an order granting Respondent's motion in limine in part and denying it in part. Specifically, I granted Respondent's motion to exclude evidence that Complainant's child suffered night terrors and self-mutilation following Complainant's termination. I denied Respondent's motion to exclude evidence of the Complainant's distress resulting from his family's distress, evidence that a pattern of retaliation exists on Complainant's service unit, and evidence of alleged retaliatory actions against other Union Pacific employees. I also found that Respondent's motion was moot as to calling the OSHA investigator as a witness since the Complainant did not plan to call him. (Order Granting Respondent's Motion in Limine in Part, December 18, 2013.) On December 19, 2013, I denied Respondent's motion for summary decision. (Order Denying Respondent's Motion for Summary Decision, December 19, 2013.)

On December 20, 2013, I held a telephonic pre-hearing conference during which the parties informed me that they were working on a set of joint factual stipulations. (Order Summarizing Telephone Pre-Hearing Conference, December 23, 2013.) On January 6, 2014, at the beginning of the hearing, the parties submitted these stipulations, outlined in detail below. On January 7, 2014, I issued an order containing these stipulations. (Order Re: Parties' Stipulations, January 7, 2014.) During the hearing, I admitted Joint Exhibits ("JX") 1-34, Respondents' Exhibits ("EX") 1-12, and Complainant's Exhibits ("CX") 1-6,[4] 7(a),[5] 7(b), 7(e)[6]-(p),[7] 7(r),[8] 8, and 12-15. (HT,[9] pp. 5–32, 381–82.) Complainant's Exhibits 7(c), 7(d), 7(q), 9, 10, 11, and 20 were withdrawn. (HT, pp. 17, 21–23.) I excluded Complainant's Exhibits 16-19. (HT, pp. 25–26.)

On January 13, 2014, I issued an order requiring that the parties submit their closing briefs by March 11, 2014. (Order Re: Closing Briefs, January 13, 2014.) I received Respondent's closing brief on March 13, 2014, and Complainant's closing brief on March 14, 2014.

ISSUES

The issues to be decided are:

[4] Pages 742-50 and 754-74 of CX 6 were withdrawn. (HT, p. 381.)
[5] Pages 964-66 and 1020-22 of CX 7(a) were withdrawn. (HT, p. 382.)
[6] Page 1102 of CX 7(e) was withdrawn. (HT, p. 382.)
[7] Pages 1293-94, 1308-10, and 1352-53 of CX 7(p) were withdrawn. (HT, p. 382.)
[8] Pages 1382-84 and 1435-40 of CX 7(r) were withdrawn. (HT, p. 382.)
[9] "HT" refers to the Hearing Transcript.

1. Was the Complainant terminated in retaliation for engaging in an activity protected by the FRSA?
2. If so, what damages are the Complainant entitled to?

(Order Summarizing Telephone Pre-Hearing Conference, December 23, 2013, p. 1.)

STIPULATIONS

The parties submitted the following factual stipulations at the hearing on January 6, 2014:

1. The FRSA applies to these proceedings.
2. A Superintendent's Bulletin, titled "Rough Riding Locomotives," went into effect on January 1, 2009. It stated in relevant part:

> When above normal vertical or lateral motion is detected on a locomotive, the train dispatcher should be notified. Engineer will reduce speed to a level that provides a normal safe ride … [C]rews must immediately notify train dispatcher of the speed at which normal ride quality is regained. This is our largest opportunity to prevent personal injuries while riding on locomotives. If it's rough – slow it down!

3. On July 24, 2009, somewhere in the vicinity of milepost 30 to 38, Complainant was working as a conductor with Locomotive Engineer Russell Millward on Engine UP5551 operating a train near Opal, Wyoming.
4. At this time and place, Mr. Millward claims that when the train hit rough track, he injured his elbow after it struck an armrest while he was reaching to adjust the mirror.
5. On July 24, 2009, upon arriving in Green River, Wyoming, Mr. Millward reported his injury to a supervisor.
6. On July 24, 2009, upon arriving in Green River, Complainant also reported Mr. Millward's injury in a required written statement.
7. Neither Complainant nor Mr. Millward immediately reported an injury or rough track at the time that it was encountered.
8. On August 3, 2009, Respondent charged Complainant and Mr. Millward with violation of several Union Pacific rules stemming from the events of July 24, 2009.
9. On August 27, 2009, Respondent conducted an employee investigation of Complainant and Mr. Millward.
10. Following the investigation, Superintendent Jack Huddleston determined that Complainant and Mr. Millward had violated Union Pacific Rule 1.6 in being careless of the safety of themselves and others, which is a dismissal offense.
11. The way in which Complainant and Mr. Millward were deemed to have been careless of the safety of themselves and others included a failure to comply

with the January 1, 2009, Superintendent's Bulletin, as well as failure to comply with the following rules:

a. Rule 1.1.3 - Report by the first means of communication any accidents; personal injuries; … or any unusual condition that may affect the safe and efficient operation of the railroad.

b. Rule 6.21.1 - If any defect or condition that might cause an accident is discovered on the tracks … or if any crew member believes that the train or engine has passed over a dangerous defect, the crew member must immediately notify the train dispatcher …

c. Rule 1.2.5 - All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

12. On September 2, 2009, Superintendent Huddleston extended an offer of leniency to both Complainant and Mr. Millward consisting of an agreement that they could both return to work and a Level 3 safety violation would be noted in their personnel files and removed after 18 months if they did not have a subsequent rule violation during that time. Mr. Millward accepted the offer, but Complainant did not. Complainant was therefore terminated on September 3, 2009.

13. By October 21, 2009, Complainant had filed a whistleblower complaint.

(Parties' Joint Statement of Stipulated Facts, January 6, 2014.)[10]

The parties agreed to the following additional factual stipulations at the beginning of the hearing conducted on January 6, 2014:

1. Respondent is a railroad carrier within the meaning of the FRSA.
2. Respondent is engaged in the business of line-haul freight operations throughout the United States and is engaged in interstate commerce within the meaning of the FRSA.
3. The Complainant is an employee covered under the FRSA and has been employed by Union Pacific Railroad, with the exception of a nearly nine month gap during the time that he was terminated, since April of 2004.
4. On or about July 24, 2009, the Complainant was working as a conductor on a train on train IGNCH3-22, on engine UP5551, that was operating at or near Opal, Wyoming, with engineer Russell D. Millward.
5. On October 2, 2009, the Complainant's union representative initiated the Railway Labor Act appeals process and sent a letter to Respondent's Labor Relations Department.

[10] The Parties' Joint Statement of Stipulated Facts contained an additional stipulation that "[o]n May 7, 2010, Superintendent Jack Huddleston ordered [Complainant] to return to work after determining that the discipline had 'served its purpose.'" At the hearing, the parties agreed to substitute this stipulation for stipulation number 8 of my Order Re: Parties' Stipulations from January 7, 2014. (HT, p. 34.)

6. On November 16, 2009, the Respondent's Labor Board rejected the Complainant's appeal.
7. On January 28, 2010, the Complainant appealed his case to the Public Law Board seeking back wages.
8. On May 7, 2010, Mr. Huddleston sent the Complainant a letter indicating that the discipline had served its purpose and offered the Complainant reinstatement. The Complainant accepted the reinstatement offer and was reinstated on May 22, 2010.
9. On November 3, 2010, the Public Law Board denied the Complainant's claim for back wages.
10. On October 21, 2009, Respondent received a letter indicating that the Complainant had filed a whistleblower complaint to recover back wages and other damages for a retaliatory discharge.
11. On February 25, 2013, the OSHA Regional Administrator issued a decision on behalf of the Secretary of Labor finding that the Complainant was improperly discharged and ordered his reinstatement, payment of damages, and other relief.

(Order Re: Parties' Stipulations, January 7, 2014; HT, pp. 34–37.)

FACTUAL BACKGROUND

Complainant's Background and Family Life

The Complainant and his wife, Camille Schow, have been married since 1993 and have lived in Malad, Idaho, for about 10 years. (HT, pp. 89–90, 128.) They have five children, Braxton, Riley, Brett, Makenna, and Kyler, who, at the time of this hearing, were 19, 18, 15, 14, and 12 years old, respectively. (HT, pp. 89, 128.) Complainant and his wife own their home and have no plans to move. (HT, pp. 89–90.)

Complainant has worked for Union Pacific for about 10 years. (HT, p. 128.) He currently works as a locomotive engineer, a position he has held since 2005. (HT, p. 128.) His first position with Union Pacific was as a conductor. (HT, pp. 128–29.) Complainant often switches between working as a locomotive engineer and working as a conductor because Union Pacific uses a seniority-based system for job assignments. (HT, p. 130.) If there are no jobs available for locomotive engineers, Complainant will take a job as a conductor but then return to a locomotive engineer position as soon as one becomes available. (HT, p. 130.) There is not much difference in pay between the two positions. (HT, p. 130.)

Union Pacific Rules and Policies

Union Pacific has a set of rules that employees are required to follow. Rule 1.6, the rule Complainant was charged with violating, pertains to negligent conduct. (JX 10.) It states:

> Employees must not be: (1) careless of the safety of themselves or others; (2) negligent; (3) insubordinate; (4) dishonest; (5) immoral; (6) quarrelsome; or (7)

> discourteous. Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

(JX 10.)

Rule 1.1.3 deals with accidents, injuries, and defects, and states:

> Report by the first means of communication any accidents; personal injuries, defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.

(JX 11.)

Rule 6.21.1 is entitled "Protection Against Defects" and provides:

> If any defect or condition that might cause an accident is discovered on tracks, bridges, or culverts, or if any crew member believes that the train or engine has passed over a dangerous defect, the crew member must immediately notify the train dispatcher and provide protection if necessary.

(JX 12.)

Rule 1.2.5 deals with reporting injuries and states:

> All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

(JX 13.)

Rule 70.1 is entitled "Safety Instructions" and requires that employees must:

> Be responsible for their personal safety and accountable for their behavior as a condition of employment; take every precaution to prevent injury to themselves, other employees, and the public; comply with all rules, policies, and outstanding instructions; report, correct, or protect any unsafe condition or practice; be aware of their surroundings and maintain situational awareness to avoid risks associated with required tasks and work within the limits of their physical capabilities and do not use excessive force to accomplish tasks; use good judgment when assessing the safety of all tasks to avoid injury or damage to equipment; and understand that Union Pacific has empowered each employee to work safely and risk free.

(JX 16.)

John "Jack" Huddleston and Randall Egusquiza testified that employees are required to immediately report rough track and excessive lateral locomotive motion. (HT, pp. 298–99, 338.)

In Mr. Huddleston's view, this requirement comes from the superintendent's bulletin and Rule 1.6. (HT, pp. 298–99.) Mr. Huddleston and Mr. Egusquiza admitted, however, that "rough track" and "defective track" are not defined anywhere. (HT, pp. 299, 331.)

Union Pacific's policy regarding accident and injury reporting is posted on the bulletin boards, and possibly in Union Pacific's rule book.[11] (HT, pp. 270–71.) The policy reads as follows:

> Union Pacific Railroad is committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. This includes compliance with Company, Federal Railroad Administration, and other regulatory agency reporting requirements. Union Pacific will not tolerate harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness. Persons who report alleged violations of this policy are also protected from harassment or intimidation. Disciplinary action … will be taken against any employee, including supervisors, managers, or officers of the Company, who commit such harassment or intimidation.

(HT, p. 271; JX 17.) The policy also outlines the steps for reporting alleged violations of the harassment and intimidation policy. Several managers acknowledged that an employee only has to report an injury if he believes or knows he is injured. (HT, pp. 204, 309, 335.) Mr. Huddleston also testified, however, that there are limitations on this, and that someone who slams his elbow into an armrest needs to call into the dispatcher immediately to report the injury. (HT, p. 222.) Part of a manager's evaluation and compensation is based on the number of reported injuries, such that a high number of reported injuries on a manager's watch could lead to a reduction in compensation. (HT, pp. 195, 313.)

Union Pacific has a progressive discipline policy wherein managers are required to use a discipline calculation worksheet in assessing discipline against employees. (HT, p. 216.) The table provides guidelines for calculating discipline based on an employee's prior discipline level and the discipline level associated with the current event. (HT, pp. 216–17.) A Level 5 discipline always results in dismissal. (HT, p. 287.)

Training and Information Provided to Union Pacific Employees

On January 1, 2009, a superintendent's bulletin entitled "Rough Riding Locomotives" went into effect. (JX 9.) It states, in relevant part, "When above normal vertical or lateral motion is detected on a locomotive, the train dispatcher should be notified. Engineer will reduce speed to a level that provides a normal safe ride … [C]rews must immediately notify train dispatcher of the speed at which normal ride quality is regained. This is our largest opportunity to prevent personal injuries while riding on locomotives. If it's rough – slow it down!" (JX 9.) Complainant and the other conductors and engineers received this bulletin, but there was no training or instruction on it. (HT, p. 139.) Complainant interpreted the bulletin to mean "if the ride

[11] Mr. Huddleston testified that the policy might have been in the rule book, but he was not sure. (HT, pp. 270–71.)

characteristics of the locomotive [are] above what's considered normal, by [his] judgment, [then] it should be reported." (HT, p. 139.)

Aside from receiving the superintendent's bulletins, Union Pacific employees are not trained regarding how to identify excessive lateral side to side movement on a locomotive. (HT, pp. 198, 290.) There is also no training regarding what constitutes potentially unsafe track conditions for conductors and locomotive engineers. (HT, pp. 198, 290.) It is left to the judgment of conductors and locomotive engineers to determine whether the track is rough and needs to be reported. (HT, p. 198.) The superintendent's bulletin never mentions the words "rough track." (HT, p. 291.)

Union Pacific's managers have annual computer-based training on whistleblower law and how to prevent retaliation and harassment, and the policies are made available to Union Pacific employees on the company website. (HT, pp. 205, 272.) They also participate in presentations and courses on this issue. (HT, p. 205.) Mr. Huddleston testified that he "know[s] the policies," is "very familiar with them at all times," is "trained on them … annually," and has discussed whistleblower protection laws and policies with other managers many times. (HT, p. 210.)

Union Pacific also issues ethics bulletins to educate its staff about ethics rules, obligations, and protections, and the consequences if people do not follow the rules. (HT, p. 272.) These bulletins often describe real or hypothetical scenarios in which a rule or policy was violated, and then explain the consequences stemming from that rule violation. For example, one such bulletin described an incident where an injured employee "was discouraged from completing an accident report and from seeking medical treatment" which ultimately led to the supervisor's termination from his position. (HT, pp. 272–73; JX 18.) Similarly, Union Pacific distributes memoranda to its managers. For example, all managers within the Operating Department received a memo entitled "Employee Personal Injury Response," which provided instructions on how to handle employees' injury reports and stated that harassment and intimidation to prevent injury reporting were forbidden. (HT, p. 273; JX 19.) Another memo, entitled "Accident Injury Illness Reporting" was distributed to managers to inform the team of the accident reporting policy and the consequences for violating it. (HT, p. 274; JX 20.) Other memos entitled "Whistleblower Retaliation" and "Federal Rail Safety Act" were also disseminated to managers to explain the governing laws and policies and the consequences for violating them. (HT, pp. 274–75; JX 21; JX 22.)

Incident on July 24, 2009, and Subsequent Events

On July 24, 2009, Complainant was working as a conductor on a train going from Pocatello, Idaho to Green River, Wyoming. (HT, p. 129.) Complainant has been on this section of track "hundreds" of times, including as recently as three days before the hearing. (HT, pp. 131–32.) During this trip, around 14:54, Complainant was writing in his conductor log when Russell Millward, the locomotive engineer, informed him that he had bumped his elbow. (HT, pp. 130, 134.) Mr. Millward had "extended his arm out to adjust the mirror" on the locomotive, and in the process "struck his elbow on a piece of steel where an arm pad was missing." (HT, pp. 130–31.) Joint Exhibit 8, a video recording taken during this trip, depicts the track and the incident that occurred. (HT, pp. 132–34; JX 8.)

At the time, Mr. Millward did not tell Complainant that he was injured. (HT, p. 135.) Though the track had a bump in it, Complainant did not take any exception to the track conditions, because he believed them to be "normal" – "the same thing [he] had been used to, trip after trip." (HT, pp. 135, 136.) Complainant explained that "locomotives, inherently, have lateral movement to them. And when you go around curves, and things like this, they do wiggle back and forth. And there are some bumps in the road, here or there, that are there all the time and they're just inherent with the railroad." (HT, p. 136.)

As their train was arriving in Green River, Mr. Millward told Complainant that his elbow still hurt and he wanted to get it checked out. (HT, p. 137.) When the train arrived, Complainant and Mr. Millward notified the yard master and the relieving crew that the arm pad was missing and needed to be fixed. (HT, p. 137.) Complainant and Mr. Millward then went in and talked to Mr. Petersen, a manager. (HT, p. 137.) Mr. Petersen handed Complainant a form to fill out and instructed Complainant to "tell [them] what happened." (HT, p. 137.) Complainant completed the form, turned it in to Mr. Petersen, and tied up the train. (HT, p. 137.) In his report, Complainant wrote that the train "hit rough track," causing the train to "rock from side to side," and eventually caused Mr. Millward "to strike [his] elbow against [the] outside armrest." (HT, p. 138; JX 5.) Complainant used the term "rough track" because he wanted to be "descriptive with what [they] noticed out on the train." (HT, p. 138.) Complainant did not report the section of track as being defective because Complainant did not believe it was unsafe or defective. (HT, p. 145.) Mr. Millward also submitted an injury report, stating that "while adjusting the mirror, the locomotive or track caused some lateral movement, which threw [his] elbow into the outside armrest which had no padding." (JX 4.)

After turning in his statement in Green River, Complainant and Mr. Millward tied up the locomotive and went to the hotel. (HT, p. 140.) Normally, after tying up the locomotive, Complainant would wait for his number to come up to the pool again and take a train back to Pocatello. (HT, p. 140.) Several hours later, however, Complainant and Mr. Millward were called to "deadhead home" in a crew bus, meaning that they were not given a work assignment and instead were taken back to Pocatello on a bus. (HT, p. 140.) This was an unusual occurrence and the Complainant did not know why he was being asked to do this. (HT, p. 140.) The next day, Complainant learned that he was taken out of service when he logged into the computer and noticed that he was in "investigation pending" status. (HT, p. 141.) He then called his manager in Pocatello, Mallory Nelson, to ask why his status was listed as "investigation pending," but Mr. Nelson did not offer an explanation. (HT, p. 141.)

Complainant's wife testified that following the events of July 24, 2009, Complainant came home early from work and told her that the locomotive engineer had bumped his elbow and because he was injured, both of them were relieved of duty for the night. (HT, p. 90.) She explained that this was unusual. (HT, p. 90.)

Union Pacific's Inspection of the Track and Locomotive

After Complainant and Mr. Millward reported Mr. Millward's injury in Green River, the locomotive was inspected and deemed safe, in terms of lateral movement. (HT, p. 199.) A Union Pacific employee rode the locomotive with the next crew and determined that it was not a "rough riding locomotive." (HT, p. 200.) The section of track was also inspected and deemed to be safe.

(HT, p. 200.) The bump in the track that was present on July 24, 2009, has not been repaired and remains there to this day. (HT, p. 136.)

Union Pacific employs a system of regular track inspections to make sure that the train tracks are safe and free of defects. (HT, p. 373.) A track inspector goes over the track "a number of times each week" in a high-rail, which is a pick-up truck on wheels similar to locomotive wheels. (HT, p. 373.) This is done in order to look for defects, anything off the rail, defects with warning devices, and other potential safety hazards. (HT, p. 373.) This process allows for the detection of defects that may be difficult to detect on a locomotive. (HT, p. 374.) Union Pacific also utilizes rail detector cars several times a year that shoot sound beams into the rail to detect its integrity and ultimately discover potential future defects. (HT, p. 374.)

Mr. Huddleston testified that employees are not disciplined for not reporting a track that was later determined to be defective because it is common for employees to not realize that the tracks are defective. (HT, p. 375.) Because a locomotive is so large and heavy, often the crew will not experience any sign that the track below is problematic, so they could not be expected to report it. (HT, p. 375.) Though it could be detected by the track inspector on his smaller, more sensitive rail equipment, or the rail detector equipment's sonic waves, the crew "would never know that it was defective" because there would not be "any side to side motion." (HT, p. 375.) Mr. Huddleston testified, however, that if he found out that the crew was aware of a track defect but failed to report it, then they would likely be disciplined. (HT, p. 376.)

Union Pacific's Decision to Investigate Complainant

Mr. Huddleston, who was superintendent of the Pocatello Service Unit at the time, made the decision to investigate and ultimately terminate the Complainant. (HT, p. 195.) Mr. Huddleston testified that Complainant "was careless with the safety of others by not reporting a condition that he deemed unsafe that caused an injury." (HT, p. 207.) He believed Complainant's actions to be "willful" because "he knew [of the dangerous condition] at the time" as evidenced by the fact that he wrote "rough track" on his report. (HT, p. 208.) Mr. Huddleston admitted that he does not know if anyone asked Complainant for clarification regarding "rough track" and he might not have asked him for clarification if he had received Complainant's initial report. (HT, p. 208.) He also acknowledged that it is left to the individual judgment of conductors and locomotive engineers as to what constitutes potentially dangerous track that needs to be reported. (HT, pp. 198–99.)

Mr. Huddleston does not know of any employees who have been disciplined after going across a section of track that was later discovered to be defective but not reporting it. (HT, p. 199.) Mr. Huddleston admitted that if Mr. Millward had not reported an injury, then Union Pacific would "have no reason to investigate anything." (HT p. 200.) He further testified, "The rule violation came from the reporting of the injury and our investigation." (HT, p. 200.) Mr. Huddleston does not believe his actions violated whistleblower protection laws because "it was a rules violation that generated the investigation." (HT, p. 209.) He testified that he does not discipline people for reporting personal injuries, but rather the discipline in this case stemmed from the information found in the report. (HT, p. 224.)

Complainant was notified that he was being charged with a Level 5 rule violation on July 27, 2009. (HT, pp. 90, 141.) His wife was present when he was notified. Complainant received a phone call relaying this information. (HT, pp. 91, 141.) Complainant was "devastated" when he received this news, and his chest became tight; he could not breathe; he became dizzy and felt that he could not move. (HT, p. 142.) Complainant's wife testified that following this phone call, Complainant was "very emotional," "unable to speak," "angry," and "scared." (HT, p. 91.) Complainant told his wife that he "felt as if he was going to fall down," then lost his balance and she helped him sit in a chair. (HT, pp. 91, 142.) Complainant's wife called her brother and told him that Complainant was having difficulty breathing; the two of them took Complainant to the emergency room. (HT, p. 92; JX 32.) Complainant does not remember much of what happened in the hospital, saying that it is all "just kind of a blur." (HT, p. 142.) After an examination, the emergency room doctor diagnosed Complainant with having had an anxiety attack and prescribed Xanax, an anti-anxiety medication. (HT, pp. 92–93, 142–43; JX 32.) Complainant took the Xanax for about a month but did not renew the prescription. He has not had an anxiety attack since then. (HT, pp. 93, 143.)

On August 3, 2009, Complainant received a formal investigation notice from Union Pacific. (HT, p. 143; JX 6.) The investigation was originally scheduled for August 12, 2009, but was postponed to August 27, 2009. (HT, p. 144; JX 7.)

Union Pacific's Investigation

Randall Egusquiza was chosen to serve as the hearing officer in Complainant's investigation. (HT, p. 331.) At the hearing, Complainant was represented by Brad Barbre, and Mr. Millward was represented by Jim Lance; both are union representatives. (RX 1, p. 2.) Complainant and Mr. Millward were both present at the investigation, along with Mr. Egusquiza (hearing officer), Brian Jones (manager of operating practices for Union Pacific and charging officer), and Robert Warth (local union chairman and observer). (RX 1, pp. 2–3.) Mr. Jones testified on behalf of Union Pacific regarding the events giving rise to the investigation, stating that Complainant and Mr. Millward had failed to report a locomotive defect and rough riding track in a timely manner. (RX 1, pp. 16–78, 109–13.) Complainant and Mr. Millward also testified at the hearing. (RX 1, pp. 78–109, 113–16.)

With his closing statement, Complainant asked for "fairness and honesty" in Union Pacific's resolution of the matter. (RX 1, p. 118.) On behalf of Complainant, Mr. Barbre argued that there was no rough track and Complainant should be returned to service with no discipline. (RX 1, p. 121.) Mr. Millward deferred to his representative, Mr. Lance, who argued that the charges were "excessive and unwarranted" because there was no rough track or rough riding locomotive. (RX 1, p. 119.)

Following the investigation, Mr. Egusquiza emailed Mr. Huddleston with his evaluation and recommendations. (HT, p. 332; JX 28.) Mr. Egusquiza wrote, "After reading the transcript, I'm convinced that this crew reported this incident as if the locomotive and/or the track was unsafe and caused a personal injury. In saying that[,] I am not clear how a neutral may view this investigations (sic) outcome." (HT, p. 339; JX 28.) He later clarified his statements by testifying at the hearing before me that "it was reported as a possible unsafe condition originally" but Complainant and Mr. Millward contradicted the evidence when they "stated that [the condition]

wasn't that bad." (HT, p. 339.) In closing, Mr. Egusquiza wrote that he thought the charges against Complainant and Mr. Millward should be sustained, but also wrote that Union Pacific should consider leniency to "avoid a neutral getting involved" and because Complainant "is a good employee and is worth taking a chance on." (HT, p. 341; JX 28.) Mr. Egusquiza wrote that Complainant "was caught up in something that he was not prepared for," and at the hearing before me Mr. Egusquiza testified that he had "a feeling" that Complainant was "led on." (HT, p. 341; JX 28.) He also testified that he had a "gut feeling" that Complainant "was very sincere in the investigation." (HT, pp. 341–42.) Finally, Mr. Egusquiza recommended leniency because there were no subsequent safety incidents or injuries stemming from the events at issue in this case. (HT, p. 342.)

Mr. Huddleston decided to offer Complainant and Mr. Millward leniency. (HT, p. 196.) On September 2, 2009, Union Pacific offered the Complainant leniency and told him he could return to work at a Level 3 discipline and forfeit the 44 days of back pay. (HT, pp. 144–45.) Complainant discussed this offer with his wife. (HT, p. 94.) Complainant's wife was concerned about the potential negative implications of having Level 3 discipline on his record, and that levels of discipline can add up and accrue. (HT, pp. 94–95.) The couple decided together that Complainant was "not going to accept responsibility for something that he had not done." (HT, pp. 94–95.) In Complainant's words, "I couldn't take a Level 3 for something I was not guilty of." (HT, p. 145.)

The day after Complainant rejected the offer of leniency, on September 3, 2009, Union Pacific sent Complainant a letter informing him that the charges against him had been sustained, he was being assessed Level 5 discipline, and he was permanently dismissed. (HT, p. 144; JX 14.) He had never been disciplined by Union Pacific before. (HT, p. 144.)

Complainant appealed the Level 5 discipline in October 2009, but this request was denied by Terrill Maxwell, Assistant Director of Labor Relations. (RX 2.) Complainant subsequently filed an appeal with the Public Law Board, which was denied in September 2010. (RX 3.)

Economic Impact of Complainant's Termination

Complainant and his family did not have any plans for making ends meet if Complainant was terminated. (HT, pp. 95, 148.) Following the termination, Complainant applied for jobs, looked on the internet, looked in the newspaper, made phone calls, and applied for unemployment benefits. (HT, pp. 95, 148.) Complainant's wife explained that they were living 60 miles from Pocatello, Idaho, the next big town, and there were not many jobs available. (HT, p. 95.) Complainant did not look for many jobs in Pocatello because the jobs there would likely not have paid enough to justify the travel to and from work that would be required. (HT, p. 157.)

Complainant and his wife decided together that they needed to cut expenses by negotiating with creditors and ensuring that they were able to fulfill the family's basic needs. (HT, p. 95.) Complainant's wife testified that at the time, the family had a home mortgage, "credit cards, vehicle loans, just average American debt." (HT, p. 99.) When they contacted their mortgage provider, Complainant and his wife were told that the only way to get a mortgage modification was to miss two payments, so they followed instructions. This was the first time they had ever missed a mortgage payment. (HT, pp. 99, 100.) Following the two missed

payments, the renegotiation of their mortgage raised the monthly payments from $677 to $711, and increased the total loan amount by over $11,000. (HT, pp. 99–100, 110; CX 7A, p. 951.) Complainant's wife testified that this "almost turned into a foreclosure" because the bank mishandled things. (HT, pp. 99, 100.)

The couple also called their credit union and credit card providers and had their monthly payments reduced for several months until they received a tax refund to help cover their bills. (HT, p. 100.) After negotiating with their creditors, Complainant and his wife were able to meet the modified payments and obligations.[12] (HT, p. 99.) Following the negotiations with their creditors, Complainant and his wife were declined enrollment in an overdraft protection plan because they had modification loans in their credit report. (HT, p. 107.) Complainant's credit score also dropped during this time from 676 to 550 or 570. (HT, p. 154.) When Complainant returned to work, his credit score was around 600, and it has since improved to around 680. (HT, p. 154.)

At the time Complainant was terminated his wife was not working, but she eventually got a job in retail for Hess Lumber. (HT, pp. 95–96, 148.) Prior to taking this position, Complainant's wife had last worked in 2001 or 2002. (HT, p. 96.) After 2002, she was a homemaker and a stay at home mom who cared for the needs of the family full time. (HT, p. 96.) When Complainant's wife returned to work, it had a "huge impact" on the family because she was no longer able to be there when the kids got home from school, help with homework, cook, clean, iron the clothes, and take care of the yard work as she had done in the past. (HT, pp. 96–97.) As Complainant's wife testified, "I wasn't available to help them. I wasn't able to take care of them, as I had." (HT, p. 97.)

Complainant's termination had other substantial effects on the family. Complainant's wife became unable to buy her ulcer medications. (HT, p. 100.) Complainant's wife's parents bought the family a wood-burning stove because they could no longer afford to pay for gas to heat their home. (HT, pp. 101, 153.) The family then went into the woods and gathered firewood to burn in the stove through the winter. (HT, pp. 101, 153.) Whereas the family used to go hunting recreationally, "the recreation was taken right away" because the family began hunting for food out of necessity. (HT, p. 102.) With the family no longer able to afford to buy meat, they hunted and harvested deer, and their neighbors also gave them the meat from the deer they hunted. (HT, pp. 102, 153.) Complainant's wife began canning fruits and vegetables at home to make sure that they would have enough food to get through the winter. (HT, pp. 102, 153.)

The family's holiday traditions were also affected. Complainant and his wife had to explain to their children that "this was going to be a different Christmas" than they were accustomed to and they would not be able to get the gifts they had gotten in the past. (HT, pp. 102–03.) Complainant's wife had to explain to their eight-year-old son that there was no Santa Claus, that the parents have to buy the gifts, and that this year there would be no gifts. (HT, p. 103.)

[12] Complainant submitted numerous financial records and documents into evidence demonstrating the significant financial toll his termination had on the family. (CX 7A; CX 7B; CX 7E; CX 7F; CX 7G; CX 7H; CX 7I; CX 7J; CX 7K; CX 7L; CX 7M; CX 7N; CX 7O; CX 7P; CX 7R.)

Complainant's Subsequent Employment with Proctor and Gamble

Around November or December of 2009, Complainant heard about a new Proctor and Gamble plant opening about 35 to 40 miles from his family's home. (HT, pp. 98, 149.) He found the job by continuously looking for positions and applying to anything that was within a reasonable distance from his home. (HT, p. 149.) The plant predicted that the Complainant would be able to start working in February or March, but he was not able to start until April 2010. (HT, pp. 98, 150.) Complainant eventually started working there, but only worked for about two weeks before he received a letter from Union Pacific instructing him to return to work. (HT, p. 150.)

Complainant's Return to Union Pacific

In May 2010, Complainant received a letter instructing him to report back to work on May 22, 2010. (HT, p. 103; JX 15.) The letter stated that the discipline had "served its purpose" and as a result, he was allowed to return to service. (JX 15.) Complainant was surprised to receive that letter, as no one had called him to tell him it was coming, and he did not know why he received it. (HT, p. 150.) Complainant immediately called his union representative, Brad Barbre, who had not received the letter. (HT, pp. 150–51.) Mr. Huddleston testified that he sent this letter to Complainant because, as the letter stated, he felt that the "discipline [had] served its purpose." (HT, p. 211.) Specifically, Mr. Huddleston, in collaboration with the Labor Relations Department, felt that Complainant should come back because he "had been off [for] 9, 10 months" and "was not a bad employee." (HT, p. 211.) The decision was also based on the fact that the track was later determined to not be defective. (HT, p. 212.) Mr. Huddleston testified that it is common for terminated employees to eventually return to Union Pacific. (HT, p. 220.)

Complainant returned to work on May 22, 2010. (HT, p. 151.) He believes that he returned to work at a discipline Level 0, but Mr. Huddleston testified that Complainant had a Level 3 discipline that "worked itself off" back to a Level 0.[13] (HT, pp. 151, 213, 289.) Complainant returned to work subject to a corrective action plan requiring him to attend a two-day rules class, report to his manager once a week for 90 days, be familiar with superintendent bulletins, and report all cases of rough track and locomotives. (HT, pp. 219–20; RX 5.)

Complainant had several discussions with managers upon his return. At the time of Complainant's termination, Scott Huffield kept a box of Complainant's belongings and told him, "I'm going to keep these, because you'll be back." (HT, p. 151.) When Complainant returned, Mr. Huffield returned the box to him and told him, "I told you you'd be back." (HT, pp. 151–52.) In addition, upon his return, Complainant was the only Pocatello employee in the rules class along with several Nampa employees. (HT, p. 152.) When the Nampa employees asked why Complainant was in the class, Randy Bosh, a Manager of Operating Practices, said, "He's just returning to work, and rightfully so." (HT, p. 152.) Finally, while attending an investigation for another Union Pacific employee, Complainant and several union representatives were speaking

[13] Complainant testified that he was brought back at a Level 0, but Mr. Huddleston testified, "I believe the record reflects that he has a Level 3, and the current level is zero. So, his Level 3 would have worked itself off, as far as the 18-month period it would have worked itself out to the current level, discipline level, of zero. I believe his record reflects a 3 – a 5, brought back as a 3, and a current level zero." (HT, p. 213.) Mr. Huddleston admitted that he did not review any documents, but this testimony was based on the "normal procedure." (HT, p. 213.)

to Manager of Operating Practices Brian Jones when the conversation shifted to Complainant's investigation and termination. (HT, p. 152.) Brian Jones told Complainant, "You got fucked." (HT, pp. 152, 368.) Mr. Jones testified that he made this statement because he felt that Complainant was a victim of Mr. Millward, "an older seasoned employee," "encouraging him to agree or testify to the fact that the injury had occurred" due to equipment defects. (HT, p. 368.) Mr. Jones further testified that he did not mean this statement to mean that Union Pacific had mistreated the Complainant in any way. (HT, p. 368.)

For the 9 to 10 month period he was out of work, Complainant lost approximately $66,000 in wages. (HT, pp. 103, 152.) He also lost about $1,400 in vacation time. (HT, p. 104.)

Emotional Impact of Complainant's Termination

When Complainant received the termination letter, he felt "about two inches tall." (HT, p. 148.) Because Complainant's wife became the family breadwinner, Complainant was distraught over no longer being able to provide for his family financially. (HT, p. 149.) He "had to be Mr. Mom" and was "very ill-prepared" for those responsibilities. (HT, p. 149.) Complainant says that he was not a very good father during those months because he was "short" with the children and "wasn't the person that they remembered [him] being." (HT, p. 149.) This was mostly due to the financial stresses he was experiencing. (HT, p. 149.) As a result of these events, Complainant went from being an optimist to being a pessimist. He feels that "the glass is always half empty" now, and he "can't shake it." (HT, p. 154.)

Complainant's wife observed Complainant's emotional distress as well. She testified that following his termination, she "saw a very strong, capable man crumble." (HT, p. 97.) Pre-termination, Complainant's wife described him as "happy-go-lucky," "easy going," a "proud father," and "a doting husband." (HT, p. 97.) Complainant had always been the breadwinner for his family, and the termination caused him to lose his sense of humor and his ability to provide for his family. (HT, pp. 97, 105.) Though Complainant tried to take over his wife's duties as caretaker for the family, Complainant's wife testified that he "did his best" but was unable to do the things that she would do. (HT, pp. 97–98.) Complainant was very upset by his termination, but there were no physical manifestations of his distress, such as ulcers or loss of sleep, aside from his anxiety attack. (HT, pp. 113–14, 117.)

Other Examples of Union Pacific Disciplining Employees for Filing Injury Reports

Gennese Annen

Gennese Annen, a Union Pacific employee in the Pocatello service unit, brought an FRSA action against Union Pacific for allegedly terminating her and preventing her from seeking medical care in retaliation for reporting a work-related injury. (CX 1, p. 1.) Following an investigation, the Secretary of Labor, through her agent, the Regional Administrator for OSHA, found that Union Pacific had violated the FRSA, and Complainant submitted a copy of OSHA's findings into evidence. (CX 1.) Specifically, OSHA found that Ms. Annen was injured as she was exiting a locomotive and her bag got caught on the doorframe. (CX 1, p. 3.) Several hours later, she decided to seek medical attention and attempted to notify a supervisor. (CX 1, pp. 3–4.) She finally got in touch with a manager as she arrived at a medical clinic, and the

supervisor told her not to seek outside medical care but instead to return to Union Pacific's depot to be seen by the company nurse. (CX 1, p. 5.) Because she was in pain, she decided to seek outside medical attention anyway, and was diagnosed with a muscle strain and prescribed medication. (CX 1, p. 6.) Before she could take the medication, a manager got in contact with the medical clinic and asked to speak with Ms. Annen. (CX 1, p. 6.) The manager informed Ms. Annen that before she could take the pain medication, she needed to take a drug test. (CX 1, p. 6.) She complied because she was afraid she would be disciplined otherwise. (CX 1, p. 7.) She then submitted an injury report. (CX 1, p. 8.)

When Ms. Annen subsequently returned to work, she was notified that she was being investigated and could not return to work until after the investigation was completed. (CX 1, pp. 8–9.) Ms. Annen was accused of failing to immediately report her injury and of failing to furnish information to a supervisor. (CX 1, p. 9.) Following the investigation, the charges were upheld and Ms. Annen was terminated. (CX 1, p. 12.) OSHA found that Union Pacific violated the FRSA by retaliating against Ms. Annen for reporting her injury and ordered Union Pacific to pay Ms. Annen back wages, compensatory damages, and punitive damages. (CX 1, pp. 18–19.)

Eric Spurgeon

Eric Spurgeon testified about an incident in which Union Pacific allegedly retaliated against him for filing an injury report. Mr. Spurgeon is a conductor for Union Pacific. (HT, p. 56.) His responsibilities include managing the freight, switching cars, and taking trains from point A to point B safely. (HT, p. 56.) On July 3, 2010, he was switching cars and getting ready to go to work when a mosquito bit his arm. (HT, p. 56.) Over the next few days, the bite continually got bigger and eventually his wife told him, "If it's bigger by tomorrow, you need to go seek medical attention." (HT, p. 57.) On July 5, 2010, Mr. Spurgeon went to urgent care where a doctor administered antibiotics shots. (HT, p. 57.) After leaving the doctor's office, Mr. Spurgeon went home, rested, and called his union representative to figure out what to do next, as he had never filled out an injury report before. (HT, pp. 57–58.)

Mr. Spurgeon's union representative called and set up an appointment for him to meet with a manager, Gary Pfnister. (HT, p. 58.) On July 5, 2010, Mr. Spurgeon met with Mr. Pfnister and filled out an injury report. (HT, p. 59.) He subsequently received a Notice of Investigation from Union Pacific, informing him that he was being investigated for late reporting of the mosquito bite. (HT, p. 59.) Following Union Pacific's investigation, Mr. Spurgeon was suspended for five days. (HT, p. 60.) Mr. Spurgeon does not believe that he was guilty of late reporting because he reported the injury as soon as he knew it was an injury. (HT, p. 60.) In his words, "[I]t was a mosquito bite. I've never reported a mosquito bite or had any incidents with a mosquito bite." (HT, p. 60.) He did not realize it was actually an injury until he met with a doctor. (HT, pp. 60–61.) Mr. Pfnister, on the other hand, testified that from the beginning he was skeptical that Mr. Spurgeon's injury occurred on duty,[14] and he referred to Mr. Spurgeon's injury

[14] This is also evident from an email Mr. Pfnister sent to Mr. Huddleston and other Union Pacific employees recounting his initial conversation with Mr. Spurgeon about the injury. (CX 15, pp. 660–62.) Mr. Pfnister describes in the email how he repeatedly questioned Mr. Spurgeon's account of the mosquito bite, and ultimately Mr. Pfnister writes that he does not believe Mr. Spurgeon's explanation of what happened. (CX 15, pp. 660–62.)

claim as a "piece of shit."[15] (HT, pp. 313–14.) In addition, Mr. Pfnister sent an email regarding the investigation to Jerry Lundquist, saying to handle the incident "like it's going to be a level 5!!" (CX 15, p. 654.)

Following an investigation, the Acting Secretary of Labor, acting through his agent, the Regional Administrator for OSHA, found that Union Pacific violated the FRSA in Mr. Spurgeon's case. (CX 2.) Mr. Huddleston was the supervisor who decided to discipline Mr. Spurgeon, and he acknowledged that Mr. Spurgeon would not have been disciplined if he had not submitted an injury report. (HT, pp. 202–04.) Mr. Huddleston does not, however, believe that his actions violated whistleblower law. (HT, p. 209.) Before Union Pacific issued the discipline letter, Mr. Spurgeon was offered leniency in the form of the Safety Intervention Program, wherein Union Pacific trains employees on how to be safer. (HT, p. 61.) Mr. Spurgeon turned this offer down because he did not feel he did anything wrong. (HT, p. 61.) He completed the five-day suspension and then returned to work. (HT, p. 61.) During Mr. Spurgeon's eight years with Union Pacific, his experiences and his discussions with other employees led him to believe that "[i]f you report [injuries], you will be punished." (HT, p. 63.) However, Mr. Spurgeon noted that the Pocatello Service Unit today has a "totally different" climate. (HT, pp. 63–64.) He recalled an incident in which he got bitten by a wasp, reported the injury, and the superintendent who replaced Mr. Huddleston, Ricky Wells, told him, "I just want you to know there's no investigation, you're not going to get fired, I just want to make sure you're okay." (HT, p. 64.)

Jeffrey Ryan

Jeffrey Ryan also testified about an incident in which Union Pacific allegedly threatened and intimidated him to prevent him from filing an injury report. Mr. Ryan has been a conductor for Union Pacific since 2007. (HT, p. 75.) In June 2010, he was working in Montpelier, and that night when he went to bed he realized his leg was sore. (HT, p. 76.) Mr. Ryan called his boss and left a message explaining that he could not come in to work because his leg hurt. (HT, p. 76.) Mr. Ryan's boss called him back and asked him to go see Susan Norby, a nurse at the Pocatello depot, about getting some paperwork to go to the hospital, to which Mr. Ryan agreed. (HT, p. 76.) Mr. Ryan went to see Ms. Norby, who looked at his leg and tried to determine whether Mr. Ryan had a blood clot. (HT, p. 76.) During the examination, two Union Pacific managers, Mr. Bybee and Mr. Sanders, came into the room and threatened Mr. Ryan, saying that if he filled out an accident report stating that his injury happened at work, he would be fired. (HT, p. 77.) Eventually, Mr. Pfnister entered the room, asked the managers to leave, and took Mr. Ryan to the hospital. (HT, p. 78.) Mr. Ryan never filled out an injury report; instead he wrote a statement saying that he hurt his knee at home so that he would not be fired. (HT, p. 79.) Mr. Pfnister, Mr. Bybee, and Mr. Sanders all deny that this occurred. (HT, pp. 324, 361, 365.)

[15] Mr. Pfnister received an email from Mr. Lundquist stating, "I just thought I would let you know, this is a POS." (HT, p. 313; CX 15, p. 683.) Mr. Pfnister agreed, replying, "Yup will be off a week[.]" (CX 15, p. 683.) Mr. Pfnister explained that "POS" stands for "piece of shit." (HT, p. 313.) When asked whether this language was referring to Mr. Spurgeon's claim, Mr. Pfnister testified, "You know, I don't know. A lot of times, what managers will do is they'll reply back, adding on the subject line. They won't change the subject line. It may be on a totally different subject." (HT, p. 314.) As discussed in further detail below, I do not find this credible and I believe that Mr. Lundquist and Mr. Pfnister were referring to Mr. Spurgeon's claim when this was written.

Lonnie Smith

Complainant also submitted OSHA's findings in the case of Lonnie Smith. Mr. Smith, a locomotive engineer for Union Pacific in Pocatello, Idaho, was en route between Pocatello and Green River, Wyoming when he began to not feel well. (CX 3, p. 4.) As the trip progressed, he felt worse and worse, so he and his conductor notified the railroad yardmaster. (CX 3, p. 5.) Eventually, a manager boarded the train and spoke to him in a stern and threatening manner. (CX 3, p. 5.) Mr. Smith asked to see a doctor, but the manager "went on a tirade," threatening and harassing him. (CX 3, p. 6.) As a result of this encounter, Mr. Smith continued working despite believing that he needed medical care. (CX 3, p. 6.) Mr. Smith later sought medical care, but did not fill out an incident report because he was threatened and harassed by the manager. (CX 3, p. 7.) He was later summoned to a meeting to discuss the incident and was followed closely by supervisors in the following weeks. (CX 3, p. 8.) Mr. Smith lost sleep and became paranoid as a result of the incident, which caused him to miss work. (CX 3, pp. 8–9.) Following an OSHA investigation, Union Pacific was found to have violated the FRSA. (CX 3.)

Other Union Pacific Employees

Complainant also submitted ALJ decisions in two other cases, Brian Petersen and Raymond Griebel. (CX 4; CX 5.) I will not summarize these cases in detail, but they both involve Union Pacific violating the FRSA by retaliating against an employee who submitted an injury report. In addition, Complainant submitted copies of various documents pertaining to OSHA investigations involving Union Pacific's alleged violations of the FRSA. (CX 6.) In some of these cases, OSHA found that Union Pacific had violated the FRSA; in others, Union Pacific was found to have not violated the FRSA; and in others, the parties settled. (CX 6.)

Expert Testimony Regarding Complainant's Economic Losses

Respondent retained Merrill Norman, an accountant, to testify and prepare a report about Complainant's economic losses. (HT, pp. 385–414; RX 11.) Mr. Norman reviewed the record and various financial documents in order to prepare his report, concluding that Complainant only lost a total of $7,022.64 to $41,324.19 as a result of his termination from Union Pacific.[16] (HT, pp. 388–89, 393; RX 11, p. 12.) Mr. Norman reached this conclusion by deducting a variety of expenses from Complainant's lost wages and by critiquing the financial testimony offered by Complainant's wife, Camille Schow. (RX 11.) In Mr. Norman's opinion, though Complainant only earned $1,100 during the time he was not working at Union Pacific, he could have earned at least $1,250 per month "with a concerted effort to find replacement employment." (HT, p. 392.) Mr. Norman believes that Complainant "could have found replacement work at an earlier date" and would have earned at least the minimum wage. (HT, pp. 392–93.) Specifically, Mr. Norman believes that it should have only taken Complainant 30 days to find alternate work. (HT, p. 397.)

Mr. Norman also deducted what he considered to be savings from Complainant's wages in order to calculate his economic losses. He deducted union dues, commuting expenses, cell

[16] The $7,022.64 figure is based on Complainant spending 44 days out of work, which would have been the result if Complainant had accepted Union Pacific's offer of leniency. (RX 11, p. 12.) The $41,324.19 figure is based on the Complainant spending 301 days out of work, which is the actual duration of Complainant's termination from Union Pacific. (RX 11, p. 12.)

phone costs, internet costs, meals, and other business expenses, reasoning that Complainant would have incurred these costs had he been employed at Union Pacific, and his termination from the railroad allowed him to save money in these categories. (HT, pp. 395–96; RX 11, p. 12.) Further, Mr. Norman included a category of "Other Saved Costs," based on the notion that Complainant's time away from Union Pacific allowed him to "increase his efforts to do things of value domestically for the benefit of the family." (HT, p. 397; RX 11, p. 12.) Specifically, Mr. Norman testified that the amount of Complainant's economic losses should be reduced because Complainant was able to go hunting, gather firewood, and garden while he was unemployed, which saved the family money and "were additional benefits derived from his time away from work." (HT, pp. 397–98.)

Mr. Norman testified that he believed that Complainant suffered no damage as a result of the loan modification for his mortgage. (HT, pp. 406–07.) In Mr. Norman's view, this is because following the two missed mortgage payments and the loan modification, the loan retained the same life and the same interest rate, though he acknowledged that the missed payments were added back into the principal, thereby increasing the principal. (HT, p. 407.) Further, Mr. Norman testified that once Complainant receives the back pay he is owed, he could go back and make the payments in arrears, restoring the original terms of the loan, though he acknowledged that this would have to be done with the consent of the lender. (HT, p. 407.)

Finally, Mr. Norman testified that Complainant suffered no damage from the decrease in his credit score. (HT, p. 408.) He reasoned that Complainant and his wife "were already heavily burdened with a lot of debt," provided no evidence of their credit score over time, and did not attempt to do any additional financing that would be dependent upon their credit score. (HT, p. 408.) He further testified that Complainant's credit score could be "restored and enhanced through good payment practices in the future." (HT, p. 408.)

ANALYSIS AND FINDINGS

Credibility Determinations and Weight Accorded to Opinions

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Complainant's Credibility

I find the Complainant to be a credible witness and will give his testimony substantial weight. Throughout the hearing, the Complainant was honest and forthcoming about the events in this case. Complainant was repeatedly asked to testify about difficult subjects, such as the emotional impact of his termination from Union Pacific, the effect of his termination on the rest

of his family, and the financial difficulties he suffered after losing his income. Despite the inherent discomfort in discussing these topics, I believe that the Complainant was truthful and forthright with his testimony. I find no reason to question his credibility, and will therefore give his testimony substantial weight.

Credibility of Union Pacific Managers

John Huddleston

John "Jack" Huddleston is currently a general superintendent for Union Pacific, and in 2009 he was the superintendent of the Pocatello service unit. (HT, pp. 193–94.) He has worked for Union Pacific since 1992. (HT, p. 194.) Mr. Huddleston was the supervisor who decided to discipline and terminate Complainant. (HT, p. 195.) There are several issues that weigh against Mr. Huddleston's credibility. The main concern I have with Mr. Huddleston's testimony is the inconsistency in his explanation of Union Pacific's policies regarding reporting injuries and rough track and the way these policies were applied to Complainant. Mr. Huddleston testified that Complainant was ultimately disciplined because he failed to report a dangerous track condition in a timely manner. (HT, p. 229.) This is based on the fact that the Complainant included the phrase "rough track" in his report of Mr. Millward's injury but did not immediately contact a supervisor when Mr. Millward's injury occurred. Mr. Huddleston admitted, however, that he does not know whether anyone followed up with Complainant about what he meant by "rough track," and he does not know if he would have clarified this with Complainant if he had been the one to receive the initial report. (HT, p. 208.) The track was later determined not to have a defect, and this was a factor Mr. Huddleston considered in deciding to bring Complainant back to work. (HT, p. 212.)

On the other hand, Mr. Huddleston acknowledged that an employee would not be required to report an injury unless he believed or knew he was injured, and that often a railroad crew will not report a track defect because they are not aware of the defect. (HT, pp. 204, 375–78.) He also said he was not aware of any employees who had been disciplined for failing to report a track defect that was later discovered. (HT, p. 202.) To me, these disparities do not make sense. It seems that if Union Pacific were truly concerned with the condition of the track, someone would have followed up with Complainant immediately upon receiving the injury report about what he meant by the phrase "rough track" to determine if there was a dangerous condition that needed to be corrected. Just because Complainant included the phrase "rough track" in the report does not mean he believed that the track was defective to the point of being a safety hazard, and in fact, the Complainant testified that he felt that the track conditions were normal. Mr. Huddleston acknowledged that an employee is only responsible for reporting an injury or a defect that he is aware of, yet he never investigated whether Complainant believed the track to be defective, instead jumping to conclusions with serious consequences based solely on the phrase "rough track." The fact that Mr. Huddleston did not consider this or further look into what Complainant meant by "rough track" weighs against his credibility.

Further, the fact that the track was later determined to not be defective further demonstrates the flaws in Mr. Huddleston's reasoning and strengthens Complainant's belief that the track conditions were normal despite his reference to "rough track." Mr. Huddleston testified that Complainant was disciplined for not reporting the hazardous track condition in a timely

manner, but there was ultimately no hazard to report. Union Pacific inspected the track in question shortly after Complainant and Mr. Millward submitted their reports, and Union Pacific found no defects. The track has not been altered or repaired in any way since the incident involved in this case. It simply defies logic that Complainant would be disciplined for not reporting a safety hazard that did not even exist. It also does not make sense that this was a factor in deciding to grant the Complainant leniency and bring him back to work, but was not a factor that weighed against disciplining him in the first place. All in all, the fact that the track was determined not to be defective conflicts with Mr. Huddleston's explanation of the events in this case, and ultimately weighs against his credibility.

In sum, I find Mr. Huddleston's account of Union Pacific's reporting policies to be inconsistent, illogical, and troubling. It seems to me that Mr. Huddleston was trying to explain Union Pacific's rules in a manner that would justify the organization's conduct after the fact, but his explanation does not make sense. This reduces Mr. Huddleston's credibility, and as a result, I will give his testimony limited weight. When his testimony conflicts with other, more credible witnesses' testimony, I will give the other witnesses' testimony more weight.

Gary Pfnister

Gary Pfnister is the Director of Road Operations for Union Pacific. (HT, p. 307.) Mr. Pfnister has worked for Union Pacific in Pocatello since 2006, and has also held the title of Senior Manager of Operating Practices. (HT, p. 207.) He is "responsible for safety on the service unit, rules compliance, discipline, [and] operating practices." (HT, p. 308.) The managers who supervise locomotive engineers report to Mr. Pfnister. (HT, p. 308.) He was not involved in Complainant's discipline. (HT, p. 308.) For the reasons articulated below, I find that Mr. Pfnister is not a credible witness due to his bias against employees who report injuries and his illogical testimony at various points during the hearing. As an initial matter, Mr. Pfnister was asked whether Union Pacific's practice of investigating and disciplining employees that submit injury reports made employees less likely to submit injury reports, to which he responded, "I don't think it really had any impact." (HT, pp. 310–11.) He explained that employees continued to report injuries, so he did not think the discipline was a deterrent. (HT, pp. 310–11.) I find this hard to believe. It is illogical to think that employees would not feel reticent to submit their own injury reports if they see other employees being disciplined after submitting injury reports and, in fact, several Union Pacific employees testified that they were afraid that Union Pacific would retaliate against them for submitting injury reports. This weighs against Mr. Pfnister's credibility.

Further, I find Mr. Pfnister's general attitude towards employees who submit injury reports to be cause for concern. Mr. Pfnister testified that he was immediately skeptical when Eric Spurgeon submitted his injury report and called for an investigation to determine its veracity. (HT, pp. 311–12.) Soon after Eric Spurgeon reported the injury, Mr. Pfnister wrote an email to Mr. Lundquist saying, "Handle it like it's going to be a Level 5!!" (HT, p. 311; CX 15, p. 654.) The fact that Mr. Pfnister immediately rushed to judgment and referenced Level 5 discipline demonstrates, in my view, his hostility and bias regarding employees who report injuries. Further, Mr. Pfnister was clearly concerned about the total number of reported injuries in the service unit, not because of the potential harm to employees, but because of the way these statistics might affect him. For example, Mr. Pfnister wrote an email to Mr. Lundquist following

Eric Spurgeon's injury saying, "It's not going to hit our number." (HT, p. 313; CX 15, p. 683.) To me, this is related to Union Pacific's policy of tracking the number of injuries reported in each unit, and potentially penalizing supervisors with high numbers of reported injuries by reducing their bonuses. The fact that Mr. Pfnister was so concerned with the injury statistics for his unit demonstrates his general negative attitude towards employees who report injuries and reduces his credibility.

A final example of Mr. Pfnister's attitude towards employees who report injuries is the email exchange referring to Mr. Spurgeon's claim as a "POS," or "piece of shit." When Mr. Pfnister and Mr. Lundquist were emailing back and forth about Mr. Spurgeon's injury report, Mr. Lundquist wrote, "[J]ust thought I would let you know this is a POS." (CX 15, p. 683.) Mr. Pfnister replied, "Yup will be off a week[.]" (CX 15, p. 683.) At the hearing, Mr. Pfnister explained that "POS" means "piece of shit." (HT, p. 313.) When asked if he was referring to Mr. Spurgeon's claim, Mr. Pfnister replied, "You know, I don't know. A lot of times, what managers will do is they'll reply back, adding on the subject line. They won't change the subject line. It may be on a totally different subject." (HT, p. 314.) I do not believe this explanation. The subject line of the email thread is "Spurgeon." (CX 15, p. 683.) It does not make sense that in an email thread with the subject line "Spurgeon," Mr. Pfnister and Mr. Lundquist would be discussing anything other than Eric Spurgeon. In addition, the rest of the correspondence in this email thread clearly refers to Eric Spurgeon, referencing him by name and talking about the mosquito bite. (CX 15, pp. 683–84.) It is obvious that the entire thread pertains to Mr. Spurgeon and his injury, and the fact that Mr. Lundquist and Mr. Pfnister both agreed that it was a "piece of shit" is evidence of their disdain for employees who report injuries. Mr. Pfnister's explanation of the email is just an attempt to minimize the obvious bias demonstrated by their comments.

Based on Mr. Pfnister's testimony and the evidence in this case, I believe that he has a bias against employees who report injuries. This likely stems from the relationship between the number of injuries reported and the managers' performance evaluations and bonuses. Whatever the basis for this attitude, I find that it weighs against Mr. Pfnister's credibility. Where his testimony conflicts with other witnesses' testimony, I will give the other, more credible witnesses' testimony more weight.

Randall Egusquiza

Randall Egusquiza is the Director of Terminal Operations for Union Pacific, a position he has held for 10 years. (HT, p. 330.) In total, he has worked for Union Pacific for 34 years. (HT, p. 330.) Mr. Egusquiza was the hearing officer in Complainant's investigation. (HT, pp. 330–31.) While I find that Mr. Egusquiza is a moderately credible witness, I do have a few concerns about his testimony. Initially, I find it troubling that Mr. Egusquiza, as the hearing officer, does not know where "rough track" or "defective track" is defined within Union Pacific's rules and policies, and he, himself, does not know what those phrases mean. (HT, p. 331.) The main issue in Complainant's disciplinary investigation was whether Complainant had failed to report a rough or defective track in a timely manner, and the fact that the hearing officer did not even know how to define those terms is cause for concern. As the hearing officer, he should have sought information regarding what constitutes rough or defective track before conducting the investigation hearing.

In addition, I find Mr. Egusquiza's explanation of the injury and track defect reporting requirements to be inconsistent and confusing. Mr. Egusquiza conceded that an employee would not need to report a track defect if the employee did not believe a defect existed, and he testified that an employee needs to report an injury "if an employee feels that they are injured." (HT, pp. 333–34.) However, Mr. Egusquiza refused to acknowledge that Mr. Millward did not need to report the incident if he did not feel he was injured or if he did not think the track was defective. (HT, p. 334.) Following his general explanation of the reporting requirements, Mr. Egusquiza was asked, "If Mr. Millward felt like he did not report the bump on his elbow, prior to Green River, that's okay, he didn't need to report it, correct?" (HT, p. 334.) He responded, "He needed to report it if he slammed his – his arm was slammed into an armrest. That would be determined as excessive." (HT, p. 334.) Complainant's counsel followed up: "If he slammed his arm into an armrest and was not injured, does he have to report it?" Mr. Egusquiza replied, "Yes, he should report the incident. That would be considered worse than normal, if something gets slammed into an armrest or a door, or whatever, yes." (HT, p. 334.)

To me, Mr. Egusquiza's explanation of the policies is illogical. He acknowledged that an employee does not need to report an injury if he does not feel he is injured, and that an employee does not need to report a defect if he does not believe a defect exists. When it came time to apply these policies to the events of this case, Mr. Egusquiza came up with a different standard and stated that Mr. Millward still needed to report the incident even if he did not believe he was injured. This testimony does not make sense and weighs against Mr. Egusquiza's credibility.

Despite these concerns, I will note that Mr. Egusquiza seemed to mostly take his responsibilities as hearing officer seriously, and I believe he tried to perform his duties fairly. In Mr. Egusquiza's recommendations following the investigation, he recommended that Complainant be offered leniency because he was a "good employee" and "worth taking a chance on." (HT, p. 341; JX 28.) As a result of this, I find that Mr. Egusquiza is moderately credible. While I do have some concerns about his testimony, I will give his testimony reasonable weight, and will give it more weight when it is consistent with the testimony of other witnesses.

Credibility of Other Union Pacific Managers

Several other Union Pacific managers testified in this case as well. Steven Bybee and William Sanders, both Directors of Terminal Operations, testified about the Jeffrey Ryan incident. (HT, pp. 359–65.) Brian Jones, Manager of Operating Practices, also testified regarding a conversation he had with Complainant. (HT, pp. 367–70.) All three managers testified about very specific incidents, and their testimony was very short. I find no reason to doubt their credibility and I will give their testimony reasonable weight.

Credibility of other Union Pacific Employees

Eric Lynch Spurgeon

Eric Spurgeon is a conductor for Union Pacific. (HT, p. 56.) In this case, he was asked to testify regarding his experience of sustaining an injury while working for Union Pacific, reporting the injury, and being retaliated against as a result. (HT, pp. 55–74.) I believe that Mr.

Spurgeon was honest, forthcoming, and truthful in his testimony and find no reason to question his credibility. As a result, I will give his testimony reasonable weight.

Jeffrey Ryan

Jeffrey Ryan is a conductor for Union Pacific and was asked to testify about an incident where he was injured and allegedly threatened by Union Pacific managers who convinced him not to report the injury. (HT, pp. 75–88.) I found Mr. Ryan's testimony to be believable and credible, and there is no reason to discredit his testimony. Therefore, I will give his testimony reasonable weight.

Credibility of Other Witnesses

Camille Love Schow

Camille Love Schow is the Complainant's wife. (HT, p. 89.) She was asked to testify about the financial and emotional impact that Complainant's termination had on Complainant and his family. (HT, pp. 88–118.) I found Mrs. Schow to be a very credible witness. Though she was asked to discuss very personal, sensitive topics, I found Mrs. Schow to be honest and forthcoming and I find no reason to question her credibility. Accordingly, I will give her testimony substantial weight.

Merrill Norman

Merrill Norman is a partner at the firm of Norman, Townsend, and Johnson, where he has worked since he started the firm in 1990. (HT, p. 385.) He completed an accounting degree and an MBA from the University of Utah and also completed one year of work towards a Ph.D. (HT, pp. 385–86.) After leaving the University of Utah in 1970, Mr. Norman spent two years as an army officer. (HT, p. 385.) He then started working as an accountant in private practice, and after several years was made partner at the firm where he worked. (HT, p. 385.) He worked as a partner with a few different accounting firms. In total, Mr. Norman worked as an accountant for approximately 19 years before starting the firm where he is currently employed. (HT, p. 385.) He is licensed as a CPA at the state and national level. (HT, p. 386.) Mr. Norman is a member of the National Association of Certified Public Accountants, and the Utah Association of Certified Public Accountants. (HT, p. 386.) He works "quite often" as a forensic economist and testifies as an expert witness, usually regarding business valuations and the calculation of economic loss. (HT, p. 387.) Mr. Norman has testified over 220 times before federal courts, several state courts, public administrative bodies, the Department of Energy, various public service commissions, and the Presidential Commissions in Washington, DC. (HT, p. 387.)

In this case, Mr. Norman was asked to review documents and the record in order to offer an opinion about the amount of economic loss Complainant suffered as a result of his termination from Union Pacific. (HT, p. 388.) He reviewed depositions, tax returns, payroll records, and medical records, and spoke with Complainant's union representative. (HT, p. 388.) In his words, he "first tried to learn, from the pleadings or the stated claims of the part[ies], what was at issue." (HT, p. 389.) He then "proceeded to read all the documents that had been provided." (HT, p. 389.) Mr. Norman subsequently "went back through the accounting and financial data, to see what else [he] could summarize, to be able to determine the types of

economic loss and non-economic losses that were being claimed." (HT, p. 389.) Ultimately, Mr. Norman "made [his] own calculations, which [he] feel[s] more accurately reflect potential damages [Complainant] may have sustained." (HT, p. 389.)

For numerous reasons, I find Mr. Norman to be a highly incredible witness and I will give his testimony and report no weight whatsoever in reaching my decision. As an initial matter, Mr. Norman testified that Complainant's damages should be reduced because he failed to mitigate them by finding alternate work sooner. In Mr. Norman's opinion, Complainant could have found a minimum wage job within 30 days if he had made more of a "concerted effort." (HT, pp. 392, 396–97.) I find this testimony to be highly speculative and will not give it any weight. Mr. Norman offered nothing other than his belief to support this opinion. Mr. Norman admitted that he did not do any labor market research or look into the availability of minimum wage jobs near Complainant's home, so this opinion is not based on any objective evidence. (HT, p. 412.) Mr. Norman testified that he "was familiar with those matters and the employment opportunities, generally," but he did not include any of that information in his report because he "just put [his] assumptions." (HT, p. 412.) He is an accountant, not a labor market specialist. The fact that Mr. Norman relied on "assumptions" rather than any objective data or evidence seriously undermines his opinion that Complainant could have found alternate work sooner.

Further, Mr. Norman's opinion that Complainant could have found a minimum wage job sooner contradicts testimony by Complainant and his wife. Complainant testified that during the time he was not working at Union Pacific, he applied for jobs, looked on the internet, looked in the newspaper, made phone calls, and applied for unemployment benefits, but was unable to find a job for months. (HT, pp. 95, 148.) Both Complainant and his wife credibly explained that due to the distance between the family's home and Pocatello, the next large town, it was difficult to find job opportunities that would have a reasonable commute. (HT, pp. 95, 157.) Nonetheless, Mr. Norman opined that Complainant and his wife "failed to demonstrate adequate mitigation," and further stated, "There are multiple reasons why a person might not appropriately mitigate earnings loss. Lack of financial motivation is one of them." (RX 11, pp. 4–5.) The suggestion that Complainant and his wife had a "lack of financial motivation" for the Claimant to find alternate employment is absurd, completely unfounded and unreasonable. Both Complainant and his wife described the fear, stress, and anxiety they felt over not being able to provide for their family. The family took drastic measures to cut expenses, including hunting for food, growing their own fruits and vegetables, and gathering firewood to heat the house. It is completely unreasonable to imply that Complainant was not financially motivated to look for alternate work, and the fact that Mr. Norman included this in his report seriously weighs against his credibility.

Mr. Norman's report also includes a category of expenses entitled "Other Saved Costs" that he believes should be subtracted from Complainant's damages, an opinion that I find to be unreasonable as well. Mr. Norman asserts that Complainant and his wife were able to save money on heating and food because Complainant's unemployment allowed him to spend more time collecting firewood and hunting. (HT, p. 397.) In Mr. Norman's opinion, Complainant's termination led to "additional benefits" for the family that they would not have enjoyed had the Complainant continued working, and as a result, his damages should be reduced. (HT, pp. 397–98.) I find this line of reasoning also to be absurd. Complainant and his wife were forced to undertake these activities to save money because they could no longer afford to heat their home and buy groceries as they normally did. Complainant had to rely on his in-laws to provide a

wood burning stove, and then he and his children gathered firewood in the woods because they did not have the resources to pay for gas to heat their home as they were used to doing. I am certain that if Complainant and his family had the option, they would have preferred to keep using gas to heat their home and continue buying groceries at the store as they had previously done. I would not consider these activities as "additional benefits" of Complainant's termination; I would instead characterize them as adaptations they were forced to make in order to survive because of Respondent's actions. As a result, I find that this weighs against Mr. Norman's credibility and I will not adopt this reasoning in calculating Complainant's damages.

Mr. Norman also made deductions to Complainant's damages inconsistently, which weighs against his credibility. For example, Mr. Norman deducted commuting costs from Complainant's damages based on the theory that Complainant no longer had to incur the costs of traveling to and from work as a result of his termination. (HT, p. 395; RX 11, p. 12.) However, Mr. Norman made no effort to add back in the extra costs Complainant had to incur as a result of his termination, such as the costs of commuting to job interviews or the costs of hunting or accumulating firewood. (HT, p. 409.) This inconsistency leads me to believe that Mr. Norman did not do a thorough job in his report, or simply ignored details and costs that would have added to Complainant's damages. This weighs against his credibility.

Mr. Norman, who has no training whatsoever in psychology or mental health, further testified that Complainant did not suffer any damages resulting from his mortgage modification, which I also find to be unreasonable and patently false. Initially, I find Mr. Norman's testimony on this issue confusing. While he acknowledged that the two missed mortgage payments were added back to the principal, thereby increasing the principal because the interest "was rolled in as if it were principal," he nonetheless testified that this did not result in any damage because the interest rate and the life of the loan remained the same. (HT, p. 407.) This contradicts basic principles of mathematics. It is obvious even to a lay person with no accounting skills that increasing the principal amount while keeping the interest rate and life of the loan constant would increase the total amount of the loan, thereby resulting in damages. It is unfathomable that an accountant with Mr. Norman's experience and training would be unable to see this. Further, Mr. Norman's testimony that any back pay awarded to Complainant could be used to make the payments in arrears is irrelevant. The only relevant consideration is whether the Complainant incurred any damages, and in this instance he clearly suffered a financial loss from the increased total amount of the loan and obvious increase in interest that he would have to pay. Finally, Mr. Norman's testimony that Complainant did not suffer any damages from the mortgage modification because once he makes the payments in arrears he could get the original terms of the loan restored "with the consent of the lender" is speculative and unreasonable. (HT, p. 407.) Even if banks were in the practice of renegotiating mortgages to terms more favorable to the mortgagor in circumstances such as these (which I find highly dubious), there is no way to determine whether the bank in this case would be amenable to doing so. As a result, I find all of Mr. Norman's opinions regarding Complainant's mortgage to be worthless and will therefore disregard it.

In addition to all of these credibility issues, the most disturbing portion of Mr. Norman's report is his assertion that Complainant failed to take measures to "reduce his emotional distress." (RX 11, p. 7.) In fact, I find Mr. Norman's opinions in this area to be so troubling, inappropriate, and irrelevant that I did not allow him to testify about them at the hearing. (HT,

pp. 405–06.) In Mr. Norman's report, however, he asserts that Complainant's "disruption in earnings did not cause all of his financial stress, nor would the sudden infusion of cash provide an equivalent amount of new found (sic) happiness and freedom of financial stress in the future." (RX 11, p. 7.) Mr. Norman then outlines six ways in which Complainant failed to mitigate his emotional distress, including: (1) an "immediate and sustained effort" to find new employment; (2) accepting Union Pacific's offer of leniency; (3) seeking professional counseling from his church at no cost; (4) accepting financial assistance or charity from his church; (5) volunteering with his family's church to "justify their acceptance of assistance"; and (6) seeking temporary employment to cover the delay in his start date with Proctor and Gamble. (RX 11, p. 7.)

As an initial matter, Mr. Norman is not qualified to testify about these matters. Mr. Norman is an accountant. He has no expertise whatsoever in medicine, psychology, counseling, or any other area that may qualify him to discuss ways in which someone might reduce stress and anxiety. In addition, even if Mr. Norman were qualified to discuss this, I find that his opinions are irrelevant. As I stated at the hearing, there is simply no legal duty or obligation for a complainant to mitigate emotional distress damages beyond a duty to seek alternative employment.[17]

In addition to being irrelevant and outside of Mr. Norman's expertise, I find that the six enumerated ways in which Mr. Norman suggests that Complainant could have reduced his emotional distress are unreasonable and unrealistic. I have already explained that I believe that Complainant did make an effort to find employment but was unable to do so because of factors beyond his control. As to whether or not Complainant should have accepted Union Pacific's offer of leniency, I do not agree with Mr. Norman's position that Complainant was required to mitigate his damages by doing so. Complainant legitimately and reasonably believed that he was wrongfully terminated in violation of the law. He testified that he refused to accept Union Pacific's leniency offer because he did not want to accept responsibility for something he did not believe he was guilty of. (HT, p. 145.) In these circumstances, Complainant should not be penalized for failing to accept the leniency offer. In addition, Mr. Norman's assertion that "[o]nce [Complainant] had been notified by Proctor and Gamble that he was hired with a delayed starting date, he could have sought and procured temporary employment" is also unreasonable. Complainant had struggled for months to find employment, so I seriously doubt that he could quickly find another position that filled the time until his start date. Given the challenging economic climate and Complainant's residence outside of any major cities or towns, it seems unlikely that he would have been able to find an available job, and even more unlikely that the position would precisely fill the time before his position at Proctor and Gamble began.

[17] At the hearing, Complainant's counsel objected to Mr. Norman's testimony about emotional distress damages and I sustained the objection. (HT, pp. 399–404.) Union Pacific's counsel inquired, "So you're saying he didn't have a duty to take advantage of that economic alternatives (sic) to mitigate their damages?" (HT, p. 405.) I responded, "I don't know that there is. I know that in Title VII employment discrimination cases, there's an obligation on the part of the discriminatee to seek other employment. … And just as in worker's compensation cases, there's an obligation on the part of the injured worker to seek other employment. That's where the vocational consultants come into play. But an employee who has been discriminated against [in] not being hired or being fired, or retaliated against, or who's injured, is not expected to explore alternatives to mitigate the economic damages, other than seeking employment." (HT, pp. 405–06.)

Finally, I find Mr. Norman's assertions that Complainant should have mitigated damages by turning to his church for counseling, charity, and volunteer work to be highly troubling. As I previously explained, a complainant does not have a legal duty to seek charity in order to mitigate damages. At the hearing, I also explained that even if Complainant and his family had relied more heavily on their church, this may have led to even more emotional consequences. As I told the parties, seeking charity could have undermined Complainant's personal pride and self-esteem, causing more psychological damage. (HT, p. 404.) Mr. Norman attempts to address this by saying that if Complainant and his family felt badly about accepting charity, they could "use a portion of their time to perform work in behalf (sic) of their church to self-justify their acceptance of assistance." (RX 11, p. 7.) Aside from the fact that this opinion is way outside Mr. Norman's area of expertise, it is speculative and irrelevant to this litigation. The bottom line is, whether or not to seek charity or assistance from the church is a personal decision that has absolutely no impact on Complainant's damages in this case. As a final matter, all of Mr. Norman's opinions in this area unsupported by any objective evidence. Mr. Norman states that Complainant had access to free counseling, food, and clothing through his church, but does not provide any basis for these assertions. (RX 11, p. 7.)

For the reasons articulated above, I find Mr. Norman to be a completely incredible witness and will disregard the entirety of his testimony and report. Mr. Norman offered opinions that were outside his area of expertise and unsupported by objective evidence and quite simply outrageous. In addition, even the opinions within Mr. Norman's expertise were questionable and poorly reasoned. As a result, I will give Mr. Norman's testimony and report no weight.

Legal Analysis

The FRSA states that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). The employee bears the initial burden, and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1982.109(a). The burden then shifts to the employer, who must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior." *Id*. § 1982.109(b).

Complainant Engaged in Protected Activity

Section 20109(a) of the FRSA identifies several protected activities, including providing information or assisting in an investigation regarding potential violations of law, refusing to violate the law, filing a complaint applicable to railroad safety or security, notifying the railroad carrier of an injury, cooperating with a federal safety or security investigation, furnishing information to a governing body, or accurately reporting hours. 49 U.S.C. §§ 20109(a)(1)–(7). In

addition, Section 20109(b) lays out more protected activities, including reporting a hazardous safety condition, refusing to work under hazardous conditions, or refusing to authorize the use of hazardous or unsafe equipment. 49 U.S.C. §§ 20109(b)(1)–(3). Protected activities related to seeking medical care are laid out in Section 20109(c).

Complainant asserts that he engaged in protected activity when he reported Mr. Millward's injury to Union Pacific. (Complainant's Closing Brief, pp. 4–5.) Respondent concedes that Complainant engaged in a protected activity. (Respondent's Closing Brief, p. 7.) Therefore, I find that Complainant engaged in a protected activity by submitting an injury report.

Respondent Knew of Complainant's Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

It is undisputed that Union Pacific knew of Complainant's injury report. (Complainant's Closing Brief, p. 5; Respondent's Closing Brief, p. 7.) Therefore, I find that Respondent was aware of Complainant's protected activity.

Complainant Suffered Two Unfavorable Personnel Actions

The FRSA specifies that a railroad carrier may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of protected activity. 49 U.S.C. § 20109(a). The regulations further state that employers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee" for engaging in protected activity. 49 C.F.R. § 1982.102(b)(1). The ARB has held that "unfavorable personnel actions" include reprimands, written warnings, and counseling sessions where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-00004 (ARB Dec. 29, 2010); *Vernace v. PATH*, OALJ No. 2010-FRS-00018 (OALJ Sept. 23, 2011), *aff'd, Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012).

The ARB has made clear that whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application." *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, at 15 (ARB Sept. 13, 2011). Cautioning against applying the more stringent standards found in Title VII cases, the ARB noted the safety issues present in "hazard-laden, regulated industries" and the "FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries." *Williams*, ARB No. 09-018 at 12; *Vernace*, ARB No. 12-003 at 3. It is thus clear that "a broad range of actions may qualify as unfavorable personnel actions under whistleblower statutes such as the FRSA, where they may not qualify in Title VII claims."

Vernace, OALJ No. 2010-FRS-00018 at 25, *aff'd. Vernace*, ARB No. 12-003. The ARB has since reiterated that in whistleblower claims, an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." *Menendez*, ARB Nos. 09-002 and 09-003 at 20.

The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). The parties have stipulated that Complainant was terminated from his employment with Respondent on September 3, 2009. (Parties' Joint Statement of Stipulated Facts, January 6, 2014.) Therefore, I find that Complainant suffered an unfavorable personnel action when he was terminated from Union Pacific.

Complainant also suffered an unfavorable personnel action when he received the notice of investigation. The ARB has held that a charging letter qualifies as an adverse action under the FRSA, and that a written warning is presumptively adverse, not only when it is considered discipline in and of itself, but also where it is routinely used as the first step in a progressive discipline policy or implicitly or expressly references potential discipline. *Vernace v. PATH*, OALJ No. 2010-FRS-00018 (OALJ Sept. 23, 2011), *aff'd, Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012); *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-00004 at 15 (ARB Dec. 29, 2010). The parties have stipulated that on August 3, 2009, Union Pacific sent Complainant a letter charging him with violating several company rules. (Parties' Joint Statement of Stipulated Facts, January 6, 2014.) Accordingly, Complainant also suffered an unfavorable personnel action when he received Union Pacific's notice of investigation.

Complainant's Protected Activity Was a Contributing Factor

A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, at 13 & n.69 (ARB Sept. 30, 2011), citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 27 (ARB May 25, 2011). Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See, e.g., Id.; Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

The main issue in dispute in this case is whether Complainant's protected activity was a contributing factor to his termination. Complainant asserts that he was terminated, "at least in part, for reporting an on-duty personal injury." (Complainant's Closing Brief, p. 6.) Complainant supports this argument by contending that Union Pacific's explanation of the termination was pretext, that Union Pacific demonstrated antagonism for Complainant's protected activity, that

there was temporal proximity between the protected activity and the adverse action, and that there is evidence of disparate treatment. (Complainant's Closing Brief, pp. 11–13.) Respondent, on the other hand, argues that Complainant's protected activity was not a contributing factor to his termination, and instead, he was terminated based on his "violation of several safety rules." (Respondent's Closing Brief, p. 7.) Respondent further argues that there was no "retaliatory climate" at Union Pacific towards injury reporting. (Respondent's Closing Brief, pp. 10–14.)

For a variety of reasons, I find that Complainant's protected activity was a contributing factor to his termination. To me, the strongest evidence of this is the evidence that Union Pacific's proffered reason for the termination was pretext. Mr. Huddleston testified that Complainant was terminated because he failed to immediately report a safety defect, and Union Pacific recites this explanation in its closing brief. (HT, pp. 207; Respondent's Closing Brief, p. 7.) In Respondent's view, when Complainant wrote the phrase "rough track" in the injury report, it demonstrated his awareness of a safety hazard, and the fact that he failed to report the condition in a timely manner is grounds for termination. This explanation is unreasonable on several levels. Initially, if Union Pacific was so concerned about a safety hazard, someone would have followed up with Complainant about what he meant by "rough track." Instead, no one ever bothered to ask Complainant for an explanation of this or tried to determine whether he actually believed that a safety hazard existed. (HT, p. 340.) It defies logic that the term "rough track," on its own and without any further elaboration, would be some kind of magic phrase that is always meant to indicate a hazardous safety condition, especially when "rough track" is not defined anywhere in Union Pacific's rules and policies. If Union Pacific was really concerned about problems with the track, I believe that someone would have followed up with Complainant about what he meant before making the decision to investigate and terminate him.

Further, the fact that no track defect was ever discovered shows that Union Pacific's stated reason for the termination is pretext. Soon after Complainant and Mr. Millward reported the injury, the track and locomotive were inspected and determined to be safe. (HT, pp. 199–200.) There have never been any repairs to that section of track. (HT, p. 136.) This supports the Complainant's belief that there was no problem with the track despite the language he used in his report. It also makes Union Pacific's explanation completely illogical; how could someone be expected to report a safety hazard that does not exist? Perhaps Union Pacific's explanation would gain more traction if there actually was a safety hazard or track defect and Complainant had failed to report it. In my view, however, Union Pacific simply cannot argue that Complainant failed to report a safety hazard when there was no safety hazard to begin with.

In addition, Union Pacific's managers acknowledged that an employee does not have to report a hazard that he is not aware of, and Complainant did not believe that a hazardous condition existed. Mr. Huddleston and Mr. Egusquiza testified that Union Pacific leaves it up to employees to determine, in their judgment, whether rough track needs to be reported. (HT, pp. 198–99, 333–34.) Further, employees are not trained, aside from receiving superintendent's bulletins, regarding how to identify excessive lateral motion or unsafe track conditions. (HT, pp. 198, 290.) In addition, the superintendent's bulletin on this issue never mentions the words "rough track," and no manager was able to point to a definition of this phrase in Union Pacific's rules. (HT, pp. 291, 331.) Therefore, logically, an employee only needs to report a condition that he, in his own judgment, believes to be hazardous. In this case, Complainant testified that he did not believe the track to be hazardous or outside of the norm, yet he was disciplined for failing to

report the condition. This is illogical and inconsistent with Union Pacific's managers' testimony about the company's policies, indicating that Complainant's protected activity was a contributing factor to the actions taken against him.

Further, I believe that Complainant's protected activity was a contributing factor to his termination because the protected activity is inextricably intertwined with Union Pacific's adverse action. The ARB has noted that where the content of a report or disclosure (the filing of which constitutes the protected activity) gives an employer the reasons for personnel action against a complainant, the protected activity is inextricably intertwined with the adverse action. *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 12 n. 49 (ARB Oct. 26, 2012), citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012). In this case, the information contained in Complainant's injury report gave Union Pacific the information they relied on to investigate and terminate him. Mr. Huddleston testified that he believed the Complainant had willfully failed to report a hazardous condition as evidenced by his use of the phrase "rough track" in the injury report. (HT, p. 208.) Without the injury report and the phrase "rough track," Union Pacific would have no basis upon which to discipline Complainant at all. This leads me to believe that Complainant's protected activity was a contributing factor to his investigation and termination.

I also find that the close temporal proximity between Complainant's injury report and Union Pacific's investigation is circumstantial evidence that the protected activity was a contributing factor to Union Pacific's adverse action. Complainant reported Mr. Millward's injury on July 24, 2009. (Parties' Joint Statement of Stipulated Facts, January 6, 2014.) Complainant was notified that he was being investigated on July 27, 2009, just three days after he engaged in his protected activity. (HT, pp. 90, 141.) On August 3, 2009, Respondent charged Complainant with violating Union Pacific's rules, and the investigation was held on August 27, 2009. (Parties' Joint Statement of Stipulated Facts, January 6, 2014.) The fact that Union Pacific made the decision to investigate and ultimately terminate Complainant so soon after his protected activity indicates that the protected activity was a contributing factor to the adverse action.

Respondent contends that "[t]o draw a causal link based merely upon proximity in time would set a dangerous precedent. If a railroad can be held to have violated federal law merely because an employee is disciplined when there is both a rule violation and an injury, railroads will have a powerful disincentive toward disciplining people when injuries occur, even when the cause of the injury was a violation of safety rules." (Respondent's Closing Brief, p. 8.) I do not find this argument persuasive. As an initial matter, the law is clear that temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, at 13 & n.69 (ARB Sept. 30, 2011); *Zinn v. American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 19 (ALJ Nov. 19, 2012). Furthermore, in this case, temporal proximity is not the only evidence that Complainant's protected activity was a contributing factor to his termination; there is also evidence of pretext, animus, and inconsistent application of rules and policies. Finally, with this argument Respondent seems to miss the entire point of the employee protection provisions of the FRSA. There is supposed to be a "powerful disincentive" against railroads disciplining employees following the report of an injury, which is why injury reporting is a

protected activity to begin with. In cases where a safety violation was the cause of the injury, the railroad is provided with an affirmative defense if it can demonstrate that it would have taken the same adverse action in the absence of the protected activity. In sum, I simply do not agree with Respondent's arguments regarding temporal proximity, and find that the close temporal proximity between the protected activity and adverse action in this case is evidence that the protected activity was a contributing factor to Complainant's termination.

Further, I find that there is evidence of animus and hostility towards injury reporting at Union Pacific. Complainant has provided a plethora of evidence that other Union Pacific employees have been retaliated against and discouraged from reporting injuries. As described above, I find the testimony of Eric Spurgeon and Jeffrey Ryan to be credible. As a result, I believe that Mr. Spurgeon experienced retaliation for reporting his injury and that Mr. Ryan was discouraged from reporting his injury. Though Respondent called several managers as witnesses to dispute Mr. Spurgeon's and Mr. Ryan's accounts, I find Mr. Ryan's and Mr. Spurgeon's accounts to be more credible. Mr. Spurgeon's testimony is corroborated by OSHA's findings in the case as well as communications between Mr. Pfnister and Mr. Lundquist. Though there is no outside evidence corroborating Mr. Ryan's account, I find that he has no reason to lie about his experience, whereas the Union Pacific managers who disputed his account would have an incentive to downplay what happened. The other cases submitted by Complainant – those of Gennese Annen, Lonnie Smith, Brian Petersen, and Raymond Griebel – further add to my belief that there is a culture among Union Pacific managers of discouraging injury reporting and retaliating against employees once an injury is reported.

Respondent contends that Complainant's and Mr. Spurgeon's testimony regarding a retaliatory climate at Union Pacific "has no basis in actual fact, and is actually counter to existing evidence." (Respondent's Closing Brief, p. 10.) Respondent also contends that the incidents cited by Complainant did not occur close enough in time to Complainant's incident to be relevant. (Respondent's Closing Brief, pp. 11–12.) I disagree. As discussed above, I find Complainant's evidence of animus towards employees who report injuries to be credible. While I agree that evidence of other employees experiencing retaliation for reporting injuries, on its own, would not be enough to prove that Complainant had experienced retaliation, I believe that this evidence demonstrates the general attitude among managers at Union Pacific towards injury reporting. To me, it is clear that the managers in the Pocatello service unit created a climate where employees were afraid to report injuries because they feared retaliation in the form of discipline or termination. This is corroborated not only by the accounts of other employees experiencing retaliation, but also the fact that managers' compensation is affected by the number of injuries reported, as evidenced by the email referring to Mr. Spurgeon's claim as a "piece of shit," and the email concerning whether Mr. Spurgeon's injury would "hit [the managers'] number." All of this, coupled with the other evidence that Complainant was retaliated against for reporting an injury, leads me to believe that Complainant's protected activity was a contributing factor to his termination.

Finally, I find that there is evidence of disparate treatment and inconsistent application of Union Pacific's rules and policies. Mr. Huddleston explained that he is not aware of any other employee being disciplined for failing to report a track defect. (HT, p. 202.) He further explained that this is the case because often a crew will not be aware of the track defect or will not notice a track defect, and it is only later that an inspector will learn of the hazardous condition. (HT, pp.

204, 375–78.) While this explanation makes sense, it is clear that Union Pacific failed to adopt this rationale in deciding whether to discipline Complainant. No one ever asked Complainant if he believed the condition of the track was hazardous, and in fact, Complainant testified that he thought the track was normal, as he had traveled over it many times and nothing seemed out of the ordinary. (HT, pp. 135, 136, 340.) The only difference between Complainant and other employees who do not report track defects is the fact that Complainant filed an injury report. Complainant was singled out and disciplined for not reporting a hazardous track condition that was later determined not to exist. This indicates to me that the true cause of the investigation and termination was the injury report.

In sum, I find that Complainant has demonstrated by a preponderance of the evidence that his injury report was a contributing factor in Union Pacific's decision to terminate him. This is based on evidence that Union Pacific's proffered explanation was pretext, the close temporal proximity between the injury report and the discipline, the fact that Complainant's protected activity was inextricably intertwined with Union Pacific's adverse action, evidence of hostility towards injury reporting, and evidence of disparate treatment. As a result, Complainant has established all of the elements of a prima facie case that Union Pacific violated the FRSA. Now, the burden shifts to Union Pacific to demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

Respondent Has Not Demonstrated that it Would Have Taken the Same Adverse Action in the Absence of any Protected Activity

Under § 1982.109 (b), relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1982.109(b). *See also Powers v. Union Pacific Railroad*, ARB Case No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 27 (March 20, 2015). In other words, even where a complainant has proven retaliation by a preponderance of the evidence, liability does not attach if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Id.* (citing *Brune v. Horizon Air. Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip. op. at 14 (ARB Jan. 31, 2006). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). Thus, the burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012).

Respondent contends that it would have taken the same action even if Complainant had not filed an injury report. (Respondent's Closing Brief, pp. 17–19.) In support of this argument, Respondent relies on the testimony of Mr. Huddleston, Mr. Pfnister, and Mr. Egusquiza that they would have assessed discipline against Complainant even if Complainant had not submitted an injury report and regardless of how they learned of the alleged rule violation. (Respondent's Closing Brief, pp. 17–18.) I disagree. As an initial matter, I have already discussed in detail my belief that Complainant cannot reasonably be said to have violated one of Union Pacific's rules. It simply defies logic that an employee could be charged with a terminable offense for failing to

report a safety hazard that is later determined not to exist. I also do not find these managers to be very credible in general, so their testimony does not convince me that Respondent would have taken the same action in the absence of Complainant's protected activity.

Further, I do not believe that Respondent would have taken the same adverse action in the absence of Complainant's protected activity because Complainant's account of the incident within the injury report is what formed the basis for Union Pacific's decision to discipline him. Mr. Huddleston admitted that he decided to investigate and terminate Complainant because the phrase "rough track" in Complainant's injury report led him to believe that Complainant willfully failed to report a dangerous condition. (HT, p. 208.) Had Complainant never submitted an injury report, the managers would never have seen the phrase "rough track" and therefore would never have been able to use it as the basis for discipline. Finally, the fact that no other employee has ever been disciplined for failing to report a dangerous condition is further evidence that Union Pacific would not have taken the same action in the absence of Complainant's protected activity.

In sum, I find that Respondent has not met its burden of establishing by clear and convincing evidence that it would have taken the same action in the absence of Complainant's protected activity. Therefore, I find that Respondent has violated the employee protection provisions of the FRSA and Complainant is entitled to damages.

REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C).[18] Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Simon v. Sancken Trucking Co.*, ARB No. 06-039, ALJ No. 2005-STA-040 (ARB Nov. 30, 2007), citing *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, at 33 (ARB Feb. 9, 2001). Punitive damages up to $250,000 are also authorized. 49 U.S.C. § 20109(e)(3).

Complainant is Entitled to Back Pay

The Complainant is entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(1). OSHA determined that Respondent owed Complainant $65,661 in back wages and $1,467 in vacation time, plus $7,260.40 in interest[19] on the back wages and vacation time

[18] *See Vernace v. PATH*, ALJ No. 2010-FRS-018 (OALJ Sept. 23, 2011), *aff'd., Vernace v. PATH*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047 at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-003, -004 at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act).

[19] The OSHA decision stated that the interest was calculated using the Internal Revenue Service's rate for tax overpayments in § 6621 of the Internal Revenue Code.

owed. (ALJX1, pp. 12–13.) I find that Complainant is entitled to back pay plus interest, minus the wages he earned during his employment at Proctor and Gamble, and compensation for vacation time he would have earned during that period. Complainant was terminated on September 3, 2009, and returned to work on May 22, 2010. (Parties' Joint Statement of Stipulated Facts, January 6, 2014; Order Re: Parties' Stipulations, January 7, 2014.) Complainant found replacement work for approximately two weeks with Proctor and Gamble during the time he was terminated. (HT, p. 150.)

Respondent contends that Complainant's back pay should be reduced because he failed to mitigate damages by accepting Union Pacific's offer of leniency. (Respondent's Closing Brief, pp. 19–20.) Respondent cites two cases that allegedly hold that a "failure to take an offer of reinstatement tolls the back pay period for an employee's claim." (Respondent's Closing Brief, p. 20.) As an initial matter, neither case cited by Respondent is binding – one is from the Department of Labor Office of Administrative Appeals, and the other is from the Supreme Court of Colorado. *Fair v. Red Lion Inn*, 943 P.2d 431 (Colo. 1997); *Lansdale v. Intermodal Cartage Co., Ltd.*, 1995 WL 848152 at *1 (DOL Off. Adm. App. July 26, 1995).

Even if the cases cited by Respondent were binding, neither case indicates that there is an absolute duty to mitigate damages by accepting an offer of reinstatement. *Fair v. Red Lion Inn*, 943 P.2d 431 (Colo. 1997), holds that an employee is obligated to accept "an unconditional offer of reinstatement where no special circumstances exist to justify rejection." 943 P.2d at 440. Here, Union Pacific did not offer Complainant an unconditional offer of reinstatement to the original terms of his employment. Instead, Union Pacific gave him the option to retain his position with a Level 3 discipline. It is reasonable that Complainant would reject this offer because he believed he would be accepting responsibility for something he had not done, and was concerned about the potential future impact of having a Level 3 discipline on his record. In my view, these constitute "special circumstances … to justify rejection." The other case cited by Respondent similarly holds that while the back pay period is usually tolled upon an unconditional offer of reinstatement, the period is not tolled where the offer is invalid. *Lansdale v. Intermodal Cartage Co., Ltd.*, 1995 WL 848152 at *1 (DOL Off. Adm. App. July 26, 1995). Again, the key word is "unconditional" – Union Pacific did not offer Complainant unconditional reinstatement – it offered Complainant reinstatement with a Level 3 discipline. Complainant had no duty to accept this offer. Therefore, I reject Union Pacific's contention that Complainant's back pay damages should be reduced due to a failure to mitigate.

Complainant is Entitled to Compensatory Damages

Complainant is Entitled to Damages for Emotional Distress

Compensatory damages include damages for emotional distress. In order to recover, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish. *Testa v. Consol. Edison Co., Inc.*, ARB No. 08-029, ALJ No. 2007-STA-027 at 11 (ARB Mar. 19, 2010). An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). A complainant's

credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 at 8 (ARB Jan. 31, 2008).[20]

I find that Complainant is entitled to compensatory damages for emotional distress. Complainant credibly testified that he experienced anxiety and stress as a result of his termination from Union Pacific, and his wife corroborated this testimony. (HT, pp. 97–98, 149, 154.) Complainant also suffered an anxiety attack when he was notified that Union Pacific was going to investigate him. (HT, pp. 92–93, 142–43; JX 32.) He was distraught over no longer being able to serve as the family's breadwinner, and concerned that he would be unable to support his family without any income. (HT, p. 149.) Complainant underwent a permanent shift in his disposition which his wife observed. Following these events, Complainant went from a "happy-go-lucky" individual to a pessimist. (HT, pp. 97, 154.) Further, the stressful events triggered by the actions taken against Complainant support Complainant's and his wife's testimony about Complainant's emotional distress. In addition to the stress of an investigation and termination, Complainant and his wife spent a great deal of time negotiating with their creditors, struggled with finances, could no longer afford groceries, had to hunt for food and grow produce, missed two mortgage payments and modified their mortgage loan, and could not afford to buy Christmas presents for their family. These events were the direct result of Complainant's termination from Union Pacific – they occurred because of the loss of income that Complainant experienced. It is understandable and reasonable that Complainant would experience a great deal of emotional distress in these circumstances, and accordingly, I find that emotional distress damages are warranted.

"[A] key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001). In similar cases, compensatory damages have ranged from $4,000 to $250,000.[21] In this case, OSHA awarded $50,000 in emotional distress damages, and I agree that this amount is appropriate. (ALJX1, p. 13.) Though this is a *de novo* review of the case and I am not bound to accept OSHA's determination, I believe that $50,000 is an amount supported by case law and reasonable given the circumstances. This case is similar to *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 1995-CAA-003 (ARB Sept. 29,

[20] *See also Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 22 (ARB Sept. 29, 1998) ("Although the testimony of health professionals may strengthen the case for entitlement to compensatory damages, it is not required. … All that is required is that the complainant show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." (internal citations omitted)).

[21] *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (awarding $50,000 in compensatory damages for emotional distress); *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 28, 2010) ($20,000 in compensatory damages for emotional distress); *Carter v. Marten Transport, Ltd.*, ARB Nos. 06-101, -159, ALJ No. 2005-STA-063 (ARB June 30, 2008) ($10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008) ($5,000); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB No. 04-183, ALJ No. 04-STA-43 (ARB Dec. 29, 2005) ($20,000); *Jackson v. Butler & Co.*, ARB Nos. 03-116, 144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004) ($4,000); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 095, ALJ No. 02-STA-035 (ARB Aug. 6, 2004) ($10,000); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-030 (ARB Feb. 9, 2001) ($250,000); *Jones v. EG&G Defense Materials*, ARB No. 97-129, ALJ No. 95-CAA-003 (ARB Sept. 29, 1998) ($50,000); *Van Der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 95-ERA-038 (ARB Apr. 20, 1998) ($40,000); *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 95-STA-029 (ARB Oct. 9, 1997) ($75,000); *Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-037 (ARB Sept. 5, 1996) ($20,000); *Creekmore v. ABB Power Systems Energy Services, Inc.*, ALJ No. 93-ERA-024 (Dep. Sec. Dec. and Rem. Ord. Feb. 14, 1996) ($40,000).

1998). In *Jones*, the ARB upheld an award of $50,000 for emotional distress damages where the complainant was terminated and subsequently unable to support his family's needs, could no longer pay for his stepdaughters to attend college, and suffered injury to his credit standing. *Id*., slip op. at 22–23. The emotional distress suffered by Complainant in this case is similar to the distress suffered by the complainant in *Jones*, and I believe an award of $50,000 is appropriate as a result.

I find that this case is distinguishable from cases in which significantly lower awards were made. Cases with awards of $10,000 or less typically involved some mental anguish and distress, [22] but I believe that Complainant experienced more severe distress than the complainants in those cases. In cases with awards of $10,000 or less, the complainants typically did not experience such drastic losses as being unable to afford groceries or Christmas presents, having to go hunting for food, not being able to afford gas to heat the house, relying on in-laws to provide a wood-burning stove for heat, taking their family into the woods to collect firewood, experiencing a decline in credit score, having to renegotiate mortgage terms, or having to come up with alternate payment plans for credit cards. Though the complainants in other cases with lower awards testified that they experienced some of the same feelings as Complainant in this case, Complainant also experienced serious financial strain from being unable to provide for his family in the manner to which they were accustomed. Finally, those cases, many of which were decided in the early 2000s, did not have the added element of the economic downturn and the fear that alternate work would not be available. In my view, these factors warrant a higher award for emotional distress.

This case is also distinguishable from cases in which a complainant was awarded more than $50,000. In *Michaud v. BSP Transport*, the ARB upheld emotional distress damages of $75,000 for a complainant who lost his house through foreclosure and had to obtain public assistance. ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997). While Complainant clearly suffered a great deal of distress resulting from his loss of income, he did not lose his home, so I feel that he is not entitled to the $75,000 awarded in *Michaud.* Further, in *Hobby v. Georgia Power Co.*, the ARB upheld an award of $250,000 in emotional distress damages for a complainant who suffered serious damage to his reputation and the elimination of a "very promising" and lucrative career. ARB Nos. 1998-166, -169, ALJ No. 1990-ERA-030 (ARB Feb. 9, 2001). Here, though Complainant undoubtedly experienced a great deal of stress when he lost his job, he did not suffer such severe damage to his reputation that he would never be able to work in the industry again, as the complainant in *Hobby* did. The complainant in *Hobby* was unemployed for eight years, could not find any work within his chosen field, and basically had no chance of future promotion or salary increases. *Id*., slip op. at 31. Here, the Complainant did

[22] *See, e.g., Hobson v. Combined Transport, Inc.*, ALJ No. 2005-STA-035 at 12 (ALJ Nov. 10, 2005) (complainant awarded $5,000 for "increased anxiety and stress" with "only one reference during his testimony to the anxiety and stress that resulted from the Respondent's actions"), *aff'd. Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 053, ALJ No. 2005-STA-035 (ARB Jan. 31, 2008); *Jackson v. Butler & Co.*, ALJ No. 2003-STA-026 at 10 (ALJ June 25, 2003) (complainant awarded $4,000 based on feeling "moody, depressed, and short tempered with a low self-esteem and sense of embarrassment"), *aff'd. Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-035 at 41–42 (ALJ Mar. 6, 2003) (awarding $10,000 in compensatory damages due to emotional distress, marital strain, and complainant's inability to continue providing the same level of financial security for his wife), *aff'd. Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095 (ARB Aug. 6, 2004).

not experience such a severe disruption to his career, so I accordingly believe that $50,000 for emotional distress is sufficient.

Respondent contends that Complainant's "emotional distress damages would have been mitigated had [he] chosen to continue working, rather than refuse the leniency offer." (Respondent's Closing Brief, p. 20.) I disagree. As I have already discussed, Complainant was under no duty to mitigate back pay damages by accepting the leniency offer, and he also had no duty to accept the offer in order to mitigate emotional distress damages. Respondent has not identified any authority that requires a complainant to mitigate emotional distress damages by accepting an offer of leniency while admitting guilt that he did not feel, and I am not aware of any such cases either.

Respondent also argues that Complainant should have mitigated his damages for emotional distress by seeking charity from his church. (Respondent's Closing Brief, p. 21.) Respondent's expert, Mr. Norman, included several opinions about this in his report, and as discussed above, I find his opinion worthless and am completely disregarding Mr. Norman's opinions on this subject. I note that Complainant might have suffered even more emotional distress, especially to his self-esteem, if his situation had deteriorated to the point where he, as the sole breadwinner for his family, was forced to accept charity.

Respondent cites no cases that stand for the proposition that a complainant has a duty to mitigate emotional distress damages, and I am not aware of any authority that requires it. Further, Respondent's arguments on this subject are unreasonable and completely ignore the context of the situation. Were it not for Respondent's illegal action, Complainant would never have experienced this emotional distress to begin with. I decline to require a complainant who is already suffering stress and hardship to mitigate emotional distress by looking for charity, and I reject Respondent's baseless, unsupported, and unreasonable arguments.

In sum, I find that Complainant is entitled to $50,000 in damages for emotional distress. Contrary to Respondent's assertions, Complainant had no duty to mitigate his emotional distress damages by accepting Union Pacific's offer of leniency or by seeking charity.

Damages for the Injury to Complainant's Credit Score

Complainant contends that he is entitled to additional compensatory damages for loss to his credit rating. (Complainant's Closing Brief, p. 30.) Complainant testified at the hearing that his credit score dropped from 676 to 550 or 570 following his termination, and that it has since improved to around 680. (HT, p. 154.) Respondent contests Complainant's entitlement to these damages, saying that this is "double counting and illusory" because Complainant "did not attempt to obtain a loan during [his] unemployed period, and there were no damages incurred from any change in their credit score." (Respondent's Closing Brief, p. 22.) OSHA awarded Complainant $25,000 in compensatory damages for the injury to his credit score. (ALJX 1, p. 13.)

I agree with Respondent that Complainant is not entitled to additional damages for the injury to his credit score. Though I find Complainant's testimony regarding his credit score to be credible, there is no evidence that Complainant actually suffered any damages as a result. The

$50,000 I awarded for emotional distress includes the understandable stress and anxiety that resulted from the loss to his credit rating. If Complainant had been denied a loan or could show that he received less favorable terms on a credit instrument than he would have otherwise been given, then I would be able to see and quantify financial damages stemming from these changes to the credit score. However, in the absence of this evidence, I find that Complainant is not entitled to additional compensatory damages for the loss to his credit rating.

Complainant is Entitled to Damages for the Modification to his Mortgage

Complainant argues that he is entitled to compensatory damages resulting from the mortgage modification he and his wife undertook when he lost his income. (Complainant's Closing Brief, p. 30.) Complainant and his wife testified at the hearing that after Complainant lost his job, they had to renegotiate the terms of their mortgage with the bank which resulted in an $11,000 increase in the total mortgage amount. (HT, pp. 99–100, 110; CX 7A, p. 951.) Respondent disputes Complainant's entitlement to compensatory damages from the modified mortgage by arguing that it is "duplicative of his lost wages claim. Had he been collecting wages as usual, those wages would have paid [Complainant's] mortgage payments." (Respondent's Closing Brief, p. 22.) Respondent further argues that Complainant suffered no damages from the modification because the missed payments were merely shifted into the future "without any penalty or increase in interest." (Respondent's Closing Brief, p. 22.) In addition, Respondent contends that Complainant can use any back pay he is awarded to cover the payments he missed, essentially restoring the original terms of the mortgage. (Respondent's Closing Brief, p. 23.) OSHA awarded Complainant $11,132.80 in compensatory damages for the modified mortgage. (ALJX1, p. 13.)

I agree with Complainant that he is entitled to damages for the increase in the total loan amount for his mortgage. Though I have already found Mr. Norman's report to be entirely worthless, it bears repeating here that Mr. Norman and Respondent employed seriously faulty logic in reaching their conclusions on this topic. While Respondent and Mr. Norman are correct that the life and interest rate of the loan were unchanged by the modification, this does not mean that Complainant did not incur any damages. To the contrary, the Complainant's missed payments were added back into the principal of the loan, thereby increasing the principal and ultimately increasing the total loan amount because the Complainant now has to pay interest on an increased amount of money. It is truly stunning that an accountant with Mr. Norman's training and experience would fail to recognize such a basic mathematical principle.

This is best illustrated by the revised loan agreement itself. Prior to Complainant's termination, the unpaid principal balance on his mortgage was $106,326.82 with an interest rate of 6.25% and a life of 320 months. (CX 7A, p. 951.) This resulted in monthly payments of $677.29, and a total loan payments of $216.732.80.[23] Following the loan modification, the missed payments were added back to the principal, increasing it to $110.757.14. (CX 7A, p. 951.) The interest rate remained 6.25% and the term remained 320 months, but the new monthly payment became $711.90. (CX 7A, p. 951.) As a result, the total loan payments now total $227,808.00.[24] Thus, as a result of Complainant's termination from Union Pacific, he will be

[23] $677.29 per month x 320 months = $216,732.80.
[24] $711.90 per month x 320 months = $227,808.00.

paying $11,075.20,[25] more on his mortgage which he is entitled to recover in damages. This was a simple mathematical calculation that did not require the skills of a CPA or accountant to determine.

I am not persuaded by Respondent's argument that Complainant can use any back pay he is awarded to cover the missed payments and thereby bring the mortgage back to its original terms. As I have explained, the mortgage modification increased the total loan payments by approximately $11,000 over the total amount that would be paid under the original terms because it increased the principal balance. Complainant would actually have to use his back wages to make higher payments than he was initially required to make in order to bring the mortgage down to a comparable level, which would result in an additional loss. Further, whether or not Complainant would be able to make accelerated payments to restore the original terms of the mortgage is entirely in the hands of the lender and is too speculative to factor into this decision. The fact of the matter is that Respondent's illegal action resulted in an $11,075.20 increase in Complainant's total mortgage payments, and Respondent is liable for those damages.

Complainant is Entitled to Punitive Damages

The FRSA authorizes punitive damages "in an amount not to exceed $250,000." 49 U.S.C. § 20109(e)(3). Punitive damages are to punish unlawful conduct and deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434–35 (2001). In whistleblower cases, punitive damages are appropriate to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, ALJ Nos. 86-CAA-003, 004, 005 (Sec'y May 29, 1991). The ARB further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson v. New Prime Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 at 5 (ARB Aug. 31, 2011).

Complainant contends that he is entitled to punitive damages because Union Pacific "showed a complete and utter disregard for the law and for basic decency" in deciding to investigate and terminate Complainant. (Complainant's Closing Brief, p. 33.) Complainant requests the statutory maximum amount, $250,000, because Union Pacific "has run roughshod" over employees' rights and employed "egregious, carefully crafted systemic efforts" to "thwart the protections of the FRSA." (Complainant's Closing Brief, p. 33.) Respondent argues that punitive damages are not warranted because Union Pacific "did not act with callous disregard for [Complainant's] rights under the FRSA." (Respondent's Closing Brief, p. 26.) OSHA awarded Complainant $150,000 in punitive damages. (ALJX 1, p. 13.)

I agree with Complainant that punitive damages are appropriate. Union Pacific exhibited a high degree of reprehensibility and culpability in this matter. The fact that Union Pacific

[25] $227,808.00 - $216,732.80 = $11,075.20. OSHA awarded Complainant $11,132.80 in damages resulting from the modified mortgage but offered no explanation for how they arrived at that figure, so I am unable to explain the difference between OSHA's award and my calculation of the actual increased cost.

terminated an employee with no history of discipline for failing to report a safety hazard that did not exist defies logic and exhibits a total callousness for employees' rights. Immediately upon Complainant's submission of an injury report, Union Pacific decided to initiate a disciplinary investigation. The railroad soon learned that there was no safety hazard or track defect, but decided to continue with a harsh course of action with serious repercussions anyway. This weighs in favor of assessing punitive damages.

In addition, the extreme amount of harm sustained by Complainant indicates that punitive damages are appropriate. Union Pacific's actions caused a husband and father of five children to lose the family's only source of income. Complainant's family was forced to take drastic measures simply to survive the many months he was out of work, including relying on their in-laws to purchase them a wood-burning stove, going into the woods to gather firewood to heat the house, hunting for food, and canning fruits and vegetables to last through the winter. Complainant's family was unable to buy Christmas gifts, and Complainant's wife, who traditionally had stayed home with the children, had to take a retail position so that the family would have any income at all. Complainant and his wife spent a great deal of time negotiating with their creditors and had to modify their mortgage in order to get by. Union Pacific's actions placed a very serious emotional and financial burden on this family, and this weighs in favor of punitive damages.

I also find that punitive damages are warranted because Complainant has demonstrated that there is a culture of hostility and animus towards injury reporting at Union Pacific. In addition to Complainant's experience of retaliation following his injury report, there is evidence that other employees within the Pocatello service unit also had similar experiences. Mr. Spurgeon testified that the general belief among employees is "[i]f you report [an injury], you will be punished." (HT, p. 63.) Mr. Spurgeon's experience is particularly egregious, as demonstrated by the fact that Mr. Pfnister immediately said to "[h]andle it like it's going to be a Level 5" and the fact that Mr. Spurgeon's injury report was referred to as a "piece of shit." Mr. Ryan's experience is also troubling; with managers threatening and intimidating him to prevent him from reporting an on-duty injury, it is not surprising that he testified that the incident "scared the living daylights out of [him]." (HT, p. 78.) In light of this evidence, as well as the other evidence submitted by Complainant demonstrating that employees have been discouraged from reporting injuries and retaliated against once they report them, I find that punitive damages are appropriate.

Another reason for assessing punitive damages is that Respondent's official policies discourage injury reporting because Respondent provides incentives for its managers to reduce the number of injuries reported by the employees they supervise by linking their compensation to the number of reported injuries. A higher number of injuries reported on a manager's watch could lead to negative consequences for the manager. The fact that Respondent's official policy connects the number of reported injuries to the manager's performance evaluation clearly gives the manager an incentive to discourage the reporting of injuries. It is unfathomable that Respondent could believe that such a policy would not have this effect. The email exchange between Mr. Pfnister and Mr. Lundquist referencing whether Eric Spurgeon's injury was "going to hit [their] number" further demonstrates that the managers are fully aware of this policy and want to keep the number of reported injuries low. This almost certainly creates a chilling

atmosphere where employees are reluctant to report an injury due to fear of subsequent retaliation, and I find that this weighs in favor of assessing punitive damages.

Respondent contends that I should give limited weight to the accounts of retaliation against other Union Pacific employees because Complainant should not be able to recover for any harm outside of that which he personally incurred. (Respondent's Closing Brief, pp. 26–30.) However, in this case, evidence of retaliation against other Union Pacific employees is relevant to the punitive damages analysis because it demonstrates that Union Pacific has engaged in a pattern and practice of violating the FRSA and trampling on employees' rights. This indicates a high degree of reprehensibility on Union Pacific's part and weighs in favor of assessing punitive damages.

In sum, I find that Respondent's conduct in this case is sufficiently reprehensible to warrant an award of punitive damages. Respondent, through its policies and its managers' actions, has created an environment of hostility and antagonism surrounding injury reporting. In this case, Respondent quickly jumped to conclusions and inflicted very harsh discipline on a long-term employee who did not report a condition that was later determined not to be dangerous. This resulted in severe consequences for Respondent and his family. All of this compels me to award punitive damages to Complainant both to punish Respondent for its illegal conduct and also to deter Respondent from engaging in this type of behavior in the future.

Considering the range of punitive damages that may be assessed, I find that punitive damages in the amount of $150,000 are justified. There have been several FRSA whistleblower cases against Union Pacific where punitive damages were assessed, ranging from $1,000 to $100,000.[26] I have also surveyed other FRSA cases where punitive damages have been assessed and found a range from $1,000 to $250,000.[27] Respondent's conduct in this case was quite egregious, as described above, so I believe that a significant award of punitive damages is justified. In the last few years, Respondent has been assessed punitive damages in several similar cases, including three cases in which $100,000 awards were made.[28] In a recent case involving Union Pacific, I found that $100,000 in punitive damages was warranted and decided not to

[26] *See Harvey v. Union Pacific Railroad*, ALJ No. 2011-FRS-039 (ALJ Feb. 12, 2015) (assessing punitive damages against Union Pacific in the amount of $100,000); *Griebel v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-011 (ALJ Jan. 31, 2013) (assessing punitive damages against Union Pacific in the amount of $100,000); *Jackson v. Union Pacific Railroad Co.*, ALJ No. 2012-FRS-017 (ALJ Feb. 15, 2013) (awarding $1,000 in punitive damages); *Petersen v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-017 (ALJ Aug. 7, 2013) (awarding $100,000 in punitive damages); *Smith v. Union Pacific Railroad Co.*, ALJ No. 2012-FRS-039 (ALJ Apr. 22, 2013) (assessing $25,000 in punitive damages against Union Pacific).

[27] *See Winch v. CSX Transportation, Inc.*, ALJ No. 2013-FRS-014 (ALJ Dec. 4, 2014) ($5,000 in punitive damages); *Raye v. Pan Am Railways Inc.*, ALJ No. 2013-FRS-084 (ALJ June 25, 2014) ($250,000 in punitive damages); *Nagra v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2012-FRS-074 (ALJ Oct. 29, 2013) ($35,000 in punitive damages); *Vernace v. PATH*, ALJ No. 2010-FRS-018 (ALJ Sept. 23, 2011) ($1,000 in punitive damages); *Anderson v. Amtrak*, ALJ No. 2009-FRS-003 (ALJ Aug. 26, 2010) ($100,000 in punitive damages); *Santiago v. Metro-North Commuter Railroad Co., Inc.*, ALJ No. 2009-FRS-011 (ALJ May 16, 2013) ($40,000 in punitive damages); *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ALJ No. 2009-FRS-015 (ALJ Mar. 14, 2011) ($5,000 in punitive damages); *Cain v. BNSF Railway Co.*, ALJ No. 2012-FRS-019 (ALJ Oct. 9, 2012), ARB No. 13-006 (ARB Sept. 18, 2014) ($250,000 in punitive damages reduced to $125,000 on appeal).

[28] *Harvey v. Union Pacific Railroad*, ALJ No. 2011-FRS-039 (ALJ Feb. 12, 2015); *Griebel v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-011 (ALJ Jan. 31, 2013); *Petersen v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-017 (ALJ Aug. 7, 2013).

impose a higher amount of punitive damages because Union Pacific did not have notice of other FRSA whistleblower decisions at the time of its conduct. *Harvey v. Union Pacific Railroad*, ALJ No. 2011-FRS-039, slip op. at 46 (ALJ Feb. 12, 2015). However, in this case, the harm Complainant suffered was so extreme as to override the concerns about notice I expressed in *Harvey*. I also believe that Union Pacific's conduct was more egregious in this case, and the proffered reason for Complainant's termination was even less rational and more attenuated than in other cases. Therefore, I find that punitive damages in the amount of $150,000 are appropriate.

Complainant is Entitled to Recover Attorney's Fees and Costs

The FRSA provides that an employee who prevails in a whistleblower action is entitled to recover litigation costs and reasonable attorney fees. 49 U.S.C. § 20109(e)(2)(C). Therefore, Complainant is entitled to recover attorney's fees and costs of litigation. Complainant's counsel is instructed to submit a fully supported application for costs and fees to Respondent's counsel and the undersigned ALJ, as outlined below.

Other Remedies

Complainant asserts that he is also entitled to expungement of his personnel records so that any reference to discipline stemming from this incident is removed. (Complainant's Closing Brief, p. 33.) OSHA ordered that all references to unfavorable personnel actions taken against Complainant be removed from his records. (ALJX 1, p. 13.) I agree that all references to disciplinary action stemming from this incident should be expunged from Complainant's personnel records and find that Respondent is required to do so.

CONCLUSION

In conclusion, I find that Respondent violated the FRSA's employee protection provisions when it retaliated against Complainant for engaging in protected activity. Specifically, Complainant engaged in protected activity when he reported the on-duty injury of his co-worker, and Respondent was aware of the protected activity. Complainant suffered unfavorable personnel actions when he was investigated and subsequently terminated, and Complainant's protected activity was a contributing factor to these adverse actions. Respondent did not prove that it would have taken the same action in the absence of any protected activity. As a result of Respondent's violation of the FRSA, Complainant is entitled to back pay including vacation time plus interest, $50,000 in compensatory damages for emotional distress, $11,075.20 in damages for his increased mortgage payments, and $150,000 in punitive damages.

ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED that:

1. Respondent, Union Pacific, shall pay Complainant, Lonny Schow, $65,661 in back pay from the date of his termination until the date he was reinstated, plus $1,467 in lost vacation time. Any wages Complainant earned for replacement employment during this time shall be subtracted from his back pay. Complainant shall provide Union Pacific with documentation showing wages he received before he was reinstated.

2. Respondent, Union Pacific, shall pay Complainant, Lonny Schow, interest on the back and vacation pay owed to Complainant as calculated in accordance with 26 U.S.C. § 6621 from the date the back and vacation pay was owed until the date it is paid.

3. Respondent, Union Pacific, shall pay Complainant, Lonny Schow, $50,000 in compensatory damages for emotional distress.

4. Respondent, Union Pacific, shall pay Complainant, Lonny Schow, $11,075.20 in compensatory damages for his increased mortgage payments.

5. Respondent, Union Pacific, shall pay Complainant, Lonny Schow, $150,000 in punitive damages.

6. Counsel for Complainant shall file and serve by May 18, 2015, a fully supported application for costs and fees to Respondent's counsel and to the undersigned Administrative Law Judge. Within 20 days thereafter, Respondent's counsel shall initiate a verbal discussion with Complainant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two parties agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes, the Complainant's counsel shall file and serve by June 22, 2015, changes agreed to during his discussions with Respondent's counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Respondents' counsel shall file and serve by July 6, 2015, a Statement of Final Objections. The Complainant's counsel may file a reply by July 20, 2015. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

7. The parties are ordered to notify this Office immediately upon the filing of an appeal.

Digitally signed by Jennifer Gee
DN: CN=Jennifer Gee,
OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. 29 C.F.R. § 1982.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue NW, Washington DC 20210-0001. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards. 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. 29 C.F.R. §§ 1982.110(a) and (b).