U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 13 January 2014

CASE NO: **2013-FRS-34**

In the Matter of:

REGGIE SEAY,
Complainant,
v.

NORFOLK SOUTHERN RAILWAY CO.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding arises under the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007) and the applicable regulations issued thereunder at 29 C.F.R. Part 1982. A hearing in the matter has been scheduled for January 21, 2014 in Washington, D.C.

On December 20, 2013, Norfolk Southern Railway Company ("Respondent" or "Norfolk Southern") filed a motion for summary decision pursuant to 29 C.F.R. § 18.40 seeking dismissal of the complainant filed by Reggie Seay ("Complainant" or "Seay"). On December 31, 2013, Complainant filed a response to Norfolk Southern's motion opposing dismissal of his complaint. Respondent then filed a Reply to Complainant's Opposition on January 8, 2013. After reviewing the moving and replying papers, the evidence attached thereto, as well as Seay's complaint, I find summary judgment is warranted.

I. FINDINGS OF FACT

Based on the record before me, and construed in a light favorable to Complainant, I find the following facts to be undisputed and material to the issues presented:

1. Norfolk Southern owns and operates approximately 22,000 miles of railway track. Respondent's Exhibit ("RX") 1 at ¶ 3.
2. Respondent's dispatchers monitor and control the occupation and movement of on-track vehicles and equipment using what are called "track warrants" or "track authority" for the purpose of avoiding on-track collisions between trains and on-track vehicles and equipment. RX 1 at ¶ 5.

3. A track authority constitutes permission to occupy an identified section of track during an identified period of time. RX 1 at ¶ 6; RX 2 at 31.
4. A track authority is "very important" because it ensures that the roadway worker has taken the track out of service and is in control of the track while it is being inspected or repaired. RX 2 at 32.
5. Violating a track authority is a "major mistake." RX 2 at 105, 109.
6. An operator of an on-track vehicle, or the roadway worker in charge of a group of employees, is responsible for obtaining a track authority pursuant to specified procedures. RX 1 at ¶ 6.
7. An employee requesting a track authority contacts the dispatcher by radio, and the dispatcher provides specific information about the track authority, including the physical limits of the track authority (denoted by Control Points) and the time during which the identified portion of the track may be occupied. RX 1 at ¶ 6; RX 2 at 50-51.
8. A Control Point may vary in size from one to several hundred yards in length and is a specific location on a track designated by track signals or other markers. RX 1 at ¶ 7.
9. A track authority extends to the "insulated joints" of a Control Point. RX 2 at 49.
10. The information provided by the dispatcher to the employee requesting the track authority is written on a standard Track Authority Form ("TA Form") by the employee requesting the track authority. RX 1 at ¶ 8.
11. The employee filling out the TA Form ensures the accuracy of the terms of the track authority by reading the information written on the TA Form back to the dispatcher. RX 1 at ¶ 8.
12. If an employee obtaining a track authority is accompanied by another Norfolk Southern employee, the other employee is responsible for: listening to the radio conversation with the dispatcher to ensure the terms of the track authority are clear and understood; reading the TA Form to ensure its accuracy; and initialing the TA Form to acknowledge its accuracy and to affirm the accompanying employee's responsibility to remain vigilant about compliance with the track authority.
13. Frequently, successive track authorities are obtained if the on-track vehicle or equipment proceeds through numerous Control Points. RX 1 at ¶ 9; RX 2 at 51-52; RX 4 at ¶ 6.
14. All Norfolk Southern employees in an on-track vehicle or equipment are responsible for adhering to the track authority and are obligated to watch out for obstructions on the track and to not run past the authorized track limits. RX 1 at ¶ 10.
15. The driver/operator of on-track vehicles or equipment must update the dispatcher of his or her progress through the authorized Control Points as the on-track vehicle or equipment travels a section of track and advise the dispatcher when the on-track vehicle or equipment leaves the track. RX 1 at ¶ 10.
16. Complainant Reggie Seay began working for Respondent on June 5, 1996 in Norfolk Southern's Dearborn Division. Exhibit B to RX 1 at 2; RX 2 at 4.
17. Seay has held various positions while working for Respondent including trackman, welder, welder helper, thermite welder, thermite welder helper,

machine operator, truck driver, foreman, assistant foreman, bridge structural welder, bridge structural welder helper, inspector and pilot. RX 2 at 5-6.

18. Complainant is a "maintenance of way employee" or "road worker"[1] whose duties as Track Patrol Foreman included operating hi-rail vehicles or on-track equipment while inspecting and repairing track on Respondent's railway tracks. RX 1 at ¶ 4; Ex. 1 to RX 1 at 2.
19. Road workers are governed by, and required to be familiar with, Norfolk Southern's operating and safety rules, and Seay was familiar with those rules. RX 2 at 24-25.
20. As a foreman, and when acting as a "worker in charge" of a group of employees, Seay was responsible for ensuring that all operating and safety rules relating to track repairs were complied with and work was performed in a safe and timely manner. RX 2 at 25-27.
21. On December 8, 2011, Seay and his supervisor Philip Hagan ("Hagan"), accompanied by a Federal Railroad Administration ("FRA") Track Inspector and an Inspector Trainee, were riding in a hi-rail vehicle inspecting track on Respondent's Chicago Line. Complainant Seay's Declaration in Opposition to Respondent's Motion for Summary Decision ("Seay Decl.") at ¶ 2.
22. Hagan drove the hi-rail vehicle, and Seay sat in the backseat. The FRA Inspector sat in the front passenger seat, and the FRA Inspector Trainee sat in the back seat behind Hagan. *Ibid*; RX 1 at ¶ 14; RX 4 at ¶ 13; RX 2 at 54-55; RX 4 at ¶¶ 4-5.
23. Usually when inspecting track, Seay would sit in the front passenger seat while Hagan drove the hi-rail vehicle. Complainant's Memorandum of Law in Opposition to Respondent's Motion for Summary Decision ("Compl. Opp.") 5.
24. The hi-rail vehicle operated by Hagan on December 8, 2011exceeded its track authority. Compl. Opp. 5.
25. Seay had difficulty seeing the track from the passenger side of the backseat, and did not immediately notice the violation. Compl. Opp. 6.
26. Hagan notified the dispatcher and his immediate supervisor that he and Complainant had exceeded their track authority limits at Control Point 503 in a hi-rail vehicle driven by Hagan while inspecting track. RX 2 at 106; RX 4 at ¶¶ 3,10; Seay Decl. at ¶ 2; Compl. Opp. 6.
27. Hagan and Complainant drove up to the next crossing where they waited for a supervisor. RX 2 at 107; RX 4 at ¶ 11.
28. James Erickson ("Erickson"), Hagan's and Seay's immediate supervisor, responded to the scene and interviewed both employees. RX 2 at 107-08; RX 4 at ¶ 11.
29. Erickson spoke to Hagan first and then spoke to Complainant. RX 2 at 108-09; RX 4 at ¶¶ 11-12.
30. Complainant told Erickson that Hagan had "r[u]n outside of his limits and there was nothing [he] could do to prevent it." RX 2 at 109.
31. Erickson told Hagan and Seay they had to wait there to talk to Lloyd Brewer. RX 2 at 110.
32. Lloyd Brewer ("Brewer"), then Assistant Division Engineer for Respondent's Dearborn Division, was notified by Track Supervisor James Erickson that Hagan

[1] A "road worker" is a Norfolk Southern employee who repairs and maintains track. RX 2 at 24.

and Complainant had violated their track authority at Control Point 503. RX 1 at ¶ 12.

33. Brewer drove to the vicinity of Control Point 503 after being informed of the track authority violation on December 8, 2011. RX 1 at ¶ 13-14; RX 4 at ¶ 13.
34. Brewer met with Hagan who explained the circumstances surrounding the violation and took responsibility for the violation. RX 1 at ¶ 13-14; RX 2 at 110; RX 4 at ¶ 13.
35. Brewer also spoke with Complainant who denied responsibility for the track authority violation. RX 1 at ¶ 15; RX 2 at 111, 113.
36. Brewer directed that both Hagan and Seay be taken out of service because they were jointly responsible for ensuring they remained within the limits of their track authority. RX 1 at ¶ 17; RX 4 at ¶ 15.
37. Seay had been a foreman inspector for a few months before December 8, 2011. RX 2 at 29-30.
38. An "inspector" is responsible for identifying and reporting defects or irregularities in such things as track, ballast, cross ties, switch parts, crossings, and signals. RX 2 at 27.
39. Seay inspected track daily as a foreman inspector and had inspected the track in the vicinity of Control Point 503 numerous times a week for at least three months prior to December 8, 2011. RX 2 at 30.
40. Complainant was "qualified" on the track in the area where he and Hagan had been working on December 8, 2011, and he knew the area of track near Control Point 503 "well." RX 2 at 17, 23.
41. In order to be "qualified" on an area of track, the employee must be familiar with the physical characteristics of the area, including the Control Points on the track, the "class of track," as well as the location of bridges, road crossings and curves. RX 2 at 11-12.
42. Three or four TA Forms had been copied during Hagan's and Complainant's hi-rail trip prior to completing the TA Form for Control Point 503. Ex. A to RX 1 at 32; RX 4 at 6.
43. Seay initialed each form after ensuring that it was 100% correct, including the track authority dated December 8, 2011 for Control Point 503 on Track 2. Ex. A to RX 1 at 32; RX 2 at 53-56; RX 4 at ¶ 6.
44. Complainant knew that every roadway worker is responsible for ensuring that the track he or she is on is protected and assisting the operator of whatever vehicle or equipment they are in by watching out for obstructions. Ex. A to RX 1 at 33.
45. Seay acknowledged that he was responsible for ensuring that the high-rail vehicle in which he was a passenger on December 8, 2011 did not exceed the track authority under which he and Hagan were operating, but further stated that he "could not perform [his] job officially based on [his] position and the situation." RX 2 at 56, 57-58.
46. Seay further acknowledged that he would have been responsible for ensuring that Hagan did not exceed the track authority if he had been seated in the front passenger seat of the vehicle. RX 2 at 60, 65-66.

47. On December 9, 2011, Hagan received a letter from Division Engineer Charles Stine informing him that he was suspended without pay for five days for the December 8, 2011 track authority violation. RX 4 at ¶ 16; RX 5 at ¶ 9-10.
48. Complainant was subsequently charged with violating the track authority and placed on notice that a disciplinary hearing would be scheduled. RX 1 at ¶ 18.
49. Seay is a member of the Brotherhood of Maintenance Way Employees Division ("BMWED"), and his discipline is governed by BMWED's collective bargaining agreement with Norfolk Southern. Compl. Opp. 7.
50. The collective bargaining agreement between BMWED and Norfolk Southern provides that Norfolk Southern could not suspend Seay without holding a disciplinary hearing, unless Seay agreed to waive the hearing. *Id.* at 7.
51. Within a day or two of the track authority violation but prior to the hearing, Brewer contacted Seay and offered him a waiver of formal investigation as provided for in the collective bargaining agreement. RX 1 at ¶ 18; Seay Decl. at ¶ 3.
52. Seay declined to sign the waiver of formal investigation offered by Brewer. RX 1 at ¶ 18; Seay Decl. at ¶ 3.
53. The investigative hearing, which was transcribed, was held on December 22, 2011 before Hearing Officer Dustin Lange ("Lange"). RX 1 at ¶ 19; RX 2.
54. Complainant was represented at the hearing by Michael D. Flowers ("Flowers"), Second Vice Chairman of Seay's union. RX 1 at ¶ 20.
55. Flowers approached Brewer after the hearing but before a decision was made and asked if the offer of a waiver remained open. RX 1 at ¶ 21.
56. Scott Goodspeed ("Goodspeed"), the Assistant Director of Labor Relations for Norfolk Southern, was contacted by Lloyd Brewer and Charles Stine, the Division Engineer of Respondent's Dearborn Division, concerning the December 8, 2011 track authority violation. RX 3 at ¶¶ 1, 4.
57. Goodspeed informed Brewer after Complainant's disciplinary hearing that a waiver under the collective bargaining agreement between Norfolk Southern and Seay's union was still available. RX 3 at ¶ 7.
58. After consulting with Respondent's Labor Relations Department, Brewer confirmed to Flowers that a waiver was still available and, if accepted, would involve a 25-day suspension and forfeiture of Complainant's foreman seniority for the December 8, 2011 track authority violation in light of a prior track authority violation by Seay. RX 1 at ¶ 23.
59. Complainant accepted the waiver but wrote on the waiver that he signed "under protest." Seay Decl. at ¶ 4.
60. Erickson then destroyed the waiver that Seay signed "under protest," and directed Seay to sign it without qualification. Seay signed the new waiver and did not include the "under protest" language. Seay Decl. at ¶ 4.
61. The waiver signed by Complainant dated January 3, 2012 states that Seay accepts responsibility for the improper performance of his duties as a Foreman on December 8, 2011 involving exceeding the limits of the track authority under which he was working and understands that he will be assessed an actual suspension beginning December 9, 2011 and ending January 2, 2012 and will

forfeit all Foreman and Assistant Foreman seniority established under his working agreement effective immediately. RX 3, Ex. B.

62. Seay previously signed a waiver dated September 14, 2009 for a violation described in a letter of charge dated September 8, 2009 and received a 13 day suspension. RX 2 at 157, Dep. Ex. 8.
63. According to Seay's Career Service Record, he also signed a waiver and received a 5-day suspension for "improper perf[ormance] of duty (mat'l truck in foul of right-of-way struck by RAM)" on May 15, 2007. RX 1, Exhibit B.
64. According to Philip Merilli ("Merilli"), Norfolk Southern's Assistant Vice President for Maintenance of Way and Structures, discipline imposed on a particular employee for a particular offense is determined by considering a number of factors including the seriousness of the offense and prior discipline of the employee. RX 5 at ¶ 6.
65. Merilli consulted with Dearborn Division Engineer Charles Stine ("Stine") about the December 8, 2011 track authority violation involving Hagan and Seay. RX 5 at 7.
66. In deciding the appropriate discipline to impose on Hagan, Stine and Merilli considered that: Hagan had no prior discipline; the vehicle driven by Hagan had exceeded the track authority by a relatively short distance; Hagan had taken appropriate action by immediately backing the vehicle to within the track authority limits and immediately informing the dispatcher and his supervisor of the violation; Hagan immediately took responsibility for the track authority violation. RX 5 at ¶ 8.
67. Hagan was passed over for a Track Supervisor position in Hornell, New York in February 2012 because of the December 8, 2011 track authority violation. RX 5 at ¶ 11.

II. STANDARD OF REVIEW

The standard for granting summary judgment is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Hasan v. Burns & Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). According to the Rules of Practice and Procedure for Administrative Hearings before the OALJ, an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R § 18.40(d). A "material fact" is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" exists when the non-moving party produces sufficient evidence of a material fact that a fact-finder is required to resolve at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 288-90 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The burden then shifts to the non-movant, who must go

beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. ARGUMENTS OF THE PARTIES

A. Respondent's Arguments

According to Respondent's motion, Seay never engaged in activity protected by the FRSA and his alleged protected activity neither caused nor contributed to the disciplinary actions imposed on him by Norfolk Southern. Respondent Norfolk Southern Railway Company's Memorandum in Support of Motion for Summary Decision ("Resp. Mot.") 16-25.

Alleged Protected Activity

Respondent asserts that Seay never reported the track authority violation and thus did not engage in any protected activity. Rather, Seay refused to discuss the violation and insisted that he was not at fault. Resp. Mot. 6-8.

Alleged Protected Activity Not a Contributing Factor to Discipline

According to Respondent, the track authority violation which occurred on December 8, 2011 was a serious breach of its safety rules. Resp. Mot. at 22. "Both Hagan and Seay were found by Norfolk Southern to be responsible for the TA violation, and both were disciplined." *Id*. at 23. Although Seay was suspended for a longer period of time than Hagan, the longer suspension was, Respondent asserts, justified by the fact that Seay had committed an earlier track authority violation within the preceding two years. *Id*. at 24. The discipline of both Seay and Hagan was entirely consistent with long-established disciplinary policies established by Norfolk Southern for violations of its safety rules, and there is simply no evidence that Respondent retaliated against Complainant for having engaged in any protected activity. *Id*. at 25.

B. Complainant's Arguments

Seay denied responsibility for the safety violation and refused to waive his right to a disciplinary hearing. Complainant's Memorandum of Law in Opposition to Respondent's Motion for Summary Decision ("Compl. Opp.") 5. According to Complainant, the FRSA protects him from retaliation for refusing to waive his right to an evidentiary hearing. Thus, it follows that Norfolk Southern violated the statute when it lengthened his suspension and required him to forfeit his seniority for not waiving his right.

Alleged Protected Activity

Complainant's version of events surrounding the track authority violation is virtually the same as Respondent's. *See* Compl. Opp. 5-7. Complainant, however, argues that his refusal to waive his right to a hearing was protected activity. *Id.* at 11. Specifically, Complainant argues that the FRSA protects his right to a disciplinary hearing because the disciplinary hearing

"necessitated Seay providing information to a hearing officer" and the information that Seay provided was safety-related. *Ibid*; *see also* 49 U.S.C. § 20109(a)(1)(c).

Complainant similarly asserts that the FRSA protects his refusal to waive his right to a hearing. Compl. Opp. 11. The FRSA was designed, he states, to promote the reporting of railroad safety issues, and Seay intended to shed more light on the track authority violation in his disciplinary hearing. *Id.* at 11-12. It would therefore be turning a "blind eye to practices that reduce railway safety" if a court were to allow Respondent to "punish employees for refusing to waive their right to disciplinary hearings." *Ibid*.

Alleged Protected Activity was a Contributing Factor to Discipline

Complainant argues that his protected activity was a contributing factor to his punishment. *Id.* at 12. In support of this contention, he asserts that Norfolk Southern offered to suspend Seay for 15 days if he agreed to waive his right to a hearing and punished him by increasing the length of the suspension and requiring him to forfeit his seniority when he declined the waiver. *Ibid*. According to Complainant, "Seay's refusal to waive his right to a hearing contributed to his discipline being significantly harsher than the discipline originally offered to him; than Hagan suffered; and than other employees for similar violations." *Ibid*.

IV. LAW

The FRSA prohibits covered rail carriers from discriminating against an employee . . .

> if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done –
>
> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security . . . if the information or assistance is provided to or an investigation stemming from the provided information is conducted by –
>
> . . .
>
> (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct . . . .

49 U.S.C. § 20109(a)(1)(C).

An employee who believes that he or she has been disciplined in violation of this section may file a complaint with OSHA, which conducts an investigation and issues findings. 29 C.F.R. §§ 1982.103 – 1982.105. Any party aggrieved by OSHA's findings may thereafter appeal to the OALJ. 29 C.F.R. § 1982.106. Such actions are governed by the rules and procedures set forth in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), including that statute's burdens of proof. 49 U.S.C. § 20109(d)(2), referencing 49 U.S.C. § 42121.

In order to prevail on this claim, Complainant must demonstrate that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *Henderson v. Wheeling & Lake Erie Ry*., ARB No. 11-013, ALJ No. 2010-FRS-00012, slip op. at 5-6 (ARB Oct. 26, 2012). If Complainant proves that Respondent violated the FRSA, he is entitled to relief unless Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); *DeFrancesco v. Union R.R. Co*., ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 5 (ARB Feb. 29, 2012).

V. DISCUSSION

I. Complainant engaged in protected activity.

Complainant argues that he engaged in protected activity by "refus[ing] to waive his right to a hearing." Compl. Opp. 11. According to Seay, he would necessarily provide information about the safety violation at the hearing, and his insistence on having a hearing, as well as his initial refusal to waive that right, were therefore protected activities under the FRSA. While I agree that Complainant engaged in protected activity, I do not agree with Seay's characterization of what actions are protected under the Act.

The FRSA clearly protects an employee who provides information to a supervisor or a person with investigative authority regarding a violation of a law, rule, or regulation relating to railroad safety or security. 49 U.S.C. § 20109(a)(1)(C). Complainant unquestionably provided some information about the December 8, 2011 track authority violation to Respondent at the time of the violation and during the disciplinary hearing at which he testified. For example, when James Erickson, Hagan's and Seay's immediate supervisor, responded to the scene, Complainant gave his version of the events surrounding the track authority violation and told Erickson that Hagan had "r[u]n outside of his limits and there was nothing [he] could do to prevent it." Similarly, the partial transcript from the December 22, 2011 disciplinary hearing shows that, although he disavowed any personal responsibility for the violation, Seay provided details to Dustin Lange, Respondent's Assistant Division Engineer, about the track authority violation by Hagan. Seay described, *inter alia*, the process used to obtain the TA Form, his recollection as to the location of the hi-rail vehicle driven by Hagan in which he was a passenger on December 8th, and his version of the circumstances surrounding the track authority violation on that date. Although Respondent was already aware of the December 8, 2011 incident by virtue of Hagan's report of the incident and acceptance of responsibility for the violation, that does not negate the fact that Seay provided information to a supervisor or person with investigative authority about "a violation of any Federal law, rule, or regulation relating to railroad safety or security." 49 U.S.C. § 20109(a)(1). The undisputed material facts thus establish that Complainant engaged in protected activity.

II. Complainant's protected activity did not contribute to Respondent's adverse action.

Although the facts confirm that Complainant engaged in protected activity, I find that any disclosure of information he made regarding the track authority violation on December 8, 2011

was not a contributing factor to Norfolk Southern's decision to discipline him as it did. On the contrary, consistent with the seriousness of the violation and Seay's history of a prior disciplinary action, Norfolk Southern simply disciplined him for his role in violating the track authority issued to Hagan and Seay on December 8, 2011.

The FRSA requires that the complainant's protected activity be a "contributing factor" to the respondent's adverse action. 29 C.F.R. § 1982.109(a). 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." *Blackie v. Smith Transp., Inc., et al.*, ARB No. 11-054, ALJ No. 2009-STA-43, at 9 (ARB Nov. 29, 2012) (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011)); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, 2012 WL 4714686 (ARB Sept. 26, 2012). "[A]ny weight given to the protected disclosure, either alone or in combination with other factors, can satisfy the 'contributing factor' test." *Smith v. Duke Energy Carolinas, LLC, et al.*, ARB No. 11-003 (ARB June 20, 2012) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). A complainant may establish that the employer's adverse action was a contributing factor either directly or indirectly through circumstantial evidence. *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-6, at 9 (ARB Sept. 24, 2009). Circumstantial evidence may include, *inter alia*, temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, or the falsity of an employer's explanation for taking adverse action. *Blackie*, ARB No. 11-054 at 9; *see also Bobreski*, ARB No. 09-057, at 11-12; *and Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-9, at 10-11 (ARB Mar. 31, 2011) (dissenting opinion).

The undisputed evidence shows that violating a track authority, as noted above, is considered a "major mistake." Furthermore, it is clear that *all* Norfolk Southern employees in an on-track vehicle, drivers and passengers alike, are responsible for adhering to the track authority, and *all* such employees are obligated to watch out for obstructions on the track and to not exceed a track authority. There is no question that the hi-rail vehicle operated by Hagan, in which Seay was a passenger, exceeded its track authority on December 8, 2011. After the violation occurred, it is also undisputed that Brewer, Norfolk Southern's Assistant Division Engineer, interviewed Hagan and Seay at the scene at which time Hagan explained the circumstances surrounding the violation and immediately took responsibility for the violation. In contrast, despite knowing that every roadway worker is responsible for ensuring that the track he or she is on is protected, and that employee passengers are obligated to assist the operator of whatever vehicle or equipment they are in by watching out for obstructions, Seay denied responsibility for the violation. Despite Seay's denial of responsibility, and consistent with established safety regulations, Brewer determined that both Complainant and Hagan were jointly obligated to ensure that they remained within the limits of their track authority, and he directed that they both be taken out of service.

The undisputed facts thus establish that Seay committed the December 8, 2011 safety violation. As explained below, the undisputed facts further demonstrate that, contrary to Seay's contention, he was not disciplined more harshly because he exercised his right to a hearing.

Complainant alleges that he was treated more harshly for refusing to waive his disciplinary hearing. Compl. Opp. 12. He notes that Hagan was suspended for only five days, yet he was suspended for 25 days and lost his foreman seniority for the same violation. *Id.* at 13. In support of this contention, Complainant submitted nine hearing waiver forms of Norfolk Southern employees which, according to his counsel's affidavit, reflect discipline imposed on those employees for violations "similar to exceeding track authority." *See* Compl. Opp., Ex. ("CX") 1. In four of the waivers, Norfolk Southern suspended the employees for five days. *Id.* at 2, 6, 8, 9. In two of the waivers, the employees were suspended for 10 days. *Id.* at 5, 7. In the remaining three waivers, Norfolk Southern imposed: a 90-day suspension plus loss of Assistant Foreman seniority and the right to bid for a Foreman or Assistant Foreman job for a year; a 121-day suspension; and an 11-day suspension. *Id.* at 1, 3, 4.

An employer's disparate treatment of similarly situated employees may be circumstantial evidence of retaliation. *Speegle*, ARB No. 06-041, at 13. If an employer disciplines an employee for violating a work rule, then disparate treatment may be shown if "the employees [] involved in or accused of the same or similar conduct are disciplined in different ways." *Id.* (citing *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997)). The complainant ultimately has the burden to show by a preponderance of evidence that the employer's disparate treatment, alone or in conjunction with other circumstantial evidence, was the result of the complainant's protected activity. *Id.* at 14, 16.

Complainant's evidence is clearly insufficient to carry his burden to show disparate treatment. The nine waiver forms submitted by Seay simply reflect discipline ranging from 5 to 121-day suspensions for nine unnamed employees with absolutely no information whatsoever establishing that Seay and any of these employees were similarly situated.[2] We do not know, for example, whether any of these employees had a history of prior violations, whether they immediately acknowledged fault and accepted responsibility for their violation, or whether any of them exercised their right to a hearing and then sought a waiver afterwards.

Likewise, Complainant has not demonstrated that he and Hagan were similarly situated and that the discipline imposed on Hagan was inappropriate under the circumstances presented in this case. On the contrary, the evidence shows that Hagan had a spotless disciplinary record, he immediately disclosed his violation to Norfolk Southern officials on December 8, 2011, and he immediately acknowledged fault and took responsibility for his actions.

Seay, in contrast, had a history of prior violations, and he consistently denied responsibility for the violation, up to and including when he eventually signed the waiver form which expressly acknowledges his responsibility and agrees to a 25-day suspension and forfeiture of his Foreman and Assistant Foreman seniority. Indeed, despite his suggestion that he was somehow coerced into signing the January 3, 2012 waiver form, the record confirms that it was Michael Flowers, *Seay's representative*, who approached Brewer after the hearing and asked if the offer of a waiver remained open. Despite the fact that, as Lloyd Brewer stated, it was "unusual" to offer a waiver after an investigative hearing had already been conducted,

[2] Indeed, two of the nine unnamed employees received substantially more severe punishment than was imposed on Seay, i.e., a 90-day suspension plus loss of Assistant Foreman seniority and the right to bid for a Foreman or Assistant Foreman job for a year for one employee and a 121-day suspension for another.

Respondent acceded to Complainant's request that he be allowed to sign a waiver, and Seay did so.

The undisputed facts further demonstrate that Norfolk Southern did not, as Seay claims, punish him simply for participating in the disciplinary hearing. According to Seay, Respondent originally offered Seay a 15-day suspension if he agreed to a waiver, but, when he refused to waive the hearing, lengthened the suspension to 25 days and required him to forfeit his seniority. Respondent's change in the level of discipline offered Seay was justified and consistent with established Norfolk Southern policy and procedures.

Norfolk Southern's procedure manual for formal investigations expressly describes the purpose and procedures for allowing waivers as follows:

> B. WAIVER OF INVESTIGATION
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> The holding of an investigation in certain cases where guilt appears evident may often seem to be a big waste of time. In addition, there is the expense required to make the transcript, handle the appeal and, in many cases, handle [the matter] in arbitration. The entire procedure probably causes as much frustration for the employee as it does for management.
>
> Some [collective bargaining] agreements contain a specific procedure by which a charged employee may waive his right to an investigation. This procedure[] offers both parties substantial relief from the burden of unnecessary investigations. It permits an employee charged with an offense to discuss the matter with his supervisory officer on an informal basis before any formal investigation. *If an understanding is reached as to responsibility and the amount of any discipline to be imposed, the employee may waive his right to the investigation and accept the discipline without an investigation*. . . . .
>
> The waiver procedure best exemplifies the primary intent and purpose of discipline, which is not punitive, but is to teach and correct. The waiver procedure provides the opportunity and the incentive for a free and open discussion of the incident or occurrence at issue. This is a constructive method of dealing with disciplinary matters, which is generally not possible in the adversarial atmosphere of a formal hearing.
>
> . . . .
>
> 1. The waiver procedure is subject to the approval of both the employee and the Company. If it is used merely as a time saver for the supervisor without any consideration of the employee, very few employees will utilize the waiver procedure. There has to be something in it for the employee or he isn't going to use it. If an employee admits his responsibility during a waiver proceeding, the Company already has his attention. Thus, *correcting an employee with the same amount of discipline that would be imposed following a finding of guilt after an investigation where he or she will not admit responsibility, is unnecessary, undesirable and unwise.*

Complainant's OSHA Complaint ("Compl.'s Comp."), Ex. B at 2-3 (emphasis added).

Respondent clearly acted in accordance with this policy in the instant matter. Because "there has to be something in it for the employee," Respondent initially offered Seay a suspension of 15 days if he was willing to forgo the time and expense consumed by a formal hearing. When Seay refused the offer, Norfolk Southern then conducted a formal hearing. When Seay's representative subsequently approached Respondent *after* the hearing and asked if a waiver was still available, Complainant was offered a 25-day suspension (the time he had already been suspended up to the date of the waiver) and a loss of his foreman status in lieu of termination. Although Respondent's renewed offer of a waiver at that point was harsher, Respondent's actions were justified in that it had already born the costs of a formal hearing and Complainant only belatedly, and reluctantly, acknowledged any responsibility for the December 8, 2011 violation. The punishment imposed on Seay under these circumstances was commensurate with the offense, Seay's prior disciplinary record, the added expense born by Respondent in conducting a formal hearing, and Seay's reluctance to fully accept responsibility for his conduct. Respondent's actions were thus in accordance with its policy and do not evince disparate treatment. *See Hoffman v. Nextera Energy Inc.*, 2010-ERA-11, at 154 (ALJ Mar. 27, 2011), *aff'd*, *Hoffman v. Nextera Energy, Inc.*, ARB No. 12-062 (ARB Dec. 17, 2013) (no evidence of disparate treatment when company acts in accordance with its policy in taking adverse action against employee).

VI. CONCLUSION

Viewing the facts in the light most favorable to Complainant, I find that Complainant engaged in protected activity by providing information to Respondent about the December 8, 2011 track authority violation prior to and at his disciplinary hearing. However, the undisputed material facts establish that Complainant's protected activity was not a contributing factor in the punishment levied against him by Respondent. Inasmuch as Claimant has failed to establish an essential element of his claim, his complaint under the FRSA must therefore be dismissed.

VII. ORDER

Based on the foregoing, it is **HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**, and the whistleblower complaint of Reggie Seay under the Federal Rail Safety Act is hereby **DISMISSED**.

SO ORDERED.

Digitally signed by STEPHEN PURCELL
DN: CN=STEPHEN PURCELL, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN L. PURCELL
Chief 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. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. 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. *See* 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. *See* 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, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 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. *See* 29 C.F.R. §§ 1982.110(a) and (b).