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: 23 January 2014

Case Number: 2013-FRS-00010

In the Matter of

MICHAEL K. TONGEN
Complainant

v.

UNION PACIFIC RAILROAD COMPANY
Respondent

Appearances:

Thomas M. Flaskamp, Esq.
Wayzata, Minnesota
For the Complainant

Daniel R. Lafave, Esq.
Chicago, Illinois

Torry N. Garland, Esq.
Denver, Colorado
For the Respondent

Before:

Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER GRANTING CLAIM

Procedural Background

This matter arises out of a claim filed under the employee protection provisions of 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 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008).

Michael K. Tongen's ("Complainant") current term of employment with Union Pacific Railroad Company ("Respondent") began in 2006 or 2007. (Tr. 10). Respondent dismissed Complainant on March 17, 2011 for failing to immediately report a February 1, 2011 work place injury and not being honest about how that injury occurred. (RX-24). Complainant filed a complaint with the Secretary of Labor ("Secretary") on April 27, 2011, alleging the real reason he was terminated was in retaliation for reporting the work-related injury. (ALJX-1). Following an investigation, the Secretary, acting through her agent, the Area Director for the Occupational Safety and Health Administration (OSHA), found there was no reasonable cause to believe Respondent violated the FRSA. Specifically, the Secretary found that a "preponderance of the evidence supported Respondent's defense that Complainant failed to comply with Respondent's Rules . . . governing both the timely reporting of workplace injuries and the requirement to provide honest and accurate information regarding workplace injuries" and dismissed the complaint on September 28, 2012. (ALJX-1).

Complainant timely appealed (ALJX-2)[1] and the case was assigned to me on November 1, 2012. A *de novo* hearing in this matter was held in St. Paul, Minnesota, on June 11-12, 2013. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits ("ALJX") 1-15 (Tr. at 6); Respondent's Exhibits ("RX") 1-24, 29, 38-40, 44-46 (Tr. at 594, 595, 600); and Complainant's Exhibits ("CX") 1, 7-11, 14-16, 22-25, 30, 33-36, 38, 40-43 (Tr. at 592).[2] Seven witnesses, including Complainant, testified at the hearing.

The parties were granted leave to file post hearing briefs. Complainant submitted his brief on October 21, 2013 and Respondent on December 18, 2013. Complainant filed a Supplemental Closing Brief on December 26, 2013.[3]

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, the evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision. While some exhibits are not discussed in their entirety, they have been carefully reviewed so that what is covered below consists of a review of the relevant evidence.

---

[1] *See also* CX-41, *Union Pacific Railroad Company's Answers to Complainant's Interrogatories, Requests for Production and Requests for Admission*, dated March 15, 2013.

[2] Complainant also offered CX-44, a deposition of Brian L. Rowe. At the hearing, I took the matter under advisement, giving Respondent two weeks to submit objections in writing. (Tr. at 593). Receiving no objections, CX-44 is also admitted. [CX-44 can be found in Complainant's Complete Exhibit Book].

[3] The parties were originally to simultaneously file closing briefs on August 30, 2013. The Court granted four enlargements of time. The first was a joint request to October 11, 2013, subsequently extended to October 21, 2013 due to the federal government shutdown. The second was to November 18, 2013, on Respondent's unopposed motion. The third was to December 2, 2013, again on Respondent's motion, and the fourth, and final, enlargement of time was to December 18, 2013, also on Respondent's motion. As Respondent had the advantage of reviewing Complainant's brief before filing its own, fairness dictates that Complainant be able to reply. Consequently, Complainant's *Motion to Submit Supplemental Closing Brief* is hereby granted. 29 C.F.R. § 18.6(b).

As will be explained in greater detail, I find Complainant has established that his report of a work place injury was a contributing factor in his dismissal and Respondent has not shown by clear and convincing evidence that it would have taken the same action regardless of the protected activity. Consequently, the claim for back pay and non-economic damages filed under the employee protection provisions of the FRSA is granted, in part. However, I find punitive damages are not warranted by the evidence.

APPLICABLE LAW

The Federal Railway Safety Act ("FRSA"), under which Mr. Tongen brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting a work-related injury or illness. *See* 49 U.S.C. § 20109(a).

The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce:

> … 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 the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done…to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C. § 20109(a)(4).

The 2008 amendments to the FRSA further provide that:

> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician ….for purposes of this paragraph, the term "discipline" means charged against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Id. at § 20109(c)(2).

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. At the adjudicatory stage:

> The Secretary may determine that a violation … has occurred only if the complainant demonstrates that any [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint [and] Relief may not be ordered … if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b)(2)(B)(iii), (iv).

Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a "contributing factor" motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC,* ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,[4] and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event). In order to meet his burden under the FRSA, Mr. Tongen must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Union Pacific knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007).[5]

Issues

Whether Complainant has proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent's decision to discipline him, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of the decision?

[4] An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009); *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008), *Agee v. ABF Freight Systems, Inc.,* ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

[5] Although I list the knowledge requirement as a separate element, I note the ARB recently reiterated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc*., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

If so, has Respondent demonstrated by clear and convening evidence that it would have taken the same adverse action even in the absence of the protected activity?

If so, can Complainant establish by a preponderance of the evidence that Respondent retaliated against him for engaging in protected activity, i.e. that Respondent's stated legitimate reasons were a pretext.

If so, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate.[6]

Positions of the Parties

Complainant. On February 1, 2011, Complainant was walking along railcars to inspect them for defects or safety hazards when he slipped and twisted his body on snow and ice. He felt a twinge but did not believe he had injured himself and continued his shift. He later climbed a rail car to release a handbrake. While it took an "extra effort" to release it, Complainant believed the handbrake was not defective and was working as intended. Complainant awoke the next morning with a painful back and went to chiropractor Dr. John Marlow. In a patient questionnaire detailing the nature of the injury partially completed on February 2, 2011, Complainant stated he was "walking on unstable surfaces, slipped on snow and ice, twisted while trying to keep from falling." He did not mention a handbrake. Dr. Marlowe subsequently recorded a history of "patient walking on an uneven surface at work, slipped on snow and ice ridge, twisted to keep from falling, felt a little pain. Later tried to loosen a large wheel parking brake when it broke free."

Complainant was called to work on February 2, 2011. Although his back was hurting, he completed his shift and returned to Dr. Marlowe on February 3, 2011. Dr. Marlowe completed a report of workability, taking Complainant out of service beginning February 3, 2011. Complainant tried to contact his immediate supervisor, Joshua Shaffer, by telephone the same day to report the injury. Shaffer did not answer and his mailbox was full. Complainant called the next day and was able to leave a message. Shaffer called Complainant on February 5 and told him to come to work to meet. Complainant told Shaffer his back hurt due to an on-the-job injury and completed a report of personal injury wherein he describes the injury as occurring on February 1 while "walking down between t[rac]k 11 & 12 performing air test. I slipped & twisted on an unseen plow/ice ridge beneath fresh snow. I twisted to prevent from falling." Complainant did not reference anything about handbrake as it was not a contributing factor. Dr. Marlow sent Respondent a workability report, which gave a history which included "patient trying to loosen a large wheel parking brake when it broke free, p[atient] twisted feet LBP."

[6] Respondent has waived its argument that Complainant's claim is barred under the FRSA's election of remedies provision because Complainant elected to appeal his termination pursuant to a collective bargaining agreement. *See Respondent Union Pacific Railroad Company's Post Hearing Closing Brief*, dated December 18, 2013, at p. 1. *See also Ratledge v. Norfolk Southern Railway Co*., No. 12-CV-402 (E.D.Tenn. July 25, 2013)(2013 WL 3872793)(the election of remedies provision at § 20109(f) does not precludes a rail carrier employee from simultaneously pursuing arbitration of his rights under a collective bargaining agreement and seeking whistleblower protection under the FRSA). *See also Reed v. Norfolk S.Ry*., 2014 BL 10187, 7th Cir. No. 13-2307 (January 14, 2014)(participation in mandatory arbitration did not trigger the FRSA's election of remedies provision).

Respondent subsequently charged Complainant with violating two Union Pacific rules, late reporting and, based on Marlowe's report, lying about how his injury occurred. Dishonesty is a level five offense punishable by termination. After a March 9, 2011 disciplinary hearing, Complainant was terminated on March 17, 2011. A Public Law Board ordered Complainant's reinstatement on October 1, 2012, without back pay, finding the decision to terminate Complainant "unjust, unreasonable or arbitrary."

Complainant contends that there is no real dispute that he engaged in protected activity when he reported a work place injury and suffered an adverse personnel action when he was dismissed from service. Complainant further contends that, as he has proven by a preponderance of the evidence that his protected activity contributed, at least in in part, to Respondent's decision to dismiss him,[7] the burden shifts to Respondent, who has not established by clear and convincing evidence that it would have fired Complainant in the absence of reporting the work place injury. Complainant now seeks back pay in the amount of $18,850.50, with interest; the same seniority status that he would have had but for the termination; compensation for emotional distress of at least $70,000.00; attorney's fees and costs; and at least $100,000.00 in punitive damages. *Complainant's Closing Brief*, dated October 21, 2013, at page 28-31.

Respondent. On February 5, 2011, Complainant reported he injured his back on February 1, 2011 when he slipped and fell on snow and ice. On February 8, 2011, Respondent received a written medical report from Complainant's treating physician that conflicted with how the injury occurred, identifying the mechanism of injury as pulling a handbrake on a railcar. Respondent charged Complainant with two rules violation, failure to timely report and dishonesty, the latter a "level 5" offense carrying a permanent dismissal as a potential penalty. A hearing officer found that Complainant was dishonest in his late report of a workplace injury, and Complainant was eventually dismissed. Complainant appealed and a Public Law Board convened as part of a collective bargaining agreement found that, while Complainant did not properly and timely report his injury, he "had no intent to be dishonest" and ordered his reinstatement but without back pay. While Respondent does not now dispute that Complainant engaged in FRSA protected activity, that Respondent knew that Complainant engaged in the protected activity and Complainant was subjected to an unfavorable personnel action, Respondent submits that Complainant has not established that the protected activity was a contributing factor that led to the unfavorable personnel action. *Respondent Union Pacific Railroad Company's Post-Hearing Closing Brief*, dated December 18, 2013, at pages 12-13. Even if Complainant has established a prima facie case, Respondent submits it has established it would have dismissed Complainant regardless of the protected activity because "if Tongen had completely failed to report his on-the-job injury, his supervisors would have undergone the same investigation and charged him with serious rules violations." *Respondent Union Pacific Railroad Company's Post-Hearing Closing Brief*, dated December 18, 2013, at pages 21-22.

[7] Complainant submits that but for the reporting of a work place injury, Respondent would not have initiated an investigation into the honesty of the report, which led to a disciplinary hearing and eventual dismissal.

Summary of the Evidence[8]

John Derrick Marlow (Tr. 32-89).

I am a chiropractic doctor and also a registered nurse. I treated Complainant for injuries he sustained on February 1, 2011. (CX-1). He first came into my office on February 2, 2011. I had not seen him as a patient before. I first take a history, do my examination then begin a treatment plan. Mr. Tongen wrote on his on-the-job accident questionnaire in my office that he was "walking on unstable surface, slipped on snow/ice ridge - twisted while trying to keep from falling." (CX-1/UP002366). I didn't complete my exam of him on February 2 because I had to go to a seminar but did tell Complainant that I was going to refer him to Dr. Morales, which is why he put it on the form. I actually filled out the consult request on February 3, 2011 when the Complainant came back to the office and completed the form (CX-1/UP002388). The consult does say "patient walked on uneven surface at work, twisted, did not fall, felt a little pain in the lower back, later that day loosened large brake wheel, pain in low back while breaking it free." I treated Complainant for three weeks. He was released to return to full duty as a conductor on March 15, 2011. (CX-1/UP002383). I did become aware that Complainant was being investigated for late reporting and being dishonest about how his injury occurred. I wrote a letter to Union Pacific attempting to explain the discrepancy in the mechanism of injury referenced in some of the reports. (CX-24). Complainant did not ask me to do it. When he told me he was being investigated, I volunteered. The top part of the physician report I filled out on February 2 only mentioned the handbrake in line 5 but I overlooked that Mr. Tongen had told me he experienced a slip and twist. That was a misunderstanding my part. The history at the end I filled out on February 8 is complete. Also, on the reporting of the injury, the injury Complainant sustained while working would not completely manifest itself in a short time period as long as mobility is maintained. That is what happened to Complainant. He sustained a back strain that did not manifest itself completely until he came in to see me on February 3, 2011. That is why he was able to work on February 1 and 2 after the onset of injury.

Yes, RX-10 is a physician's report I filed out. Yes, the date of claimed injury at the top says 2-2-11. But that was wrong. I must have put the date he came in the office. The date of injury was February 1, 2011. I eventually corrected the report. Complainant did tell me during the initial February 2 examination that he injured himself slipping on ice. Slipping on ice was not reflected on the first page of the physician's report, which says "patient was trying to loosen large wheel parking brake when it broke free, patient twisted, felt lbp [low back pain]." Complainant did tell me as part of the initial history I took on February 2, 2011 about slipping on snow and ice and turning a large parking brake. (RX-40/008). Line 5 on the first page only mentions the brake because there was not enough room to write it all down. (RX-40/001).

The form Complainant filed out on the February 2, 2011 does say that he reported the injury to employer on February 3. (RX-40/004). Again, that is because he started filling out the report on February 2 but did not complete it because I had to leave the office for a seminar. He returned on February 3 and finished filling out the report. By then, he must have tried to notify his employer about the injury. But I still had him sign and date the form "2/2/11, the date he

[8] The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

initially came into the office, because otherwise the billing people would be confused. But I have no doubt that Complainant said the date of the injury was February 1, 2011. I have no doubt that Complainant told me that he injured his back when he twisted to keep from falling on a snow ice ridge. He then said he felt more pain after trying to loosen a wheel brake later in the day.

Complainant – Michael K. Tongen (Tr. 90-243).

I was born on July 12, 1958. I am married with a seven year old and a sixteen month old. My son has mild autism. I started with Burlington Northern as a conductor in 1986, 1987 until being furloughed I think in 1990, 1991. I worked as an engineer with Twin Cities Western for about 18 months until being furloughed. Then I got a job with I&M Rail Link for about a year. I worked for BNSF again before leaving for UP, I think sometime in 1995 to about 2001. I came back to UP in about 2006 as a freight conductor after passing my background investigation. (RX-44). I have not claimed any on-the-job injury where I received money while working for UP. On Tuesday, February 1, 2011, I was working on a local job in the St. Paul yard. My back was feeling good. The ground was rough and there was a lot of snow. I couldn't see some of the tire ruts. I was walking back to the rear of a train when I slipped and twisted in a weird way. I didn't want to fall because of the steel cars and possibly hit my head. I felt a little twinge. I didn't think I had suffered any back damage. I kept walking and continued my inspection. I then picked up the second portion of the train. During the inspection of that train, I mounted a rail car and tried to release a handbrake. This one "took a little extra strength to loosen, but there was nothing wrong with the handbrake. It was just tied on tight." (Tr. at 106). The handbrake was functioning as it was supposed to. It was not defective which is why I never reported anything to UP. When I released the brake, I felt a little tight. When I reached the ground, I felt a little pain. I was still able to finish my shift. I did not tell my engineer that I had suffered a back injury because I did not think anything out of the ordinary had happened. I get off work about 4 – 6 pm on February 1, 2011 and took a cab home. While my back hurt a bit, I attributed it to the twist and figured I would take a couple Ibuprofen and a hot bath and go to bed. The next day my back was still stiff so I called Dr. Marlow's office. He started taking a history. I told him I twisted wrong at work and it didn't get better with ibuprofen and a hot bath. He asked when I noticed something different – that's when I said I felt something when I reached up to release a handbrake. I did not include the handbrake on the report of injury (CX-1) because I thought Dr. Marlow only wanted what started the process. We didn't get a chance to finish the exam because Dr. Marlow had to leave the office. But he did give me some electrical stimulation and manual adjustment and a consult to Dr. Morales for the next day. I went in to work after leaving Dr. Marlow's office because I had been called. I worked the entire 6 pm shift. My back worsened. I was not scheduled for work on February 3 and went in to see Dr. Marlow. He tried more manual and electrical stimulation, which did not help. Dr. Marlow wrote a note recommending I not work until further notice. I then tried to contact Josh Shaffer, my manager at UP, at 3:46 pm to let him know. He did not answer and his mailbox was full so I could not leave a message. I saw Dr. Morales on the 4th. I did not mention a handbrake because it never occurred to me it was an issue. I called Josh Shaffer again on the February 4th. There was no answer but this time I was able to leave a voice message at 3:28 pm. (RX-19). Mr. Shaffer called me back at 7 a.m. on February 5 and told me to come down to the office to fill out some paperwork. I did not

reference the handbrake on the personal injury report because it did not operate out of the ordinary and was not a contributing or an initiating factor at all. (CX-8).

I received a Notice of Investigation on February 16, 2011 that I was being investigated for violating General Code Operating Rule (GCOR) 1.2.5,[9] failing to immediately report the February 1 injury, and GCOR 1.6,[10] for allegedly being dishonest about how the injury occurred. (RX-7). I was upset and angry. I delayed reporting because I didn't know what was going on with my back right away and it wasn't until two days later that I realized this was something pretty serious. The actual investigation was on March 9, 2011 and I was dismissed from the company on March 17, 2011. (RX-24). When I got the dismissal notification, I was in pure panic. My wife was getting close to finishing her degree but had to pull out and get a part time job. I did get a job with Securitas about a month after I was fired and eventually Wisconsin Northern Railroad in March 2012. But because of our financial situation, we applied for medical assistance and WIC. I also had some financial issues with trying to sell some property owned by my deceased father and paying my mother's property taxes. I was eventually reinstated by the Public Law Board and returned to work at Union Pacific on October 1, 2012.

I am familiar with safety training and compliance with Union Pacific rules. I am also aware that, if a handbrake on a car isn't fully released, it can cause a journal to overheat. If a journal overheats, it can cause a wheel to fall off a car. That could potentially be devastating and why adherence to rules is important not just for the safety of employees but also for the general public. I know there is a rule on reporting of injuries. When I saw Dr. Marlow on the February 2, I told him my pain level was at an 8 of 10. I was very sore but it was not debilitating. I don't think I saw Dr. Marlow before February 2, 2011. I did not report any injury to Union Pacific on February 1. The first day I actually reported an injury to a UP manager was on Saturday the 5th. I tried to report on the 3rd and 4th. I did not think it was necessary to put the handbrake on the 52032 because there was nothing wrong with the equipment. It wasn't that hard or difficult, just took a little more pull to get it loosened. Yes, Dr. Marlow told me not to return to work on the 2nd but I had already taken the call to come into work and I felt better with his manipulation and Ibuprofen. I don't believe my failure to report that I was injured on a handbrake was not providing complete information to the company. To the best of my knowledge, I provided complete and accurate information.

As soon as I knew I was injured, I reported it. Dr. Marlow never prohibited me from working on the 2nd. He recommended no work. (RX-43).

Joshua Isaac Shaffer (Tr. 244-390).

I have been employed by Union Pacific since 1998. My first supervisory job was manager of yard operations in 2005 and then manager of train operations in 2010 in St. Paul. In 2013, I became manager of road operations. I was Mr. Tongen's assigned supervisor on February 1, 2011. Prior to that date, I was not aware of any employment concerns regarding Mr. Tongen's conduct. In my experience, he never lied to me about any of his duties, which included

[9] GCOR 1.2.5 provides that "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." (RX-2).
[10] GCOR 1.6 provides that "Employees must not be: … 4. Dishonest…" (RX-1).

responsibility for handling hazardous materials as a conductor. I did not have any problems with Mr. Tongen not being trustworthy in the way he carried out his job for the railroad.

I would have been off duty on February 3 and 4, 2011. I would typically leave my work cell phone at home and not carry it when I went out. If my colleagues had to contact me, they knew my personal cell phone number. My voicemail was full on February 3, 2011. Mr. Tongen did leave me a message on the 4th and I called him back on the 5th to come down to the property. Mr. Tongen claimed he injured himself on February 1, 2011. I knew this was a protected activity under the whistleblower statutes. I had him fill out a personal injury report and a medical information release form. He told me he was walking between track 11 and 12 and performing a train inspection when he slipped on a ridge of ice or snow. As he was falling, he caught himself on a rail car and didn't fall all the way to the ground but in doing so he twisted his back. He said that was the only activity he had done that would have resulted in an injury. He did not mention anything about a handbrake.

The term "injury" is not defined in the UP rules. It is up to the employee to decide if he or she is injured. The term "immediately" is not defined in the UP rules, it is also a judgment call by the employees. (Tr. at 262). We had the February 5, 2011 report of injury that said he slipped on snow and ice in the park yard. We subsequently received a physician's report dated February 8, 2011 from Dr. Marlow that mentioned working with a handbrake and feeling a pull. Given the apparent discrepancy, that is why we charged him with dishonesty. Dishonesty is a level 5 violation, the worst charge one could get. The level 5 charge of dishonesty, by itself, is an offense that carries with it a maximum penalty of permanent dismissal from service. By the time I got the termination notice, CX-33, I had not yet received the medical chart from Dr. Marlow where he referenced the hand brake and slip on the ice. A violation of Rule 1.2.5, late reporting, would not, by itself, be enough to result in a dismissal. That is a level 3 offense, with a maximum discipline of up to five days suspension without pay or one day training without pay. What brought this case into the serious realm was Rule 1.6, dishonesty. That charge alone is enough to permanently terminate an employee.

Jamie Lynn Lukehart (Tr. 391-438).

I have been a claims examiner for Union Pacific since 2004. I was first notified of Mr. Tongen's case on February 5, 2011 when I received a voice mail from Josh Shaffer. He gave me a medical authorization on February 23, 2011. (CX-10). By February 24, I knew that Mr. Tongen had received a notice of investigation for potential dishonesty and late reporting of an injury. I still had not gotten the medical records by March 8. (CX-1). I eventually got them on March 21, after the hearing. I do not recall if I gave them to any supervisor.

Sean Michael McGovern (Tr. 439-493).

On February 1, 2011, I was the director of road operations for Union Pacific out of St. Paul, Minnesota. I oversaw safety for the service unit. I first learned of the incident on February 5, 2011 when Josh Shaffer called me. I went to the St. Paul depot to meet Mr. Tongen and Mr. Shaffer. I was not required to be there but I was interested in the details surrounding the incident

because of the late reporting. Mr. Tongen essentially described the injury as being caused when he slipped on snow and ice between tracks 11 and 12 and twisted. I reported the injury on February 5 to Superintendent Rod Doerr. I did see CX-14 sometime on 9 or 10 February. I then went to Mr. Doerr and told him we have two conflicting stories on how the alleged incident occurred, the personal injury report which talks about slipping on snow and ice and the physician's note which talks about turning a large brake wheel. That is the basis of the level 1.6 charge, along with the late reporting charge. If Mr. Tongen was found guilty of only late reporting, that that would be reportable to the Federal Railroad Administration but if he was guilty of dishonesty, then the incident would not be reportable. (CX-36). Today is the first time I ever saw CX-24, where Dr. Marlow says "I filled out a physician's report, specifically under 'History and Disease," item 5, not having much knowledge of the railroad job he performs. I initially wrote down that he was releasing a big hand brake wheel when he felt the initial pain. Upon review of the patient on-the-job accident insurance questionnaire he had to fill out first for me, I overlooked that he wrote down that very fact that he experienced a slip and twist before getting to the hand brake part. That was a misunderstanding on my part, not Mr. Tongen's, as he did state so on the aforementioned questionnaire." Even now, that would not make a difference on the dishonesty charge. He still never told us about the hand brake.

I also thought he was being deceptive on his recollection about going to the chiropractor and his general demeanor during the interview. If he immediately reported the injury when it happened, we could have gone out and examined the area and if he had mentioned the hand brake, we could have checked it out to make sure it was working properly and avoid more problems. CX-8 does have a section that allows a person to include defects in equipment. Mr. Tongen circled "no". By the 8th of February, we could have tracked down the railcar if we wanted to. If Mr. Tongen really felt he was not hurt on the hand brake but rather hurt when he slipped and twisted, he would not have been dishonest filling out CX-8. But he did never told us about the handbrake. I am aware of the whistleblower provisions and we get refresher training on them. The training included at least a reference to the two UP rules Mr. Tongen was charged with violating were 1.6, dishonesty, and 1.2.5, late reporting of an injury.

On February 5, 2011, I got a call from MTO Shaffer and went in to the St. Paul depot to discuss the incident involving Mr. Tongen. I was aware that Mr. Tongen had tried to leave Mr. Shaffer a voicemail on February 3 to report the injury. CX-8 appears to be the personal injury report Mr. Tongen filled out, where he described the injury as being caused when he slipped and twisted his back on snow and ice between tracks 11 and 12. I did ask Mr. Tongen if he had been shoveling snow prior to work, thinking that may have been a potential cause of his back strain, which Mr. Tongen denied. I called my supervisor, Mr. Doerr, and told him what Mr. Tongen had said during the interview. A few days later, Ms. Lukehart sent me CX-14, and I realized there were two conflicting stories about how the injury occurred. I called Mr. Doerr and asked if should add a 1.6 dishonesty charge with the 1.2.5 late reporting charge initiated by Mr. Shaffer.

If Mr. Tongen were found guilty of only the 1.2.5 late reporting charge, that would be reportable to the Federal Railroad Administration. But because Mr. Tongen was also found guilty of the dishonesty charge, the incident was no longer reportable to the FRA. CX-35 is an email dated March 22, 2011 requested that Mr. Tongen's incident be removed from the service

unit stats. CX-36, dated March 22, 2011, is an email from Mr. Rowe that Mr. Tongen's case would not be viewed as reportable.

Before today, I had not seen Dr. Marlow's explanation about the handbrake on the first page of the physician's report (CX-24). I was the individual who recommended Mr. Tongen be charged with dishonesty because Mr. Tongen never said anything about a handbrake. Now that I have read CX-1 and CX-24, it does not make a difference. During the interview, Mr. Tongen was changing his recollection about going to see a chiropractor and his general demeanor led me to believe he was not being honest with us. I couldn't pinpoint it. When the doctor's note came in and it mentioned the handbrake, that led me to believe he was trying to deceive us about how the injury occurred. But I have no evidence that the injury occurred off the property. I don't have any medical records that Mr. Tongen saw a chiropractor before February 1, 2011. (Tr. 475). Even if the medical reports from Dr. Marlow reference the handbrake, I believe Mr. Tongen was dishonest because he did not tell us about the handbrake. In addition, he did not mention a handbrake on the report of injury. (CX-8). It is important to us to know what caused an injury to help mitigate future injuries. In my opinion, Mr. Tongen violated Rule 1.6 because he did report an alternative mechanism of injury. I agree that by marking "no' on CX-8 where it asked about defects in equipment, Mr. Tongen means whatever equipment he was working on when he suffered his injury was not defective. I also agree that if Mr. Tongen really felt he was not hurt on the handbrake but when he slipped and fell on the ice, he would not have been dishonest in the way he filled out CX-8. (Tr. 488). In my experience, employees report the direct cause of an injury, not a contributing cause, and "immediate" means "immediate" [when an employee becomes aware he or she has suffered an injury].

Rodney N. Doerr (Tr. 504-557).

I was the Superintendent, Twin Cities Service Unit in February 2011, supervising about 1200 people. I read the transcript of the investigation and made the decision to dismiss Mr. Tongen. CX-30 is an email from me dated March 17, 2011 to Mr. Miller, the head of our admin section. I developed the "Inconsistencies of Fact" section by reading the transcript. I concluded that Dr. Marlow's letter was written to present his side of the story and attempted to change the description of events that allegedly caused the injury. There were two main problems: Marlow's description of injury being caused by a handbrake was not referenced by Tongen and Marlow's letter explaining his misunderstanding and that Tongen had mentioned the handbrake to him. Second, Tongen signed the form on February 2, 2011 yet indicated he was referred to Morales on Feb 3 and saw him on the 4th.

I did not have CX-1 at the time I made my decision. Even if I did, it would not change my mind. In fact, I think it bolsters my decision to dismiss him. I have no reason to doubt that he was injured slipping on the snow and ice and twisted. I just believe he should have also put the hand brake on the personal injury report. But I agree that if Mr. Tongen honestly felt that the twist on the snow and ice was the cause of his injury and he put that on the form, he was not dishonest. (Tr. 519). If found guilty of only the original late reporting of an injury charge, Mr. Tongen would not have been dismissed from the railroad. The reason he was dismissed was because of the 1.6 charge.

Michael D. Phillips (Tr. 559-589).

I am the General Director of the Labor Relations Division of Union Pacific. The incident involving Mr. Tongen was covered by a collective bargaining agreement. (RX-6) He was entitled to a hearing and the decision maker has 10 days to issue a decision on whether or not the charges were proven. If sustained, then the employee can file a claim with the Superintendent to adjust the discipline. If he is not satisfied, he can appeal to the Public Law Board. In this case, the PLB found there was sufficient evidence to support the late reporting charge. However, while there was evidence indicating some inconsistencies between statements the physicians made, Mr. Tongen did not have the intent to be dishonest. (RX-29).

Discussion

On February 1, 2011, Complainant strained his back after slipping and twisting on a snow and ice ridge. As the incident did not then affect his mobility, Complainant continued working, although his pain intensified after pulling on a railcar handbrake later in the day. Complainant did not report the injury to management because he was not scheduled to work the next day and thought he would be fine with Ibuprofen, a hot bath and a good night's sleep. However, as he was still sore the next morning, Complainant scheduled an appointment with Dr. Marlow later that day, February 2, 2011. At the doctor's office, Complainant started filing out RX-18, a Patient On-the-Job Accident Questionnaire, but did not complete it until the next day because Marlow had to leave the office. Though not scheduled, Complainant was called in to duty on February 2, and worked a full shift. On February 3, 2011, Complainant and Dr. Marlow completed the questionnaire and Dr. Marlow placed Complainant on restricted duty. Complainant attempted to leave a message for his supervisor but his mailbox was full. Complainant was able to leave a message for him the next day, February 4 and gave a formal report of injury to Mr. Shaffer on February 5.

Complainant was initially investigated for late reporting of an injury. However, based on perceived inconsistencies between Complainant's Report of Personal Injury (RX-9), Dr. Marlow's Physician's Report of Injury (RX-10) and Complainant's Accident Questionnaire (RX-18), Union Pacific believed Complainant was untruthful about the mechanism of injury and added a charge of dishonesty because they believed Complainant should have added the handbrake as a cause of injury. However, Complainant believed the slip and twist on the ice/snow ridge was the mechanism of injury. While pulling the handbrake may have taken some extra effort, it was not the direct cause of his back strain. Further, Complainant did not reference the handbrake on the Report of Injury form because it had not malfunctioned and was not broken. Complainant did not attempt to hide the role the handbrake may, or may not, have played in this incident and it was included in the physician's report.

Respondent initiated a disciplinary investigation and Complainant was subsequently found guilty of violating GCOR 1.2.5 and 1.6 for late reporting and dishonesty and dismissed from service on March 17, 2011, a decision later reversed by an arbitration proceeding which ordered Complainant returned to duty, but without back pay.

Complainant now alleges that Respondent violated 49 U.S.C. § 20109(a)(4), which provides:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or subcontractor or such a railroad carrier, or an officer or employee of such a railroad carrier, 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 the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done …
>
> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee…

As noted above, actions brought under 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). Accordingly, to prevail, a complainant must demonstrate that: (1) his employer is subject to the Act and he is a covered employee under the Act; (2) he engaged in protected activity, as statutorily defined;[11] (3) he suffered an unfavorable personnel action;[12] and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.,* ARB No. 05-048, ALJ No. 2004-AIR-11 (ARB June 29, 2007).

The term "demonstrate," as used in AIR 21 and FRSA, means to prove by a preponderance of the evidence." Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of Complainant's behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

There is no dispute that Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. 20109(a).[13] Respondent also concedes that Complainant engaged in protected activity on February 5, 2011 when he formally notified Respondent of an injury and that Complainant's dismissal from employment on March 17, 2011 qualifies as an "adverse employment action." Thus, there is no dispute that Complainant engaged in protected activity when he finally reported a work related injury on February 5, 2011 and that he suffered an adverse employment action when he was terminated on March 17, 2011. The issue is whether there is a causal link between the two.

---

[11] By its terms, FRSA defines protected activities to include acts done "to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.**"**

[12] The term "unfavorable personnel action" includes making charges against an employee in a disciplinary proceeding and suspending, terminating, placing on probation or making notes of reprimand on an employee's record.

[13] *See* CX-41, *Union Pacific Railroad Company's Answers to Complainant's Interrogatories, Requests for Production and Requests for Admission*, dated March 15, 2013 and Tr. at 29-31.

Contributing Factor Analysis

To establish causation, Complainant need only show that his report of a work place injury was a contributing factor in the unfavorable personnel action, "not a substantial, significant or even predominant one." *Araujo v. New Jersey Transit Rail Operations, Inc*., No. 12-2148, __ F.3d __, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). In other words, whether or not the protected activity is a "contributing factor" in a FRSA whistleblower case is not a demanding standard. A "contributing factor" means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989). Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish that his disclosure of the work place injury was a contributing factor to his dismissal. *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."). Additionally, the question is not whether Union Pacific had a good reason for its adverse action, but whether the prohibited discrimination was a contributing factor "which, alone or in connection with other factors, tends to affect in any way" the decision to take an adverse action. *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013).

The evidence does demonstrate that Union Pacific's decision to terminate Mr. Tongen on March 17, 2011 was based, at least in part, on the reporting of his February 1, 2011 work-related injury as the former would not have happened without the latter. In other words, if Mr. Tongen had not formally reported his February 1, 2011 injury to Mr. Shaffer on February 5, 2011, Union Pacific management would not have initiated the subsequent investigation into the timeliness of Complainant's reporting or the honesty of his claims of how his injury occurred and he would not have been dismissed from service. I do not find credible Respondent's argument that, "if Tongen had completely failed to report his on-the-job injury, his supervisors would have undergone the same investigation and charged him with serious rules violations." *Respondent Union Pacific Railroad Company's Post-Hearing Closing Brief*, dated December 18, 2013, at pages 21-22. Without Complainant's report of injury, Respondent would not have learned of the incident. There were no eye witnesses to the slip and no independent source. Respondent only became aware of it when Complainant came forward, albeit a couple days later. In other words, I find the protected activity was a contributing factor in the adverse personnel action because, but for the report of a workplace injury, no investigation would have ensued and no discipline imposed.

This court is not suggesting that a Complainant automatically establishes a causal nexus by simply demonstrating an Employer took any unfavorable personnel action after a report of injury. Rather, a prima facie case is established here because the basis for Complainant's dismissal cannot be discussed without reference to the protected activity. Simply put, Complainant's reporting of his injury set in motion the chain of events eventually resulting in the allegation of dishonesty and is inextricably intertwined with the eventual adverse employment action. *See DeFrancesco v. Union Pacific Railroad Co*., ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). *See also Ray v. Union Pacific R.R. Co.*, 2013 WL 5297172, ___F.Supp.2d ___ (D. Iowa 2013)("If [Complainant] had not reported the alleged work-related injury, [Respondent] would not have undertaken an investigation into either the honesty of

[Complainant's] statement . . . or the timeliness of [his] injury report, and Complainant would not have been terminated.")

Affirmative Defense

Once an employee demonstrates that the protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. This is a high burden which I find Employer has not met. Respondent submits it consistently dismisses dishonest employees and would have done so here, regardless of the protected activity, because the dishonesty involved safety and safety is of paramount importance in the railroad industry. While that position has superficial attraction, the problem is that Respondent's position presumes that Complainant was dishonest when he failed to include or reference pulling of the handbrake as a cause of his back injury. This is simply not the case. Complainant did not include or reference the handbrake on the report of injury because the handbrake was not defective or broken and, at best, only exacerbated the existing back strain, caused by the earlier slip and twist. In fact, Complainant's failure to reference the handbrake is arguably consistent with common practice within the company. As Mr. McGovern testified, in his experience, most employees only report the direct cause of an injury, not a contributing cause. Regardless, even if he should have mentioned it, Complainant did tell Dr. Marlow on February 2 and the perceived inconsistencies in the various reports were fully and credibly explained by Dr. Marlow in his letter, an explanation summarily rejected by Respondent without good cause. The bottom line is that Complainant did not attempt to hide the role the handbrake may, or may not, have played in this incident.

Respondent submits Complainant was not dismissed for reporting the injury, which is protected, but for falsely reporting the injury, which is not. Consequently, Respondent's purported basis for dismissal is premised on finding Complainant was either deceptive or dishonest when relating the cause of his February 1, 2011 work-related back injury, a premise I find is refuted on the facts of this case. I find Complainant was not deceitful or dishonest and certainly had no intent to mislead as to the cause of his injury, which he honestly and reasonably believed was the slip and twist on the ice, not pulling of a properly functioning handbrake. In other words, Complainant was not dishonest in his report of injury.

As Respondent's witnesses all concede, but for the [now rejected] finding of dishonesty, Complainant would not have been dismissed. There was no other basis to remove him.[14] Mr. McGovern testified: "I also agree that if Mr. Tongen really felt he was not hurt on the handbrake but when he slipped and fell on the ice, he would not have been dishonest in the way he filled out CX-8." (Tr. 488). Mr. Doerr testified: "But I agree that if Mr. Tongen honestly felt that the

[14] Although not case dispositive, I am not convinced that Complainant even violated the rule against late reporting. As Mr. Shaffer testified, the term "injury" is not defined in the UP rules and it is up to the individual employee to decide if he is injured. Similarly, the term "immediately," is likewise not defined and also up to the individual employee's judgment as to when to report. To Complainant, the slip and twist did not rise to a "reportable injury" until it affected his ability to work, a not unreasonable position and one which Respondent's rules apparently do not prohibit. Here, though formal notification did not occur until February 5, Complainant did try to inform his supervisors about the injury on February 3, less than 48 hours after his slip on the ice ridge and when he fully realized it would affect his mobility. In other words, under a broad interpretation of GCOR 1.2.5, Complainant did arguably immediately report his personal injury to the proper manager.

twist on the snow and ice was the cause of his injury and he put that on the form, he was not dishonest." (Tr. 519). As Complainant honestly believed the slip on the snow and ice caused his back injury, he is not guilty of violating GCOR 1.6. Given the lack of an otherwise dismissible offense, I find that Respondent has not established by clear and convincing evidence that it would have dismissed even without the protected activity.

Remedy

The FRSA provides, in general, that "[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole." § 20109(e)(1). Relief shall include: (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) any back pay, with interest; and (C) 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. § 20109 (e)(2). Furthermore, "[r]elief in any action under subsection (d) may include punitive damages in the amount not to exceed $250,000." § 20109 (e)(2); *see also* 29 C.F.R. § 1982.109(d)(1).

Reinstatement. Complainant has already been reinstated. However, as the PLB decision did not specifically order that Complainant be reinstated with no loss in seniority status, I do so here.

Loss of Wages. Complainant lost $70,370 in earnings from Union Pacific, but made $51,519.50 during the same period while working for other employers. In this case, the amount of back pay owed Complainant will be offset of the amount of income earned in the alternative jobs, which equals $18,850.50.

Emotional Distress. To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City enters., Inc.*, ARB Nos. 09-033, 08- 091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ's award of $50,000 in compensatory damages for emotional distress). Compensatory damages for emotional distress may be awarded for violations of FRSA. 29 C.F.R. § 1982.109(d)(1); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based "solely upon the employee's testimony." *Ferguson*, ARB No. 10-075, slip op. at 7-8. Nonetheless, a "key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

Complainant submits that he is entitled to $70,000 in other compensatory damages for the pain, suffering, and emotional toll taken upon him and his family as a result of the investigation and subsequent termination. I find any "emotional toll" suffered by Complainant and his family as a consequence of the investigation itself is not compensable as an Employer is entitled to reasonably investigate potential rules violations without subjecting it to compensatory damages for emotional distress. In other words, the actual investigation conducted by Respondent in this case, though admittedly a stressful event, is not an "adverse personnel action" for which

Complainant may seek damages. However, as to the actual termination, Complainant credibly testified his wife had to quit school, the family applied for medical assistance and WIC benefits and he had to move his family in order to find work. That said, Complainant was able to find work within the month and also experienced stress unrelated to his termination, namely dealing with his deceased father's property and mother's taxes.

On the evidence before me, I find Complainant has established by a preponderance of the evidence entitlement to emotional distress damages, but not at the amount requested. Instead, his complaint is similar to *Bailey, supra.* Like Complainant, Bailey had worked for the employer for a number of years. The ALJ's decision was issued some two years following termination. *Id.* This period approximates the length of time following Complainant's termination. Compensatory damages of $4,000 were awarded for emotional distress in *Bailey*. As Mr. Tongen's complaint approximates the situations found in *Bailey*, I find that Complainant has suffered emotional distress quantifiable as $4,000.

Punitive Damages. Punitive damages may be awarded under FRSA where there has been a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." *Ferguson*, ARB No. 10-075, slip op. at 8-9 (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The *Smith* court explained that purpose of punitive damages is to punish the defendant for outrageous conduct and to deter future violations. *Id.*, slip op. at 8. It further explained that "[t]he focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that produced by compensatory awards." *Id.*; *see White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 95-SDW-1, slip op. at 8 (Aug. 8, 1997) (overturning ALJ award of $60,000 in punitive damages because Board fully expected future compliance).

Complainant submits that he is entitled to at least $100,000.00 because Union Pacific "knew that [he] was engaged in protected activity, and yet took no reasonable steps to investigate." Accordingly, UP's conduct in the pending case warrants an award of punitive damages at least in the same amount as the $100,00.00 awarded by the ALJ in *Griebel v. Union Pacific R.R. Co*., Case No. 2011-FRS-11, slip op. (Jan. 31, 2013). I disagree.

Reasonable minds would not likely dispute, upon reflection, that Respondent's investigation in this case could have been more exhaustive. However, the issue before me is not how much weight Dr. Marlowe's report and supplemental letter should have been given, and whether additional evidence could have assisted the decision-maker, but whether the information provided a reasonable basis to support Union Pacific's decision to dismiss Complainant *at the time it was made*. Based on the inconsistency between Complainant's report of injury and Dr. Marlow's physician's report, Union Pacific management concluded Complainant was not honest about how his back injury occurred, namely that pulling the brake handle was a contributing factor. I find that, at the time it made the decision to terminate Complainant, Union Pacific believed, albeit unreasonably, that Complainant was not honest about how he was injured, a dischargeable offense, even if now in clear hindsight and cool reflection, a different decision may have followed.

The Federal Railway Safety Act protects employees who report work related injuries from adverse personnel action. The FRSA does not protect employees from weak investigations.[15] While the thoroughness of the investigation, and the conclusions reached, may now reasonably be questioned, at the time Union Pacific relied upon it, they sincerely questioned Mr. Tongen's honesty. Given the sincerity of their beliefs, I find Respondent's conduct in this case was not outrageous. That the thoroughness of the investigation can now be challenged does not change that Respondent acted in good faith at the time the decision was made to terminate Complainant.

The evidence demonstrably shows that Union Pacific fired Complainant because they believed he lied about the cause of his February 1, 2011 injury. The critical piece of evidence used to support their decision was the reference in several of the reports to pulling a handbrake on a railcar.[16] Union Pacific believed this evidence contradicted Complainant's assertion he was injured when he slipped and fell on ice. At the time the adverse action was taken, Union Pacific believed it had a reasonable non-retaliatory ground to discharge Complainant. Even if the validity of that position is now rejected, and a different outcome lies today, that does not change the fact that, at the time of the original decision to terminate, Union Pacific believed they had a reason to do so. "An Employer can fire an employee for a good reason, a bad reason, or for a reason based on erroneous facts" as long as it is not taken with callous disregard for his or her rights. *Malacara v. City of Madison*, 224 F.3d 727, 731 (7th Cir. 2000). Such is the case here. This court is not charged with evaluating the quality of Union Pacific's disciplinary process. If it were, I would recommend additional due process protections. That said, I find that Union Pacific's decision to terminate Mr. Tongen, though based on what can now only be called questionable inferences drawn from weak evidence, was not taken with such callous disregard for his rights that punitive damages are warranted. *See Bailey v. Consolidated Rail Corp*., ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013).

Additionally, an important factor to consider when weighing whether damages are necessary to deter future violations is whether the illegal conduct reflects a corporate policy. *Ferguson*, ARB No. 10-075, slip op. at 8-9. A corporate policy that reflects illegal conduct may justify a finding that punitive damages are necessary for deterrence. *See Bailey*, ARB Nos. 13-030, -033, slip op. at 4 (J. Corchado concurring) (noting the converse, that a "corporate policy" of trying to comply with whistleblower laws "may" justify denying punitive damages under an affirmative defense analysis). Similarly, the ARB has held that an employer may avoid liability for punitive damages "where it has made a 'good faith effort' to comply with anti-discrimination provisions." *Youngermann*, ARB No. 11-056, slip op. at 7 (applying the good faith effort standard to a claim arising under the Surface Transportation Assistance Act).

While the record reflects a failure by Union Pacific to clearly and convincingly demonstrate that Mr. Tongen's report of injury was immaterial to its termination decision,

[15] The [FRSA] does not forbid sloppy, mistaken, or unfair terminations; it forbids retaliatory ones. *Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013). *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012).

[16] The other reasons cited by Employer's witnesses for dismissing Complainant, including allegations of a changing recollection about seeing a chiropractor, conflicting dates on the 2/2/11 patient questionnaire, and his general demeanor during the initial interview, are without merit.

nothing here suggests an insensitive disregard for Mr. Tongen's rights. Further, Union Pacific's non-retaliation policy, as testified to by several of the witnesses, is itself affirmative evidence of a corporate policy of intended conformity with the rules set forth in FRSA and demonstrative of a good faith effort to comply with them. Consequently, I find that punitive damages are not warranted.

Conclusion

Complainant has demonstrated by a preponderance of the evidence a prima facie case under the FRSA, that is: he engaged in protected activity, Respondent had knowledge of that protected activity, he experienced an adverse action, and his engagement in the protected activity contributed to his experience of the adverse action. Respondent has failed to demonstrate by clear and convincing evidence that it would have taken the adverse action despite Complainant's engagement in the protected activity. Respondent is therefore liable pursuant to FRSA, and Complainant is entitled to the remedy described above.

ORDER

IT IS ORDERED that Union Pacific shall pay Complainant $18,850.00 in back pay with prejudgment interest for the period beginning September 16, 2011 to the period ending the date of this Order, and postjudgment interest for the period beginning the date of this Order to the period ending the date payment is made. In addition, Union Pacific shall pay Complainant $4,000.00 in other compensatory damages. No punitive damages shall be paid.

IT IS FURTHER ORDERED that Union Pacific shall pay to complainant all costs and expenses, including reasonable attorney fees incurred by him in connection with this matter before the OALJ. Counsel for complainant shall have 45 days from the date of this Order to submit a relevant petition. A service sheet showing that proper service has been made upon the respondent and complainant must accompany the petition. If respondent disagrees with any aspect of the petition, it shall first confer with complainant's counsel and make reasonable efforts to resolve such differences. If counsel for complainant wishes to change its petition following such conference, it must file an amended petition within 10 days from the date of the conference. If instead there remain unresolved differences following the conference, counsel for respondent must file objections, accompanied by a statement explaining why it has not been able to agree with opposing counsel, within 30 days of the conference.

SO ORDERED:

Digitally signed by Stephen R. Henley
DN: CN=Stephen R. Henley, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
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).