U.S. Department of Labor

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Issue Date: 12 March 2014

CASE NO.: 2013-FRS-00028

IN THE MATTER OF:

OLEN WARE,
Complainant

vs.

BNSF RAILWAY COMPANY,
Respondent

DECISION and ORDER

Procedural History

This case comes under the Federal Rail Safety Act (FRSA),[1] as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

On 13 Jul 12, Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA). In it, Complainant alleged that Respondent retaliated against him by firing him on 15 Jun 12 for reporting a 13 Jun 12 workplace injury. OSHA issued its decision on 3 Jan 13, dismissing the complaint. Complainant filed a timely objection, the case was referred to the Office of Administrative Law Judges and assigned to me. On 19 Sep 13, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

[1] 49 U.S.C. § 20109.
[2] Pub. L. No. 110-53 (Aug. 3, 2007).

My decision is based on the entire record, which consists of the following:[3]

Witness Testimony of

Complainant
Cheryl Ware
Kyle James
Elaine Stewart

Exhibits

Complainant's Exhibits (CX) 1-9, 11-18, 20-23
Respondent's Exhibits (RX) 1-8, 10-21, 23-26
Joint Exhibit (JX) 1

STIPULATIONS[4]

1. Complainant began work for Respondent on 16 Jan 12. He worked as a switchman, brakeman, and conductor. Complainant successfully completed his training program and began his probationary period of employment with Respondent. Under the applicable collective bargaining agreement, Respondent has the right to disapprove of a probationary employee's job application, subject to federal employment laws, including the FRSA.
2. Respondent is required by federal regulations to give its employees operational tests. On or about 16 May 12, Complainant was given an operations test failure for failing to comply with Respondent's rule for inspecting passing trains. On or about 24 May 12, Complainant was given an operations test failure for failing to comply with Respondent's rule for damaged or defective switches.
3. Respondent's safety rules require employees to remove finger rings unless working in an office environment. On or about 13 Jun 12, Complainant reported that he was injured while closing a gate in the field. At the time of the injury, he was wearing a ring under his work gloves. On 16 Jun 12, Complainant's application for employment was disapproved. Complainant challenged the disapproval under the collective bargain act. On 11 Sep 12, Complainant filed suit against Respondent under the Federal Employers Liability Act.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] JX-1; Tr. 7.

4. Respondent is a railroad carrier and Complainant was an employee within the meaning of the FRSA. Complainant's notification of his injury was a protected act under the FRSA. Respondent's disapproval of Complainant's application was an adverse action under the FRSA. Complainant filed a timely complaint to OSHA and a timely request for a de novo hearing.
5. At the time of the disapproval, Complainant was earning about $5,000 per month from Respondent. From 11 Jan 13 through the date of hearing, similarly situated switchmen were earning an average $6,973.25 per month. Complainant worked for Federal Express from 21 Jan 13 to 20 Feb 13 and earned about $1,090.66. Complainant worked for Home Depot from 21 Feb 13 to 14 Jun 13 and earned about $5,580.97. Complainant worked for G4 Compliance and Investigations from 17 Jun 13 through the hearing and earning about $7,014.95 through August 2013.

FACTUAL BACKGROUND

Complainant had completed his training and was working in his 60-day probationary period when he was assessed with operation test failures on 16 and 24 May 13. On 13 Jun 13, within days of the end of the probationary period, Complainant reported that he had injured his hand while closing a gate. Complainant was wearing a ring in violation of safety rules at the time of his injury. Respondent disapproved his application for employment before the end of the probationary period, effectively firing him.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

The parties agree that Complainant engaged in protected activity by reporting his injury and that Respondent knew about that report when it took adverse action against him by disapproving his application. Complainant maintains his report led to the disapproval and Respondent is therefore liable. Respondent responds that the injury report was not a contributing factor in its decision to disapprove his application and even if it was, clear and convincing evidence shows that it would have done the same thing even in the absence of the report.[5]

[5] Respondent also objected to the entire proceeding under the FRSA, noting that Complainant had sought relief for the same alleged wrong under the Railway Labor Act (45 U.S.C. §151) and arguing that the FRSA election of remedy provision (§20109(f)) barred his FRSA complaint. However, Respondent also conceded that the ARB had ruled to the contrary (*Mercier v. Union Pacific R.R. Co.*, 2008-FRS-3, 4 (ARB Sept. 29, 2011)) and stated it was preserving the issue for possible appeal.

LAW

Prima Facie Case

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,[6] for reporting a work-related illness or injury,[7] "for requesting medical or first aid treatment, for refusing to work when confronted by a hazardous safety or security condition,[8] or for following orders or a treatment plan of a treating physician."[9] The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).[10] AIR 21 requires a complainant prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[11] If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.[12]

Contributing Factor

In establishing that a protected activity was a contributing factor to a subsequent adverse action, it is not necessary to show that the employer was motivated by the activity or even gave any significance to the activity. To place the clear and convincing burden on a respondent, all a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to the adverse activity.[13] In short, in order to vindicate what has been interpreted as congressional intent to make it very difficult for employers to defend themselves against whistleblower complaints, the contributing factor analysis has become simply a question of "but for" factual causation.[14]

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[6] 49 U.S.C. §20109(b)(1)(a) (2011).
[7] *Id.* at §20109(a)(4).
[8] *Id.* at §20109(b)(1)(B).
[9] *Id.* §20109(c)(2).
[10] 49 U.S.C. §42121 (2011).
[11] 49 U.S.C. §42121(b)(2)(B).
[12] 29 C.F.R. § 1979.109(a); *Hutton v. Union Pacific Railroad Co.*, 2010-FRS-20 (ARB May 31, 2013).
[13] *Hutton,* at 6-7. Indeed, it may well be that the protected activity was totally unrelated to the employer's articulated reason for the adverse action, as long as it was within the chain of cause in fact. For instance, an employee reports an injury and a subsequent investigation discloses employee misconduct that is unrelated to the report. If the employer takes adverse action solely because of the unrelated misconduct, the report was nevertheless a contributing factor. *See e.g.,DeFrancesco v. Union Railroad Co.*, 2009-FRS-9 (ARB Feb. 29, 2012). Under the expansive reading of the statute, this may be true even if the unrelated misconduct took place after the protected activity. In other words, an employee who reports an injury, is given light duty and then is fired for punching his new supervisor would be able to show that but for his reported injury, he would have never engaged the new supervisor. The employer would then bear the clear and convincing burden.
[14] *Hutton* at 7-8.

Respondent's Burden

However, simply because the protected activity was a link in the chain of event leading to the adverse action does not mean another independent chain of causation did not exist.[15] Even if a complainant is able to establish a factual link of causation between the protected activity and adverse action, an employer may still avoid liability by presenting clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity.[16] That evidentiary standard is more rigorous than the preponderance-of-the-evidence and denotes a conclusive demonstration that the thing to be proved is highly probable or reasonably certain.[17]

Damages

Authorized remedies include, where appropriate, abatement, reinstatement, back pay, compensatory damages, costs and attorney's fees, and punitive damages up to $250,000.[18]

Although there is a presumption in favor of reinstatement, it may not be required in cases where the employer can show it is impossible or impractical,[19] particularly where it would be impossible to have a productive and amicable working relationship,[20] or the complainant could not do his job without endangering others.[21]

An employee must attempt to mitigate his damages and the employer is entitled to set off any income earned so as to avoid a double recovery.[22] However, the employer bears the burden of showing that the employee failed to mitigate back pay damages by seeking comparable employment.[23]

Compensatory damages may be awarded for emotional pain and suffering and for mental anguish.[24] However, emotional distress cannot be presumed and the complainant has the burden of proving the existence and magnitude of subjective injuries.[25] Punitive damages are warranted where the complainant shows the respondent acted with callous disregard of his rights.[26]

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[15] *Franchini v. Argonne National Lab.*, 2009-ERA-014, slip op. at 12 (ARB Sept. 26, 2012) (a true reason does not necessarily rule out other reasons).
[16] An apt parallel seems to be the inevitable discovery rule applied to evidence obtained in criminal cases. *See, e.g., Nix v. Williams*, 467 U.S. 431 (1984)(evidence otherwise inadmissible as "fruit of the poisonous tree" remains admissible if it would inevitably have been discovered by law enforcement through legal means).
[17] *DeFrancesco*, 2009-FRS-9, slip op. at 8.
[18] 29 CFR § 1982.105(a)(1).
[19] *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005).
[20] *Creekmore v. ABB Power Sys. Energy Servs., Inc.,* 1993-ERA-024 (Sec'y Feb. 14, 1996).
[21] *Roadway Express, Inc. v. United States Dep't of Labor*, 495 F.3d 477, 486 (7th Cir. 2007).
[22] *Roberts v. Marshall Durbin Co.*, 2002-STA-35, slip op. at 17 (ARB Aug. 6, 2004).
[23] *Hobson v. Combined Transp., Inc*., 2005-STA-35, slip op. at 6. (ARB Jan. 31, 2008).
[24] *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983) (1981-ERA-1 (Sec'y Apr. 30, 1983)).
[25] *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).
[26] *Youngerman* v. *United Parcel Serv., Inc.*, 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013) (internal citations omitted).

EVIDENCE

Complainant testified at hearing in pertinent part that:[27]

He was born in 1963 and attended high school in Houston. After he graduated, he went into the Air Force and then worked at the Postal Service. After that, he worked as a civilian jailer for two years and then was a police officer. He was with Metro Transit Authority for twelve and a half years in a full time position. He has never been fired from a job.

He would always check the Respondent's website because he was interested in trains. One day he saw an opening for testing and applied for it. The pay and benefits were better than what he was doing. He took the test and Respondent hired him as a probationary conductor out of Galveston. He started earning probably between $4,000 and $5,000 because it elevated as time went on and it was closer to $5,000 when he was terminated.

He started to work for Respondent on 16 Jan 12. He completed a mixture of classroom and field training. He thinks there were a total of 18 conductors in his class, but isn't sure about that number.

The conductor is the supervisor of the train and handles the paperwork. He's the one that's really responsible for making sure the correct cars are dropped off or picked up and will also assist with making sure that they don't go through signals and stuff like that. There is also a locomotive engineer on the train who basically operates the engine. Sometimes they have two person crews and sometimes they have three person crews. The engineer obviously operates the train. The conductor is the supervisor of the crew and the other person would be the brakeman, who actually works the switches. The brakeman is also a conductor. When he shows up to work as a conductor, sometimes he can be assigned the foreman and sometimes he can be assigned the brakeman.

From the point that they start until they take the test, they are with a trainer. Once they pass the test, they're pretty much on their own. They are on a probationary period for one full shift or schedule and then 60 days beyond that. During the probationary period they're doing the same job as any other conductor would be doing in any yard on the road. The only difference is they are in the probationary phase. Once they complete the 60-day period, they become an employee of Respondent.

During that time, employees must pass all of the requirements that Respondent expects. It is part of the union agreement. RX-2 is the new hire expectations that were provided to him at the time that he was a probationary conductor. He understood that they were not an exclusive list of performance standards and expectations. He understood that failure to conform his conduct or performance to Respondent's policies and standards and the expectations might lead to his application being revoked. Two of the new hire expectations were to know and comply with the rules.

[27] Tr. 41-125; 288-291.

There are many rules related to general conduct, safety, train yard, and engine operation. There are probably 500 rules that they have to know. They were trained on the General Code of Operations, the GCOR and also the TYNE safety rules. They were also responsible for system instructions and general notices. General notices are usually specific to a division. One of the requirements of his job as a new conductor trainee was to carry a copy of the GCOR and the TYNE, so he could look at it if he had any questions. During his time as a conductor trainee, he complied with that and carried the rules with him. They were expected to demonstrate knowledge and understanding of the rules. He successfully completed that part of the training.

RX-7 is an excerpt of the TYNE Safety Rules Rule S-1.32 and says, "Do not wear rings unless you are working in an office-like area." It is one of the very first TYNE rules in the book and he was trained on it.

RX-4 has GCOR Rule 8.16, damaged or defective switches. It states that a switch that is damaged or defective should be reported and tagged or spiked, if necessary. If the switch cannot be made safe, protection should be provided at once. He was trained on that rule in Galveston. He saw the spiking once, but had never done it before. Reporting a switch is not the only part of the rule, it also has to be tagged. RX-6 has TYNE's safety Rule 13.7, operating switches and derail. It describes the process of what should be done with a switch that is defective and/or unsafe. It says report it, tag it, and do not use it.

A roll by inspection is where one of the personnel exits the engine to the ground as a train is going by and checks for safety issues to make sure the wheels are not dragging, the load is secured, and stuff like that. RX-4 has GCOR Rule 6.29, inspecting trains. It says when a train is stopped and met by another passing train, crew members must inspect the passing train. It also describes how to do the inspection. He was trained on this rule, the techniques and methods of how to inspect the train, and the importance of inspecting passing trains. It is important to make sure the load is secure, there are no fires, and the wheels are not sticking to create other problems. It's a safety rule.

The probationary period was to make sure that the employee can satisfactorily do the job by giving Respondent an opportunity to evaluate performance. One way they would do that was through the operations testing. An operations test is when management observes an employee working or listens to an employee on the radio, to make sure the employee is doing the job properly. The employee may or may not know about the observation while it's going on. Afterwards, they tell the employee what was right and what was wrong and give a grade of pass or fail. Some employees get tested more than others. He doesn't know why.

Critical test failures fall under two areas. One is authority violations such as an engine going through a red light when it wasn't supposed to. The other one is what they call eight deadly sins, like getting on moving equipment or going between cars without speaking to the engineer. Critical test failures during the probationary period can get you fired pretty quick. A 209 violation has something to do with authority to be on that track and at that time.

One of his failures was on 24 May 12 for failure to report a defective switch. They are required to report a defective switch. However, he did report the defective switch prior to 24 May 12. Every night before they left, they would write down what they did during the shift, what cars were on what track and if they had any issues. They would send two faxes, one to the dispatcher and to the Belleview Office to the train master.

On 16 May 12, they tried to move some cars, but couldn't because the switch was out of line. He reported that problem the same day, when he first discovered the defect. He knows he wrote down that he was having problems operating a couple of switches and they needed to have maintenance fix them. CX-17 page 6 is what he faxed. He did not tag the switch. One switch could be dangerous to a train that would try to use it, but the other was just hard to throw and needed industrial grease to loosen it up.

The tag is a six-inch card they tie around the switch that tells the person "don't mess with this switch because there's something wrong with it." He had looked for tags for almost a month prior to that and had been asking for some, but they never had any. He looked in lockers, desks, and on the engines. He had never needed a tag before then and was never told to make a tag. If there were no tags, they secured it the best way they could.

He was told that he was actually given the failure not for failing to report it, but for not tagging it. He didn't tag it because they didn't have any. There are other ways to protect the switch besides writing on a tag and sliding it on there, but where he was, that wasn't feasible. It wasn't like at a big yard where it's pretty much self-sufficient. It was not their yard, so they didn't have all the things that other yards have. It's possible he could have also spiked the switch. He spoke to them probably three times a week by phone and told them the switch was not tagged, but didn't mention that in the fax he sent.

On 24 May 12, he was approached by Mr. Powell about failing to report and tag those switches. He told Powell the reason he didn't tag them is because he didn't have anything to tag them with. Powell said it was a safety failure because they were supposed to report and tag. He was pretty mad when he got the write-up because when he asked what he was supposed to do in cases where they don't have tags, he was told to check his desk, and there should be some in there. So, he looked in his desk and it was full of tags. He was surprised to see that, because there had not been any tags when he looked before. Later on, they walked to the train and there were a bunch of tags on the engines, too. Respondent placed them there. He didn't challenge the write up beyond Powell. He didn't think he could call the union.

He was given another failure on 16 May 12 for not doing a roll by inspection. He was conductor and working with a classmate, Jason Elliott, and a more experienced engineer named Tim Pane.

Since he was the conductor, he was going to do the roll by, but Jason is a heavy smoker and wanted to do it so he could smoke. He expected Jason to do the roll by inspection and never received any notification that Jason wasn't doing it. The first time he learned it wasn't done was when Supervisor Nate Edge and a couple of other managers came on board the engine and asked why they didn't do a roll by. He told them Jason was on the ground to do it, but because he didn't inspect the train and Jason didn't inspect the train,

his crew failed to comply with Rule 6.29. Both he and Jason received an operations failure. He doesn't remember if the engineer did.

He was surprised that Jason didn't do what he was supposed to, but was not surprised that they decided to hold him accountable as the conductor. They had been told in class that they were not protected by the union until they were off probation. He understood that he could not appeal the operations test failure.

On 15 Jun 12, they were working out of Pearland and went to a chemical company called Third Coast to drop one car. When they got there, they realized that the company wanted cars in a certain order, so they had to do a little switching and get them in the correct order. He was wearing safety equipment, including gloves, eye protection, and steel toe boots. He got the gloves at Davey yard out of a vending machine. He had forgotten to take his wedding ring off and was wearing it, even though it was a safety violation and he should have taken it off. He just messed up and forgot. It was the first job he ever had where he couldn't wear a ring so he was still adjusting to not wearing it. It was the only time he wore it. He has occasionally seen other employees wearing their wedding rings out in the field, but didn't approach them about violating a safety rule. Normally, if somebody forgot to take a ring off, they just reminded him to do it.

It was around 6 AM and he was trying to close the company's gate. It was still dark. While he was closing the gate he was injured. He fractured and lacerated the ring finger. There was a fracture right underneath the nail and just a slight fracture, a hairline fracture on the side. Neither his gloves nor his ring had anything to do with whether the accident happened or how he got hurt.

He first thought he had been bitten by something, because he had seen a black widow earlier that night, but then he looked down and realized what had happened. He said some words that caught the attention of the brakeman, who asked what happened. He told the brakeman what happened and said he was going to the engine to get something cold on it. He doesn't remember if he or the engineer called the yard master to tell them about the injury. They are required to report injuries.

After the call, they waited for someone to pick him up and take him to the hospital. Danny Fleming, who is a manager, came. Manning asked him if he was wearing gloves and he told him he was. They got all the stuff of the engine, stopped at an office and went to the hospital. The doctors took X-rays, said he had fractured fingers, and cut his wedding ring off so they could stitch the cut. His hand was swollen. They cleaned the cut out with a solution to prevent any type of infection and put in 19 stitches between the two fingers. Then they wrapped it up, put it in a splint and that was pretty much it.

Neither Jonathan Gomez nor Danny Fleming said anything to him in the ER about him wearing his wedding ring. They just kind of joked that his wife would get on him. They asked him if he wanted to do a statement on the injury and he said he would. He wrote CX-1 and gave it to one of them. Then he went home. He would not have gotten an ops failure for wearing the ring, because when he reported to work, he was around supervision and no one wrote him up then.

In a day or two he got calls from someone from the claim department and from somebody at Respondent's Medical and Environmental Health Department. He was concerned about how much function he would have afterwards. They considered surgery, but he went to a lot of physical therapy and it's a lot better than it was. Eventually, he was released to return back to work on 11 Jan 13.

He was injured on a Wednesday. He got a UPS package on the next Saturday morning telling him he was terminated. He got another letter, U.S. Mail certified, on the following Tuesday stating the same thing.[28] He was shocked, because he thought that it was telling him that he passed his probationary period. Then he saw he was not going to be continued with the company. No one from Respondent ever contacted him to tell him why. All he knew was what was in the letter. He had no idea until then that he was even close to being rejected. None of his supervisors ever told him that he was close to being fired.

H**e** never called or reached out to Respondent to ask about the letter and why his application was disapproved. The letter has a number for the manager of Human Resources to call with any questions. He never contacted her. He wrote RX-24 because he felt wronged. He was doing his job, just happened to get hurt, and was terminated two days afterwards. Before his injury he had the two operations test failures and hadn't been told anything to make him think he was in jeopardy.

CX-4 has his Employee PPI Detail or Personal Performance Index. It shows he was assessed 40 points for getting injured. It also shows op test failures on 16 and 24 May 12. When he got his letter it was pretty vague and he had no idea they were letting him go because of those op tests. RX-7 is the new hire expectations and says they have to pass all operations tests.

There were 15 other people in his class and some of them had operations test failures during their probation period. CX-14 shows that a number of his classmates had test failures and one classmate had two test failures. He was the only one let go. He doesn't think anyone else in his class reported an injury. He had a total of 26 operations tests and failed two. He doesn't know if any of these other trainees were reported to Mr. Kyle James, the superintendent of the division of the Gulf division.

When he received the operations test failures, he got a notification about them when he logged on to Respondent's computer. He had to click and accept the failures or they keep popping up. He clicked and accepted the failures. He never requested a conference with the superintendent of the division or the general manager of that division to talk about the failures. RX-3 has a general notice that sets forth the process for an employee to challenge an operations test failure. It says an employee can do so with union representation or on his own. He was not aware of this general notice. He did not ask anyone if there was some sort of mechanism to challenge operations failures and was never specifically told that he could not challenge the operations failures. RX-11 lists the two rules violations, the dates, the time, the train, and the subdivision information. There is nothing to indicate he disputed those failures.

[28] RX-15.

He went from the salary he was making even prior to Respondent to fighting with the state for $426.00 a week of unemployment and trying to get back in the workforce with FedEx making that small amount. He did attempt to go back into law enforcement with a couple of agencies, an Administrative Police Department and Seafare Police Department. That was within the past few weeks.

He worked part time at FedEx from 21 Jan 13 to 20 Feb 13. RX-17 has earning statements from FedEx and they accurately reflect his wages during that time. He worked Home Depot from 21 Feb 13 to 14 Jun 13. RX-18 has earning statements from Home Depot and they accurately reflect his wages during that time.

He left Home Depot to start with G3 Investigations on 17 Jun 13. He is a salaried employee there. He gets paid $15.00 per hour and minimum wage while he travels to and from a case. The hours vary, depending on the case. Normally, the case is eight hours plus the travel time, so that can vary. Sometimes he works out of the city, so it just depends. G3 Investigations hasn't told him how many hours to expect, because they get rush cases and can't even give an accurate estimate of what it would be.

He was on unemployment from somewhere around the end of July 2012 to March of 2013 at $462.00 a week. RX-16 doesn't include that.

He would like to be reinstated to his job and back pay from the date that he was released to go back to work. He'd like his name cleared; the injury stuff expunged; and, if possible, he'd like this type of situation to be stopped so nobody else goes through what he and his wife have been through.

He has been wondering if he's going to keep his house, what bill gets paid on what date, and who gets neglected. It's been pretty rough. There were a lot of sleepless nights because of the stress level. He put a lot of stress on his wife having to pull the load. He has been a worker since he was 15 years old, so to be in a position not to work, not to contribute was mentally rough. He has been depressed at times but has to keep moving.

The injury itself caused him some suffering and he couldn't do the things he used to do. He has filed a Federal Employers Liability Act lawsuit against Respondent and is asking mental anguish damages for his injury. He is also attempting to appeal the disapproved application through the grievance process and is asking the arbitrator or the Public Law Board to get him his job back and back pay for the salary he lost.

It's been hard on his wife to see him in this condition because he's always been moving and doing what he needs to do. To be sidelined sitting at the house doing nothing, not able to work, and kicked to the curb because he got hurt works on him. It has been hard on his marriage at times. Even though people may not want to admit it, when the money is funny, it messes up a relationship because it's stressful. He talks to a pastor at church about it, but other than that, he hasn't had any treatment.

If he tries to go to another railroad company, this would be on his record and he would be unofficially black balled, because they're going to look at this injury and those ops tests and think he's a totally unsafe worker, even though they don't know anything about the circumstances of the ops test or injury. He tried to go to work for a different railroad and was told immediately through their system that he was not qualified.

He applied at Union Pacific probably two or three months ago for a conductor position. He doesn't recall the date. Once he clicked enter to enter his application, it came back a few minutes later telling him that he was not accepted at this time. He had applied with them in the past on two occasions and been accepted. He remembers the deposition he gave in this case. He doesn't remember being asked whether or not he applied to Union Pacific. He would not have lied, so if he said at his deposition he hadn't applied at Union Pacific, it was because the deposition was before he applied.

Cheryl Ware testified at hearing in pertinent part that:[29]

She has been married to Complainant for twenty-three years. They have two children, ages 22 and 28. Complainant has always worked and she never knew him without a job, even in high school. Prior to his employment being rejected by Respondent he was easygoing, smiley, positive, happy, and always easy to get along with. He was never depressed.

After he learned that he wasn't working at Respondent anymore, at first, he just kind of walked around and kept going over things and couldn't believe it was happening. It took him time to calm down about that. He got real quiet and didn't engage in anything. He got aggravated easily, which is away from his normal personality. He was hard to live with.

He was a lot calmer when he testified today. Before, he would be angrier about it. He has cried from it and the depression. It was tough. He saw her come home from work at 9:30 or sometimes 10:00 and wouldn't say anything. He would just look at her. She had to pick up the extra weight, which was very hard, because she has never had to do that before. It's night and day. He's not the person that he was the first 22 years. It's really hard for her to explain because it is just devastating.

When he gave his deposition in this case, he broke down. She would see the sorrow and it was kind of tough to hear. He's used to taking care of her and said he took her from her father to take care of her, but now he can't and she's taking care of him. It's almost like he doesn't know how to function and it's just a totally different life. Recently, with this G3 thing, he lightened up a little bit because he was making a tiny bit more money, but he's not the same. He's still not who she knew him to be. He's still not providing what he wants to provide.

[29] Tr. 125-134.

She is a hair stylist and works 40 to 50 hours per week. While Complainant was a probationary employee she was still working maybe 40. She doesn't know. She worked by appointment and didn't count hours. It varies with her clients. Lately, she has to work harder and longer to make ends meet. She paid every single bill. Complainant was getting unemployment and it went to what it could, food and any little ends. When he got hired for Respondent, she thought she could finally take it easy and not have to work so much. After his application with Respondent was disapproved, she canceled quite a few days because she was worried about his mental condition. That most definitely affected their financial situation.

After he got hurt with Respondent, there was a period of time that he was not able to work because of the injury, anyway. He was not able to return to Respondent until January 2013. As soon as he was cleared to return to work, he went back to work.

Kyle James testified at hearing in pertinent part that:[30]

He is the superintendent of operations for Respondent's Gulf Division, headquartered in Houston, Texas. He has been the superintendent of the Gulf Division for about a year and a half. Part of his roles and responsibilities are budget, safety, customer needs, and employee needs. So, he was informed that Complainant was wearing a wedding ring during the performance of his duties. He then looked into Complainant's past record and made the determination to disapprove his application after consulting with Human Resources.

Respondent believes every accident and injury is preventable. His salary is not tied to the number of personal injuries that are reported. He has broad oversight to ensure that people that are training and the probationary employees are getting all the proper trips done and learning all the rules and regulations. He supervises managers who are doing the hands-on work with the probationary employees. Respondent's superintendents usually have a couple of layers of managers underneath them. So, he would be four levels up from the probationary employees. He has somewhere between 400 to 500 within his span of control. Complainant was one of these employees. In June of 2012, Complainant would report to a division train master. That division train master reports to a senior train master who's in charge of the terminal and that person reports up to him.

Respondent used to assess points. Before points, it was a color. If you were a perfect employee, you were green. If you were trouble, you're yellow. If you're bad, you were red. They changed it to a point system to where various points would be awarded for adverse behavior, safety violations, or derailments. It was used to identify at-risk employees. It had no significance under the collective bargaining agreement for what would qualify for disciplinary action. It was much more of a general assessment.

[30] Tr. 134-224; 291-293.

The probationary period is a part of the collective bargaining agreement that the union and Respondent agreed upon. Before, the day that an employee passed a conductor promotion, they were a full-fledged conductor. The problem with that was there are people that just don't fit that role. So, the 60-day probationary period gives an opportunity to identify employees that don't meet the requirements and disapprove their application without going through collective bargaining and taking ten investigations over a year's time.

RX-19 is the union agreement with the United Transportation Union that includes the probationary period provision. Article 7 is the probationary period. New hire trainees are made aware of the probationary period and Respondent's expectations for their performance in that period. RX-2 is the new hire expectations given to conductor trainees. As a superintendent, he considers everything on that document in evaluating whether or not the conductor trainee has satisfactory performance during his probationary period. That would include passing all operations tests and demonstrating compliance with the Respondent standard and safety rules. The expectations are the same whether he is a superintendent on the Gulf Division or superintendent in Nebraska.

If somebody makes one mistake, it does not mean he is automatically going to disapprove their application. There are a lot of variables and the more important thing is if there is a pattern. If he sees multiple incidents within a short 60-day period, it's in the best interests for that employee and for the company to disapprove that application.

When he makes a decision to recommend that an application be disapproved, he sends a brief summary to HR Department and copies his superiors. He wants the whole story for his superiors and HR Department to verify that they support the decision. Complainant's application for employment was disapproved on 15 Jun 12.

He was made aware by phone from one of his front line managers that Complainant had been involved in a rules violation and they were taking him to the hospital. Before that phone call, he had never seen or spoken to Complainant. He had never spoken with any of Complainant's supervisors or co-workers about Complainant. He had no idea that Complainant had any prior failures. He didn't know anything about Complainant. The caller told him that they had a problem. Complainant was switching, working the third coast on the wayside with his wedding ring on. Complainant had reported a problem and asked to be taken to the hospital.

When he received the phone call, the sole source of his information was Jonathan Gomez and Danny Fleming, his front line supervisors. He didn't speak with Complainant or his co-workers about what happened. When he got the call from Complainant's bosses about the gate problem, the call was about the fact that they were going to have to take him to the hospital. The phone call is what caused him to look at Complainant's record and led to the disapproval of Complainant's application. He did not know Complainant was claiming an injury. He looked into Complainant's operations testing history because he knew Complainant was involved in an incident and the front line supervisors said Complainant was violating a rule.

He regularly gets calls when somebody has to go get medical care. He would not have been called about just the ring violation, it just would have ended up in the computer.

No ring is the most basic rule and the time was a factor as well. He has seen other employees wearing their wedding rings in the field. He has held people accountable for wearing wedding rings and entered failures into the system on people for wearing wedding rings. So have different managers that he has worked with in the past. He doesn't know of any discipline or termination for wearing a wedding ring.

If Complainant just forgot to take it off, he should have caught it eight hours or nine hours into his shift. It wasn't the first move of the day. So, he started to look into Complainant's past operations testing history to see if there was any kind of pattern or if this had been an ongoing issue. That's when he noticed that Complainant had two operations test failures prior to this event. At the deposition he said he had an employee in the hospital, so he wanted to look at his entire record. But people go to the hospital all the time that don't get diagnosed with something.

At the time that he reviewed the information and decided to disapprove Complainant, he was not aware that Complainant did not believe he should have been assessed those failures. He did not know anything about the specifics of the failures, only that the codes told him one was a switch and one was a roll by. The first time that he became aware that Complainant did not believe he should have been assessed those failures might have been at his deposition in this case.

He did not reach out to anyone to obtain additional information regarding those failures. He is sure there's one example where a failure was bogus, but for as many failures as are entered and in the time that he has been doing this, if they're in the computer, they're legit. He's under the impression if they're in the computer, they've been challenged all the way up to the regional vice president and survived those challenges. So, he takes it for what the data he has in hand and believes it to be accurate.

As a superintendent he is not out in the field and relies on the operations summary to provide information as to whether or not employees understand and are complying with the rules. He assumes any time he sees a failure that it's a credible failure, because if an employee is put in for a failure and they didn't in fact fail the rule, they'll have a local chairman call.

RX-11 is the operations test summary he relied on in determining what Complainant's safety record had been during the probationary period. When he reviewed the document, the only thing he knew is Complainant had failed two operations tests and which rule was violated. Based on RX-4 and 5, which are GCOR Rule 6.29 and 6.2.1 about inspecting trains, he understood Complainant had failed to properly watch a train roll by. Based on RX-4, which is Rule 8.16, he understood Complainant had failed to report or tag a switch. When he made the decision to reject his employment, he believed that Complainant had failed to report a switch as being defective or failed to tag it, one or the other. At his deposition he said he believed that Complainant failed to report the switches.

He didn't review anyone else's safety record before deciding what to do with Complainant. He looked it up and with 400 employees, it would be quite a lengthy day to go through and compare. If he revoked somebody's application tomorrow, he's not going to pull up 50 other people to compare them. There's really not a reason for him to do that.

He does not recall looking at the operations testing history of others in his class before they were made full-fledged employees. He didn't reach out and talk to anyone about Complainant, because he took the operations testing review for what it's worth. He had highly trained and paid managers entering data and he trusts that they put in accurate information. He didn't compare Complainant's operations tests to other employees in his training class.

After he made the decision, he escalated the email to the Director of HR and his superiors.[31] Elaine Stewart was the HR contact and said they were okay to move forward. Mr. Stevens responded in some form to move forward.

The email said Complainant had two failures and a personal injury to his finger during switching operations in his short time with Respondent. He should have had a comma and then an "an" in there, but it was two operations failures and now a wedding ring violation. It was a mistake, but he usually gets up about 2:30 in the morning.

CX-5 is the email that he wrote to Steve Curtwright at 5:05 p.m., with a copy to Sheila Miller from HR. The email is true and accurate. He never sent any corrective or amending email. The words "I found it very alarming that an employee with less than six months of service demonstrating unsafe behavior… Attempting to force a gate closed resulting in a PI to himself" were his words and were accurate to an extent. He didn't put the rule violation for wearing the wedding ring, because he didn't know it off the top of his head.

When he sends out an email, people are going to want the whole story. He feels it's better to put it all in as kind of a one stop shop, so he mentioned the details about the switching incident. The non-slip gloves are like a rubber glove that Complainant was wearing and it wasn't raining out. To him, that's not the right tool for the job. 99 percent of his co-workers will be wearing leather gloves while they were doing this move. It just shows him that maybe Complainant's not the best. Complainant didn't use the best common sense even in his gloves, let alone the wedding ring. He can't say whether the gloves or ring had anything to do with the injury, though. He has given operations failures to employees for violating the personal protection equipment clothing rule.[32]

Operations testing for any employee, including probationary employees, helps them make sure the rules are being enforced and followed. Train crews are self-starters and don't have a lot of supervision with a two or three man crew in the cab, so testing gives an opportunity for managers to be out in the field holding crews accountable for bad work habits. When managers observe a failure in the field, they log it into the computer. They may also notify the employee face to face, but it will automatically pop up the next time

[31] RX-13.
[32] RX-7.

the employee logs in. Employees can't do anything on the computer without accepting the acknowledgement of an operations test failure. Federal law requires that every time operations testing is done, the results must be inputted into the system whether it's a pass or fail.

RX-10 is the system general notice outlining three steps for an employee to take when they challenge a failure. Conductor trainees are responsible to know it. The first step is for the employee to immediately challenge the manager about it and then a joint review is held with the employee to validate circumstances and accuracy of the entries.

If the employee doesn't like that, the employee can then go to the division general manager and set up a meeting with his chairman or by himself. And then if they can't come to a resolution, then they can have a meeting with the regional vice president. If Complainant disagreed with the operations test report, he had numerous options. He could have followed the general system notice or could have called the union local chairman. When people get Ops tests entered on the record, they make a big deal out of it. He remembers giving his deposition on 2 Jul 13 and swearing to tell the truth. He said he wasn't aware if Respondent had a written policy governing other employees who can challenge operations test failures.

Critical events are those Respondent has deemed as having a good potential resulting in fatal or real serious injuries or collisions of trains. There are eight deadly decisions. But in his eyes, a failure is a failure. He does not consider whether or not it was a critical or non-critical failure. When he sees multiple failures it's very alarming. The critical and non-critical is addressed in the collective bargaining. He can't fire somebody for coming to work one time without their safety glasses on, but he should fire someone for getting on and off moving equipment.

He did not review CX-4 prior to making the recommendations to disapprove Complainant's application. At that time, the Gulf Division was not using the Personal Performance Index. He never relied on this detail when evaluating whether or not to not accept Complainant's application for employment, but it would not have mattered that on this detail, the failures were categorized as other failures.

They have five days to enter an operations test. There's times where it may take three or four days to get back on the computer to do that. Although the ring was a failure, he was disapproved before the failure was entered in the computer.

More than one failure in six months will trigger the computer to notify the person putting in the failure that this person has had multiple operations test failures. It does not flash directly to him. But the supervisor would probably bring multiple failures to his attention. If it was somebody that's been doing it for 30 years and it was their second one, probably not, but a brand new employee, yes. An operations test failure is not an unusual event, but to have three in less than 60 days is very unusual.

The fact that Complainant reported the injury had no bearing on his recommendation to disapprove his application. Complainant had a pattern of unsafe work practices in a short tenure at Respondent. Even if Complainant had not been injured, there are eight managers that could have seen it, escalated it and held him accountable. He played no role in investigating that incident. He did not review the injury report or Complainant's statement and did not have any firsthand knowledge before making the recommendation. He would have made the same recommendation for Complainant's application even if he had not reported an injury, because he demonstrated a pattern of unsafe behavior and unsatisfactory performance in short tenure at Respondent. He harbors no ill will towards Complainant for filing an injury report.

He came to the Gulf Division in April 2012, when the probationary period arrangement with the UTU union was fairly new. Complainant was the first employee that he personally recommended disapproval of. There have been several other applications that he has recommended be disapproved for unsatisfactory performance in their probationary period.

RX-21[33] is a letter informing Devon Antonio Berry that his application is being disapproved. That was in May of 2012. It was actually disapproved before Complainant's. Mr. Berry's application was disapproved for a pattern of unsafe behaviors as reflected by three rules violations in his operations test summary. He doesn't recall the specifics, although one was a deadly decision. Mr. Berry did not conform to the new hire expectations. Mr. Berry had a total of seven operations tests and he failed three of them. Two of them were for deadly decisions. His failure rate was higher than Complainant's, but he's not looking at percentages. They both had three failures.

RX-23 is a disapproval of Jeff Brannon's conductor application. He failed to meet the requirements of the new hire expectations. It was for his lack of initiative and commitment to the job, inability to complete work effectively and efficiently and just coming to work in general. Neither Mr. Brannon nor Mr. Berry reported an injury.

Complainant wasn't treated any differently than anyone else. He has no control over who was tested and who was not tested. It's very random. RX-12 shows L.N. Galicia, A.H. Heck, D.K. Larue, Mr. Pervis, Reyes, and Complainant. A. H. Heck had the most tests, thirty-six, with no failures. Mr. Larue had two.

Respondent has an anti-retaliation policy that they're required to train on and sign off on a Code of Conduct every year. It is RX-14. If anyone retaliates against an employee that's injured, they are fired.

At the deposition, he said there was not a certain number of failures that meant he would recommend Respondent reject employment. A probationary employee with two Ops test failures could warrant termination, but not always. There are variables that play into it. One test failure might be enough. An operations testing failure does not always constitute discipline in terms of the collective bargaining agreement unless Respondent does in addition to the computer entry showing the actual failure. If a person violates the same

[33] CX-13.

operations test multiple times, it can escalate to discipline. If a person violates an eight deadly decision or an authority violation, it can be disciplined right away.

Had this not been related to any sort of injury and had the supervisor observed Complainant wearing a ring and put the failure in the computer, it would have flashed to the supervisor, who he would have expected to contact him. If there had been no injury, and he would have just seen the ring, roll by and switch failures, he would have done the same thing and disapproved the application.

Elaine Stewart testified at hearing in pertinent part that:[34]

She is the HR Director for Respondent's Texas and Gulf Division. Complainant was part of the Gulf Division, so he would be part of the employees that she would support in her role as the HR Director. Complainant was hired as a probationary employee. She was given the information that Complainant had not satisfactorily completed his new hire probationary training and with that information, she concurred with the recommendation to disapprove his application.

She has been with Respondent a little over 23 years. She started as a craft employee in the clerical ranks. She became director of Human Resources for the Texas and Gulf Divisions in April of 2012. She supports roughly 3,500 employees and has two direct reports. One is an HR generalist and one is an HR manager. Part of her duties include supporting the senior leadership team of both divisions. They are involved in rules compliance, hiring, and any time there are disciplinary decisions concerning probationary employees who are not under the umbrella of Labor Relations. Employees cannot grieve under the bargaining agreement until they become full-fledged union members on the 60th day.

The HR generalist reports to the HR manager, who reports to her, as the HR Director. Then there is the regional HR Director, assistant vice president and then the vice president. The HR manager for the Gulf Division is Tashia Miller. Miller was in that position when she became director of HR in April 2012. Miller would be the first line of defense for anything that would happen on the Gulf. She would be responsible for the hiring. Because Ms. Miller is on the Gulf in Houston and her office is in Fort Worth, they will contact Miller first. Miller would then escalate any issues that would need a decision. Kelli Courreges was the Regional Director at the time she became HR Director.

Once a determination has been made that employees need to be hired, Respondent posts that internally. They would do a comparison of skill sets for that particular job and invite candidates in. Once they select that person to move forward in the process, they offer what's called a conditional offer of employment, conditional based upon passing the background as well as medical checks. Once an employee passes both of those there would be a final offer letter with new hire expectations[35] and other administrative items. When that new hire showed up at that location at that time, it would be as a probationary employee.

[34] Tr. 231-288.
[35] RX-2.

A probationary employee is an employee who has been hired by the company as a try out. The company is looking to see if this employee is going to satisfactorily perform the job duties as prescribed and that also gives the candidate an opportunity to determine whether or not this job is a good fit for him or her and their lifestyle.

The new hire expectations include passing all operations tests. The new employees are told the expectation list is not an exclusive list and failure to conform conduct and performance to Respondent's policies and standards may lead to immediate disapproval of the application." They try not to disapprove probationary employees because it's very costly to the company, but it does happen on occasion.

In determining whether an employee has failed to conform his or her conduct and performance to Respondent's, there's going to be a progression. They look at what may or may not have occurred, the progression, the seriousness, and whether the new hire employee is grasping the material.

A new hire conductor trainee will have 13 to 15 weeks training and then an additional 60-day probationary period. The bulk of the training is going to be in the classroom so they really can't see them at work and determine if that employee is grasping fully what they are doing. That's what the additional 60 days is for, to see them working in the actual environment. That arrangement is part of the collective bargaining agreement.[36]

When Complainant initially went through the background check into the conditional offer phase, it was her team that was doing his background checks. It's possible that she spoke to him. She spoke with hundreds and thousands of employees so she can't say one way or the other. She does not recall ever hearing anything about Complainant until June 2012.

Around 14 Jun 12, she had a conversation with Superintendent James and heard through her HR manager, Tashia Miller, that Complainant had had a third operational test failure and Mr. James was seeking concurrence from an HR prospective with his decision to deny Complainant's application. She does not remember if she received a phone call or email from Mr. James because she spoke with Mr. James and Ms. Miller and she doesn't remember in which order she spoke to either one of them. She did speak to both of them.

She recalls James told her Complainant had a third operations test failure and that it had to do with wearing a wedding ring. That was by email as well as by phone. She doesn't remember exactly which took place in which order, but does know they had communications both ways. During the course of their communication, he mentioned there was an injury that had been involved as well, but nothing specific about the injury. They may have discussed the two operations test failures at that time, but she doesn't remember him providing the exact details of each one.

Neither Mr. James nor Ms. Miller ever described the circumstances surrounding the third operations test failure as an accident. It was described to her as an operations test failure. The conversation was, "We have an employee with a third operations test failure and we'd like to deny their application and also you need to know that there was an injury involved."

[36] RX-19 p.18.

She concurred with the disapproval, because of their progression and nature. The operations tests by nature indicated there was something involved in safety. Complainant was a new hire probationary employee and not satisfactorily performing his job to Respondent's standards.

Operations tests are either going to be planned or unplanned, but their purpose is for the supervisor to observe the employee in their working environment to ensure that employee is working within standards.

Prior to her conversation with Mr. James, she was not aware of any operations tests failures. After they spoke, she didn't go to either of the supervisors involved in Complainant's previous failures or look at any documentation about them.

The fact that Complainant had suffered an injury had no effect on her concurrence, because based upon the three operations test failures, it was pretty clear that Complainant was not grasping the full realm of how to work safely in a safety sensitive work environment and comply with the rules. The injury portion was not something that HR would take into consideration. She was only basing her judgment on whether this employee was satisfactorily performing the job.

She told James initially that she did agree with his recommendation, but also wanted to confer with her supervisor. Those emails are at RX-13. Her boss agreed. That it was the right thing to do based upon the fact that this employee had had operations test failures. She did not speak with any of Complainant's supervisors or coworkers to determine whether he was grasping the information during the probationary period.

Mr. James told her that Complainant had two previous operations test failures in addition to the one that he had just received with the wedding ring. In her email to Ms. Courreges, there was a typo. She did say second and should have said he's had two previous and now there is a third. When she wrote "Second Ops test failure" instead of third it was a typo. She should have written third instead of second. If he had just had two Ops test failures, it's quite possible that she still would have recommended that his employment be terminated for not meeting the new hire expectations and unsatisfactory job performance.

Her email to Ms. Courreges mentioned the injury and 20109 concerns. As the HR Director, she has to look at all aspects whenever an application is being denied. A 20109 is a very real concern that comes up. She has to make sure that the decisions that are being made are non-retaliatory and perfectly in line with the Respondent's guidelines. 20109 is if you let go of an employee because of an injury. In this case, that was not the reason that she recommended this employee's application be denied, but in her role as Human Resources, she will not deny that those things will come up and the employee may be thinking that's what's happening.

There were other new hires whose applications were disapproved during their probationary period for some kind of unsatisfactory performance. Amy Davis was a new hire probationary employee whose application was disapproved for unsatisfactory job performance that included several things, one of which was that she had several

operations test failures.[37] She does not recall what the other issues were, specifically. She did not know that one of Davis' failure was a deadly decision type.

Both she and Superintendent James were involved in that decision. Davis had two Ops test failures. Depending on the circumstances, two Ops test failures is enough to reject a probationary employee, if it becomes clear that the person is not satisfactorily performing their job and not grasping the rules or following the guidelines. It's not about the number. It's the progression and the nature. She did not contact and speak with Davis' training coordinator or supervisors.

Jeffrey Brannon was also a new hire probationary employee whose application was disapproved for unsatisfactory job performance. Among other things, Mr. Brannon had attendance issues. She and Mr. James were involved in the decision to deny Mr. Brannon's employment application.[38] Mr. Brannon issues with attendance are similar to Complainant's in that they would be viewed the same way. They are both not satisfactorily meeting the guidelines of a new hire employee. She can't recall the specifics of Brannon's other problems, just that they would be again not meeting the new hire guidelines and expectations.

Mr. Berry was a probationary employee whose application was disapproved due to unsatisfactory job performance. Among other things, he had operations test failures. She and Mr. James were personally involved in the decision to disapprove Mr. Berry's employment application. Mr. Berry had three Ops test failures. She doesn't know how many were deadly decisions. That's not a decision that she would be making. Again, when it comes to the probationary employees, she is going to be looking at if the employee is following the new hire guidelines expectations and satisfactorily performing his job. The other issues with Mr. Berry would be his not meeting the new hire guideline expectations. That's as specific as she can be. He did not meet the new hire guideline expectations and his job performance was unsatisfactory.

There are other specific standards that Ms. Davis or Mr. Berry failed to comply with. A couple that come to mind would be following instructions, handling stressful situations well, adapting effectively to change, and demonstrating quality and technical competency.

Mr. Brannon's performance was unsatisfactory in terms of being able to travel over a large geographic area and spend time away from home, demonstrating reliability by reporting to work on time, not leaving early or having no excused absences, completing work effectively and efficiently, showing initiative and commitment to a job, following instructions, adapting effectively to change, and demonstrating quality and technical competency. She was not aware of any injury history as to any of those three employees. All three employees did not meet the new hire expectations as outlined and therefore had unsatisfactory job performance.

[37] RX-20.
[38] RX-23.

Respondent has an anti-retaliation policy and all managers have to certify to the Code of Conduct yearly.[39] The code says "Retaliation for good faith reporting of an apparent or actual violation of this law, this Code of Conduct, any BNSF policy, participating in any investigation of a suspected violation is prohibited. Acts of retaliation could lead to disciplinary action up to and including termination." She complied with the Code of Conduct and specifically with the provision regarding no retaliation in her dealings with Complainant. His injury played no role at all in her decision to concur with Mr. James' recommendation to disapprove Complainant's employment application. Had Complainant never suffered or reported a single injury, none of her choices would have been different.

She doesn't go ask supervisors if employees are having problems. They would be making that information known to her. She trusts her supervisors to make the right decisions for the right reasons. She had never heard anything about Complainant from anyone, but Ms. Miller speaks with managers a lot more than she does regarding new hire employees.

She didn't look at any of the other persons in Complainant's class for operations test failures. She can't explain why Mr. Larue was continued despite the fact that he had two operations test failures during his probationary period. Mr. Larue was never presented to her at all.

She gets her information from her supervisors and relies on them to have the correct information. She didn't speak to Mr. Powell, Mr. Edge, Mr. Gomez, or Mr. Fleming, but she did speak to Mr. James and would assume Mr. James spoke to the people that were under his supervision. Mr. Powell and Mr. Edge both reported operations test failures for Complainant.

Respondent's e-mails show in pertinent part that:[40]

On 14 Jun 12 at 5:05 PM, Kyle James sent an email recommending rejecting Complainant's employment because of "several concerning events." He cited 2 OPT failures and a personal injury during switching operations, noting as even more alarming the use of the wrong type of work gloves and wearing of a ring. He also mentioned the fact that Complainant had attempted to force a gate closed, resulting in the injury and emphasized that Complainant had less than 6 months service and was nearing completion of the 60 day probationary period. He summarized the back ground by listing (1) failure to perform roll by; (2) failure to report defective switch; and (3) injury while switch and wearing wedding ring.

Elaine Stewart concurred, and recommended rejection based on two OPT failures, the second for wearing a wedding ring and being injured.

[39] RX-14.
[40] CX-5; RX-13.

Respondent's records show in pertinent part that:

> Respondent expected all new hires to pass all operational tests, wear required personal protective equipment, demonstrate knowledge of Respondent's standards and safety rules. Complainant was aware of those expectations.[41]
>
> Respondent's Rules required employees to inspect passing trains; report and tag, spike, or provide protection on defective switches; and not wear rings in the field.[42]
>
> Rules violations must be entered into the database. Employees may elevate an OPT entry from his local supervisor through the Region Vice President.[43]
>
> Complainant had 26 passed and two failed OPTs.[44]

Nathaniel Edge testified at deposition in pertinent part that:[45]

> He was a trainmaster foreman and has supervised. No one asked him about disapproving Complainant's job application and he did not know Complainant was the individual who had injured his finger in the gate. He doesn't recall the OPTs he gave to Complainant. He has never heard of anyone making a tag to put on a switch. He wouldn't think wearing a wedding ring would alone be grounds for termination. He doesn't know of anyone without a failure.

Curtis Powell testified at deposition in pertinent part that:[46]

> He is a trainmaster. If he does an OPT that results in a failure, he documents it. The superintendent decides what to do about it. He administered the switch test that Complainant failed by not tagging it.

DISCUSSION

Liability

The parties agree that Complainant's report of his injury was a protected activity, that Respondent was aware of the protected activity and that the rejection of his probationary employment was an adverse action. Respondent maintains, however, that the protected activity did not contribute to the adverse action, and even if it did, the record establishes by clear and convincing evidence that it would have taken the same adverse action, even in the absence of the protected activity.

[41] CX-7; RX-2.
[42] CX-8-9; RX-5-7.
[43] RX-8-10; CX-10-11.
[44] CX-12; RX-11.
[45] CX-20.
[46] CX-21.

Contributing Factor

The relevant basic facts are clear. Complainant injured his hand and told his supervisors about it. They in turn called Kyle James and told him Complainant was working with his wedding ring on, had a problem, and asked to be taken to the hospital. Until he received that phone call, Kyle James had never had seen or spoken to Complainant and didn't know anything about him. He had never spoken with any of Complainant's supervisors or co-workers about Complainant and had no idea that Complainant had any prior failures. The phone call is what caused him to look at Complainant's record, learn about the prior test failures, and prompted him to disapprove Complainant's application. Given the cause-in-fact test that applies, the record clearly establishes that Complainant's report of his injury was a link in the chain of events that led to the decision to reject his application. It was therefore a contributing factor.

Respondent's Burden

Since Complainant was able to show that his protected activity contributed to the adverse action, in order to avoid liability, Respondent must show by clear and convincing evidence it would have taken the same adverse action in the absence of the protected activity. That means Respondent has to establish not that it might have, but that it would have still rejected Complainant's application, even if he had never reported his injury.

That might be more easily done if a clearly independent basis for the adverse action existed; for example, if a random drug test sample taken before the injury was subsequently reported to be positive. However, given the facts in this case it is virtually impossible for Respondent to show by clear and convincing evidence that, had Complainant never told anyone he was hurt, it would nonetheless have learned about the wedding ring, looked at his testing history, or terminated his probationary employment for that or any other reason.

There was some discussion about the first two failures and whether or not they were fairly charged to Complainant. I find that in both instances they were, given Respondent's rules and operational standards. Complainant was responsible for ensuring someone on his crew performed an inspection of the passing train. It wasn't done and he was held accountable in accordance with Respondent's policies. Similarly, a defective switch must not only be reported, but tagged or protected, and Complainant failed to do that. Finally, Complainant's failure to remove his ring was a clearly a third failure to follow Respondent's rules.

The central issue is whether Respondent would have taken the same action based on those three failures, without the report of an injury. That raises the immediate question of whether the three infractions would have ever even come to Kyle James' attention in the absence of the phone call advising him Complainant was being taking to the hospital. James suggested that he would have, if the first line supervisors had entered the ring infraction into the computer. However, the record is by no means clear that they would have (1) even noticed Complainant was wearing a ring if there had been no reported injury or (2) elected to input the infraction into the computer, rather than just reminding him to take the ring off.

Moreover, the most probative evidence is the email that James himself sent. It prominently includes, almost as a matter in aggravation, that Complainant was involved in a personal injury. The record does not show by clear and convincing evidence that James would have never heard about Complainant or his three infractions even in the absence of a report of injury.[47] That said, I also found both James and Stewart to be relatively credible witnesses and that the preponderance of the evidence is that had James only known of the three failures with no other information about a report of injury, he still would have rejected Complainant for continued employment. On the other hand, given the language in the email, I would not have found clear and convincing evidence of that hypothetical fact. [48]

Accordingly, I find that Respondent failed to carry its burden and the record shows that the adverse action was a factual and legal consequence of the protected activity.

Damages

Complainant seeks reinstatement with full pay back pay at a rate of $6,973.25 and all accrued benefits and seniority retroactive to 11 Jan 13, the date upon which he could have physically returned to work.[49] Complainant also argues that Respondent should expunge his record of any reference to his employment rejection and amend it to show he successfully completed his probationary period and has been in good standing since. Finally, Complainant seeks compensatory damages for mental and pain and suffering in an amount of $25,000 to $50,000 and punitive damages in the amount of $250,000.

Respondent opposes reinstatement, arguing that the high level of hostility between it and Complainant would make an employee-employer relationship impossible and that Complainant's inability to comply with safety rules would put his coworkers and the public at risk. Respondent also suggests that any back pay should be reduced for periods during which Complainant failed to mitigate his loss of pay and for the unemployment benefits he received, in addition to the wages he actually earned. Respondent maintains that the record is insufficient to establish Complainant's entitlement to either compensatory or punitive damages.

Reinstatement

Complainant is entitled to reinstatement unless Respondent can show by a preponderance of the evidence it would lead to a threat to safety or workplace unrest because of the high level of hostility. The record shows no angry exchanges, outspoken workplace complaints, threats, or anything else that would tend to indicate that reinstatement would result in workplace unrest. There was no testimony adduced that directly addressed whether bringing Complainant back would threaten the safety of the work place or the public. Instead, Respondent essentially argues that the passing train inspection, defective switch, and wedding ring infractions are sufficient to establish that reinstatement would endanger coworkers and the public. While I have found that

[47] In fact, the weight of the evidence is to the contrary.

[48] There was evidence offered relating to comparator employees as circumstantial evidence of what Respondent would have done in the absence of an injury report. Although it marginally may have corroborated James' testimony, given the circumstances of the case, it to be sufficiently probative to enable Respondent to meet the clear and convincing standard.

[49] Complainant concedes his back pay should be reduced by $6,599.63, which is the amount he earned in other employment.

all three failures were properly identified as such pursuant to Respondent's rules, given the circumstances of those infractions (the inspection failure was derivative; the switch was reported albeit not tagged; the wedding ring primarily endangered Complainant and appears to be a less aggravated problem), I do not find that Respondent was able to overcome the presumption of reinstatement by establishing the requisite exceptional circumstances by a preponderance of the evidence. Accordingly, Complainant is entitled to reinstatement.

Back Pay

Similarly, Respondent did not show that Complainant failed to mitigate his loss of pay. Complainant concedes he was injured and unable to return to work until 11 Jan 13 and does not seek back pay until that time. He started working for Federal Express 10 days later.

Both sides agree that Respondent may reduce the back pay by any amounts Complainant earned in the meantime, although they disagree on whether that should include unemployment benefits.[50] The parties stipulated that from 11 Jan 13 through the date of hearing, similarly situated switchmen were earning an average $6,973.25 per month. Complainant testified that he received $462.00 a week in unemployment from somewhere around the end of July 2012 to March of 2013.

Complainant is entitled to back pay from 11 Jan 13 to the time of reinstatement offer in the monthly amount of $6,973.25. However, that amount due shall be reduced by the stipulated amounts he earned from Federal Express and Home Depot.[51] It shall also be reduced by his earnings from G4 Compliance and Investigations[52] and his unemployment benefits.[53]

Records Correction

Respondent did not respond to Complainant's request for an order directing it to expunge and correct his records. Consequently, the request is granted and Respondent will be directed to expunge his record of any reference to his employment rejection and amend it to show he successfully completed his probationary period and has been in good standing since.

[50] I find it should. Although the parties discussed the collateral source rule in terms of tort cases, this is not a tort case and it is clear that the goal is to put the employee in the same position he would have enjoyed but for the adverse action, not to allow double recovery.
[51] Federal Express from 21 Jan 13 to 20 Feb 13 in the amount of $1,090.66. Home Depot from 21 Feb 13 to 14 Jun 13 in the amount of $5,580.97.
[52] From 17 Jun 13 through August 2013 in the amount of $7,014.95; and from 1 Sep 13 to reinstatement offer at a monthly rate of $2,805.98 (the same rate he earned from mid-June through August).
[53] From 1 Aug 12 to 1 Mar 13 in the amount of $13,806.00 (30 weeks @ $462.00 a week).

Compensatory Damages

Complainant did not allege that the adverse action had caused any physical distress that required medical attention or even professional counseling aside from his spiritual advisor. He and his spouse did credibly testify that the unexpected notice that he was not going to complete his probationary period and had been essentially fired caused a great deal of financial and emotional stress. Complainant seeks compensatory damages for mental and pain and suffering in an amount of $25,000 to $50,000 and Respondent answers that there is no real evidence of suffering that justifies an award of damages.

The absence of medical care or physical manifestations does not exclude the possibility of psychological stress and suffering. It would be the rare individual who could be suddenly fired and not feel any emotional distress. The record shows that Complainant suffered more than a transient moment of being upset. On the other hand, part of his period of unemployment (and related stress) was apparently due to his injury rather than his discharge. I find that $20,000 adequately compensates Complainant for his consequential emotional damages.

Punitive Damages

Punitive damages are appropriate if the record shows Respondent acted with callous disregard of Complainant's rights. I found the evidence that Respondent trains its managers to comply with the law relevant. I similarly found highly probative the specific concern expressed in the emails discussing whether or not Complainant's case was covered by the employee protection section of the FRSA. I did not find that language to be cynical or looking for a way to avoid the law. It appears that Respondent failed to appreciate the very broad interpretation applied to the language of the Act in order to make it very difficult from employers to defend themselves against complaints where there is a factual chain of causation. It appears Kyle James was very surprised to learn that what he had done could be considered retaliation against an employee for reporting an injury. This is not a case where an employer demonstrated an intent to discourage employees who exercise their rights. I do not find that punitive damages are appropriate.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that Respondent:

1. Offer reinstatement to Complainant to his former position without loss of benefits or other privileges, retroactive to 11 Jun 13.

2. Expunge Complainant's record of any reference to his employment rejection and amend it to show he successfully completed his probationary period and has been in good standing since.

3. Compensate Complainant for lost back pay consistent with this decision.

4. Pay Complainant $20,000 in compensatory damages.

5. Complainant's Counsel may file a petition for attorney fees and costs no later than 45 days after the receipt of this decision. Respondent shall file any objections within 30 days of receipt of said petition and Complainant's Counsel shall file any reply within 15 days of receipt of any objections.

ORDERED, this 12th day of March, 2014 in Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
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).

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, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *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.

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).