

**U.S. Department of Labor**

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**Issue Date: 15 August 2012**

**CASE NO.: 2010-FRS-00022**

**IN THE MATTER OF**

**MICHAEL JESSEN,  
Complainant**

**v.**

**BNSF RAILWAY COMPANY,  
Respondent**

**DECISION AND ORDER DISMISSING COMPLAINT**

This case arises under the “whistleblower” protection of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-432 (October 16, 2008). The FRSA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to their terms or conditions of employment.

Complainant has been employed by BNSF Railway since March 2006. On January 29, 2010, Complainant received a letter of discipline, allegedly related to his dispatcher training misconduct. Complainant avers the discipline was in retaliation for a safety hotline complaint made around the same time period, and filed a complaint with the Department of Labor alleging a violation of the FRSA.

A formal hearing was held in Dallas, Texas, from April 30 to May 2, 2012 where the Parties were afforded full opportunity to present testimony, submit documentary evidence, and submit post-hearing briefs. Complainant’s Exhibits (CX) 1-29 and Respondent’s Exhibits (RX) (A-D, F-I, K-Q, S-Y); (CC, DD, EE, GG, II, JJ, NN, PP, VV, WW, XX, YY, ZZ); and (CCC, FFF) were received into evidence. Complainant filed a post-hearing brief on July 31, 2012, and Respondent on August 3, 2012.

**ISSUE**

Was complainant disciplined because he engaged in activity protected under 49 U.S.C. § 20109?

## *Findings of Fact*

1. Respondent is a railway company engaged in commerce, operating in 28 states and Canada. (Tr. 202-203). Respondent is covered under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §2109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-432 (October 16, 2008).
2. I found Kevin Held, Robert Newlun, Donald Johnston, William Calvert, Dennis Mead, and Terry Smith to be credible witnesses.
3. Complainant began working for Respondent in 2006, and became a qualified dispatcher in 2008 in the Texas Division. After qualifying for all the jobs in the Texas zone, he was moved to train in the Springfield division.
4. Joe McCullough was Complainant’s trainer in the Springfield division. McCullough testified that Complainant felt he should not have to go to a new zone and learn different jobs.
5. On October 13, 2009, supervisor Chuck Fox stopped by the pod to discuss with Complainant how much chair time he had. Complainant was not in the pod. McCullough told Fox Complainant had little “chair time” training and was not bringing his headset to work.
6. On the morning of October 15, 2009, Fox stopped by the terminal to speak with McCullough about Complainant training in the chair. Fox then complained to supervisors Donald Johnston and Wade Calvert that Complainant was not training in a satisfactory manner. Fox stated he had a report from McCullough that Complainant was not training in a satisfactory manner; “he didn’t bring his headsets to the desk, he didn’t wear his headset if he did bring it, just didn’t appear to want to learn the job at that time.” Based on Complainant’s experience and days on the job, Johnston felt that Complainant was taking an excessive amount of time to qualify. Because of these concerns, Johnston performed operations tests on Complainant.
7. Later that morning, a train went into “emergency”, and Complainant was told to handle the situation while McCullough walked to the chief’s desk. Complainant did nothing, alleging he did not have enough information.
8. McCullough ran into Johnston at the chief’s desk and complained that Complainant did not want to work in the chair; Johnston stated he would go talk to him.
9. Johnston came to Complainant’s workstation to discuss the operations test and to speak with Complainant about “marking up,” or finishing his dispatcher training.<sup>1</sup> Complainant did not mention any train emergency or safety concerns to Johnston.

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<sup>1</sup> Complainant alleged in his testimony that Johnston was forcing him to qualify before he was ready. However, I found Johnston to be a more credible witness, and found that Johnston was just questioning the amount of time it was taking Complainant to train, and urging him to complete the process.

10. Robert Newlun reviewed the dispatcher tapes concerning the train emergency. Newlun determined that on October 15, 2009, the train that went into emergency had been pulling into a yard; the train was pulling to a stop and put it “in emergency,” which means that a train has applied their emergency breaks in a quick fashion. All of the air is let out of the break system to allow the train to stop. [McCullough] said something like “let me know if your air comes back up.” Because the train was moving slow, and it was a crew-induced stop, Newlun concluded that it was a non-serious event. At 10:05 the train went into emergency, and at 10:07 the train attempted to call the dispatcher and notify them that the air came back up; however, Newlun believed at that time McCullough had left the desk already to tell the chief dispatcher about the situation. No one else was on the radio to respond. He stated that three trains were on the territory, with the train in emergency obviously stopped. Also, the other two trains were stopped, which a dispatcher would know by looking at the screen and seeing red signals.

11. Based on Complainant’s experience, Newlun opined Complainant had enough information to handle the call. The situation was not unique to that particular territory, so Complainant had likely encountered it before. Moreover, he had sat in the seat earlier that morning, so he had knowledge of what was going on in the territory that day regarding other trains.

12. Newlun opined that Complainant did not err on the safe side in the situation; if he was concerned that the train emergency was serious, it would have been safer to get on the radio and call the field to find out the facts. Furthermore, if Complainant had looked at the screen, even if he did not listen to the radio, he would have been able to tell that the train was moving again.

13. Complainant testified that he walked over to the chief’s desk to try to get information about the train. Johnston saw the conversation going on and approached the chief’s desk. Johnston did not hear the conversation and did not hear anything about safety concerns. Complainant asked for a union representative, Kevin Held. Johnston agreed.

14. A meeting commenced between Complainant and Held. After allowing them to speak amongst themselves, Johnston joined the group, and then Calvert. Complainant’s training issues were discussed, but he never mentioned safety concerns to Johnston or Calvert. I find that Calvert and Johnston were unaware of any safety concerns. It is not clear the specific training instructions that Complainant was given, but I find that expectations to engage actively in training were clearly set, and Complainant was to report at the end of the day to Johnston.

15. T.D. Smith and Calvert then discussed dispatcher training and expectations with Held, and expressed frustration with employees abusing training time. Held mentioned no safety issues to Smith or Calvert, just shook his head and walked away.

16. Later that same day, Calvert called Darren Whitten, his counterpart in the Texas division where Complainant worked prior; Whitten relayed that they had similar problems with Complainant not engaging in the job. Johnston also spoke with two supervisors from the Texas division, Barry Anderson and Lance Wolfe, who stated Complainant would frequently leave his workstation.

17. Complainant's 2009 Performance Review while working the Texas zone stated that "[r]ule violation indicates loss of focus on rules . . . Repeated instances of absence from desk is indication of failure to understand requirement to remain at desk and attentive to job tasks."
18. Towards the end of the day Complainant requested that he be moved to another shift to enhance his training. Because this was the weekend and there would be little supervision, Calvert recommended to Smith that a camera be placed in Complainant's work station. Smith agreed. Cameras had been used in the past to observe employees' performances.
19. On Friday, October 16, and Saturday, October 17, 2009, Complainant was videotaped entering and exiting his work pod multiple times and having an excessive number of visitors.
20. On October 19, 2009, Complainant called the "Reportline", alleging he could not "mark up" safely with only 13 days of training, and that he believed reasonable bathroom breaks should be given. He was concerned about having to handle the train emergency on his own; he felt it was a safety concern.
21. That same day, Calvert reviewed the video footage, and along with Smith, decided a formal investigation was warranted. On or before October 20, 2009, Calvert notified dispatching practices and rules to launch a formal investigation. Johnston took no part in deciding to place cameras on or investigate Complainant.
22. On October 23, 2009, Complainant received a letter notifying him of an investigation and requesting his attendance at a meeting on October 26, 2009, for alleged incidents on October 16 and 17, 2009.
23. That same day, Johnston, Calvert, and Smith were notified Complainant had called the safety hotline, through anti-retaliation letters or e-mails. They did not receive transcripts of the call, so they did not know the content. This was the first time they had knowledge a hotline call or any type of safety complaint had been made.
24. On December 1, 2009, Courtney Johnson, Human Resources, sent a letter to Complainant to notify him the investigation for his internal complaints filed on October 19, 2009, and October 31, 2009 was complete. The investigation yielded insufficient information to substantiate Complainant's allegations of harassment.
25. Dennis Mead conducted Complainant's formal investigation. He found a conduct rule violation, a violation of compliance with instructions, and a violation of the dispatcher conduct expectations. When Mead recommended discipline for Complainant, he was unaware of any hotline call. He did not investigate any safety complaints, and based his discipline solely on Complainant's non-compliance with instructions on the video recorded dates.
26. On January 29, 2009, Complainant received a letter informing him that as a result of his internal investigation, a thirty day level "S" Record Suspension was issued.
27. On March 24, 2010, OSHA determined there was no reasonable cause to believe Respondent violated FRSA, but that Complainant was in violation of several company rules.

## *Testimony*

### **Complainant**

Complainant began working for Employer (BNSF) in March 2006 as a conductor and was later promoted to dispatcher. (Tr. 110). He worked initially in the Texas zone but was transferred to the Southeast zone in the Springfield Division. (Tr. 111-112).

On October 15, 2009, Complainant was training with McCullough. The shift began around 7:00 a.m., and Complainant was sitting in the dispatcher's chair while McCullough was up "wandering around." He sat in the chair for a couple of hours that morning, and McCullough was in shouting distance the whole time, available to assist Complainant. However, a written job transfer did not occur. (Tr. 113-114; 149, 152-153).

Complainant took a break for a drink and came back to find McCullough cussing into the phone; he told Complainant to take over. Complainant surmised from McCullough's words that a train had gone into emergency; he sat in the chair but did nothing. (Tr. 114-115; 157-159). He testified that he did not want to start giving people signals and hitting buttons when there was a potential emergency; he could not act on incomplete information. (Tr. 116; 160).

Johnston entered the Memphis terminal position to discuss an operations test with Complainant. Complainant stated he may not have been wearing his headset at the time. (Tr. 116; 160, 164). Johnston wanted Complainant to work the rest of the shift himself; Complainant, however, did not feel safe to "mark up." He felt that he needed to see more traffic prior to taking responsibility. (Tr. 117; 144-145). Complainant asked Johnson for a job transfer or job briefing, but was told he did not need one because he was a qualified dispatcher, and "don't go down that road with me." (Tr. 167). Johnson told him to come by at the end of the day and tell him if he was ready to qualify for the position. (Tr. 174).

Complainant then went to the chief dispatcher's desk to ascertain information on the train emergency, and McCullough just shrugged his shoulders; he refused to return to the desk to work the job with Complainant. (Tr. 118). At that point Complainant told Johnston, in front of Sandy Horner and McCullough, that he wanted a proper transfer and to speak with a union representative. (Tr. 119).

Complainant told Kevin Held, the union representative, that he was not given the information when he asked for it, and how no proper job transfer occurred. (Tr. 120). They first spoke alone, then Johnston joined the conversation. Calvert, the corridor superintendent, walked by, and said Complainant should not be "force qualified."<sup>2</sup> (Tr. 120-121). Complainant called the hotline on Monday before anyone had spoken with him "about an allegation or instructions or discipline or anything like that." He testified that he had no issues prior to raising safety concerns in the October 15, 2009 meeting. (Tr. 121). Complainant stated the accident occurred on his 13th day at the Memphis terminal position, not the 14th day as Respondent's records reflected. (Tr. 126-127).

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<sup>2</sup> Force qualify appears to mean that a dispatcher in training becomes a qualified dispatcher before he is ready, by order of a supervisor.

Complainant's 2009 Performance Review while working the Texas zone stated that "[r]ule violation indicates loss of focus on rules . . . Repeated instances of absence from desk is indication of failure to understand requirement to remain at desk and attentive to job tasks." (CX-5, p. 3; Tr. 138-139).

On October 23, 2009, Complainant was asked to go to the manager of dispatching practices, and given a notice of investigation alleging misconduct on October 16 & 17, 2009. (Tr. 189). In November 2009, Complainant notified OSHA about Employer's actions. (Tr. 124). On January 29, 2010, Complainant received a discipline letter for "S" discipline. (Tr. 195). He lost two days of pay during his investigation, at \$305.91/day. (Tr. 196).

### **Joseph McCullough**

Joe McCullough was deposed by the parties on August 5, 2010. (CX-25). He is a dispatcher for the Memphis terminal. (CX-25, p. 4). McCullough stated he never complained about Complainant, but would tell supervisors when asked. (CX-25, p. 71). On October 13, 2009, Greg Fox stopped by the pod to discuss with Complainant how much chair time he had had, but Complainant was not there. McCullough told Fox Complainant had had no chair time that day because he did not want any and had not brought his headset. (CX-25, p. 72).

On October 15, 2009, Fox stopped by again and spoke with McCullough about Complainant training in the chair; McCullough relayed the information to Complainant, who sat in the chair and put his headset on. (CX-25, p. 10). He stated Complainant got up and left, then he had to take a call about a train in emergency. When Complainant returned to the pod, McCullough told Complainant to take over, but Complainant said no. (CX-25, p. 11). He told Complainant "this guy said emergency air application. If you want to take the call and work it, I'll go tell the chief." McCullough left for the chief's desk. (CX-25, p. 17).

At the chief's desk, McCullough spoke with Johnston about Complainant not wanting to work in the pod. (CX-25, p. 18). Johnston told McCullough to go sit at the chief's desk while Complainant worked the job. (CX-25, p. 19). Johnston said he was going to talk to Complainant. (CX-25, p. 20). "He had told [Complainant] he expected him to be over in the chair in the position working and if he needed help, said he would get it for him. Said I would be there in and out." (CX-25, p. 21).

McCullough testified that a job transfer and briefings are not required in the middle of shifts. (CX-25, p. 25). He stated that when Complainant came over to the chief's desk, Complainant said something like he needed a transfer and a union representative; he asked for information about the train emergency once, but did not wait around for an answer from McCullough. Complainant did not state why he needed a union representative. (CX-25, p. 29, 50-51).

McCullough testified that on the first day he trained with Complainant, "[Complainant] felt like he shouldn't have to be over here. He learned all the positions on his zone. He shouldn't feel like he should have to go to a zone and learn different jobs." (CX-25, p. 29).

## **Kevin Held**

Kevin Held testified at the formal hearing. He was a union representative for the ATDA union on October 15, 2009, but is no longer a representative. (Tr. 44). Held stated he was called by Complainant to discuss Johnston's instructions that McCullough sit at the chief's desk while Complainant worked the Memphis terminal. (Tr. 44-45).

Held was told Complainant "didn't like the fact that Mr. McCullough wasn't in the pod, there had been a train in emergency and that [Complainant] didn't know the specifics and that when he asked Mr. Johnston about the specifics he was ridiculed." (Tr. 55-56). Held talked to Complainant alone prior to speaking with Johnston and Calvert. (Tr. 52). He testified that there were no instructions given to Complainant during the meeting on October 15, 2009, between Complainant, Held, Johnston, and Calvert. (Tr. 57). Calvert also testified that no instructions were given in his presence, but Johnston stated there had been. (Tr. 62). Held told Johnston that McCullough should sit with Complainant so Complainant could refer to him if he had any questions. (Tr. 74).

On cross-examination, Held testified that if a qualified dispatcher was training on the job and a train went into emergency, they should know how to handle it. (Tr. 91).

Held recalled that either Johnston or Calvert or both felt that Complainant was not participating in the training process the way they wanted him to; however, there were no instructions given on how he was to go forward with training. (Tr. 93). "[B]asically expectations that they would like, you know, to see from [Complainant]." (Tr. 94).

Held also talked to Smith, who was concerned about Complainant "basically screwing off and not participating in training." (Tr. 97). Held stated that Johnston's statement about "getting in the chair" and "taking control of the territory" probably meant sitting down as the trainee, performing dispatching duties, but under the initials of the trainer. (Tr. 99-100).

## **Robert Newlun**

Robert Newlun began working for Respondent in 1979. (Tr. 202-20). He has been senior manager of dispatching practices and rules for about eight years; he watches over new hire dispatchers, the hiring process, the training process, and the hires' progress. (Tr. 203). He explained that dispatchers report to chief dispatchers who report to the assistant corridor superintendent, who reports to the general superintendent of transportation. (Tr. 206). A radio system is used for dispatchers to communicate signals to the train crews; they wear headsets to hear. (Tr. 211). "The train dispatcher has to know the General Code of Operating Rules, the train dispatcher control operator and operator's manual, the maintenance-of-way operating rules, the air brake and train handling rules, system special instructions, the hazardous material instructions, the employee safety rule book." The rules establish employee expectations. (Tr. 212; RX-A, RX-B, & RX-CCC).

A majority of the dispatchers are in Forth Worth, where the network operations center (NOC) is located. (Tr. 217). The formal investigations process for dispatchers is an agreement between the company and the union, with established guidelines. (Tr. 224; RX-D, p. 30). Incidents are categorized as minor mistakes, standard infractions, or serious infractions. Minor infractions, such as transposing numbers, will require discipline, coaching, and counseling, if it is the first infraction in 18 months. A standard infraction, for example, could be not delivering a speed restriction to the train crew. The dispatcher may receive alternative discipline, which is retraining, and they are paid at 80 percent of the dispatcher rate. A dispatcher is allowed up to two alternative discipline options in an 18 month period; after 2, they go directly to the formal investigations process. (Tr. 227-228). Serious infractions, such as track damage, injury, or close calls go directly to the formal investigation process. Newlun testified that “conduct” falls under serious violations, and then explained the procedural process of the investigation, including the appeals process. (Tr. 228-231; RX-D).

Newlun explained that PEPA (policy for employee accountability) was in effect during fall 2009, and it ensures that the company is consistent with its disciplinary procedures. A level “S” is considered a serious rule violation, and includes a thirty day record suspension with a three year review period. (Tr. 232-233; RX-C). A record suspension goes on the employee’s personal record, but they do not serve the time or lose the pay. (Tr. 234). Some violations, such as personal conduct offenses, are not eligible for alternative discipline. (Tr. 236; RX-F).

When an already-qualified dispatcher is training for another job, generally the training period will last three to ten days.<sup>3</sup> (Tr. 238).

Newlun explained that the disciplinary procedures for attendance and operating rule violations are separate from each other. (Tr. 239). He testified that Complainant’s name “came across my desk in July of 2009 for a rule violation that he had,” prior to the situation in October 2009. (Tr. 240).

Newlun testified that “[f]ailure to comply with instructions is a serious violation . . . the next step was to issue an investigation notice . . . a notice of formal investigation.” (Tr. 244-245, 297; RX-M). After the initial report, Newlun stated the company had five days to issue an investigation notice. On October 23, 2009, the notice of formal investigation was issued to Complainant. (Tr. 246, 292; RX-N; RX-O). It listed the dates of issue as October 16, 2009, and October 17, 2009. (Tr. 332). The company and the union then postponed the formal investigation to allow for preparation, and the notice of postponement was provided to Complainant. (Tr. 247; RX-P; RX-Q).

A formal investigation was held on January 7, 2010. (Tr. 247; RX-Q). Complainant received a three-year probation period; he was not eligible for the one-year probation because of

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<sup>3</sup> Newlun later clarified that there is not a set number of days for a qualified dispatcher to train, but three to ten days is the guideline for a journeyman train dispatcher. “There are no written guidelines, but they use the established guidelines for any journeyman train dispatcher as a rule of thumb, a guideline.” (Tr. 311). Nevertheless, RX-DD states that 5-20 days will be allowed, but there are no set standards, more will be allowed if the chief approves it. (Tr. 312).

his July 2009 rule violation. (Tr. 249; RX-G). He and the union appealed the disciplinary decision. (Tr. 252; RX-T; RX-U; RX-V; RX-W; RX-X).

Newlun gave an example of another employee who exhibited similar behavior and was similarly disciplined. (Tr. 255).

Newlun testified that he became aware Complainant made a hotline complaint when he was told verbally by Courtney Johnson, in human resources. She requested he look into the situation, so he listened to the recordings of the dispatcher's transmissions and transactions. (Tr. 259-260). However, he was never provided with details of Complainant's actual hotline complaint. "It's privileged information." (Tr. 263).

Newlun determined that on October 15, 2009, the train that went into emergency had been pulling into a yard; the train was pulling to a stop and put it "in emergency," which means that a train has applied their emergency breaks in a quick fashion. (Tr. 264). All of the air is let out of the break system to allow the train to stop. [McCullough] said something like "let me know if your air comes back up." Because the train was moving slow, and it was a crew-induced stop, Newlun concluded that it was a non-serious event. (Tr. 265). At 10:05 the train went into emergency, and at 10:07 the train attempted to call the dispatcher and notify them that the air came back up; however, Newlun believed at that time McCullough had left the desk already to tell the chief dispatcher about the situation. No one else was on the radio to respond. He stated that three trains were on the territory, with the train in emergency obviously stopped. Also, the other two trains were stopped, which a dispatcher would know by looking at the screen and seeing red signals. (Tr. 266-267).

Complainant was qualified to handle emergency events, and that information was provided to Ms. Johnson. (Tr. 267; RX-DD; RX-GG). However, after Newlun listened to the recordings, he determined this was not an emergency event, so the guidelines for handling it did not apply. Complainant had attended a job safety briefing the morning of October 15, 2009. (Tr. 268).

Newlun testified that when a train goes into emergency, one of the dispatcher's duties is to see if there is an adjacent track which other trains may pass on. (Tr. 272). Based on Complainant's experience, he opined Complainant had enough information to handle the call. (Tr. 274). "He could have easily sat in the chair and started gathering information or answering any questions that he had." The situation was not unique to that particular territory, so Complainant had likely encountered it before. Moreover, he had sat in the seat earlier that morning, so he had knowledge of what was going on in the territory that day regarding other trains. (Tr. 275). Newlun felt Complainant had an adequate job briefing because McCullough had told him there was a train in emergency, and there were only three trains he was dealing with that day.

Newlun opined that Complainant's alleged lack of information was not a safety issue because the situation was not a real emergency. (Tr. 277-278). Moreover, it was not a safety issue to have him sitting in a chair as part of his training in the Memphis position. (Tr. 278). He testified that when a trainer is leaving for a little bit and asking the trainee to work the desk, a

change in the dispatcher of record is not required. Furthermore, it is not an uncommon occurrence or a rules violation. (Tr. 279-280).

Newlun testified that Complainant's hotline complaint and subsequent e-mails played no role in his decision to recommend discipline for Complainant. (Tr. 282-283). The triggering event which called for investigation was the day that Complainant was monitored on video leaving his workstation excessively. (Tr. 293-295)

He testified that a 60 minute break is on the high end for someone to take, but there are no set break times for dispatchers, noting that they should use good judgment. (Tr. 285; RX-FFF, p. 3).

Newlun admitted that one way Complainant could receive information about the train in emergency was to go to the chief's desk. (Tr. 300-301). He also answered that although trains go "into emergency" daily, it is an undesired application of the breaks. (Tr. 303). He stated that any dispatcher may request to replay the tapes in order to determine what happened in any particular situation. (Tr. 307).

Newlun opined that Complainant did not err on the safe side in the situation; if he was concerned that the train emergency was serious, it would have been safer to get on the radio and call the field to find out the facts. (Tr. 342). Furthermore, if Complainant had looked at the screen, even if he did not listen to the radio, he would have been able to tell that the train was moving again. (Tr. 345-346).

### **Donald Johnston**

Donald Johnston testified at the formal hearing; he began working for Respondent in 1972 as a clerk operator. (Tr. 353). He also served as a dispatcher, took a crew manager's position, manager of dispatcher practices and rules, assistant manager of dispatcher training, then became chief dispatcher II in 1997, his current position. His title is assistant corridor superintendent for the Springfield division; he executes the transportation service plan, and reports to Jeff Beck, the corridor superintendent for the Springfield division. Beck in turn reports to Smith, general superintendent for the central region. In fall 2009, he reported to Calvert, who held Beck's position at the time. (Tr. 354-355).

Johnston testified that while a dispatcher is training, you would expect them to listen to the radio even if not actually working the desk. (Tr. 356). He stated that training time varies based on experience and the frequency the dispatcher trains. (Tr. 357).

Johnston first learned of Complainant on October 15, 2009, when Fox informed him and Calvert that he had a report from McCullough that Complainant was not training in a satisfactory manner; "he didn't bring his headsets to the desk, he didn't wear his headset if he did bring it, just didn't appear to want to learn the job at that time." (Tr. 358). Based on Complainant's experience and days on the job, Johnston felt that Complainant was taking an excessive amount of time to qualify. (Tr. 358-359).

Johnston testified that Complainant sat in the chair for a couple of hours that morning, because he performed operations tests with him. (Tr. 359-360; RX-H, p. 3). Complainant failed one operations test that day, but that did not mean he was not ready to qualify. (Tr. 362). Johnston discussed the results of the tests with Complainant, asked him if he was ready to mark up, and indicated that he should hasten his training. (Tr. 363). Complainant complained about others taking that long to train, and Johnston stated “let’s don’t go down that road, I’m not here to talk about anybody else.” He testified that he did not tell Complainant he was force qualifying him, and had never even heard of the term “force qualify.” (Tr. 364).

Johnston stated that performing the functions of a dispatcher while training means to get in the chair, issue authorities, take up authorities, lining, switching, signals, “doing everything that a dispatcher does.” (Tr. 365-366). It does not mean, however, becoming the dispatcher of record. Complainant did not ask Johnston for a job briefing or job transfer; he did not mention safety concerns regarding McCullough. (Tr. 366). He did not tell Johnston that a train went into emergency, or that he did not have enough information to handle the call. (Tr. 367).

After Johnston spoke with Complainant, he went to the chief dispatcher’s desk with chief dispatcher Fox, dispatcher McCullough, and dispatcher Sandy Horner. He witnessed Complaint asking questions to McCullough, and when he approached Complainant, Complainant indicated he wanted a union representative. (Tr. 369). Johnston heard nothing about Complainant’s safety concerns.

Complainant went to get Held, and Johnston allowed them some time to speak before he approached. Next, Calvert joined the discussion, but no safety concerns had been mentioned at that point or anything about a train emergency; they had only discussed sitting in the chair while training. (Tr. 371-372). When Calvert joined, he reiterated the instructions Johnston gave to Complainant at the work station, about being more active in his training process. (Tr. 373). Neither Held nor Complainant mentioned anything about Complainant having to do something unsafe.

After the discussion, Calvert and Johnston walked back to the chief’s desk, and Smith was in the area. They informed Smith of the conversation and instructions given to Complainant on the training position. Smith spoke with Held about the training expectations. Complainant did speak to Johnston at the end of the day. (Tr. 375). He relayed he was not ready to mark up, and wanted to work a different shift with more train traffic; Johnston testified he did not tell anyone Complainant was ready to mark up. (Tr. 376). Complainant never indicated to Johnston any safety concerns, or mentioned anything about calling the hotline. (Tr. 377).

On that same day, Johnston spoke with Lance Wolfe, chief dispatcher II on the Texas division, and Barry Anderson, also a chief dispatcher; Johnston spoke with the two separately. They both indicated Complainant would frequently absent himself from the work station. Johnston testified he was not involved in the decision to place cameras on Complainant; he did not review the video. (Tr. 378). He was not involved in issuing a notice of investigation, but was a witness in the investigation. He was not involved in any decision to discipline Complainant. He learned Complainant had called the hotline when he received an anti-retaliation letter on October 23, 2009 from Human Resources, via e-mail. (Tr. 379; RX-EE). He

testified that he never saw a transcript of Complainant's hotline call, or knew Complainant sent a subsequent e-mail to human resources regarding Johnston's harassment. He was not involved in Complainant's end of the year performance review for 2009, or took any retaliation against him for his safety complaints. (Tr. 380).

On cross-examination, Johnston testified it was his understanding that Complainant was upset about his training, not the fact that he did not have enough information about the train emergency or not receiving a transfer. (Tr. 429).

### **William Calvert**

Calvert testified at the formal hearing. (Tr. 438). He works for Respondent, currently as superintendent of service excellence. In October 2009, Calvert served as corridor superintendent for the Springfield division; he was responsible for the operations within the NOC for the Springfield division. (Tr. 439). He reported to Smith. Calvert stated he first learned about the issues with Complainant on October 15, 2009, when Fox approached him and Johnston. (Tr. 440). He asked Johnston to investigate a couple of things, especially because McCullough had raised the issue and was a man of integrity and "takes care of business." (Tr. 441).

He joined the conversation between Complainant, Held, and Johnston, and thought it probably had something to do with the training issue. (Tr. 442). When he approached, the group was discussing the number of jobs Complainant would have to learn. (Tr. 443). He told Complainant the expectations were for him to "remain in the pod, actively engage in the training process . . ." They discussed Complainant reporting to Johnston at the end of the day to determine if he was ready to mark up. (Tr. 444). No safety issues or the train in emergency was discussed. (Tr. 445).

Shortly after that conversation concluded, Calvert brought Smith "up to speed" on what was going on. Smith was upset. (Tr. 446). Smith and Calvert then discussed dispatcher training and expectations with Held, who mentioned no safety issues. (Tr. 447). Later that day, Calvert talked to Darren Whitten, his counterpart in the Texas division; Whitten relayed that they had had similar problems with Complainant.

Calvert testified that he recommended to Smith a camera be placed in Complainant's work station. (Tr. 448). Complainant had been moved to another shift to enhance his training, as requested. He felt that based on the complaints concerning Complainant, a camera would be a good idea. Calvert testified that he has used cameras on employees in the past. (Tr. 449). A camera recorded October 16 and 17, and Calvert reviewed the footage on October 19, 2009, his next scheduled workday. (Tr. 451). He observed Complainant entering and exhibiting the pod on various occasions, practicing his golf swing, and tossing paper in the air; he also had a lot of visitors. Calvert discussed with Smith what he observed, and they agreed the footage was enough to warrant a formal investigation. (Tr. 452).

Calvert went to the manager of dispatching practices and rules, either October 19 or 20, and told them he wanted to issue a formal notice of investigation; someone in the office prepared the notice. (Tr. 453). Calvert had prepared a summary of what he saw in the video from October

16, 2009. (Tr. 454-455; RX-K). He also concluded that Complainant indicated on the turnover sheet that he left at 22:50, when in fact he left the pod at 22:38. (Tr. 459-461; RX-WW).

Calvert testified he learned about Complainant's hotline call possibly from Smith, and from a letter on October 23, 2009; he never saw or reviewed the transcript of the call. (Tr. 463). He testified to having no knowledge of this call when he directed cameras placed on Complainant, or when he requested a notice of investigation be issued. (Tr. 464). The hotline complaint played no role in his decision to formally investigate Complainant. Moreover, he was aware of no safety concerns or issues of Complainant. (Tr. 465).

On cross-examination, Calvert testified that after receiving the anti-retaliation letter, he did not order the investigation to stop because he thought there was no correlation between the two events. (Tr. 469-471). Calvert testified that he was not disciplining Complainant on October 15, 2009. (Tr. 490). He did not recall what instructions Johnston gave Complainant in their meeting that day. (Tr. 500).

Calvert stated that McCullough was removed from the work station while Complainant was working the job, and this was ordered by Johnston without his approval. However, he stated that a job transfer would not be necessary for him to take over the position at that time. (Tr. 501). "[T]he expectations are that [Complainant]'s in that work station, paying attention to what's going on, taking notes, wearing his headset, possibly working the job. The expectations are he knows what's going on as well as the dispatcher." (Tr. 503).

## **Dennis Mead**

Dennis Mead testified at the formal hearing. (Tr. 509). He is director of transportation process for Respondent, and reports to David Rogerson, general director of transportation support. He stated that he never was in Smith's reporting line. (Tr. 510). He was the conducting officer of Complainant's investigation; his job is to ensure that the process is carried on within the terms of the collective bargaining agreement. After the formal investigation, he looks at the transcript and exhibits and determines whether the charges are substantiated. (Tr. 512). He determined there was a violation as charged, and it was a level "S" or serious violation. Mead found a conduct rule violation, a violation of compliance with instructions, and a violation of the rule telling dispatchers how to handle themselves. (Tr. 513-514; RX-S).

Mead testified that at the time he recommended discipline, he was not aware of Complainant's hotline calls. (Tr. 516). He stated that he did not allow Complainant to testify about any safety complaints during the investigation, because the investigation was about his non-compliance with instructions on two specific dates. He did not consider any safety complaints in his decision. (Tr. 516). He stated that the discipline Complainant received is consistent with other employees who engaged in similar conduct. (Tr. 517).

On cross-examination, Mead testified that he based the discipline on Calvert and Johnston's instructions to Complainant on October 15, 2009, which Complainant failed to comply with during the following two days, evidenced on video. (Tr. 519).

## **T.D. Smith**

Terry D. Smith testified at the formal hearing. (Tr. 524). He has worked for Respondent for 34 years, and became a manager in 1992. Currently, he is general superintendent of transportation for the central region, and has been since May 2005. (Tr. 525). He testified that a qualified dispatcher with more than a year's experience would not have thought the "train emergency" on October 15, 2009 was a serious safety concern. If it had been serious, the train crew would have dialed 9-1-1 on their radio tone pad, which sends a call to the train dispatcher, and it starts a yellow strobe light at the pod's location, along with "a very irritating noise." (Tr. 530). This was not the case on October 15, 2009.

Smith stated he saw Calvert and recognized Johnston meeting with some individuals; Calvert told him a training issue was going on. At that time, Smith did not know who Complainant was. (Tr. 531). He stated that he "perched near the Nebraska corridor superintendent's pod and basically just watched what was going on. I watched the conversation." (Tr. 532). After about 10 minutes, the meeting broke up, and Johnston and Calvert informed him that Complainant was not training proactively. Smith "asked them clearly if the expectations were set, if there was any doubt in his mind what was expected of him going forward, and I was assured that he knew very well what was expected." (Tr. 532). Smith was not aware a train was in emergency, and was not aware of any safety concerns. (Tr. 533).

Smith approached Held following the meeting, and discussed employees abusing training and how he was upset about people not taking their training time seriously. (Tr. 534). He stated Held "basically shook his head and walked off", but he had no reason to believe Held did not understand what he was saying. Held did not mention any safety concerns or safety rule violations. (Tr. 536).

Later that day, Calvert told Smith that Darren Whitten in the Texas division stated they had experienced the same issues with Complainant. They agreed to move Complainant to a second shift so he could see more trains; Calvert asked for authority to have the security cameras on Complainant. Smith stated he got permission, and then told Calvert it was okay to use the cameras. (Tr. 537-538).

After Calvert reviewed the security footage on October 19, 2009, he relayed what he had seen to Smith. (Tr. 538). He agreed that there was enough evidence to proceed with a formal investigation and Calvert decided to issue the notice of investigation that day. (Tr. 539). Smith stated that it is not unusual the notice of investigation is not issued the same day dispatching practices and rules is notified of an incident. (Tr. 540).

Smith testified that he received an anti-retaliation letter on what he assumed was November 17, 2009, per the date on the letter. (Tr. 541; RX-YY). He felt the charges of failure to comply with instructions from the October 15, 2009 meeting were proven. (Tr. 541-542). Smith believed that a serious violation occurred, which carried a penalty of a 30-day records suspension and a level "S" three-year probation. He solicited the opinion of the conducting officer, Dennis Mead, in coming to that conclusion. (Tr. 543). He also requested that Dan Bodeman give his opinion, along with Bob Newlun and Dave Rogerson; they all came back to

him with the same conclusion. Smith gave his overview to Jeff Wright, his direct boss. (Tr. 544).

Smith stated that it did not matter what Complainant was doing during the times he left his work station. “I just could tell by the times he had came and went . . . just the sheer number of times he was in and out of the pod, that he was not actively engaged in training. (Tr. 545). He had no knowledge Complainant raised a safety concern on October 15th. He became aware of the hotline call when Courtney Johnson sent him an e-mail on October 23, 2009. (Tr. 545-546). Prior to that e-mail, he had not heard any of Complainant’s safety concerns; he has never read the hotline call transcript. He testified that it played no role in his investigation of Complainant. (Tr. 547).

Smith testified he received an e-mail regarding the hotline call on October 23, 2009, but received the anti-retaliation letter on November 17, 2009. (Tr. 556).

### **LAW AND CONTENTIONS**

Congress enacted the FRSA to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 29 U.S.C.A. §20101. The FRSA states in pertinent part:

A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an office 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--

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes any violation of any Federal law, rule, or regulation relating to railroad safety or security . . .

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security.

§20109(a)(1). Additionally, Subsection (b) relates to hazardous safety or security conditions, and states that an employer shall not “discharge, demote, suspend, reprimand, or in any other way discriminate” for, *inter alia*, the good faith reporting of a hazardous safety or security condition, or refusing to work when confronted with a hazardous safety or security condition related to the performance of duties. §20109(b).

The whistleblower provision incorporates procedures established by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C.A. §42121(b); 49

U.S.C.A. §20109(d)(2)(A); *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB February 29, 2012). Thus, an FRSA complainant must establish by a preponderance of the evidence<sup>4</sup> that: 1) he engaged in protected activity; 2) the employee knew of the protected activity; 3) he suffered an unfavorable personnel action; and 4) the protected activity was a contributing factor in the personnel action. §42121(B)(2)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op at 3 (ARB June 29, 2007); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012). If the complainant meets his burden of proof, the employer may avoid liability by proving, through clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv); *DeFrancesco*, ARB No. 10-114, slip op. at 5.

### **A. Unfavorable Personnel Action**

The statute provides that an employer may not “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee.” 49 U.S.C.A. §20109(a). As one element to his claim, Complainant must prove that he suffered an unfavorable personnel action under the FRSA. I find that Complainant's thirty day level “S” Record suspension constitutes an unfavorable personnel action.

### **B. Protected Activity**

As part of Complainant's prima facie case, he must prove by a preponderance of the evidence that he engaged in statutorily defined “protected activity.” Protected activity may include providing information regarding conduct which the employee *reasonably* believes constitutes a violation of railroad safety or security, reporting a hazardous safety or security condition, or refusing to work when confronted with a hazardous safety or security condition. 49 U.S.C.A. §20109(a)-(b).

Complainant argues he engaged in protected activity on October 15, 2009, when he asked Johnston “to speak with a union representative to discuss concerns he had.”<sup>5</sup> Complainant allegedly had some safety concerns regarding the train in emergency and having to work the desk while McCullough sat at the chief's desk. Pursuant to Section 20109, protected activity may constitute the reporting of a hazardous safety condition. However, I find that Complainant never brought up any safety concerns during the meeting which occurred between himself, Johnston, Calvert, and the union representative, Kevin Held.

While Held testified that Complainant was concerned about the train in emergency, based on the testimony these concerns were never told to Complainant's supervisors. Held recalled that Johnston and Calvert felt Complainant was not participating in the training process, but Held never stated that any safety concerns were brought up during the meeting. Additionally,

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<sup>4</sup> This standard has been defined as “superior evidentiary weight.” *DeFrancesco*, ARB No. 10-114, slip op. at 5, citing *Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006).

<sup>5</sup> Complainant's Post-Hearing Brief, p. 7.

Johnston and Calvert testified that no safety concerns were mentioned during the meeting, and Complainant never mentioned the train in emergency or his alleged lack of information needed to handle the situation. Thus, if no safety concerns were reported to the Johnston or Calvert, or later to Smith, no protected activity occurred on October 15, 2009.

Furthermore, Complainant did not engage in protected activity on October 19, 2009, when he called the safety hotline, alleging he was not adequately trained to handle the situation that day, that he wanted his trainer in the pod with him, and that he was refused a job briefing. Based on the testimony of the witnesses in this case and the accompanying record, I find that no reasonable safety concerns existed. First, multiple witnesses explained that a train goes into “emergency” frequently, but it is usually not a safety concern. It happens at multiple locations daily, and someone with Complainant’s experience should have known how to handle the situation, whether he was qualified for that particular region or not. Specifically, Newlun went over the tapes from the train emergency on October 15, 2009. He found that the train went into emergency at 10:05 that morning, but a mere two minutes later the air came back up. No one was on the radio to answer the call, however. Complainant had refused to participate in his dispatching duties. Newlun testified that Complainant would have seen that the train was running again by simply looking at the screen; there were only three trains in his area that day. Moreover, if Complainant truly had a safety concern about acting on this train emergency, all he had to do was get on his radio, call out to the field, and find out the facts. Thus, I do not find it reasonable for Complainant to believe his alleged lack of information about the train in emergency was a safety concern.

I also find it unreasonable for Complainant to believe being left alone without his trainer in the pod was a safety concern. There are no rules that a trainee may not work the desk without direct supervision. By Complainant’s own testimony, McCullough had been in and out all morning, but within shouting distance the whole time and available to assist Complainant. Moreover, a change in the dispatcher of record is not required if someone is leaving the pod in the middle of a shift. Complainant also had an issue that he was not given a job briefing before McCullough left the desk that morning. McCullough testified that job briefings are not required in the middle of shifts. Additionally, it has been established that if Complainant had used his dispatcher knowledge he could have ascertained what occurred with the train in emergency, and did not need to be told any additional information. “[T]he expectations are that [Complainant]’s in that work station, paying attention to what’s going on, taking notes, wearing his headset, possibly working the job. The expectations are he knows what’s going on as well as the dispatcher.” (Tr. 503). I do not find Complainant’s testimony truthful that he had a safety concern when he called the hotline. Accordingly, there were no reasonable safety concerns and no protected activity occurred on October 19, 2009.

In addition to finding no protected activity, I also find that the decisionmakers had no knowledge of the alleged protected activity, as explained *infra*. Therefore, even if protected activity existed, it could not have been a contributing factor to Complainant’s discipline.

### **C. Knowledge and Contributing Factor**

Generally, the complainant must establish that the decisionmakers who subjected him to the adverse action, rather than his employer as an entity, were aware of the protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006). Additionally, and related, a complainant must show that the protected activity was a contributing factor in the decision to discipline. A “contributing factor” has been interpreted as “any factor which, alone, or in combination with other factors, tends to affect in any way the outcome of the decision.” *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006). This may be established by direct evidence or indirectly by circumstantial evidence. *DeFrancesco*, ARB No. 10-114, slip op. at 7, citing *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011).

Here, Complainant has the burden of showing that Calvert and Smith knew about his hotline call on October 19, 2009, prior to making the decision to monitor and investigate Complainant, and that the knowledge contributed to his discipline. It was Calvert who recommended to Smith a camera be placed on Complainant, after calling Complainant’s prior supervisor from the Texas Division. Smith approved the idea. Thereafter, the camera was placed on Complainant, recording his activities in the pod on October 16 and 17. Thus, the decisionmakers did not have knowledge of Complainant’s hotline call prior to placing cameras in his workstation.

Furthermore, Complainant has failed to show that his decisionmakers had knowledge of his hotline call prior to issuing the notice of investigation. On October 23, 2009, Complainant received his letter notifying him of an investigation regarding October 16 & 17. It was on or before October 20, 2009 that Calvert notified dispatching practices and rules of Complainant’s potential rule violation. Calvert received his anti-retaliation letter on October 23; he had no knowledge of the hotline call when he directed cameras placed on Complainant or when he decided to initiate formal investigation proceedings. He never reviewed the transcript of the hotline call; thus, he had no knowledge of its contents. Smith received an e-mail notifying him of the hotline call on October 23, 2009, and received his anti-retaliation letter on November 17, 2009. I find neither Smith nor Calvert was aware of protected activity when they issued a notice of investigation.

Because I find that Smith and Calvert had no knowledge of the hotline call prior to monitoring and investigating Complainant, the protected activity cannot be a contributing factor in the decision to discipline. Furthermore, Mead conducted the investigation and assigned discipline without knowing Complainant ever made a hotline call or had safety complaints. Temporal proximity existed between Complainant’s hotline call and the formal investigation. However, timing is insufficient to prove a contributing factor when a respondent puts forth legitimate reasons for discipline. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 5 (ARB Apr. 28, 2006). Respondent proffered legitimate reasons for disciplining Complainant beginning on October 13, 2009, when McCullough complained to Fox, days prior to the hotline call. Once cameras were placed on Complainant and the footage was reviewed, Complainant was seen exiting his workstation 16 times on October 16 and 14 times on October 17. He had 20 visits on October 16 and 18 visits on October 17. Additionally,

Complainant was seen exiting his job prior to the time he officially indicated on his job transfer. Thus, Respondent put forth plausible, consistent evidence that Complainant's training behaviors were the reason for the investigation and his discipline.

#### **D. Employer's Burden**

If a complainant meets his burden, an employer may avoid liability by proving through clear and convincing evidence they would have taken the personnel action remote from the protected activity. Had Complainant met that burden here, which I found he did not, Respondent more than satisfied their burden.

The testimony and record in this case demonstrate clearly that Complainant engaged in conduct which warranted the suspension he was given, as discussed *supra*. Convincingly, the formal investigation was lead by Mead, who had no knowledge that Complainant called the hotline. The investigation was limited to Complainant's training, and not related to his alleged safety complaints or hotline call. Independent of the hotline call, Mead would have arrived at the same disciplinary conclusion. Accordingly, I find that Respondent would have taken the same personnel action despite any possible protected activity.

#### **SUMMARY**

Complainant failed to prove by a preponderance of the evidence that Respondent engaged in retaliation under the FRSA. In addition to failing to show protected activity, there is no evidence that his decisionmakers had knowledge of that activity, and thus the protected activity was not a contributing factor to his discipline.

#### **ORDER**

For the foregoing reasons, Complainant has failed to prove he was retaliated against pursuant to the Federal Railway Safety Act, and his complaint is hereby DISMISSED.

**SO ORDERED.**

**A**

**LARRY W. PRICE**  
**Administrative Law Judge**

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**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 for Occupational Safety and Health. *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).

