

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 11 September 2015**

**CASE NOS.: 2014-FRS-00020  
2014-FRS-00021**

**IN THE MATTER OF:**

**NICHOLAS AYMOND and**

**TIMOTHY MARTINO**

**Complainants**

**v.**

**NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)**

**Respondent**

**APPEARANCES:**

William C. Tucker, Esq.  
For the Complainant

Robert D. Corl, Esq.  
For the Respondent

**BEFORE: LEE J. ROMERO, JR.**  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (herein "the FRSA" or "the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

## I. PROCEDURAL BACKGROUND

Complainants, Nicholas Aymond and Timothy K. Martino, filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor on July 9, 2013, alleging that on or about April 24, 2013, National Railroad Passenger Corporation ("Amtrak" or "Respondent") violated Section 20109 of the FRSA by treating Complainants disparately in retaliation for reporting occupational injuries. (ALJX-1).

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on October 25, 2013. OSHA determined that the evidence developed during the investigation was not sufficient to support the finding of a violation. (ALJX-1).

On November 4, 2013, Complainants filed their objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). (ALJX-2).

A de novo hearing was held in Covington, Louisiana on September 9, 2014. Complainants offered 14 exhibits, and Respondent proffered 14 exhibits, which were admitted into evidence, along with 7 Administrative Law Judge exhibits. The parties also entered into formal stipulations. Thereafter, Complainants submitted CX-Q, which was received into evidence on November 24, 2014. This decision is based upon a full consideration of the entire record.<sup>1</sup>

Post-hearing briefs were received from Complainant and Respondent on May 11 and 12, 2015, respectively. On May 11, 2015, Complainants also submitted an amended brief. The undersigned issued an order closing the record on April 16, 2015. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Complainant's Exhibits: CX-\_\_\_\_; Respondent's Exhibits: RX-\_\_\_\_; and Administrative Law Judge Exhibits: ALJX-\_\_\_\_.

## II. STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find:

1. At all times material, Complainant Aymond worked as a locomotive electrician, and Complainant Martino worked as a sheet metal repairman and pipefitter for the National Railroad Passenger Corporation (Amtrak). (ALJX-1, p. 2).
2. At all times material, the National Railroad Passenger Corporation (Amtrak) was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. (Tr. 18; ALJX-1, p. 1).
3. At all times material, Respondent was engaged in interstate commerce within the meaning of 49 U.S.C. §§ 20109. (ALJX-1, p. 1).
4. On February 8, 2013, Complainants were passengers in an Amtrak truck driven by Gilbert Isaac, which was en route from Atlanta to New Orleans following overtime work performed for Amtrak in Atlanta. (Tr. 18-19; ALJX-1, p. 2).
5. Complainants were involved in an accident and sustained injuries during their car ride from Atlanta to New Orleans on February 8, 2013, when Derrick Francisco, another motorist, ran a red light and struck their vehicle. (Tr. 18-19; ALJX-1, p. 2).
6. Complainants were on duty at the time of the accident, and they both reported their injuries to Amtrak. (Tr. 19; ALJX-1, p. 2).
7. Complainants both received medical attention following the accident, and they were taken off of regular-duty work by their doctors. (Tr. 19-20; ALJX-1, p. 2).
8. Complainants both engaged in protected activity under the Act, and Respondent had knowledge of such protected activity. (Tr. 20).

9. Complainants timely filed their complaints with OSHA on July 9, 2013. (ALJX-1, p. 1).

### **III. ISSUES**

1. Did Complainants suffer any adverse, unfavorable action:

a. (1) when Complainant Martino was denied a waiver of Amtrak's lien on his insurance claim as an alleged result of his reporting an injury;

b. (2) when an Amtrak supervisor allegedly made intimidating/threatening comments regarding the reporting of Complainants' injuries;

c. (3) when Complainant Aymond was placed on a light-duty, off-site assignment as an alleged result of his reporting an injury; and

d. (4) when Complainants and Amtrak co-workers lost their overtime Atlanta work allegedly due to Complainant's reporting of injuries?

2. Were Complainants' protected activities contributing factors in the alleged adverse, unfavorable personnel actions?

3. If Complainants meet their burdens of entitlement to relief, has Respondent established, by clear and convincing evidence, that it would have taken the same action absent the alleged protected activities?

### **IV. APPLICABLE PROVISIONS OF THE FRSA**

Complainants allege that Respondent violated the Federal Railroad Safety Act. The applicable provisions are as follows:

(a) In General-A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such

discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-

. . .

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee

49 U.S.C. §§ 20109(a) (3) & (a) (4) (2008).

## **V. SUMMARY OF THE EVIDENCE**

### **Testimonial Evidence**

#### **Nicholas Aymond**

Aymond is 28 years old, and he was hired by Amtrak in September 2011. He has been employed by Amtrak for three years, and he works as an electrician. (Tr. 32-33). Aymond had performed the overtime work in Atlanta two times prior to his accident. (Tr. 33).

Aymond testified that it was assumed he would get the overtime work in the future, which brought in an extra \$2,500 for his family. (Tr. 33-34). The overtime work was performed on tracks that ran from New York through Washington, Atlanta, and Birmingham, and ending in New Orleans. (Tr. 34). Aymond stated that the tracks were shut down for maintenance, and the train was returned to Atlanta, instead of New Orleans. (Tr. 34-36). Approximately ten Amtrak employees went on each trip to Atlanta to perform the overtime work, each holding different positions and bearing different responsibilities. (Tr. 36-37). Aymond felt that this was a "big job," which included watering the train and turning it around on the track. (Tr. 37-38). The work performed took at least six hours, and the workers would be on call thereafter to take care of issues that arose. (Tr. 38-39).

Aymond verified that his injury occurred on the job, and that it was not a "frolic and detour" excursion. (Tr. 40). Aymond testified that he was proud of the work he did, and that he got along with the other Amtrak employees. (Tr. 40-41). Aymond performed the overtime work in Atlanta two times in 2013. (Tr. 41).

Aymond was in an Amtrak vehicle when he sustained his injuries. This was not the normal way that Amtrak employees came to and from the Atlanta site, but because the train coming into the Atlanta station was 10-12 hours late, Aymond proceeded to New Orleans in an Amtrak vehicle that needed to be returned to the city. (Tr. 41).

In recalling the accident of February 8, 2013, Aymond testified that Derick Francisco hit the Amtrak truck "on the rear driver tire" because he ran a red light. Gilbert Isaac was the driver of the Amtrak vehicle, who was free of fault in the crash. Timothy Martino was also injured in the accident. (Tr. 42). The location of the accident was close to the travelers' destination. (Tr. 42-43).

After the accident, Aymond reported his injuries and sought medical treatment. Aymond gave his injury report to Forrest Walters at the site of the crash who was the general foreman who was on duty at the time. (Tr. 43). A general foreman is "between a foreman and an assistant superintendent." The chain of command in New Orleans was "Mr. Isaac, Mr. Walters, [and] Mr. Delgado." Raul Delgado was the assistant superintendent. (Tr. 44). The accident report was prepared on February 11, 2013. (Tr. 45; CX-E). The investigation team who reviewed the accident was Forrest Walters, Mark Wohlers, and Raul Delgado. The reviewer of the investigation was "Tommy" Farr. (Tr. 45).

After the accident, Aymond alleges he began losing time at work. He lost ten weeks of work before he could be released to light duty. At the first opportunity he could after his doctor's release, Aymond went on light duty in compliance with his doctor's orders and because he needed a paycheck to support his family. Aymond needed another month of work before he could be eligible for railroad retirement and supplemental sickness benefits. (Tr. 46). As a result, he had no income for a total of ten weeks before he went on light duty. The light duty program Aymond returned to, Right Care Day One, afforded him the opportunity to make his regular salary while performing less strenuous work. Aymond performed light duty work from April

2013 to September 2013. In September 2013, Aymond was released to full duty. (Tr. 47).

Aymond testified that he had heard rumors about himself while he was on leave, which made him feel like he would lose work because he reported his injury. (Tr. 48-49). Raul Delgado allegedly stated that the overtime work would be lost due to the accident. The rumor that the work was going to be lost to Sanford, Florida employees surfaced later. (Tr. 48). He felt bad about the effects which lost overtime and income would have on his co-workers. (Tr. 49). Aymond heard these rumors from other co-workers, including Tim Martino and Paul Dupre, who in turn heard it from Delgado. Aymond stated that he had liked working for Amtrak. (Tr. 50).

Through the Right Care Day One program, Aymond was handing out brochures and flyers, giving people information of the events in the New Orleans Jazz National Park. (Tr. 50).

Paul Dupre is the safety facilitator for the "Safe-2-Safer" program that "Amtrak implemented for employees to safely observe at-risk behaviors without liability of being punished." (Tr. 51). Aymond was assigned to work with Paul Dupre in the "Safe-2-Safer" program. (Tr. 52).

After working light-duty in the "Safe-2-Safer" program for three weeks, Aymond was asked to leave and "removed" from the Amtrak property. Loretta Burton called Paul Dupre to "remove" Aymond from the property because Tommy Farr was not happy he was on-site. Aymond was not to participate in Right Care Day One on the property. (Tr. 52). Aymond felt embarrassed and humiliated when he was asked to leave, and he believed it was related to his reporting of injuries. (Tr. 53).

Aymond went back to work in September 2013 when he was released to full-duty. Aymond continued hearing rumors about Delgado's "retaliatory statement." (Tr. 53). Amtrak eventually told employees that the overtime work was contracted out. (Tr. 54).

Shortly after the accident, Aymond made his own claim against driver Derick Francisco with State Farm. Francisco's "minimal" policy limits were "15/30." Aymond's medical treatment as a result of the accident came to a total of \$13,222.87, a fact to which the parties stipulated. (Tr. 54-55). Aymond has his own personal uninsured/underinsured motorist policy. (Tr. 55).

Aymond was present at Patty Hebert's deposition, and "[she] hear[d] what Raul [Delgado] said." Aymond would have continued to go to Atlanta in the future, if the work were available. (Tr. 58). Upon learning that Amtrak would not waive its subrogation lien, Aymond felt defeated. (Tr. 59).

On cross-examination, Aymond confirmed he was injured in New Orleans, but the overtime work took place in Atlanta. Aymond admitted that no one overtly kept him from trying to report his injuries, but "hav[ing] to fill out paperwork" regarding the injury was a dissuasion from doing so. (Tr. 61). No one ever confronted Aymond or told him he would be disciplined for reporting an injury. Aymond agreed the "Safe-2-Safer" program existed to promote safety through non-punitive means. (Tr. 62-63). He was also aware that railroad managers were no longer evaluated based on the injuries reported to them. (Tr. 63).

Delgado never directly told Aymond that losing the overtime was his fault. Aymond was not promised overtime when he was hired by Amtrak. All employees were deprived of the overtime opportunity due to the decision to contract out the work. Aymond did not get to participate in the overtime work in 2012 because he was a new employee on six-month probation. (Tr. 64).

Aymond heard that Amtrak had contracted out the overtime work in December 2013 from an official Amtrak announcement. Prior to that, Aymond's suspicions were all based on rumors through what he heard from other Amtrak employees. The rumors began at a meeting with John Meyer and Willie McKenzie. (Tr. 65). Aymond recalled, however, that Meyer testified he did not remember Delgado making any comments. (Tr. 68).

Aymond did not know of the internal policy that light-duty workers were not allowed on site, but he was aware that the reason for the separation of the light-duty and regular-duty workers was for morale purposes. (Tr. 68).

### **Willie McKenzie**

McKenzie has worked for Amtrak in New Orleans as an electrician for 17 years. He has taken part in the Atlanta overtime work and would like to again in the future. (Tr. 70-71). The overtime work amounted to an extra \$2,500. McKenzie "enjoyed" the work he did. Aymond's description of the overtime work was accurate. (Tr. 71).

McKenzie heard about Aymond and Martino's car accident when he returned to work the next day. (Tr. 71). Initially, he had only heard "that the wreck had happened." McKenzie also testified that Delgado stated the Atlanta work would be revoked due to the accident. (Tr. 72). During an "International Brotherhood of Electrical Workers" meeting, McKenzie stated Raul Delgado said, "'You can pretty much scratch off ever going back to Atlanta because of this wreck.'" (Tr. 73).

McKenzie explained the Amtrak workers' sentiments about Raul Delgado. McKenzie stated that "Raul liked for people to feel guilty," and that "anything he could do to put a black eye on Martino, he would do." (Tr. 73). McKenzie also testified he did not think that Delgado said this to dissuade the reporting of accidents, and that "maybe it was something he wanted to get done and didn't want to get the blame for." Rumors circulated around the railroad. (Tr. 74).

McKenzie stated that Meyer and Delgado were "pretty tight," which is why Meyer would not recall Delgado making the comment regarding the overtime being taken away due to the accident. Rumors were present saying the overtime work was taken away because of Aymond and Martino, but McKenzie was not sure which ones were serious and which were not. McKenzie stated Delgado accomplished taking the focus off himself and placing it onto Aymond and Martino. (Tr. 75).

McKenzie stated that other employees on light-duty in the Right Care Day One program were also asked to leave the Amtrak property, such as Herbert Broussard. (Tr. 76). The supposed "morale" reasons for removing light-duty employees depended on "which side of the fence you were on." He stated, "Would you rather see the people there helping out [on-site] or have them go down to the French Quarter passing out flyers." (Tr. 77).

On cross-examination, McKenzie testified the workers took turns taking the overtime work. (Tr. 78). When asked "what happened to Delgado," McKenzie said he was escorted off the property by Amtrak police, and it was unlikely he retired because he was not given a cake and told goodbye. (Tr. 80).

McKenzie was asked about his statement that the light-duty program was more of a Tommy Farr policy rather than an Amtrak policy. He was further asked to certify that it was applied uniformly. McKenzie replied that he had seen "managers there with boots on where they can't walk, but they got to work."

McKenzie stated the managers were all performing normal duty. (Tr. 81).

Upon questioning by the undersigned, McKenzie stated the comment by Delgado about overtime being taken away due to the wreck was made a day or two after the accident during the union meeting between McKenzie, Delgado, and Meyer. (Tr. 82). That occasion was the only occasion McKenzie heard Delgado make a comment to that nature. Aymond was not the only employee who was escorted off the property because of light-duty work. (Tr. 83). McKenzie had not heard any rumors about contracting the Atlanta work prior to Delgado's comment. (Tr. 86). He had never heard rumors about Florida employees doing the Atlanta work. (Tr. 87).

### **Timothy K. Martino**

Tim Martino is 57 years old and has been with Amtrak since 1984. (Tr. 88). He was injured on February 8, 2013. (Tr. 89). Specifically, Martino was a sheet metal worker, and he held a local chairman position with the union. (Tr. 88-89). He was in charge of setting up and staffing the overtime boards and the Atlanta work. (Tr. 90). Martino had participated in the 2013 Atlanta work two times, and he planned on going back in the future. Martino has a family with four children. (Tr. 91).

While in Atlanta, Martino stated that everyone works together on the job because the work is less "craft-sensitive." (Tr. 92). Martino is proud of the work he does. (Tr. 93).

The accident report from the February 8, 2013 car wreck stated "Contract servicing train in Atlanta to a vendor to eliminate liability of transporting employees." (Tr. 94; CX-F). Martino had not heard that statement prior to reading it on the accident report. He had heard a rumor from Raul Delgado that the work would be contracted out, which is what the statement from the accident report reflected. (Tr. 94).

Directly after the accident, Martino went back to Amtrak to get the paperwork to report his injuries. He then went to the emergency room. While in the ER, he was told he would not be able to work. Martino thought it was odd that they had to go "back to the yard" first before seeking medical treatment. (Tr. 95-96). The ER found Martino had a "pulled neck," and instructed him not to work. (Tr. 96).

After the initial ER visit and the Mardi Gras holiday, Martino returned to the doctor and was placed on leave. (Tr. 97-98). He then brought his medical paperwork back to Amtrak, but Delgado was not there. Instead, Martino spoke with Patty Hebert, an Amtrak secretary, the "boss behind the boss." (Tr. 98). After realizing that Delgado was not there, Martino went downstairs where he was confronted by a co-worker. Martino testified that he was told, "Thanks a lot dummy." Martino was blamed for "getting hurt" and causing the Amtrak employees to lose the Atlanta overtime work. Martino was also told that he was responsible for "taking the food out of [their] families' mouths." (Tr. 99). Martino felt that these statements were "not surprising," and he felt "bad" about this. (Tr. 100).

Delgado "[had] it in for [Martino]." Delgado and Martino had "locked horns" in the past because Martino was a union representative. Martino went to Amtrak shortly after the accident to give Hebert the paperwork as "a courtesy," but he was confronted by Delgado, who told him he was "'not supposed to be [there].'" Martino knew that was the type of reception he would get from Delgado. Hebert told Delgado, "'You can't just run him off.'" (Tr. 101).

Martino did not hear Delgado "make the statement out of his mouth," but he heard rumors about himself from other co-workers. Specifically, he heard rumors from McKenzie, Hebert, and "a list of people that [he] could go down in his head." (Tr. 102). Martino returned to work on April 15, 2013. When he returned, he heard the story about "Raul's statements." (Tr. 103).

Martino would have anticipated going back to Atlanta, had it not been for Delgado's statements. Martino was aware Francisco had a 15/30 insurance policy limit. Martino's lien was \$5,613.48, and Martino had a \$25,000 underinsured motorist policy with Allstate. Martino had not been paid because "[it was] in limbo with all of this." (Tr. 105).

Martino made efforts to find out whether or not the rumors and threats about losing the overtime work were true. (Tr. 106). Martino found out on December 6, 2013, via email from Amtrak personnel that the Atlanta work would be performed through contractors. (Tr. 111; CX-N). While discussing the cost savings report contained in the email to support Amtrak's release of Amtrak employees from the overtime work, Martino felt that the numbers representing overtime work for employees were inflated, making the contract look more attractive. (Tr. 112-113). Martino stated that the report for Amtrak employees added

extra benefits; the calculations for the contract were for five people, instead of ten; an allocation of \$900 for meals for contractors was understated; and the hotel allocations for contractors were understated. (Tr. 113-116). Martino felt that Amtrak would be spending more money to contract out the work. (Tr. 115).

When asked about the rumors he had heard from his co-workers regarding his involvement in the loss of the overtime work, Martino stated that the tone of his peers was "joking with an underlying disappointment[.]" These remarks and subtle grudges continued for about a year. (Tr. 116). Martino expressed his concern for Aymond's future; he felt Aymond was "demonized," which was upsetting because he had his whole career ahead of him. (Tr. 117).

On cross-examination, Martino would not concede that the chart prepared could not be analyzed because it only reflected the end results, and the numbers that led to the calculations were not provided. (Tr. 120).

On re-direct examination, Martino confirmed that the spreadsheet reflecting Amtrak employee versus contract figures came from Tommy Farr. (Tr. 121).

On re-cross examination, Martino stated that he felt dissuaded by Forrest Walters to report the accident. In particular, it was Forrest Walters's body language that discouraged him from doing so. (Tr. 121-122, 123). Martino felt his medical treatment had not been prompt. Martino had never been "brought up on charges" due to the accident. (Tr. 122).

When Martino returned to Amtrak on April 15, 2013, almost every co-worker he had contact with informed him of the rumor. (Tr. 123). Martino admitted the rumor originally was that the overtime work was going to go to Sanford Amtrak employees. Martino could not remember why he changed his allegation from the OSHA complaint which claimed the work was going to Sanford employees to the work going to contractors. (Tr. 125). Martino stated that no manager had said anything directly to him regarding his fault in the loss of the overtime work. Martino was aware that Amtrak managers are not evaluated based on the number of injuries reported to them. (Tr. 126). He did not believe that Farr had a vendetta against him. (Tr. 126-127). When asked what motivation Farr would have to "fudge" the numbers on the Amtrak versus contractor comparison, Martino

stated he had been around the railroad for 30 years and had dealt with Tommy Farr and his management. (Tr. 127).

Martino could not remember if he was promised overtime when he was hired. (Tr. 127). However, there was an expectation to be able to do the overtime work. (Tr. 127-128). Martino conceded that the impact of contracting out the overtime work was felt by all employees. (Tr. 128).

### **Paul Joseph Dupre**

Dupre testified at the formal hearing and is a Safe-2-Safer safety facilitator at Amtrak in charge of maintaining safety and avoiding accidents and injuries. He knew Aymond, Martino, Delgado, Forrest, and "all the people we've been talking about." He was also a coach cleaner, hired by Amtrak in 2000. He was then made "car man" in 2004, followed by facilitator in 2013. (Tr. 146-147).

Prior to his involvement as director, it had been commonplace for light-duty employees who had been injured to do tasks on the property. There was no light duty performed in the mechanical department, but departments such as transportation, onboard service, and clerical had light-duty workers. Dupre had just begun his work with the Safe-2-Safer program when Aymond and Martino were injured. (Tr. 148).

There was discussion on the shop floor that Delgado had made comments that the overtime work would be lost because of Aymond and Martino's injuries. Dupre never heard Delgado say it himself. He was aware that Hebert and McKenzie heard the rumor from their depositions. (Tr. 149).

Aymond "wasn't having a very good time with [his light-duty work,]" so Dupre offered Aymond work in the office on Amtrak property. (Tr. 149-150). Nafeesah McKenith approved the switch, and Aymond would be on the property, but isolated from mechanical doing tasks in the office. The new assignment for Aymond "went well." (Tr. 150). Aymond was helpful in producing the first training manual that was to be published, and he was doing "good things" for Amtrak. It did not appear his presence was hurting morale, and it did seem the new assignment was helping his morale. (Tr. 151).

Dupre received a phone call from McKenith, stating that the matter was urgent. He returned the call, and she notified him that Aymond was no longer allowed to work in the office. As a

result, Aymond was removed from the office, not forcefully, and he was instructed not to show up again on the property and told to make arrangements for work elsewhere. (Tr. 151).

Clark Whitehead and Clifton Tacke were mechanical department employees. In the past, Whitehead had done light duty work in the yard. (Tr. 152). The Safe-2-Safer program began in New Orleans in late 2009. (Tr. 153).

Aymond was devastated he was shifted back off property. Dupre spoke to Farr personally about Aymond, and Farr explained "that it was not what he had intended for mechanical employees to be doing." Dupre then stated, "I believe in conversation if it wasn't through him, but from someone else that he didn't want it perceived as an opportunity for another employee to take a fall and then have bankers' hours, sitting behind a desk, punching keys." (Tr. 153).

Dupre did not agree with every management decision Delgado made. "Some were good experiences, often times they were not." It appeared that Delgado could be vindictive. The rumor that Delgado made a statement about Aymond and Martino causing the loss of the overtime work due to their injuries was not surprising to Dupre. (Tr. 154).

On cross-examination, Dupre recalled that injury-reporting was not a part of the evaluation of management due to the Safe-2-Safer program. (Tr. 155). Harassment and intimidation would not be tolerated. These changes were implemented in 2009, and Aymond and Martino were injured in 2013. It was his opinion that the safety program had been effective, although "it's taken some time." (Tr. 156).

Dupre had been afforded multiple opportunities to perform the overtime work in Atlanta. (Tr. 156). He performed the overtime work five or six times. Dupre had been involved as facilitator of the Safe-2-Safer program for two years. (Tr. 157). In his opinion, he has noticed a change since 2009 for the better, and managers had not been trying to create a chilling effect on reporting injuries any longer. He would attribute the change to the Safe-2-Safer program. (Tr. 158).

On re-direct examination, Dupre conceded that, for many years, Amtrak did measure safety performance of its managers by injury ratios. Safe-2-Safer was brought on to change the incentive of intimidating the reporting of injuries. (Tr. 160). Pervasive retaliation, however, was a part of the "world that

Raul Delgado and Forrest Walters and others of that age grew up in[.]” It was hard to break old managers of that mindset. (Tr. 161). Delgado’s behavior would fall in line with the old form of retaliation. (Tr. 161).

On re-cross examination, Dupre agreed that by January 2010, managers no longer had an incentive to make disciplinary charges based on injuries due to the Safe-2-Safer program. (Tr. 162). However, what happens on paper and what happens on the property were two different things. (Tr. 162-163). In regards to the present claim, Dupre stated, “[W]hatever said, whatever was done, it was done. In some way, shape, or form, that’s why we’re here.” Although no one charged or counseled Aymond and Martino, the rumor was “their way of lashing out in a Safe-2-Safer world.” (Tr. 163).

Upon questioning by the undersigned, Dupre confirmed that he never actually heard Delgado make a comment about the contracting out of the overtime work due to Aymond and Martino’s injuries. He heard rumors and hearsay. On a whole, things had gotten better at Amtrak because of the Safe-2-Safer program, but he could not speak for all managers. (Tr. 164).

A bulletin posted by Amtrak stated that Delgado had resigned, but there were other stories as to why he was no longer with Amtrak. (Tr. 165).

Upon recalling the witness, Counsel on direct asked whether Dupre recalled a conversation about Aymond with Delgado about his future on the railroad and his associations with Martino. Delgado advised that Aymond should not associate with Martino, as it would not help his future aspirations. This was after the February 8, 2013 accident. (Tr. 166).

Upon questioning by the undersigned, Dupre felt that Delgado said this because of Delgado’s personality conflicts with Martino. Dupre could not say whether the personality conflicts or the conversation was due to the injuries. (Tr. 167).

### **Paul Carver**

Paul Carver has been with Amtrak for 20 years, and he is currently the Assistant Superintendent for mechanical operations in New Orleans. His current work location is the New Orleans Mechanical Facility. Forrest Walters was his predecessor. (Tr. 174). Carver testified that the dynamics surrounding the

reporting of injuries have changed since around 2005 or 2006. (Tr. 174-175).

He was taught that under the FRSA, if an injury was reported, there would be no retaliation allowed. (Tr. 175). If a manager does retaliate, his punishment could be up to and including termination. (Tr. 176).

He was aware of Amtrak's accident-reporting policy, 3.11.5. That policy provides an employee hotline for reporting violations. In addition, the Amtrak ethics policy has similar provisions. In general, since 2007, the Amtrak policy has been to report all injuries. (Tr. 176).

On cross-examination, Carver testified he had not reviewed anything in anticipation of the hearing, and he was aware of the dispute involved in the hearing. (Tr. 177).

When asked about Delgado's alleged statement that the Atlanta overtime work was contracted out due to Aymond and Martino's accident and injuries, and whether that statement would be retaliatory under the FRSA, Carver replied that it would not be retaliatory in his opinion. He thought telling an employee not to report his injury was retaliatory, however. "It depend[ed]" whether an individual on light duty in the Right Care Day One program got to work on the property. (Tr. 179). If it were "permissible[,]" it would be allowed. (Tr. 180).

Carver had been a manager for 13 years, and he had never been graded on injury reporting rations. (Tr. 180). Other managers may have been graded in that manner. (Tr. 181). Others at Amtrak had told Carver that Delgado was vindictive, retaliatory, and abrasive. Delgado was "old school[.]" (Tr. 181).

Carver agreed it was a "fireable offense" to make a false statement about official Amtrak business. He was aware Hebert and McKenzie deposed that Delgado made allegedly retaliatory statements in May 2014. He was also aware that neither of them had been charged by Amtrak with making a false statement. (Tr. 182).

Upon questioning by the undersigned, Carver stated he was not employed in New Orleans when Delgado's employment ceased. Carver began employment in February 2014. Delgado was terminated before the overtime contracting work began. (Tr. 183).

## Other Evidence<sup>2</sup>

### U.S. Department of Labor, Occupational Safety & Health Administration Secretary's Findings and Subsequent Request for Hearing

On October 25, 2013, the Occupational Safety & Health Administration ("OSHA") completed its investigation of the above-referenced complaint, filed on July 9, 2013. OSHA found there was no reasonable cause to believe Respondent violated the FRSA, and issued its findings. (ALJX-1; RX-A).

It was found that Respondent was a railroad carrier within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102, and Complainants were employees within the meaning of 49 U.S.C. § 20109. OSHA's accounting of the facts indicate that Complainants alleged that Respondent cancelled or reassigned future Atlanta locomotive "turning" jobs from New Orleans-based employees to Sanford, Florida-based employees because they reported their injuries from the February 8, 2013 accident. Complainant Aymond also alleged he was assigned light-duty work off-site, and then prohibited from being allowed to accompany a co-worker conducting "safety workarounds." He was directed to return to the off-site location to perform his light-duty work. Complainant Martino alleged Respondent refused to waive their lien on his insurance payment from State Farm because he filed an FRSA complaint with OSHA. (ALJX-1; RX-A).

As to the last allegation of protected activity, OSHA found that Respondent's refusal to waive the lien was not considered protected activity, but rather a right of subrogation the Respondent may invoke. An unfavorable personnel action must have a tangible or material impact on the compensation, terms, conditions, benefits, or privileges of employment. (ALJX-1; RX-A).

OSHA also determined that the evidence demonstrated there was a contractor under consideration, and Respondent had been in negotiations about taking over the "turning of the trains" in various locations. OSHA found that using this contractor rather than Respondent's employees would save Respondent approximately \$100,000.00 per trip. Respondent claimed expenses associated

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<sup>2</sup> Any objections made through separate court filings or during formal hearing that were not previously ruled on, will be considered in summarizing the evidence and the weight I give to it thereafter. Separate rulings on each objection will not be made. See e.g., (Tr. 138-144).

with sending nine employees and one manager for a four-week period cost \$139,491.43, while having a contractor costs \$40,620.00. The contractor under consideration confirmed they have been in negotiations with Respondent for several years about the taking over "turning of trains" in various locations. The contractor also confirmed they operated at a lower cost relative to Respondent's employee-related expenses to do the same job. Thus, OSHA found the decision to eliminate New Orleans employees from the Atlanta assignment was made as a cost-savings measure at several locations and affected all employees, including those who had not reported an occupational injury. The complaint was dismissed. (ALJX-1; RX-A).

On November 4, 2013, Complainants objected to OSHA's findings, and requested a hearing before an Administrative Law Judge. (ALJX-2). The cases for Complainants were consolidated, a Notice of Hearing and Pre-Hearing Order was issued by the undersigned on November 18, 2013. (ALJX-3). Complainants filed their Formal Complaint on December 19, 2013. (ALJX-4). Respondent filed its Answer on January 17, 2014. (ALJX-5). A Joint Motion to Continue Hearing and Extend Deadline for Discovery was issued on March 6, 2014. (ALJX-6).

#### **Deposition of Melvin "Tommy" Farr, Dated March 11, 2014**

The deposition of Melvin Farr was taken by the parties on March 11, 2014. Farr goes by the name "Tommy." (CX-A, p. 4; RX-L, p. 4). Farr had been working for Amtrak for 32 years, and he had reached retirement. (CX-A, p. 5; RX-L, p. 5). Farr was the Master Mechanic for the Southern Division, and he had held that position since 2003. (CX-A, p. 6; RX-L, p. 6).

Farr's working relationship with Martino was "pretty good." He had never met Aymond, however. (CX-A, p. 7; RX-L, p. 7). Farr was familiar with the allegations Complainants made in their claim. Exhibit 1 to the deposition was a document that described the work done in Atlanta and the turning of the trains. (CX-A, p. 8; RX-L, p. 8). Farr was unaware of any meeting that was held by Delgado in which he informed complainants that the Atlanta work was to be given to Sanford employees. To his recollection, the only mention of Sanford employees ever taking over that work was when Amtrak had difficulty "a couple of years ago" with getting New Orleans employees to go perform the overtime. (CX-A, p. 10; RX-L, p. 10).

Discussions of contracting out the overtime work began in approximately 2010. (CX-A, pp. 11, 13; RX-L, pp. 11, 13). Exhibit 2 of Farr's deposition reflects the dates and the contractor with whom Amtrak began negotiating. (CX-A, pp. 11-12; RX-L, pp. 11-12). Contracting the work out was cheaper than transporting Amtrak employees, feeding, and housing them for the work. "It had nothing to do with anything but budgets and money." Farr conducted an analysis to determine the cost savings. Exhibit 2 reflected that analysis. (CX-A, p. 13; RX-L, p. 13). Exhibit 3 is a budget sheet for Amtrak employees to do work from Miami in Jacksonville. (CX-A, p. 14). Exhibit 4<sup>3</sup> is another chart showing costs savings for contract work in Atlanta. (CX-A, p. 15; RX-L, p. 15). The pressure from Amtrak to cut "monies here and there" prompted the contract work. (CX-A, p. 15; RX-L, p. 15).

Farr was aware that the Complainants alleged protected activity in reporting their injuries. The contractors were to begin working January 6, 2014. (CX-A, p. 17; RX-L, p. 17). Drummac was the company that was providing the contract work. Farr thought Delgado knew of the decision to use contractors. (CX-A, p. 18; RX-L, p. 18).

Right Care Day One was a program created to put injured employees in an organization outside of the company, allowing them to get partial pay for the time they are on injured status. (CX-A, pp. 18-19; RX-L, pp. 18-19). Injured employees do not get to perform their light duty on site. (CX-A, p. 19; RX-L, p. 19). Farr was made aware that Aymond was working with a facilitator in New Orleans doing Safe-2-Safer observations, and he called Delgado. Delgado informed Farr that Dupre was authorizing Aymond's assistance. Farr stated there was no light-duty policy in the Safe-2-Safer division, and no light-duty policy for working on the property. Farr called Loretta Burton to let her know that Aymond was working on property in an unauthorized position and that it might hurt morale. (CX-A, p. 19; RX-L, p. 19). "Aymond was asked to go out[,]" and Farr was unsure of what happened after that. The fact that Aymond reported an injury was not a factor in having him removed from the property. (CX-A, p. 20; RX-L, p. 20).

Amtrak had a zero tolerance policy for retaliation under the FRSA. Immediate termination was the punishment for

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<sup>3</sup> Exhibits 1, 2, 3, and 4 to Farr's deposition were not offered for the truth of the matter asserted; they were not intended to prove actual figures of costs savings in contracting the work. Counsel admitted them to show when Amtrak began discussions of contracting out the work.

retaliatory conduct. In his opinion, neither Aymond nor Martino were discriminated against with the decision to use contractors in Atlanta or with Aymond's removal from the property. (CX-A, p. 20; RX-L, p. 20).

On cross-examination, Farr stated managers like himself and Delgado are not evaluated on their safety record. He was not sure that the policy changed due to the whistleblower law enactment. (CX-A, p. 23; RX-L, p. 23).

Delgado, the senior mechanical department employee in New Orleans, answered to Farr. (CX-A, p. 25; RX-L, p. 25).

The contract to outsource the overtime work for Florence, Jacksonville, Charleston, and other cities was contained in "one big contract." (CX-A, p. 28; RX-L, p. 28). The discussions to contract overtime work that began in 2010 included the Atlanta work, but each year Atlanta was put off in actually following through. (CX-A, p. 29; RX-L, p. 29). A lot of the discussions about the contract work were never documented. The discussion to contract out the Atlanta work was "contingent upon the OSHA response." Before getting that answer, Farr did not share the possibility of contracting the work throughout the property because it was "negative information." Once OSHA dismissed the instant complaint, Farr went through with the contracting. He was told the complaint was dismissed, and he could go forward. (CX-A, p. 30; RX-L, p. 30). He had only told union employees contracting out the work was a possibility before that time. (CX-A, pp. 30-31; RX-L, pp. 30-31). In November or December 2013, when Delgado opted to retire, Farr had a monthly business meeting in New Orleans with the union representatives, "ARSA foremen," and the managers. The possibility of contracting work was discussed. (CX-A, p. 31; RX-L, p. 31). It was not necessary to tell anyone of the contract negotiations prior to that time. (CX-A, p. 32; RX-L, p. 32).

When confronted with the Amtrak position statement from the OSHA complaint, dated September 5, 2013, which states, "the decision had already been made [prior to February 2013] not to use any employees for this assignment at all, but to use less expensive contract laborers[,]" Farr stated the decision to contract had indeed been made that early, but it was "contingent on finding the contractor to do it for the price we wanted." (CX-A, pp. 34-35; RX-L, pp. 34-35).

Farr could not remember if he asked Delgado about the alleged retaliatory statements Delgado made. He could also not

remember if he asked other employees if Delgado had made retaliatory statements. He did not want to "entertain that." (CX-A, p. 36; RX-L, p. 36).

Delgado was fired because he was unproductive; he failed to get his trains cleaned properly, failed to follow instructions, and failed to get his Safe-2-Safer program off the ground, among other things. (CX-A, p. 36; RX-L, p. 36). Delgado's failures accumulated over a period of three years. (CX-A, p. 37; RX-L, p. 37).

It was a possibility that the New Orleans Amtrak employees did not know their overtime work would be terminated. (CX-A, pp. 38-39; RX-L, pp. 38-39). Farr did not think Delgado would make retaliatory statements, which is why Farr did not ask if they were said. (CX-A, p. 39; RX-L, p. 39).

Farr did not know the tone of voice used to send Aymond off the property. (CX-A, p. 43; RX-L, p. 43).

Farr knew the contractors would be as safe as Amtrak employees in performing the work in Atlanta because they have certifications. (CX-A, p. 44; RX-L, p. 44).

Farr did know how the workers heard that the overtime work was either going to Sanford or contractors, when asked if it had not been for Delgado making statements. (CX-A, pp. 47-48; RX-L, pp. 47-48). Sanford employees were used in the past when Amtrak could not get a group of New Orleans employees to perform the overtime work. (CX-A, p. 48; RX-L, p. 48). Farr speculated the rumors might have begun due to the previous work of the Sanford employees and the talk over the years of contracting. (CX-A, p. 49; RX-L, p. 49).

Individuals who made false statements about official company business could be subject to discipline or termination. (CX-A, pp. 49-50; RX-L, pp. 49-50). If an Amtrak employee said something that Delgado did not say, they would need to "rethink what they said." (CX-A, p. 51; RX-L, p. 51).

When asked what was the difference between having someone doing Safe-2-Safer work on the property and having them "doing something almost meaningless for some charity [the Right Care Day One Program,]" Farr responded that Aymond's Safe-2-Safer work created a job that did not exist; it set a precedent that had not been set in a long time for handling light duty and Right Care Day One; and it created a morale issue for workers

who were not injured "doing all the work[,] " but observing someone who was on light duty and not "sweating." (CX-A, pp. 53-54; RX-L, pp. 53-54).

Right Care Day One programs did not have to be affiliated with the railroad. (CX-A, p. 54; RX-L, p. 54). It gives an employee an opportunity to be paid while he was injured, "[w]hether he's working at a church social or working in a jazz museum." (CX-A, p. 55; RX-L, p. 55).

Paul Carver took over Delgado's position when he was fired. (CX-A, p. 57; RX-L, p. 57).

On re-direct examination, Farr stated the overtime work in Atlanta was not a guarantee to employees. (CX-A, p. 58; RX-L, p. 58).

#### **Deposition of Patricia Hebert, Dated May 15, 2014**

The first exhibit to Hebert's deposition was her sworn affidavit dated February 25, 2014. (CX-B, p. 8). Hebert is a "secretary one to the assistant superintendent[,] " Paul Carver, who replaced Delgado. (CX-B, p. 11).

Regarding Hebert's affidavit and what she alleges Delgado said, Hebert testified she had returned to lunch, and Martino was in the pipe shop a few days following the accident. (CX-B, pp. 12-13). Delgado was angry Martino was in the pipe shop, and Hebert told him to calm down because Martino was bringing her medical documents. Delgado then stated he was angry Martino was there, and that they were going to lose the work in Atlanta because Aymond and Martino filed injuries. Hebert heard these words directly from Delgado's mouth. (CX-B, p. 13).

Although Hebert never heard Forrest Walters make that comment, she heard Delgado and Walters discussing it, but it was "more [Delgado] talking about it than [Walters]." The threat of not going to Atlanta "bounced back and forth[.]" (CX-B, p. 14).

Threats, intimidation, making people feel bad, and trying to turn employees against one another was part of Delgado's management style. "If he got mad at them, he tried to get them to do what he wanted them to do." (CX-B, p. 15).

Besides making the comment to Hebert, Hebert knew Delgado made the comment at a meeting. Delgado informed her after the meeting he told the individuals at the meeting that they lost

the overtime work because of the reported injuries. (CX-B, p. 16).

On cross-examination, Hebert stated Martino asked her to prepare the affidavit with the information she knew. She did not talk with anyone in the Amtrak law department before she agreed to give the statement. She did not have a personal relationship with Delgado; he was her boss. He never loaned her any money. (CX-B, p. 16).

Hebert had not heard the rumor from any shop workers before she heard it from Delgado. Delgado did not say that Farr was "retaliating[,]" as paragraph 9 to Hebert's affidavit states; Delgado "just said that Mr. Farr was going to take the work away from us." (CX-B, p. 17). Likewise, in paragraph 8 of her affidavit, the word "retaliating" was never used by Delgado. (CX-B, pp. 17-18).

The first time Hebert heard Delgado make a comment about the loss of the work due to the injuries, she perceived it as a "threat." (CX-B, p. 18). Delgado only made the threat to Martino; Aymond was not present. (CX-B, p. 19).

Hebert had only heard about contracting the work after the injuries occurred, but she was aware of Amtrak's policy to reduce costs. (CX-B, p. 20).

Aymond and Martino were injured in New Orleans on their way back from Atlanta. (CX-B, p. 20). It would make more sense to her that the work was taken away as a cost-saving measure than as a punishment for reporting injuries in New Orleans. (CX-B, pp. 20-21).

On re-direct examination, Hebert agreed that there had been no talk of contracting the work until after the accident. Even if the work was being moved because of the cost, there was still an opportunity to intimidate people. (CX-B, p. 23).

#### **Sworn Affidavit of Patricia Hebert, Dated February 25, 2014**

Complainants offered as CX-C the sworn affidavit of Patricia Hebert, dated February 25, 2014. Hebert attested she was an Amtrak employee as Secretary I to Delgado at the time Aymond and Martino were involved in a car accident on February 8, 2013. She was aware that Complainants filed a whistleblower complaint about threats made by Delgado pertaining to the loss

of work of Amtrak employees due to the Complainants' reporting of injuries. (CX-C, p. 1).

Hebert personally heard the threat made by Delgado, and Martino brought his medical information to Hebert shortly after the accident. Delgado was angry because Martino was on the property, even though he was doing Amtrak a favor by delivering his medical paperwork. Delgado stated Martino should not be on the property or in the shop, and because Complainants got hurt, the New Orleans employees were losing the Atlanta work, which included overtime and travel time. (CX-C, p. 1).

Hebert knew Delgado said this in a meeting because he told her he did so. Delgado was retaliating against Complainants for getting hurt, and Delgado told Hebert that his boss, Farr, was retaliating. (CX-C, p. 1).

#### **Deposition of Paul Joseph Dupre, Dated May 19, 2014**

Dupre is 34 years old and employed by Amtrak. (CX-D, p. 7). He has been employed by Amtrak for 14 years, and his current position is the Safe-2-Safer Facilitator. (CX-D, p. 8). He has been Safe-2-Safer Facilitator for two years. (CX-D, p. 9).

Dupre performed the overtime work in Atlanta in February 2013 when Aymond and Martino were injured. (CX-D, p. 9). Dupre did not report to Raul Delgado; he reported to Martin Yerth, the director for Safe-2-Safer. (CX-D, p. 11).

Dupre was aware of a "threat" Delgado made about losing overtime work due to the injuries. It "was a discussion on the shop floor." At the time, it created ill feelings amongst workers. He had never heard Delgado make the comments, himself, however. (CX-D, p. 12). Dupre conceded that the ill will could have been perceived as directed towards Aymond and Martino. (CX-D, pp. 12-13).

At the time of the rumors, the men on the shop floor, including Dupre, did not know that Block 31 of the accident report from Aymond and Martino's February 2013 crash stated, "contract servicing train in Atlanta to a vendor to eliminate liability of transporting employees." (CX-D, p. 13). Dupre agreed, as a Safe-2-Safer Facilitator, that a work environment that is friendly and trusting is better than one that is vindictive and retaliatory. (CX-D, p. 15).

Martino returned to work before Aymond did. (CX-D, p. 15). Martino had mentioned Aymond was frustrated working in his capacity in "the parks and recreation or something to that nature," and Dupre extended an invite to Aymond to work with Safe-2-Safer. (CX-D, p. 16). Dupre did not go through anyone else, and he made the invite himself. He did not check to see if that was okay with anyone "higher" than him. Nafeesah McKeith, a Right Care Day One coordinator, contacted Dupre after Aymond spoke to him. Dupre assured McKeith that they would be "isolated from mechanical" in his office. (CX-D, p. 17). Aymond's work with the Safe-2-Safer program would have helped his career and facilitated extinguishing the "old mentality" of retaliation. (CX-D, pp. 17-19).

Dupre was not aware if the Safe-2-Safer program was a result of the FRSA enactment. (CX-D, p. 20). He was aware, however, that older members of the railroad, like Delgado, Farr, and Walters, were compensated based on the number of reported injuries. (CX-D, p. 21).

He was not aware of any policy from Farr or Delgado that forbade light-duty work on the property. Dupre knew that other Amtrak employees had performed light duty on the property, such as Clark Whitehead, who has retired, and Clifton Take. (CX-D, p. 21). They were both in the mechanical department as a car man and an electrician. (CX-D, p. 22).

Dupre received a phone call or an email from Nafeesah McKeith, which instructed Dupre to call her immediately. Aymond had been helping Dupre for four weeks at this point. (CX-D, pp. 24-25). McKeith stated Aymond could no longer continue his current capacity on the property; she did not use the word "remove." Dupre questioned McKeith why, but she said she was not at liberty to say, and she gave Dupre her superior's contact information. Dupre called Loretta Burton, the director of the Right Care Day One program. (CX-D, p. 25). Burton stated Farr was not pleased with Aymond being on property; it was not Farr's policy to have light-duty workers on the property. (CX-D, pp. 25-26).

Dupre reached out to Farr, himself. "Tommy went a little bit further in detail, it's not his policy and he didn't feel it necessary to have someone working banker's hours, weekends off, doing nothing and then have another guy or girl on the property decide that they wanted to do the same thing and take a dive and have an injury themselves." This was the exact attitude the Safe-2-Safer program was trying to change. (CX-D, p. 26).

Aymond was returned to work with the "parks and recreations."  
(CX-D, p. 27).

Aymond took the news hard, and he was "extremely upset" and "greatly embarrassed." Farr, Delgado, and Walters are all gone from Amtrak. (CX-D, p. 28). If someone was hurt and had to perform light duty, Dupre would certainly make the invitation for them to come work with him in Safe-2-Safer, and he would hope there would be a new philosophy "this next go around." (CX-D, pp. 28-29).

On cross-examination, Dupre stated that Tacke and Whitehead performed their light duty on the property back in "2006 to now." There was something in place at that time similar to the Right Care Day One program. (CX-D, p. 29).

Burton explained that Farr's impetus for removing light-duty workers from the property was concerned solely with disincentivizing "taking a dive[,] " rather than for the morale of the workers. This was consistent with what Farr told Dupre, as well, however, Farr was "more polished in his approach." (CX-D, p. 30). Dupre was not in a position to negotiate with Farr. Farr was part of the "old regime" and the "old mentality." (CX-D, p. 31). Dupre could not say that that mentality had changed because "you still have members of the old regime that are still holding true to some of these positions." (CX-D, pp. 31-32). Dupre did not know whether management was still evaluated on injuries or not, in his opinion, although he was aware that Joe Boardman, the President and CEO of Amtrak, struck injury ratios as performance measures. (CX-D, pp. 32-33).

Dupre participated in the Atlanta work for seven years. No one was injured during the train moves. (CX-D, p. 33). No one reported any safety concerns out of the ordinary. Despite his concerns about individual managers, the Safe-2-Safer program changed company attitude from the top down. The hostile work environment was more of an individual problem than a problem for the company as a whole. (CX-D, p. 34).

When Tacke was on light-duty, he performed inventory in the store room due to his foot injury, making it easier for other workers to find what they needed. He worked normal hours; not "banker's hours." (CX-D, p. 35). Dupre could not remember what the other light-duty, on-property worker did because he was an electrician, and Dupre was a car man. (CX-D, p. 36).

Paul Carver replaced Raul Delgado. Carver's management style was more welcoming and receptive. He was not an "old school" manager. (CX-D, p. 36). Farr is an "old school" manager, and he is no longer with Amtrak. (CX-D, pp. 36-37). Walters was also an "old school" manager, and he too is no longer with Amtrak. (CX-D, p. 37).

On re-direct examination, Dupre stated that he would make as much as \$2000.00 per overtime trip. (CX-D, p. 40). The work was "highly desirable." If not for the injuries, Amtrak employees would still have that work. (CX-D, p. 41).

On re-cross examination, Dupre deposed that company policy was to reduce overhead costs in reference to the Atlanta train work and the cost of sending Amtrak employees there. Aymond and Martino's accident was in New Orleans. (CX-D, p. 46).

On re-direct examination, the numbers given to prove the cost savings did not add up and were not accurate. (CX-D, p. 47).

**Amtrak Investigation Report of Nicholas Aymond, Dated February 11, 2013**

Complainants offered as CX-E the Amtrak Investigation Report of Nicholas Aymond's car accident that occurred on February 8, 2013. The date of the completion of the report was February 11, 2013. Aymond was being transported in the company truck from the Atlanta Station to the New Orleans Maintenance Facility. The accident occurred at the Canal Street and Derbigny Street intersection. It was found that another vehicle ran through a red light and struck the company truck on the "left side rear wheel and trailer on the front." Tim Martino was listed as an eye witness. The investigation team consisted of Forrest Walters, Mark Wohlers, and Raul Delgado. (CX-E, p. 1). The "conclusions and recommended remedial/corrective actions" listed on the report stated, "[c]ontract servicing train in Atlanta to a vendor to eliminate liability of transporting employees." Farr reviewed the report. (CX-E, p. 3). A third party was found to be the root cause of the accident. (CX-E, p. 4).

**Amtrak Investigation Report of Tim Martino, Dated February 11, 2013**

Complainants offered as CX-F the Amtrak Investigation Report of Tim Martino's car accident that occurred on February

8, 2013. The report reflects the same information as was contained in Nicholas Aymond's accident report, described above, except that the section listing eyewitnesses was redacted. (CX-F, pp. 1-4).

**State of Louisiana Uniform Motor Vehicle Traffic Crash Report,  
Dated February 8, 2013**

Complainants offered as CX-G the Louisiana Motor Vehicle accident report prepared by New Orleans Police. (CX-G, p. 1). The location and a description of the accident were included in the report. (CX-G, p. 2). Derrick Francisco was the name of the non-Amtrak driver who struck the Amtrak vehicle carrying Aymond and Martino. Francisco's insurance was held with State Farm. (CX-G, p. 3). Isaac Gilbert was the driver of the Amtrak vehicle, which was insured by Travelers Insurance. Aymond and Martino were listed as occupants of that vehicle. (CX-G, p. 5). A description of the damage to the vehicles was also included. (CX-G, pp. 4-7).

**"Aymond Letter to OSHA (7-2-13);" "Martino Letter to OSHA (7-2-13);" and "Martino Letter to OSHA (8-13-13)"**

Complainants offered as CX-H, CX-I, and CX-J the correspondence from Aymond and Martino to OSHA. The letters each describe the accident that occurred and the alleged retaliatory actions that were taken as a result. See (CX-H, CX-I, CX-J). Aymond's letter, dated "7-2-13," describes the Right Care Day One New Orleans Jazz and Heritage Historical Park work Aymond was originally placed in and returned to after it was determined he could not work on Amtrak property as a Safe-2-Safer worker. Aymond's letter also describes that the overtime work was taken away from Amtrak employees because of the injuries Aymond and Martino reported. It states that the overtime work was instead to be delegated to Sanford employees. (CX-H, p. 2).

Martino's letter, dated "7-2-13," also describes the alleged retaliatory threats made by Raul Delgado, and that the overtime work was to be performed by Sanford Amtrak employees. (CX-I, p. 2). Martino's letter, dated "8-13-13," describes the original whistleblower complaint made by Martino on July 2, 2013, and it adds another alleged adverse action. The letter details the monies expended by Amtrak to pay Aymond and Martino's medical bills, as a result of the inadequate insurance coverage of Derrick Francisco. Amtrak therefore had a subrogation lien on any other insurance coverage that would pick

up the costs of the medical bills. (CX-J, p. 1). Counsel for Complainant Martino requested that the lien be waived. Shelly Molaschi, the Amtrak individual handling Complainants' liens, allegedly informed Counsel that the liens would be waived, until Amtrak received Complainants' whistleblower complaint. As a result of the receipt of the complaint, Molaschi allegedly refused to waive the lien. Complainant Martino contended the filing of the whistleblower complaint was a protected activity, and the failure to waive the lien was an adverse action in violation of the FRSA. (CX-J, p. 2).

**"Martino Letter to Molaschi (8-9-13)"**

Complainants offered as CX-K correspondence from Martino to Shelly Molaschi, whereby Martino requests that Amtrak reconsider its refusal to waive the medical costs subrogation lien it placed on State Farm. The letter reasons, "State Farm has tendered its \$15,000 policy limits to Mr. Martino subject to full payment of the Amtrak subrogation claim. When you consider that he also has to pay back the Railroad Retirement sickness benefits if Amtrak insists on its subrogation then he would recover very little." The letter alleges that Amtrak refused to waive its lien once Martino filed his whistleblower claim. (CX-K, p. 1).

**Amtrak Work Order Titled, "Atlanta Instructions: Work Order TBA Function 1889. WMS Work Order TBA"**

Complainants offered as CX-M an undated Amtrak "Work Order," which describes the work done in Atlanta on "Train #19" and "Train #20." Pay was described as three hours of overtime on Monday, Tuesday, Wednesday, and Thursday. Sunday and Friday were travel days, which were also compensated. Travel was to be by train with coach accommodations. The positions needed were two coach cleaners, two carmen, two electricians, one pipefitter, one machinist, and one foreman. Employees were responsible for their own meals on travel days. Otherwise, employees had a daily allowance for two meals. The first trip was to report at work at 6:30am, Sunday, January 6, 2013. Hotel accommodations were at the Hyatt Place Atlanta Buckhead. (CX-M, p. 1).

**Email Titled, "Amtrak reply to NS track work ATL-MEI will affect 19 and 20 numerous dates Jan 06 through Feb 06"**

Complainants submitted as CX-N an email and attachment from Tommy Farr, dated December 6, 2013, which informs recipients

that the Atlanta work was to be performed by a contractor for the year 2014. The email states that the move to contractors is a "business decision that allows us to better utilize our work force and allows us to perform maintenance on equipment that we would not normally have the opportunity to do if regular train service was operating." Farr claims with the contractors performing the Atlanta work, Amtrak can add additional work in New Orleans to keep everyone employed without work stoppages. (CX-N, p. 2).

The email contains a "Cost Comparison," which states that the total costs for Amtrak employees to perform the overtime work for fiscal year 2012 was \$214,720.84; the total costs for Amtrak employees to perform the overtime work in fiscal year 2013 was \$196,452.85; and the total projected costs for the overtime work with a contractor for fiscal year 2014 was \$115,053.30. The analysis stated, "The use of a contractor for the 5-week period from January 6, 2014 to February 6, 2014 would realize a savings of \$99,000 off FY12 costs or \$81,000 off FY13 costs." In arriving at the different figures, the analysis provided numbers for the costs of straight time, overtime, double time, travel time, benefits, hotels, and meals. There was no support as to how the preparer of the spreadsheet arrived at the numbers for each subcategory. (CX-N, p. 3).

Martino responded to the email and the attached analysis on January 2, 2014, alleging that the benefit amount is overstated; employees do not get additional benefits for overtime work. Martino also alleges the hotel and meal expenses are understated, appearing that the amounts are for one person only, instead of five. Lastly, Martino claims "the furlough statement appears to be added as a scare tactic." Martino believes that the contractors will in fact be more costly than Amtrak employees. (CX-N, p. 4).

Lastly, CX-N contains a modified spreadsheet titled, "SWM Analysis of ATL\_Track\_Work\_Cost\_Comparison," which attacks the projections made by Tommy Farr, and adds alternative figures for projected meal and hotel costs for the fiscal year 2014 contractor work. Again, the exhibit does not contain receipts, pay stubs, or other supporting documentation, which would explain how both Farr and Martino arrived at their totals. (CX-N, p. 6).

**Email Titled, "Aymond/Martino - State Farm"**

Complainants submitted as CX-X an email from "Charles Rumbley" to "Michael Alexis"<sup>4</sup> and Shelly Molaschi, dated May 23, 2014, and titled "Aymond/Martino - State Farm." The email states that in a conversation, it was confirmed that Amtrak does not have a lien right pursuant to any federal or Louisiana statute for the recovery of medical expenses paid on behalf of Aymond and Martino against a third party/responsible tortfeasor. The email states that the only recovery exists under a "theory of subrogation." The email states that Amtrak's rights of subrogation are no greater than those of Aymond and Martino. Aymond and Martino executed releases as to all claims against State Farm and its insured, and thus, they have no legal right to recover the amounts paid on their behalf. (CX-Q, p. 1).

Notwithstanding the release, the email informs that Amtrak has received payment from Aymond for the medical expenses paid on his behalf, so there is no outstanding subrogation interest with regard to his claim. However, the subrogation issue regarding Martino had not been resolved. (CX-Q, p. 1). The release executed by Martino was also attached. (CX-Q, p. 2).

**Amtrak Position Statement to OSHA**

Respondent offered as RX-B its position statement sent to OSHA on September 5, 2013. In its statement, Amtrak conceded that there was protected activity on the part of Complainants, but denies that there was any adverse action taken against them due to that protected activity. (RX-B, p. 1). Amtrak defended its decision to ask Aymond to leave the property and its decision to use contractors. (RX-B, pp. 1-2). It explained the history of retaliatory conduct in the railroad industry, and the proactive measures Amtrak has taken to turn away from retaliation. Amtrak explained its new policies, procedures, training, and guidelines to encourage safety and injury reporting. (RX-B, pp. 3-4). An interview with Delgado detailed in the position statement revealed that he did not recall ever having a meeting with employees. Delgado stated that he would never have said what was alleged by Complainants. (RX-B, pp. 5-6). An interview with Farr in preparation for the statement revealed that Farr made the decision to contract the overtime work to save money. (RX-B, pp. 6-7).

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<sup>4</sup> Mr. Rumbley and Mr. Alexis are individuals introduced in this matter only on the email exchanges described above. They bear no significant role in this case, and their role in Amtrak operations is unknown.

### **Amtrak Policy 3.11.5**

Respondent submitted as RX-C its policy regarding the accurate reporting of injuries and illnesses, approved on January 3, 2013. The policy states that the "safety and care of our employees and passengers is Amtrak's top concern." The policy details the procedures of reporting injuries, which includes assessment of the injury, notification of the injury, assisting in transporting the injured, reporting the injury, and filling out forms. (RX-C, pp. 1-2). The policy states that Amtrak is committed to complying with the FRSA. It states that any employee who engages in harassment, intimidation, retaliation, interference, or other prohibited conduct is subject to discipline, up to and including termination. The policy provides a hotline for the reporting of violations. (RX-C, p. 3).

### **Complainants' Personal Statements; Injury/Illness Reports; and Medical Information and Consent Forms**

Respondent submitted as RX-D Aymond and Martino's personal statements and injury reports. In the personal statements, Aymond and Martino explained in their own words how the accident happened. They described their medical treatment and diagnoses. Both reported neck pain. The injury report contained personal information, information regarding the date and time of the February 8, 2013 accident, a description of the illness/incident, and the treating medical facility. (RX-D, pp. 1-4). Respondent submitted as RX-E the medical information and consent forms of Aymond and Martino, which contained personal information, a release and consent, and information regarding medical treatment of each Complainant. (RX-E, pp. 1-2).

### **Amtrak Safety Letter, Dated December 14, 2009; Special Employee Advisory; Amtrak Ethics and Compliance Program**

Respondent submitted as RX-F a safety letter to Amtrak employees from Joe Boardman, the President and CEO of Amtrak. The letter addresses an issue that was realized in the Safe-2-Safer program regarding injury reporting. Employees were confused as to what injuries to report and were worried about blame. The letter clarifies that "[a]ll injuries that occur during work and/or on Amtrak property must be reported." The underlying goal of the policy was to assess the reported injuries and seek to eliminate them. The letter stated that harassment was not tolerated. Any employees who fail to comply

with the standard is subject to disciplinary action, including termination. (RX-F).

Respondent submitted as RX-G a "Special Employee Advisory[," dated January 29, 2010, which discussed the goals and aspirations of the Safe-2-Safer program and the elimination of the fear of reporting injuries. (RX-G).

Respondent submitted as RX-H an excerpt of the Amtrak Code of Ethics. The ethics policy states that its code of ethics applies to all officers and employees of the Amtrak corporation. (RX-H, p. 1). It explains the Ethics Compliance Hotline, and states that retaliation is not acceptable. It details Amtrak values, business conduct, management responsibilities, harassment policy, and employee privacy. (RX-H, pp. 2-5).

#### **Sworn Affidavit of Ashley Rea, Dated June 11, 2014**

Respondent offered as RX-I the sworn affidavit of Ashley Rea, dated June 11, 2014. Rea attested she was an employee of Moran Environmental Recovery, LLC, of which Drummac Incorporated is a wholly-owned subsidiary. Specifically, Rea was the Vice-President of Drummac. Drummac provided contract staffing to a number of corporations, including Amtrak. Drummac had a contract with Amtrak to provide contractors to supplement and, at times, stand in place of Amtrak employees. Drummac was contacted in 2010 by Tommy Farr to discuss costs and feasibility, as well as to prepare estimates for having contract employees from Drummac perform the overtime work in Atlanta in January and February 2011. (RX-I, p. 1).

Rea attested Amtrak regularly uses contractors for special moves, such as the Atlanta train move, throughout the continental United States. Beginning in January 2014, Drummac assumed responsibility for the regular annual Atlanta train overtime work for Amtrak with the intent of conducting the work annually every year going forward. (RX-I, p. 1).

In Rea's personal conversations with Tommy Farr of Amtrak, it was clear that the reason Amtrak chose to contract its overtime work was entirely based on Amtrak's budgetary constraints and its mandate to reduce expenditures. It was Rea's personal belief that, based on cost information provided to Drummac by Tommy Farr for 2010, 2011, and 2012, that Drummac contractors were going to save Amtrak money over using its own employees for the Atlanta overtime work. (RX-I, p. 1).

At no time prior to the lawsuit brought by Complainants were the names Aymond and Martino ever mentioned in Rea's dealings with Tommy Farr. There was no mention of any particular employees being the reason for the decision to use contractors. (RX-I, p. 1).

**Sworn Affidavit of George Frye, Dated June 6, 2014**

Respondent offered as RX-J the sworn affidavit of George Frye, dated June 6, 2014. Frye was the Chief Marketing Officer of Drummac. Frye attested to the exact same facts and opinions of that of Ashley Rae, detailed above. (RX-J, p. 1).

**Sworn Affidavit of Tommy Farr, Dated August 29, 2014**

Respondent offered as RX-K the sworn affidavit of Tommy Farr, dated August 29, 2014. Farr attested he was a retired employee of Amtrak. He made the determination to use contractors from Drummac in 2013 to perform train-turning services for the Atlanta overtime work. He had been in periodic and sporadic negotiations with Drummac for two to three years prior to the incident involving Martino and Aymond. (RX-K, p. 1).

Farr was not aware of the investigative conclusion made by Forrest Walters recommending the use of contractors until this proceeding and long after the decision to use contractors had already been made. Amtrak regularly used contractors for special moves, such as the Atlanta train move, throughout the continental United States. (RX-K, p. 1).

The decision to use Drummac contractors for the Atlanta overtime work was purely for budgetary reasons and was consistent with the trend to use contractors for train-turning work at other Amtrak locations. In 2013, Drummac assumed responsibility for the regular annual Atlanta overtime work with the intent of conducting the work annually every year going forward. (RX-K, p. 1).

It was Farr's personal belief that, based on cost compilations for 2010, 2011, and 2012, that Drummac contractors were going to save Amtrak substantial amounts of money over using its own employees for the Atlanta overtime work. At no time prior to the lawsuit brought by Complainants were the names Aymond and Martino ever mentioned in Farr's dealings with Drummac. There was no mention of any particular employees being the reason for the decision to use contractors. (RX-I, p. 1).

### **Deposition of Nicholas Aymond, Dated March 20, 2014**

The deposition of Nicholas Aymond was taken by the parties on March 20, 2014. (RX-M, p. 1). Aymond did not personally hear the alleged retaliatory statements from Raul Delgado; he heard them from Paul Dupre and Tim Martino. (RX-M, pp. 11-12). He did not hear them from anyone else because he was not on the property. Martino was not in the meeting when Delgado made the statements, although he thought Dupre was in the meeting. (RX-M, p. 12).

Aymond was not aware of Amtrak policy 3.11.5, which dealt with the accurate reporting of injuries and illnesses. (RX-M, p. 14). He was not aware of the Federal Rail Safety Act compliance program, and he was not sure if he had attended training for the program. (RX-M, pp. 14-15).

Aymond stated that it was co-workers, not managers, who placed the blame on him for losing the overtime work in Atlanta. (RX-M, p. 16). He had never personally witnessed anyone else doing light duty in the mechanical department at Amtrak. (RX-M, p. 18). No one made him feel harassed, intimidated, or out of place while he was doing light duty on the property. (RX-M, p. 19). He was on the property performing light-duty work for three weeks before he was told to leave. (RX-M, pp. 19-20). Aymond was released from light-duty work back to his regular craft in mid-September 2013. (RX-M, p. 21).

Aymond stated that if he did not report his injury, he knew he could get fired. (RX-M, p. 23). Aymond was aware that the Safe-2-Safer program was implemented to encourage injury reporting without fear of retaliation. (RX-M, p. 30).

### **Deposition of Timothy Martino, Dated March 20, 2014**

The deposition of Timothy Martino was taken by the parties on March 20, 2014. (RX-N, p. 1). Martino thought his medical treatment following the February 8, 2013 accident was not prompt; after he filled out Amtrak paperwork, he was allowed to go to the hospital. He could not remember if he expressed concern about the delay. (RX-N, p. 9).

A threat of retaliation was not made to Martino directly, but "the workers that [he] worked with informed [him] of the comments made by Raul Delgado." (RX-N, p. 14). He did not consider what he heard a rumor because he trusted the people

giving him the information. (RX-N, p. 15). Martino was not personally in the meeting where Delgado made the alleged retaliatory statement. (RX-N, p. 16). The co-workers from whom Martino heard the rumor were Darren Billiot, Willy McKenzie, Jerry Nee, Clark Whitehead, Greg Meyer, John Meyer, Cory Whitehead, Paul Dupre, and Patty Hebert. (RX-N, pp. 16-17). These individuals told him both that the work was either going to Sanford workers or contractors. (RX-N, p. 19).

Martino was not aware that Hebert owed Delgado money, and he did not know if that would motivate her to start a rumor. (RX-N, p. 20). Scott Lestremau was also an individual who told Martino about the rumor. (RX-N, p. 21). Exhibit 1 to Martino's deposition was an email wherein Lestremau stated, "I did not witness the aforementioned meeting following the accident involving Mr. Martino and Mr. Aymond. I heard the comment supposedly made by Mr. Delgado from other Amtrak employees." (RX-N, pp. 23-24). Martino agreed that Lestremau heard the comment secondhand, as well. (RX-N, p. 24).

Exhibit 2 to Martino's deposition was an email wherein John Meyer stated, "[A]ll I can tell you is we, the union reps, were in a meeting and Tommy Farr said he did not know if we were going to Atlanta. But if we do, he would change our agreement some. That is all I can tell you." (RX-N, p. 24).

Martino was aware of several Right Care Day One employees who were injured and were allowed to perform their work on the property. (RX-N, p. 29). Delisa Smith, Enrique "Haze or Maze[,]" and Mike White were the employees Martino recalled. (RX-N, p. 30). Delisa Smith was the only employee who had performed Atlanta overtime work. (RX-N, p. 34).

Martino was not fully aware of Amtrak policy 3.11.5. (RX-N, p. 36). "Mr. Haze" and "Mr. White" were doing light-duty work in the facility "from what [Martino] was told." (RX-N, pp. 36-37). Martino did not personally witness them performing light duty. Martino did witness "a person" that performed light duty through Right Care Day One or regular light-duty work on the property "years ago." (RX-N, p. 37). Martino would not feel slighted if he observed a fellow worker performing light duty while he was performing his regular craft. (RX-N, pp. 38-39).

**Deposition of John A. Meyer, Dated March 21, 2014**

The deposition of John A. Meyer was taken by the parties on March 21, 2014. (RX-0, p. 1). Meyer is 53 years old, and he has worked for Amtrak for 30 years. He knows Martino and Aymond. (RX-0, p. 5). Meyer has performed the Atlanta overtime work in the past about three or four times. (RX-0, p. 6). It was not a requirement of the job to perform the overtime work. (RX-0, p. 8).

Meyer heard about Aymond and Martino's February 8, 2013 car accident the next day after it occurred. (RX-0, p. 9).

Meyer typed out a written statement of what he knew of the present litigation and sent it to Jason LaBossiere, an individual from Respondent Counsel's law firm. He was then asked to sit for a deposition. (RX-0, p. 11).

Because he had hundreds of meetings regarding union business, Meyer could not remember a particular meeting with Delgado after the wreck. Meyer's position with the union, if any, is not set forth in the record. There was a rumor that Delgado made statements to the effect of losing the overtime work due to the car accident of Complainants, but Meyer never heard Delgado make the statement himself. (RX-0, p. 12). Meyer did recall being present in a meeting with Tommy Farr. When the issue of the Atlanta work arose, Farr stated that if it were to be contracted, it would be a cost-saving measure. (RX-0, pp. 12-13). Meyer did not recall saying to Martino that Amtrak employees lost the overtime work because of Complainants. Meyer stated, "I'm not saying I did not, but I do not recall that at all." (RX-0, p. 13).

Meyer confirmed and recognized the email he sent to Jason LaBossiere. Meyer knew Patty Hebert. Meyer did not hear Hebert make any statements regarding the alleged retaliatory statements of Delgado. (RX-0, p. 14).

Meyer has in the past reported safety issues, but he has never reported a personal injury. (RX-0, p. 15). No one has harassed him or tried to threaten him for reporting safety issues since 2007. (RX-0, p. 16). He was not personally aware of anyone reporting an injury while performing the Atlanta overtime work. (RX-0, p. 17).

Meyer knew that the FRSA protected employees from being fired for reporting injuries. (RX-0, pp. 17-18). Prior to the

Safe-2-Safer program, "when someone got injured, they automatically got charged[.]" The culture at Amtrak has substantially changed. (RX-O, p. 18). He had not observed anyone engaging in deterrent behavior for reporting injuries since the Safe-2-Safer program was implemented. Safe-2-Safer was implemented probably four years ago. (RX-O, p. 19).

Meyer did not blame Aymond and Martino for losing the overtime work in Atlanta. "[I]n a larger scope of the company, [] they did the same thing in Florida." Meyer had no idea of how long Farr had been looking to outsource the work. Meyer was not privy to that information. (RX-O, p. 20).

A manager who harassed employees today would get into a lot of trouble. (RX-O, p. 23). Farr was told that Delgado was offered a pension, and he took it; Meyer did not know if he was fired. (RX-O, pp. 23-24).

Meyer guessed that the rumor started because of the "Conclusions and Recommendations" statement Forrest Walters made on Aymond and Martino's accident report, which stated, "Contract servicing train in Atlanta to a vendor to eliminate liability of transporting employees." (RX-O, pp. 24-25).

Aymond and Martino were in New Orleans when the accident occurred. (RX-O, p. 25).

#### **Deposition of Scott Lestremau, Dated March 20, 2014**

The deposition of Scott Lestremau was taken by the parties on March 20, 2014. (RX-P, p. 1). Lestremau is 49 years old, and he has been with Amtrak since 2001. He has performed the Atlanta overtime work. (RX-P, pp. 5-6). Lestremau has never been hurt on the job. He knew Raul Delgado. (RX-P, p. 6). He expected to be able to perform the overtime work through 2014, until they were told that Amtrak had contracted through an outside company. (RX-P, p. 7).

Lestremau did not personally hear Raul Delgado make any allegedly retaliatory statements, but he heard a rumor throughout the facility that the work was lost due to the Complainants' injuries. (RX-P, p. 7). He could not recall where the individuals who told him said they heard the rumor. The rumor was that the work was going to Sanford employees, instead. He heard this shortly after the Complainants' car accident. (RX-P, pp. 8-9).

Lestremau knew who Forrest Walters and Tommy Farr were. (RX-P, p. 9). The rumor that Lestremau had heard was essentially what was written in the "Conclusions and Recommendations" section of the accident report by Walters. (RX-P, pp. 9-10).

Lestremau was not aware that Delgado had been on probation. (RX-P, p. 11). Most of the times, the rumors circulating were true. In dealing with Delgado, one would feel "like you were being attacked." (RX-P, p. 12). It was unusual, however, for Delgado to take responsibility for a "big decision," such as the transition from Amtrak employees to contractors for the overtime work. Usually, Delgado would push the blame to Tommy Farr. (RX-P, p. 13). Delgado seldom took responsibility for the actions he took. The threat and attempt to make people feel bad was his management style. Work is better now that Delgado is gone. (RX-P, p. 14).

Lestremau did not blame Aymond and Martino for the loss of the work. Lestremau was familiar with Amtrak policy 3.11.5. (RX-P, p. 15). He recalled having FRSA training. Lestremau had never reported an injury. (RX-P, p. 16). He was not sure if Patty Hebert had been one of the individuals who had heard the rumor. (RX-P, pp. 16-17). He did not recall hearing the rumor from Hebert. (RX-P, p. 17).

Lestremau was aware of the Right Care Day One program, and he knew that as a matter of policy light-duty workers were not allowed on Amtrak property. (RX-P, p. 17).

Lestremau was "fairly certain" that Amtrak switched to contractors because of a decision made by Farr and Delgado due to the injuries of Aymond and Martino. (RX-P, p. 18). Farr had mentioned in a meeting shortly before Delgado parted ways that the work might be contracted. If he had known that negotiations for contractors had been going on, he would change his mind about why the overtime work was switched to contractors. (RX-P, pp. 18-19).

Lestremau did not observe Aymond performing light duty at the facility. He did not feel that Amtrak cultivated an environment of harassment and intimidation for the reporting of accidents and injuries. (RX-P, p. 25).

**Deposition of Warren J. Nee, Jr., Dated March 20, 2014**

The deposition of Warren J. Nee, Jr. was taken by the parties on March 20, 2014. (RX-Q, p. 1). Nee goes by the name of "Jerry," and he is 53 years old. Nee works at Amtrak and knows Aymond and Martino. He also knows Walters and Delgado. He has been with Amtrak for 35 years. (RX-Q, p. 5).

Nee had never engaged in any conversation with Amtrak management about the possibility of the overtime work being contracted or transferred to Sanford employees. He had heard about the car accident in which Complainants were involved. (RX-Q, p. 6). The work getting contracted out due to Complainants' injuries was "shop talk[,] " and Nee had never heard Delgado make any retaliatory statements to that effect. Nee could not recall from whom he heard the rumor. Nee discussed the rumor with Martino. (RX-Q, p. 7). It would not surprise him that Delgado would make a retaliatory statement. (RX-Q, p. 8). He could not make the same judgment call for Walters. (RX-Q, p. 9).

Nee did not know of the intention of the individual who wrote the statement on the Complainants' accident report in the "Conclusions and Recommendations" section that stated the work would be contracted out to reduce liability. Nee felt it was "shop floor talk" that had it not been for Aymond and Martino's injuries, Amtrak employees would still be performing the overtime work in Atlanta. (RX-Q, p. 11). Amtrak workers expected to have the overtime work going forward. (RX-Q, p. 12).

Nee did not know why Delgado was no longer with Amtrak. He was told Delgado was offered an early retirement. (RX-Q, p. 13).

Nee never incurred an injury at Amtrak. Nee had never known of any injuries that were covered up at Amtrak in New Orleans. (RX-Q, p. 17). As a foreman, Nee has had injuries reported to him, which in turn he reports and turns over to management. He did not feel that he would be penalized for reporting an injury. (RX-Q, p. 18). Employees who have reported injuries have received prompt medical attention. (RX-Q, p. 19).

Nee had been offered the opportunity to perform the overtime work, but he declined to go. (RX-Q, p. 20). He did

not consider the transition to contracts to be a denial of overtime opportunity because he never went. (RX-Q, p. 21).

To the best of his knowledge, he had never observed employees performing light duty on the property. (RX-Q, p. 22). He did not blame Aymond and Martino for the lost opportunity to go to Atlanta. He knows of no one personally who blames Complainants. (RX-Q, p. 23).

Nee was not aware of a policy in years past that reported injuries affected management's pay. There were no instances where he thought that reporting injuries led to retaliation. (RX-Q, p. 24). It did not matter to him whether Delgado was gone or not. (RX-Q, p. 25).

## **VI. CONTENTIONS OF THE PARTIES**

Complainants aver Respondent eliminated its regular practice of sending ten New Orleans workers to Atlanta to work on a "highly prized" job that provided employees significant overtime opportunities in retaliation for the report of work-related injuries. Complainant Aymond also claims he was removed from light-duty work and forced to perform non-railroad work off-site in retaliation for the same report of injuries. Complainants also filed a supplemental complaint, alleging that Respondent and its officials refused to waive its alleged reimbursement loan for medical expenses paid on their behalf because Complainants filed their OSHA complaint.

Complainants state the deterrence of reporting injuries was still part of the culture of Amtrak, despite the FRSA. Complainants contend that Respondent's assertion that it was contracting out the overtime work is pretense for retaliation. Complainants aver that Respondent has offered no evidence proving its prior plans to contract the work. Complainants state that the figures relied upon in asserting the contracting work would be cheaper than overtime work by Amtrak employees are underinflated. Likewise, they claim that the numbers for Amtrak employees purported to do the overtime work were inflated.

Respondent does not dispute that Complainants have engaged in a protected activity when they reported their injuries from the car accident, and by virtue of the report, it had knowledge that Complainants engaged in such protected activity. However, Respondent disputes that Complainants suffered an adverse employment action. Respondent maintains that its actions were not retaliatory, and that it made plans to contract the Atlanta

work to save money. Respondent alleges Complainants have been inconsistent in their accounts, and the loss of overtime work due to the contract resulted in the loss of work for all New Orleans Amtrak employees who previously performed the overtime.

Respondent additionally avers that Complainant Aymond's light-duty, off-site assignment was not an unfavorable personnel action because it was handled identically as all other employee light-duty assignments according to company policy. For morale purposes, all individuals who are placed on light-duty are instructed to work off-site to avoid animosity of employees who are working full-duty and being paid the same wages as the light-duty workers. Respondent further argues its "legally-entitled" subrogation lien is a result of Amtrak's payment of medical expenses for Complainants' injuries and the subsequent determination that the Complainants were not at fault in the car accident. Respondent claims the fact that the lien may have been discussed in a settlement negotiation does not mean it was an adverse employment action.

Respondent claims any adverse comments made to Complainants Aymond and Martino were opinions made by a low-level manager with no decision-making powers. Furthermore, Respondent states that Complainants sustained their injuries in New Orleans through no fault of their own, which proves the lack of incentive to punish them for Atlanta-based work.

## VII. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). See 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: **(1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.** See 49 U.S.C. § 42121(b)(2)(B)(iii); Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. @ 11 (ARB March 29, 2013); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. @ 3 (ARB June 29, 2007); Luder v. Continental Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. @ 6-7 (ARB Jan. 31, 2012); see also Powers v. Union Pacific

Railroad Co., ALJ Case No. 2010-FRS-30, ARB Case No. 13-034, slip op. @ 10-11 (ARB March 20, 2015).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." See Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. @ 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. @ 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). Thus, a complainant bears the burden of proving his case by a preponderance of the evidence, and the evidence need not be "overwhelming" to establish a **prima facie** case. In fact, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013).

If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121 (b)(2)(B)(iii)(iv); Menefee v. Tandem Transportation Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. @ 6 (ARB Apr. 30, 2010) citing Brune, ARB No. 04-037, slip op. @ 13.

It is worth emphasizing that the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the McDonnell Douglas standard, and is thus more challenging for a defendant to overcome. Among the reasons for this complainant-friendly standard is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. One of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. Although many railroad companies have since changed this system, a culture of retaliation for reporting injuries unfortunately still lingers in some instances. See, Araujo, supra.

In view of the undisputed facts noted above, it is found that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainants were covered employees of Respondent under the FRSA; that they engaged in protected activities; and Respondent had knowledge of their protected activities. No evidence to the contrary was introduced at the hearing.

As outlined in the post-hearing briefs of the parties, the issues to be decided are whether Complainants suffered any adverse, unfavorable personnel actions, and whether the Complainants' protected activities were contributing factors in the unfavorable personnel actions.

#### **A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

Id. at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 & n. 5 (3d Cir. 1975). Moreover, based on the unique

advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Overall, in this instance, I find that Complainants are generally credible. Their testimony was consistent, and there were no major discrepancies in the accounts they recalled that would cause me to question the veracity of their testimony. Complainants' descriptions of their work injury have been consistent and align with the objective evidence establishing their February 8, 2013 accident. In addition, both Complainants allege that they heard the same alleged rumor, albeit from secondhand sources. While that fact may detract from the strength of their case and the evidence they have provided, as discussed below, it does not diminish their credibility.

In several instances, however, I had the impression that, while consistent in their testimony, Complainants may have exaggerated the circumstances of their protected activities. I question the motivation of Complainants in the regard that their OSHA complaints allege that the overtime work was to be given to Amtrak employees stationed in Sanford; whereas in their complaint before the OALJ, the overtime work was alleged to be contracted to non-Amtrak employees.

Similarly, Complainant Aymond insisted that he was "removed" from Amtrak property while on light duty, implying that there was a level of physical force or inappropriate coercion taken on the part of Amtrak in denying him access to the premises. The testimony of his co-workers and management contradicts this implied or suggested use of force. When asked if he had ever observed light-duty workers on the Amtrak property, Complainant Martino also exaggerates the extent of his recollection in stating that he had witnessed "a person" performing light duty on the property "years ago."

The credibility of Willie McKenzie and Patricia Hebert are also crucial to a sound resolution of this matter, as these two witnesses are the only witnesses who testified they heard allegedly threatening comments from Raul Delgado directly regarding the loss of the overtime work in Atlanta. First, I

find that Willie McKenzie was generally credible. McKenzie testified he heard the retaliatory statement from Delgado, but that rumors circulated the railroad and that he was unsure of the motivation of Delgado in making such a comment. He testified that perhaps Delgado did not want to get the blame for the loss of the overtime, and he used Complainants as the "sacrificial lambs" to take the responsibility. McKenzie appeared truthful in his assertions, as he seemed to favor neither Complainants nor Respondent, and he often testified against his own interest as a current employee of Amtrak. For these reasons, I find McKenzie to be a credible and reliable witness.

Patricia Hebert on the other hand had some discrepancies in her accounts, which causes me to question the veracity of her testimony. Like McKenzie, Hebert also testified she heard Delgado make retaliatory statements directly. However, Complainants also supplied the court with an affidavit from Hebert, which contradicts some of her assertions. In her affidavit, Hebert states that Delgado was retaliating against Complainants for getting hurt, and that Delgado told her Tommy Farr was retaliating, as well. Hebert admits in her deposition, however, that Delgado never actually stated Farr was retaliating, and that the word "retaliating" was never used. These contradictions by Hebert cause me to question her truthfulness, and they show her propensity to exaggerate the circumstances. As such, I question the reliability of her testimony, and consider that factor accordingly when examining the weight of her testimony.

#### **B. Alleged Unfavorable Personnel Actions**

By its terms, FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, in whole or part, to the employee's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying Respondent of a work-related illness, or denying, delaying or interfering with Complainant's request for medical treatment or care. See, generally, 49 U.S.C. §§ 20109.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the

U.S. Department of Labor. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57.

In Burlington Northern & Sante Fe Railway Co. v. White, the Supreme Court addressed the anti-retaliation provision in Title VII of the 1964 Civil Rights Act, which generally prohibits employers from retaliating against employees who report employment discrimination based on "race, color, religion, sex, or national origin." See 42 U.S.C. §§ 2000e-2, 2000e-3. An anti-retaliation claim under Title VII, like an anti-retaliation claim under the FRSA, requires a showing of an "adverse action" which the employer imposed on the employee. Id. at 53-54.

The plaintiff complained to Burlington supervisors of sexual harassment she had encountered from her immediate supervisor while on the job. The immediate supervisor was suspended and ordered to attend sexual harassment training. The plaintiff was then informed of the discipline the immediate supervisor received, and she was removed from her forklift duty and assigned to perform on track laborer tasks. The plaintiff filed a complaint with the Equal Opportunity Employment Commission, alleging her reassignment amounted to gender-based discrimination and retaliation for her complaints about sexual harassment. She also filed additional charges that she was placed under surveillance, wrongfully accused of insubordination, and suspended. Id. at 57.

The Court addressed "how harmful [the adverse] action must be to constitute retaliation. Id. at 60. The Court answered that, "the [adverse] action [must be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 67-68 (internal quotations and citations omitted). "We speak of *material* adversity because we believe that it is important to separate significant from trivial harms." Id. at 68.

Whether in its context a company's conduct well might dissuade a "reasonable" worker from engaging in protected conduct is a legal question. Stewart v. Miss. Transp. Comm'n, 586 F.3d 321, 332 (5th Cir. 2009) (deciding "material adversity" "as a matter of law"); Aryain v. Wal-Mart Stores Tx., 534 F.3d

473, 485 (5th Cir. 2008); Morales-Vallellanes v. Potter, 605 F.3d 27, 33 (1st Cir. 2010); see also Burlington, supra at 68 ("We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable.").

The alleged unfavorable personnel actions in the present matter include the failure of Respondent to waive Complainant Martino's lien; the threats and intimidation on the part of Amtrak employee Raul Delgado; the light-duty, off-site assignment of Complainant Aymond and his "removal" from Amtrak property; and the loss of the Atlanta overtime work. Each of these alleged personnel actions will be examined seriatim below:

**1) Respondent's Failure to Waive the Lien of Complainant Martino**

Whether a failure to waive a subrogation lien is an adverse action is a novel issue not previously presented before the undersigned or any other ALJ. In light of the standard for establishing unfavorable personnel actions under Burlington, I find that Respondent's failure to waive its legally entitled subrogation lien is not an unfavorable personnel action.

The fact that Amtrak has refused to waive the subrogation lien on Complainant Martino's claim is undisputed. However, the evidence of record consists of self-serving testimony and correspondence from Complainant Martino's counsel that a failure to waive the lien was an unfavorable personnel action. Under the Burlington analysis, to attempt to characterize Amtrak's legal entitlement to subrogation is a legal stretch I am unwilling to make.

The entitlement to the lien, which is a state law issue, is a tangential matter related to insurance collection and settlement negotiations, rather than a retaliatory action taken against Complainant Martino for filing his OSHA complaint. Specifically, Burlington emphasizes the importance of distinguishing material adversity from trivial harms. The Court states that reporting discriminatory behavior "cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Burlington, 548 U.S. at 68.

Had Complainant Martino paid for his medical costs out-of-pocket while the insurance company was determining liability, he would have had an equal state-granted right to subrogation over

those expenses. The fact that Respondent used the waiver of this equal, state-granted right as a bargaining chip for settlement negotiations does not transform it into an unfavorable personnel action.<sup>5</sup> Complainant Martino is in no worse condition than he would be had he been entitled to the waiver, as he alleges, and as such, I find it is a "trivial harm."

Furthermore, and perhaps most importantly, as a trivial matter related only to settlement negotiations and insurance claims, the waiver does not dissuade a reasonable employee from making or supporting a charge of discrimination. It would not promote ostracism, and it would not cause a disadvantage in the terms and conditions of employment.<sup>6</sup>

## **2) Intimidation & Threats Regarding Loss of Overtime by Raul Delgado**

Intimidation and threatening actions are prohibited discrimination. Vernace v. Port Authority Trans-Hudson Corporation, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21, 2012). A threat related to protected activity can, standing alone, constitute adverse action under the FRSA.

In Almendarez v. BNSF Railway Co., defendant-roadmaster threatened the plaintiff when he stated that the group's injury record was excessive in comparison with other groups, and he advised that the group would be abolished if any additional inquiries were reported. Although the group had not been disbanded, and defendant argued that plaintiffs had suffered no effect on the terms and conditions of their employment, the court found no binding or otherwise persuasive authority that required a showing of both an adverse action and a resulting effect on terms and conditions of employment. As such, the court concluded that a threat alone will suffice to establish an unfavorable personnel action. ALJ No. 2012-FRS-23, 2014 WL 931530 (W.D. Wash. Mar. 10, 2014).

In Pearl v. DST Systems, Inc., the 8th Circuit affirmed the district court's grant of summary judgment against a SOX

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<sup>5</sup> Neither party raised evidentiary objections to the admissibility of the alleged settlement negotiation involving the waiver of the subrogation lien.

<sup>6</sup> Because I find that Respondent's failure to waive the lien of Complainant Martino is not an adverse action, any monies which Counsel for Complainant Martino is withholding in his trust account must be immediately returned to Amtrak, as the continued possession of the lien funds is arguably improper and unethical.

plaintiff. The court stated that the plaintiff's complaint to the defendant about a possible understatement of earnings did not amount to protected activity under SOX because the evidence showed that such a belief was not objectively reasonable. 359 Fed. Appx. 680 (8th Cir. Jan. 7, 2010).

The district court found that the plaintiff had sent an e-mail to the defendant stating that there may have been an understatement in earnings in the amount of \$12 million dollars, but that the plaintiff's information came from an unidentified source, the plaintiff had not consulted with anyone prior to sending the e-mail, and the plaintiff never learned any more factual information. Pearl v. DST Systems, Inc., No. 06-cv-00918 (W.D. Mo. Apr. 25, 2008). The plaintiff had acknowledged in his deposition that there might be a SOX violation, but he did not have knowledge of whether it did or did not occur. The district court wrote:

With respect to this claim, plaintiff had scant factual information on which to make the allegation. Plaintiff did not know who had made the report to begin with; he had not seen any of the documents which he suspected might be the cause of the under reporting of the income; he did not attempt to obtain any further factual information; and he admits he did not have sufficient knowledge to know if a SOX violation had occurred. Thus, plaintiff did not have a subjective belief that a violation had occurred. Because of the lack of information, plaintiff also lacked an objectively reasonable basis on which to base his report. This was not a situation where even though no SOX violation was ultimately found, plaintiff had actual information, as opposed to rumor and hearsay, that would support an alleged SOX violation.

Pearl, No. 06-cv-00918, slip op. @ 20-21. See also, Van Asdale v. Int'l Game, Tech., 498 F.Supp.2d 1321, 1333 (D. Nev. 2007) (no reasonable jury could find that plaintiff had a belief that fraud had occurred since her testimony was that she had no belief one way or the other); Bechtel v. Competitive Tech., Inc., Case No. 2005-SOX-33, slip op. @ 29-32 (ALJ Oct. 5, 2005) (complainant's belief that company president engaged in insider trading not objectively reasonable where "[t]he snippet of conversation that [complainant] overheard is too vague to make a reasonable guess at [the president's] intentions, never mind to reach the serious conclusion that complainant drew").

In this matter, Complainants have the burden of proving the alleged threats and intimidation of Raul Delgado by a preponderance of the evidence. While circumstantial evidence is sufficient to meet this burden, double hearsay consisting of a tangled web of rumors is not. Neither Complainant Aymond, nor Complainant Martino, actually heard threatening comments made by Raul Delgado directly. Aymond testified he heard rumors about himself, and that Delgado never directly told him that losing the overtime work was his fault. (Tr. 64). Martino testified he did not hear Delgado "make the statement out of his mouth," but he heard rumors about himself from other co-workers. Martino listed numerous employees who allegedly blamed him for the loss of the overtime opportunity. (Tr. 102).

Because of Complainants' insufficient evidence to meet their burden, they attempted to offer the testimony and affidavits of other Amtrak employees who would support their allegations of threats and intimidation on the part of Delgado. Only two employees, Willie McKenzie and Patricia Hebert, testified that they heard Delgado make comments that the overtime job was lost due to Complainants' reporting of injuries. First, Willie McKenzie testified that Delgado stated, "'You can pretty much scratch off ever going back to Atlanta because of this wreck.'" (Tr. 73). This was the only occasion he heard Delgado make such a comment. (Tr. 83). McKenzie subsequently also admitted he did not think Delgado said this to dissuade the reporting of accidents, and that "maybe it was something he wanted to get done and didn't want to get the blame for." (Tr. 74). McKenzie stated rumors circulated the railroad, and he was not sure which were serious or not. (Tr. 74-75).

Second, Patricia Hebert, deposed that upon Complainant Martino's return to Amtrak property following the accident, Delgado was angry he was there and stated the workers were going to lose the Atlanta overtime job because Complainants filed injury claims. (CX-B, p. 13). Hebert stated "making people feel bad" and turning co-workers against each other was Delgado's management style. (CX-B, p. 14). However, due to inconsistencies in Hebert's deposition and affidavit, as discussed above, I cannot give significant weight to her testimony.

As such, the undersigned is left with one credible witness who testified he heard Delgado make threatening statements. The rest of the evidence consists of double hearsay of Complainants

and other Amtrak employees who heard rumors regarding Complainants' role in the loss of the overtime work. The other Amtrak employees who testified they heard rumors include Scott Lestremau, Paul Dupre, John Meyer, and Warren Nee.

Specifically, Dupre testified he never heard Delgado make retaliatory statements; he heard "rumors and hearsay." (Tr. 149, 163). Dupre also stated the rumor was "their way of lashing out in a Safe-2-Safer world." (Tr. 163). Additionally, Meyer deposed he too never heard Delgado make statements regarding Complainants' role in the loss of the overtime, but instead he heard rumors. (RX-O, p. 12). Meyer also stated he did not blame Aymond and Martino for losing the Atlanta job. (RX-O, p. 20). Likewise, Lestremau did not personally hear Delgado make any allegedly retaliatory statements, but he heard a rumor throughout the facility that the work was lost because of the Complainants' car accident. (RX-P, p. 7). He could not recall where the individuals who told him said they heard the rumor from. (RX-P, pp. 8-9). Lestremau felt the threats and attempt to make people feel bad was Delgado's management style. (RX-P, p. 14). Lastly, Nee testified that the rumor was "shop talk[,] " and he never heard Delgado make any statements blaming Complainants. (RX-Q, p. 7).

As a final attempt to gather sufficient evidence, Complainants suggest Delgado was fired from his position with Amtrak because of the alleged statements he made. They aver this is circumstantial evidence of his improper retaliatory behavior. Beyond this mere speculation, Complainants failed to offer any other proof of the reason behind Delgado's absence from Amtrak. As such, I find this to be insufficient to constitute even circumstantial evidence in this matter.

In considering this evidence as a whole, the vast majority of the proof that Delgado made retaliatory statements lies in second-hand rumors and speculation. Complainants themselves had no direct proof of any allegedly retaliatory statements made by Delgado. The undersigned does not find that this is sufficient evidence to meet the preponderance of the evidence standard.

**Assuming arguendo** that the testimony of one credible witness, rumors, and hearsay is sufficient evidence, the Complainants lacked a reasonable basis upon which to base their allegations. McKenzie, whose testimony I credit with the most weight, stated that Delgado made the comments to shift the blame. The other individuals who testified they heard rumors also indicated Delgado had a spiteful management style. They

also dismissed the rumor as "shop talk." Additionally, there is no record evidence of Delgado's decision-making capacity, if any, which could support his alleged actions as a contributing factor to any adverse action. Because of this, I find that it was unreasonable for Complainants to take seriously the substance of these rumors.

### **3) Loss of Overtime Work in Atlanta**

It has been found that the loss of an overtime opportunity may constitute an adverse action. See, e.g., Scerbo v. Consolidated Edison Co. of NY, Inc., Case No. 89-CAA-2 (Sec'y Nov. 19, 1992). Complainants allege the loss of their Atlanta overtime opportunity was an unfavorable employment action due to the reporting of their injuries. Unlike the evidence supporting the allegations of adverse actions discussed above, the evidence supporting the allegation of the loss of overtime as an adverse action is significantly more substantial.

The record supports that although Amtrak employees were not guaranteed overtime work, they expected it because the Atlanta job was a regular opportunity to make extra income. Complainant Martino, Scott Lestremau, and Warren Nee attested to this fact. Amtrak employees had been performing the work for several years, and they enjoyed the opportunity to work on their craft in a new location. (Tr. 127-128; RX-P, p. 7; RX-Q, p. 12).

Furthermore, a loss of overtime work is a material adversity which would cause a reasonable employee to refrain from reporting injuries. Overtime work is not a mere trivial harm; it does not merely tangentially relate to Complainants' employment. Various testimonials indicated that the overtime work generated an extra \$2,500 in income. (Tr. 33-34, 71). Thus, the loss of overtime causes a significant change in the yearly income of the employees who performed the Atlanta job, which would naturally dissuade a worker from admitting injury.

### **4) "Removal" of Complainant Aymond from Amtrak Property While Performing Light-Duty Work**

Lastly, Complainant Aymond avers that his "removal" from Amtrak property while performing light-duty work was an adverse action. He testified that after his accident, he was placed on light-duty work through the Right Care Day One program, which afforded him the opportunity to make his regular salary while performing less strenuous work. Complainant Aymond performed light-duty work from April 2013 to September 2013. In September

2013, Complainant Aymond was released to full duty. (Tr. 47). Through the Right Care Day One program, Aymond was handing out brochures and flyers, giving people information about the events in the New Orleans Jazz National Park. (Tr. 50).

Aymond testified that he thereafter worked light-duty in the Safe-2-Safer program, presumably in the mechanical department, at the instruction of Paul Dupre for three weeks before he was "removed" from the property because Tommy Farr was not happy he was on-site at Amtrak. (Tr. 53). Aymond stated that he did not know that light-duty workers were not allowed on site, but he was aware that the reason for separating light-duty and full-duty workers was for morale purposes. (Tr. 68). Aymond himself admitted he had never witnessed anyone else performing light-duty in the mechanical department on Amtrak property. (RX-M, p. 18).

When asked whether the light-duty program was applied uniformly, Willie McKenzie testified that he had seen "managers there with boots on where they can't walk, but they got to work[]" performing light duty. (Tr. 81). Paul Dupre on the other hand, the Safe-2-Safer safety facilitator, testified that prior to his involvement with the program, it had been commonplace for employees who had been injured to perform light-duty tasks on Amtrak property. He stated there was no light-duty performed in the mechanical department, however, but departments such as transportation, onboard service, and clerical had light-duty workers. (Tr. 148).

Dupre stated Complainant Aymond "wasn't having a very good time with [his light-duty work,]" so Dupre offered him work in the office on Amtrak property. The switch was approved, but Complainant Aymond would be isolated from the mechanical department doing tasks in the office. (Tr. 149-150). Dupre received a phone call instructing him that Complainant Aymond was not to be allowed to work on the property performing light-duty work. Aymond was told to leave without the use of force, and he was instructed not to show up again on the property and to make arrangements for work off site. (Tr. 151). Dupre observed that Complainant Aymond took the news hard, and he was "extremely upset" and "greatly embarrassed." (CX-D, p. 28).

Loretta Burton, the Amtrak official who contacted Dupre to inform him that Complainant Aymond was not to be performing light-duty on the property, stated that it was not Tommy Farr's policy to have light-duty workers on site. (CX-D, pp. 25-26). Dupre speculated that Farr's true intentions of preventing

light-duty work on site was that "it's not [Farr's] policy. . . to have someone working banker's hours, weekends off, doing nothing and then have another guy or girl on the property decide that they wanted to do the same thing and take a dive and have an injury themselves." (CX-D, p. 26).

Dupre also testified that Clark Whitehead, a mechanical department employee, had performed light-duty work in the yard. (Tr. 152). Dupre deposed that Clifton Tacke worked light-duty performing inventory in the store room on Amtrak property. Tacke worked normal hours, not "banker's hours." (CX-D, p. 35). Tacke and Whitehead performed their light-duty work from "2006 to now." (CX-D, p. 29). Dupre stated that if another employee were injured, he would certainly make the invitation for them to come work with him in Safe-2-Safer, and he would hope there would be a new philosophy "this next go around." (CX-D, pp. 28-29).

Farr himself stated there was no light-duty position in the Safe-2-Safer program and no light-duty policy for working on Amtrak property. (CX-A, p. 19; RX-L, p. 19). Farr stated that Complainant Aymond's reporting of an injury was not a factor in having him removed from the property. (CX-A, p. 20; RX-L, p. 20). Farr stated that allowing Complainant Aymond to perform light-duty in the Safe-2-Safer program created a job that did not exist, and it created a morale problem for workers who were performing full duty and observed light-duty workers who were not "sweating." (CX-A, pp. 53-54; RX-L, pp. 53-54). Farr stated the Right Care Day One work did not have to be affiliated with Amtrak, and it gave an injured employee the opportunity to be paid. (CX-A, p. 55; RX-L, p. 55).

Complainant Martino deposed that "Mr. Haze" and "Mr. White" were performing light-duty work on site, from "what [Martino] was told." He did not personally witness them performing light-duty on the property, but he witnessed "a person" who performed light-duty through Right Care Day One or standard light-duty on the property "years ago." (RX-N, p. 37). Scott Lestremau deposed that he was aware of the Right Care Day One program, and as a matter of policy, light-duty workers were not allowed on Amtrak property. Warren Nee deposed that, to the best of his knowledge, he had never observed employees performing light-duty on the property. (RX-Q, p. 23).

In Halliburton Co. v. Administrative Review Board, U.S. Dept. of Labor, Anthony Menendez, an employee of Halliburton, used the company's internal procedures to submit a complaint to

management about what he thought were "questionable" accounting practices. Menendez also lodged a complaint about the company's accounting practices with the SEC, which led to the SEC contacting Halliburton and instructing it to retain certain documents during the pendency of the investigation. When Halliburton received the SEC's notice of the investigation, the company inferred from Menendez's internal reports that Menendez must have reported his concerns to the SEC too. 771 F.3d 254 (5th Cir. 2014).

Halliburton sent an email to Menendez's colleagues that instructed them to start retaining certain documents because "the SEC has opened an inquiry into the allegations of Mr. Menendez." Once his identity was disclosed, Menendez's colleagues began treating him differently and refused to associate with him. The court found that Halliburton's disclosure of Menendez's identity amounted to a "materially adverse" action under Burlington. The court found that it was inevitable that such a disclosure would result in ostracism. Furthermore, the disclosure of his identity could have been viewed as a warning, granting implied consent for differential treatment, or otherwise expressing discontent. Id.

In view of the foregoing evidence, Complainant Aymond is unable to establish that his "removal" from Amtrak property while performing light-duty work on site is an adverse action. Those individuals who testified they observed light-duty workers on site stated they saw light-duty workers performing tasks that were not in the mechanical department: Willie McKenzie stated he saw a manager performing light duty; Dupre stated Whitehead and Tacke were in the yard and storage room, respectively; and Complainant Martino's testimony about his observations of light-duty workers was vague and noncommittal, which deserves no credit.

Moreover, Warren Nee and Complainant Aymond himself stated they had never observed a light-duty worker on Amtrak's property. Farr and Lestremau stated Amtrak's policy was to not allow light-duty on the property whatsoever. Although somewhat conflicting, the overwhelming majority of this testimony proves that Amtrak's policy was either to not allow light-duty workers on site, or alternatively, that light-duty workers were not allowed in the mechanical department.

Additionally, Complainant Aymond's situation varies greatly from Halliburton, detailed above. Unlike Menendez, the change in Complainant Aymond's location of light-duty work did not open

him up to ridicule or ostracism. His removal from Amtrak property cannot be viewed as a warning, granting implied consent for differential treatment, or otherwise expressing discontent. There is no testimony that Complainant Aymond's co-workers resented him for his change in location. Complainant Aymond was only observed as being personally "embarrassed," and there is no testimony from other workers that they would refrain from reporting injuries due to the change in location of light-duty work.

As such, I find a reasonable worker would not be dissuaded from reporting injuries for fear of being relocated off site during their light-duty work. What is more, the relocation of Complainant Aymond is viewed as a trivial harm under Burlington because he was paid at the same rate as his regular-duty work and still afforded the opportunity to perform light-duty, regardless of whether he was on site or not.

### **C. Contributing Factor**

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." Ameristar Airways, Inc. v. Admin, Rev. Bd., 650 F.3d 563, 567 (5<sup>th</sup> Cir. 2011) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5<sup>th</sup> Cir. 2008)). Essentially, the question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor which, alone or in connection with other factors, tends to affect in any way the decision to take an adverse action. Thus, the argument that respondent had a "legitimate business reason" to take the adverse action is inapplicable to FRSA whistleblower cases. DeFrancesco v. Union Railroad Co., ARB No. 10-114, ALJ No. 2009-FRS-9 (Feb. 29, 2012).

The Board recently observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), supra @ 16, that "proof of causation or 'contributing factor' is not a demanding standard." To establish that his protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tends to affect in any way the employer's

decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ Case No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). Furthermore, a **prima facie** case does not require that the employee conclusively demonstrate the employer's retaliatory motive. Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010).

In Powers v. Union Pacific Railroad Co., ARB No. 13-034, ALJ Case No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the Administrative Review Board ("ARB") revisited en banc the "contributory factor" evidentiary analysis enunciated in Fordham v. Fannie Mae, ARB No. 12-96, ALJ Case No. 2010-SOX-51 (ARB Oct. 9, 2014). In Fordham, a split panel of the ARB had ruled, inter alia, that a respondent's evidence of a legitimate, non-retaliatory reason for an adverse action may not be weighed by the ALJ when determining whether the complainant met his or her burden of proving contributing factor causation by a preponderance of the evidence. The panel reasoned that permitting the employer to put on such evidence at the contributory factor stage would render the statutorily prescribed affirmative "clear and convincing" evidence defense meaningless.

In Powers, the ARB en banc panel stated that it was affirming, but clarifying the Fordham decision:

[T]he ARB in Fordham held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). Fordham, ARB No. 12-061, slip op. at 20-37. That holding as set forth in Fordham is fully adopted herein. Our decision in this case, considered en banc, reaffirms Fordham's holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, i.e., the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in Fordham may seem to foreclose consideration of specific evidence that may otherwise support a

respondent's affirmative defense, the Fordham decision should not be read so narrowly. This decision clarifies Fordham on that point.

Slip op. @ 14.

The ARB's clarification is essentially that the employer's evidence must be relevant to the issue presented at the contributory factor stage of the analysis, and that proof of the respondent's statutory defense of proving by clear and convincing evidence that it would have taken the personnel action at issue absent the protected activity is legally distinguishable from the complainant's burden to show contributing factor causation. Specifically, the ARB stated:

Contrary to the dissent's assertion in Fordham that the majority's holding in that case precluded consideration by an ALJ of all relevant evidence in deciding the question of contributing factor causation (see Fordham, slip op. @ 37), the majority in Fordham only addressed the question of what evidence could properly be weighed under the "preponderance of the evidence" standard in analyzing complainant's proof of contributing factor causation. Fordham specifically addressed the question as to evidence that may be weighed to demonstrate the contributing factor element under the preponderance of evidence standard. The majority decision in Fordham stated that its ruling "does not preclude an ALJ's consideration, under the preponderance of the evidence test, of respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower in order to prevail," explaining that "[i]t is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn." Fordham, ARB No. 12-061, slip op. @ 35, n. 84. The distinction should not, however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. It merely recognizes that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence. Certainly, analyzing

specific evidence in the context of the AIR 21 burden shifting framework "requires a 'fact-intensive' analysis." Franchini v. Argonne Nat'l Lab, ARB No. 11-006, ALJ Case No. 2009-ERA-014), slip op. @ 10 (ARB Sept. 26, 2012).

While, as Fordham explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof. 29 C.F.R. § 18.401. Thus, the Fordham majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence." Fordham, slip op. at 23.

Id. @ 22 (footnote omitted).

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. DeFrancesco, supra.

"Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. See Kewley v. Dep't of Health and Human Servs., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (noting that, under the Whistleblower Protection Act, 'the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, **prima facie**, that the disclosure was a contributing factor to the personnel action') (internal

quotation omitted)." Direct evidence of an employer's motive is not required. Araujo, supra, slip op. @ 19.

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. @ 9 (ARB Nov. 30, 2005). However, where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006). The ARB noted that "while temporal proximity alone may at times be sufficient to satisfy the contributing factor element, ARB precedent has declined to find 'contributing factor' based on temporal proximity alone where relevant, objective evidence disproves that element of complainant's case." Powers, supra, at 23 (footnotes omitted) (emphasis as in original).

While suspicious timing alone is rarely sufficient to establish the requisite causal connection, see id., a **prima facie** case may be made on temporal proximity alone if it is "very close." Valderaz v. Lubbock County Hosp. Dist., 2015 U.S. App. LEXIS 10988, \*14, (5th Cir. Tex. 24, 2015); Washburn v. Harvey, 504 F.3d 505, 511 (5th Cir. 2007). For example, a time lapse of up to four months has been found to be sufficient. See Evans v. City of Houston, 246 F.3d 344, 354 (5th Cir. 2001); Hypolite v. City of Houst., Tex., 493 F. App'x 597, 606 (5th Cir. 2012); but see Flanner v. Chase Inv. Servs. Corp., 600 F. App'x 914, 921-22 (5th Cir. 2015) (noting that a four-month gap, or even a two-month gap, standing alone, is insufficient to establish causation, and that Evans actually held that the five-day gap in time was sufficient in that case); see also Clark County School Dist. v. Breedon, 532 U.S. 268, 273-74, (2001) (noting that a three-month or four-month period may be close enough to make a **prima facie** showing of causation but holding that a twenty-month period was not).

The ARB further noted in Powers that where the protected activity and unfavorable personnel action are "inextricably intertwined," the respondent bears the risk that the influence of legal and illegal motives cannot be separated. Powers, supra @ 23-24. In DeFrancesco, supra, slip op. @ 3, the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In Smith v. Duke

Energy Carolinas, LLC, ARB No. 11-003, ALJ Case No. 2009-ERA-007, slip op. @ 4 (ARB June 20, 2012), the employee reported a rule violation and was fired for reporting the violation late. Similarly, in Henderson v. Wheeling & Lake Erie Railway, ARB No. 11-013, ALJ Case No. 2010-FRS-012, slip op. @ 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. Thus, in DeFrancesco, Smith, and Henderson, the protected activity and adverse action were "inextricably intertwined" because the basis for the adverse action could not be explained without discussing the protected activity. However in Hutton v. Union Pacific R.R. Co., the respondent fired the complainant solely because he failed to comply with necessary steps to accommodate his return to work, and it consequently was not necessary to discuss that he reported his injury; the reporting of the injury and the adverse action were not inextricably intertwined. ARB No. 11-091, ALJ Case No. 2010-FRS-020 (ARB May 31, 2013).

Because Complainants have been successful in establishing that their loss of overtime work was an adverse action, they must also establish that their protected activities, the reporting of their injuries and the filing of their OSHA complaints, was a contributing factor in Respondent's revoking the overtime work. First, the record contains direct evidence of such a contributing factor in the form of an overt statement contained in the Complainants' accident reports. Amtrak's investigation reports prepared shortly after Complainants' February 8, 2013 accident contain vital information regarding the motives of Respondent.

Specifically, the Amtrak investigation reports dated February 11, 2013 of Complainants' February 8, 2013 accident, each state, "Contract servicing train in Atlanta to vendor to eliminate liability of transporting employees." The reports indicate that the "investigation team" consisted of Forrest Walters, Mark Wohlers, and Raul Delgado. The documents also indicate that Tommy Farr reviewed the report. (CX-E; CX-F). Rarely is such blatantly retaliatory evidence available to prove the mindset of Respondent, but the reports establish that Amtrak removed the overtime opportunity from Amtrak employees due to the injuries Complainants incurred.

Next, the temporal proximity between the injuries incurred and the contracting of the overtime work is also circumstantial evidence that the reporting of Complainants' injuries was a contributing factor in the adverse action. Complainants' injuries occurred on February 8, 2013, and they were reported

that same day. Complainants filed a whistleblower claim with OSHA on July 9, 2013. The first indication in the record that the Atlanta work was to be outsourced is contained in an email, dated December 6, 2013, from Tommy Farr, which informs recipients, including Complainant Martino, that the Atlanta work was to be performed by a contractor for the year 2014. As the announcement to contract the work was made in December 2013, it is logical to conclude the actual negotiations to outsource the work occurred before that time. At most, ten months transpired between the reporting of the injuries and the adverse action, and five months transpired between the Complainants' filing of their OSHA complaint and the contractual outsourcing of the overtime work.

While Fifth Circuit precedent holds that a two-month gap, standing alone, is insufficient to establish temporal proximity, the record before me contains different circumstances. Here, the record contains direct evidence of retaliation, as discussed above, and the overtime work was performed only on a biannual basis. (Tr. 41, 91). Although there is a 10-month and 5-month gap between the protected activities of reporting injuries and filing complaints, respectively, and the adverse action, the very next opportunity for Complainants to perform the overtime work was contracted out after the trip upon which the injuries occurred. Thus, unlike in scenarios where the adverse action can be taken directly following the protected activity, a gap between the protected activity and adverse action is mandatory in this situation. Consequently, since Complainants' very next opportunity to perform the overtime work was taken away, and given the direct evidence establishing causation, as discussed above, there is sufficient evidence to draw an inference of causation due to temporal proximity.

It can be further found that the loss of the overtime work is inextricably intertwined with the Complainants' reporting of injuries and filing of a complaint. Like DeFrancesco, Smith, and Henderson, discussed supra, the Complainant's injuries occurred while returning from the overtime work, and the overtime work was subsequently contracted out due to the transporting of Amtrak employees to the overtime location in Atlanta. Thus, the adverse action cannot be discussed without acknowledging the protected activity.

Because the foregoing is violative of the FRSA, Complainants have established a **prima facie** case of whistleblower discrimination. It is next Respondent's burden to

prove by clear and convincing evidence that it would have taken the same unfavorable action despite the protected activity.

**D. Respondent's Burden to Prove It Would Have Taken the Same Action, Absent Complainants' Protected Activity**

Respondent next has the burden to establish that it would have taken the same action absent the Complainants' protected activity. A respondent's burden to prove this by clear and convincing evidence is a purposely high burden, as opposed to a complainant's relatively low burden to establish a **prima facie** case. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." DeFrancesco, supra; Araujo, supra at 157. To meet the burden, Respondent must show that "the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

Because proof of contributing factor does not require evidence of retaliatory motive, evidence of non-retaliatory motive, such as "self-serving testimony of Company managers" does not rebut a complainant's evidence of contribution. Rather such evidence is more relevant to a respondent's affirmative defense, i.e., at the clear and convincing stage of the analysis. Powers, supra @ 26-28.

Respondent contends it would have contracted out the overtime work, despite the Complainant's reporting of injuries and the filing of their complaints. Respondent offers the testimony and affidavit of Tommy Farr, as well as two affidavits from Drummac employees Ashley Ray and George Fry, as evidence that it would have taken the same action despite the protected activities. The substance of the testimony and affidavits are that Amtrak contracted the work for cost-saving measures, and that the negotiations began as far back as 2010. Farr states that the decision to use contracts was for budgetary reasons, and was consistent with the trend to use contractors for train-turning services at other Amtrak locations across the country.

Respondent also argues that the overtime work was taken away from all New Orleans Amtrak employees, not just the Complainants. In addition, the December 6, 2013 email contains

a spreadsheet and urges that the decision to contract the work was to save money. The spreadsheet conclusively values the cost of contractors as less than the cost of keeping Amtrak employees on the overtime job, without providing supporting documentation for how Respondent arrived at the values.

Based on this weak evidence, the undersigned cannot conclude that Respondent has met its burden by clear and convincing evidence. The self-serving testimony of Tommy Farr and the affidavits of the Drummac employees are insufficient to rebut Complainants' **prima facie** case. Despite the contentions of Farr, Rae, and Fry, I am presented with no conclusive evidence that demonstrates a different motivation for Respondent to contract the Atlanta work, other than to retaliate against Complainants. The record is devoid of proof of negotiations with Drummac in 2010 in the form of contracts or emails, for example. Moreover, the figures contained in the spreadsheet from the December 6, 2013 email are unsupported and based on conjecture. The undersigned is unable to look beyond the numbers to determine whether contracting the work is a true cost-saving measure.

The argument that all Amtrak workers lost the overtime opportunity, instead of solely Complainants, is equally insufficient. The fact that all employees lost the work does not diminish the harmful effects of punishing Complainants for their protected activities. Based on Complainants' **prima facie** case, the retaliatory nature of Respondent's action is still present, despite the widespread effect of removing the opportunity for overtime work from all employees. Likewise, Respondent's argument that other Amtrak locations contracted out their overtime work does not lessen the retaliatory motivations of Respondent with regard to New Orleans employees, in particular Complainants.

Notably, Respondent had ample time to provide the undersigned with clear and convincing evidence of proof of its defense. The undersigned concedes that the majority of Complainants' **prima facie** case is based on speculation and rumors, but Respondent failed to submit evidence of its potential exoneration by the close of the record. I issued an order on March 30, 2015, wherein I rejected an exhibit submitted by Respondent which contained a cost comparison between Atlanta and Meridian track work and purported to compare wages, hotel, and meal costs for Amtrak employees to the costs associated with contractors. Complainants had not been afforded the opportunity to cross-examine the preparer of that document to determine the

methodology in formulating the numbers. Similarly, on April 16, 2015, I rejected Respondent's submission for the same reasons I had rejected Respondent's previous submission, in addition to its tardiness. The record had been closed approximately six months prior. I generously gave Respondent ample time post-hearing to depose witnesses regarding cost comparisons, and it failed to take advantage of this opportunity.

In conclusion, Respondent has failed to establish by clear and convincing evidence that it would have taken the same actions despite Complainants' protected activities.

### VIII. REMEDIES

A successful complainant under the FRSA is entitled to all relief necessary to make the employee whole including reinstatement with back pay, compensatory damages and punitive damages. Specifically, the FRSA provides that:

(e) Remedies.-

(1) In general.-An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.-Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.-Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 20109(e)(1)-(3).

## A. Reinstatement and Back Pay

With regard to reinstatement, Complainants have not been terminated or demoted, thus reinstatement is not a necessary remedy. Regarding back pay, Complainants aver they are entitled to back pay in the amount of \$2,500 a year for two trips of overtime work per year, for the years 2014 and 2015. Additionally, Complainants aver they are entitled to \$2,500 per year until they each reach the age 65. By Complainants' computations, Complainant Martino would be entitled to \$15,000, and Complainant Aymond would be entitled to \$90,000.

In Palmer v. Western Truck Manpower, Inc., the respondent objected to the amount of overtime pay due to the complainant. The Board rejected the respondent's argument and found no reason to withhold an overtime award due to it being "'of necessity highly speculative.'" Slip op. @ 2, Case No. 1985-STA-16 (Sec'y June 26, 1990). That the amount of overtime hours a complainant would have worked, but for the discrimination, cannot be determined with certitude does not deprive a complainant of all compensation for overtime lost. Id.; see Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir, 1974) (where the court notes that "in computing back pay award[s,] two principles are lucid: (1) unrealistic exactitude is not required, (2) uncertainties in determining what an employee earned but for the discrimination, should be resolved against the discriminating employer."

Federal courts have consistently held under a variety of discrimination statutes that the purpose of back pay is to make "whole" the employee who has suffered economic loss as a result of the employer's illegal discrimination. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984); Palmer, supra @ 3. The failure to compensate a claimant for overtime would leave him less than "whole." Palmer, supra at 3. Where an award of back pay can only be a close approximation, the use of a seniority formula to compute earnings of a "representative employee" gives a reasonable approximation of what the complainant would have made but for the discrimination. Id. at 4 (internal quotations omitted).

The undersigned concedes that a calculation of \$2,500 per year for overtime work is a reasonable figure and supported in the record by substantial evidence. As indicated by case precedent, the need for an exact figure does not provide a valid reason to withhold overtime pay from a complainant who suffered illegal discrimination. I do not agree, however, that

Complainants in the instant matter are entitled to an unfettered amount of overtime for every year until they reach the age of 65. While exact certainty in calculations is not required, I find that finality is necessary.

To award Complainants such a virtually indefinite award for hypothetically performing overtime work every year until the age of 65 is unreasonable. To make such an award would assume that Respondent could never contract out its overtime work for valid, non-discriminatory reasons, and it would assume that both Complainant Aymond and Complainant Martino would indeed be employed for Amtrak until the age of 65. Consequently, I award Complainants overtime pay for only the years 2014 and 2015, totaling an award of \$5,000.00 apiece. Making any further awards would be an abuse of discretion. While the standard requires that any uncertainties in determining the award be assessed against the employer, I find that to award Complainants \$90,000 and \$15,000, respectively, would be speculative beyond what the standard assumes, and it would unnecessarily punish Respondent as disguised punitive damages, discussed below.

## **B. Compensatory Damages**

Damages for emotional distress may be compensated under the Act. See Mercier v. Union Pacific Railroad Company, ARB Nos. 09-101, 09-121, ALJ Nos. 2008-FRS-3, 2008-FRS-4 (ARB Sept. 29, 2011); Anderson v. Amtrak, Case No. 2009-FRS-3 (ALJ Aug. 26, 2010); Bala v. Port Authority Trans-Hudson Corporation, Case No. 2010-FRS-26 (ALJ Feb. 10, 2012). "A complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish in order to receive compensatory damages for those conditions." Id. at 14. (citing Testa v. Consol. Edison Co. of New York, Inc., Case No. 2007-STA-27 at 11 (ARB Mar. 19, 2010)).

The Supreme Court has noted in employer retaliation cases that even when an employer makes an employee whole for lost wages, it does not make the employee whole emotionally. Burlington Northern v. White, supra, at 72. Even though the employer never terminated the employee, the court observed:

But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional

hardship that 37 days of having 'no income, no money' in fact caused...('That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad...I got very depressed.')

Id.

Here, Complainant Aymond argues Amtrak's elimination of the Atlanta work made him "feel bad, ashamed and demoralized," according to Complainants' brief. He allegedly also felt bad for his co-workers. He testified he felt responsible for the loss of overtime work. Complainant Martino argues that he felt animosity from co-workers and was "hurt" for being blamed for costing co-workers the Atlanta overtime job. As such, Complainant Aymond requests \$45,000 in compensatory damages, and Complainant Martino requests \$40,000 in compensatory damages.

Complainants' requests for compensatory damages for mental anguish are grossly disproportionate to the emotional stress they incurred. While I found insufficient evidence to make a finding of retaliation in the form of threats and intimidation from Raul Delgado, I do believe, however, that Complainants were the subject of gossip and "shop talk" amongst their co-workers and peers. Complainants' feelings of distress are a natural result of being the subject of rumors at the workplace, but as I discussed in my analysis regarding their credibility, I find that Complainants are exaggerators, which diminishes the award they should receive due to mental anguish. However, because the majority of Complainants' anguish stems from the rumors circulated by co-workers, their emotional distress was not entirely due to the Respondent's adverse action. As a result, I award Complainants \$1,000.00 each in compensatory damages due to the distress they felt regarding the loss of the overtime work only and the feelings of guilt for costing co-workers overtime opportunities.

### **C. Punitive Damages**

The FRSA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e)(3).

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . . ." Smith v. Wade, 461 U.S. 30, 51 (1983); see also Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ Case No. 2009-STA-47 (ARB Aug. 31, 2011) (\$75,000 awarded in

punitive damages based on a finding that the Respondent's fleet manager had intentionally violated a federal safety statute when he pressured Complainant to drive through hazardous conditions). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Punitive damages may be assessed in whistleblower cases to "punish wanton or reckless conduct and to deter such conduct in the future." BMW v. Gore, 517 U.S. 559, 568 (1996); Anderson v. Amtrak, Case No. 2009-FRS-3 (ALJ Aug. 26, 2010) (citing Johnson v. Old Dominion Security, Case No. 1986-CAA-3/4/5 (Sec'y May 29, 1991)). In determining whether punitive damages are appropriate, factors to assess include: (1) the degree of the respondent's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. See Anderson at 26 (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001)).

In Bailey v. Consolidated Rail Corp., the Complainant petitioned for review of the ALJ's award of \$4,000 for pain and suffering, seeking an increase to \$100,000 in compensatory damages for pain and suffering, and \$250,000 in punitive damages. The ARB found that the \$4,000 award was well within the ALJ's discretion and supported by substantial evidence. The ALJ found that the Complainant's emotional distress was not entirely due to the Respondent's adverse action, and found that the Respondent had not acted with such callous disregard of the Complainant's rights that punitive damages were warranted. The ALJ rejected the Complainant's claims that company managers harbored antagonism or hostility against him and were conspiring to terminate his employment. Substantial evidence supported the ALJ's finding that the Complainant's protected activity was a contributing factor in the adverse action, but that the evidence did not rise to the level of establishing grounds for awarding punitive damages. ARB Nos. 13-030, 13-033, ALJ Case No. 2012-FRS-12 (ARB Apr. 22, 2013).

In Jackson v. Union Pacific Railroad Co., the Complainant engaged in protected activity when he reported a foul, smoky odor to the manager of yard operations (which had resulted from marsh fires outside New Orleans). Because of possible health concerns, the Complainant requested to be assigned to an area free from the smoke and smell. Unable to accommodate him, the

Complainant's supervisor sent the Complainant home without pay and directed him to return to work only after obtaining a medical release. The ALJ awarded \$1,000 in punitive damages for the "exaggerated" response to the Complainant's smoke concerns. The ARB found that substantial evidence did not support the punitive damages award, finding that the record did not indicate any reckless or callous indifference to the Complainant's legal rights. The ARB found that the Complainant's supervisor had consistently testified that the Complainant was reporting a personal health issue and that he wanted a doctor to determine why the Complainant had a problem while no one else at the yard did. The ARB acknowledged that the ALJ had implicitly disregarded this testimony in favor of the Complainant's testimony about his safety concerns, but nonetheless found that the Complainant had provided no evidence of how the supervisor's conduct showed reckless or callous indifference toward the Complainant. The ARB thus reversed and vacated the punitive damages award. ARB No. 13-042, ALJ Case No. 2012-FRS-17 (ARB Mar. 20, 2015).

Complainants aver Respondent's behavior in this matter is particularly reprehensible. Complainants claim Respondent punished not only themselves, but also the entire mechanical department at Amtrak New Orleans. Complainants assume Raul Delgado was fired for the alleged threatening remarks he made, and they aver Complainant Aymond's removal from Amtrak property reverses the public policy movement to encourage the reporting of injuries. Complainants urge the undersigned to award the statutory maximum of \$250,000 to each of them.

In the instant case, punitive damages are not warranted for several reasons. Respondent's culpability was not egregiously reprehensible, as opposed to findings in cases where punitive damages were awarded.<sup>7</sup> Instead, Respondent's conduct is

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<sup>7</sup> For examples, see:

Ferguson, supra (awarding \$75,000);

Hall v. U.S. Army, Dugway Proving Ground, Case No. 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding \$400,000 in compensatory damages for mental anguish);

Creekmore v. ABB Power Systems Energy Services, Inc., Case No. 1993-ERA-24, (Dep. Sec'y Feb. 14, 1996) (awarding \$40,000 for emotional pain and suffering);

Michaud v. BSP Transport, Inc., ARB No. 97-113, ALJ Case No. 1995-STA-29 (ARB Oct. 9, 1997) (awarding \$75,000 in compensatory damages for major depression caused by discriminatory discharge); and

comparable to the actions taken by respondents in Bailey and Jackson, cited above. Respondent in the instant matter has not engaged in any reckless or callous behavior that pushes their conduct from unlawful and prohibited to reprehensible.

While I found substantial evidence to warrant a finding of adverse action and resulting back pay and compensatory damages, a request of punitive damages in this matter is wholly disproportionate to the gravity of Respondent's prohibited conduct and is excessive in nature. While Respondent engaged in inexcusable adverse action, it did not violate federal safety laws or jeopardize the health and well-being of its employees. Complainants and their co-workers maintained their positions and regular pay with Amtrak, although they lost a coveted overtime opportunity. In view of the foregoing, I find that punitive damages are not warranted.

#### **D. Attorney's Fees and Costs**

Lastly, Complainants are entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of their complaints, limited to the success achieved in establishing that the overtime work was wrongfully taken away from Complainants because they reported their injuries. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainants has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

### **IX. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I find and conclude that Complainants have established Respondent Amtrak retaliated

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Griebel v. Union Pacific Railroad Co., ARB No. 13-038, ALJ Case No. 2011-FRS-11 (ARB Mar. 18, 2014) (The Respondent challenged the ALJ's punitive damages award of \$100,000 under FRSA, 49 U.S.C.A. § 20109(e)(3). The ARB affirmed the award finding that the facts supporting the decision to award such relief were supported by substantial evidence, and that the Respondent failed to present persuasive reasons for overturning the amount of punitive damages.).

against them in violation of the Federal Rail Safety Act for reporting a work-related injury. Accordingly,

**IT IS HEREBY ORDERED** that:

1. Respondent Amtrak shall pay Complainant Aymond, \$5,000.00 in back pay for two years of missed overtime work, plus interest from the date such wages were lost until the date of payment at the rate prescribed in 28 U.S.C. § 1961.
2. Respondent Amtrak shall pay Complainant Martino, \$5,000.00 in back pay for two years of missed overtime work, plus interest from the date such wages were lost until the date of payment at the rate prescribed in 28 U.S.C. § 1961.
3. Respondent Amtrak shall pay to Complainant Aymond compensatory damages in the amount of \$1,000.00 for emotional distress.
4. Respondent Amtrak shall pay to Complainant Martino compensatory damages in the amount of \$1,000.00 for emotional distress.
5. Respondent shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondents shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

**ORDERED** this 11<sup>th</sup> day of September, 2015, at Covington,  
Louisiana.

LEE J. ROMERO, JR.  
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).