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Issue Date: 01 March 2016

In the Matter of:

DWIGHT BOHANON,
Complainant,

v.

GRAND TRUNK WESTERN RAILROAD CO.,
Respondent.

Case No.: 2014-FRS-00003

DECISION AND ORDER

This matter arises under the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. § 20109, as amended by the 9/11 Commission Act of 2007. Section 20109 of the Act protects employees of railroad carriers from discrimination based on their prior protected activity pertaining to railroad safety or security.

Procedural History

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") on September 26, 2012, alleging that Respondent, Grand Trunk Western Railroad Company ("GTW") retaliated against him for reporting a safety issue during a discussion with his supervisor, Trainmaster Eric Herbeck, on September 23, 2012. JX 25. The Regional Administrator issued a decision on September 20, 2013, dismissing the complaint. JX 26. On October 17, 2013, Complainant submitted his objections to the Secretary's findings. JX 27. This matter was docketed with the Office of Administrative Law Judges ("OALJ") on October 17, 2013, and subsequently assigned to my docket. Pursuant to my November 7, 2013, *Notice of Hearing and Prehearing Order*, this matter was scheduled for formal hearing on February 26, 2014, in Ann Arbor, MI. ALJ 1. The hearing was rescheduled on February 4, 2014, and again on May 27, 2014, to provide the parties additional time to complete discovery. ALJ 2, 3. Upon receiving a request from Employer's counsel to continue the hearing in light of an emergency, I rescheduled the hearing a third time on October 27, 2014. ALJ 4. On December 16, 2014, I rescheduled the hearing for July 28-30, 2015. ALJ 5.

On June 2, 2015, I received *Respondent's Memorandum in Support of its Motion for Summary Decision.* I received *Complainant's Motion for Extension of Time to File a Response Brief to Respondent's Motion for Summary Decision* on June 4, 2015. Complainant requested an additional fourteen days to submit a response to the *Motion for Summary Decision,* noting that

counsel for Respondent stated no objection to this extension. On June 9, 2015, I received *Complainant's Motion to Cancel the July 28, 2015 Hearing Date.* In its motion, Complainant requested a continuance of the hearing date in order to allow sufficient time for me to rule on Respondent's motion for summary decision. On June 9, 2015, I issued an *Order Granting Extension and Postponing Hearing*, in which I granted Complainant's requests for both a continuation of the hearing and an extension of time to respond to Respondent's *Motion for Summary Decision.* ALJ 6. Pursuant to this order, the hearing was rescheduled for October 28-29, 2015. I received *Complainant's Response to Respondent's Motion for Summary Decision* on June 23, 2015. On September 30, 2015, I denied *Respondent's Motion for Summary Decision*. ALJ 7.

On October 28-29, 2015, pursuant to a *Notice of Hearing* dated June 9, 2015, (ALJ 6),[1] I conducted a hearing in Ypsilanti, Michigan. My Decision and Order in this case is based on the testimony presented at the hearing and the following documents admitted into evidence: CX 1, 2, 5, 6, 9, 11, 14, 14(a), 15, 16, 18, 19; RX 2, 5; and JX 1-27.[2] Tr. 7, 29, 317, 437. Both parties filed post-hearing briefs in this matter which I have considered in rendering this decision.

Stipulated Facts

At the hearing, the parties stipulated to the following:

1. Complainant is a party covered by the Act.

2. Respondent is a railroad covered by the Act.

3. Complainant suffered an adverse employment action with a 30 day suspension.

4. During a formal investigation of the incident by Respondent, Complainant raised a safety concern, i.e., that he felt Circular 6 also known as "the Ten Minute Rule" was not safe.

Tr. 30-32.

These stipulations have been admitted into evidence, and are therefore binding upon Complainant and Respondents. *See* 29 C.F.R. § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Coverage under the Act cannot be conferred by stipulation. *See Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985). However, I find that such coverage is present here.

I have carefully reviewed the foregoing stipulations and find they are reasonable in light of the evidence in the record.

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[1]The following notations appear in this decision to identify exhibits: JX - Joint Exhibit; CX - Complainant exhibit; RX - Respondent exhibit; ALJ - Administrative Law Judge exhibit; and TR - Transcript.

[2] The following exhibits were withdrawn at the hearing: RX 3,4; CX 3, 3(a), 4, 8, 10, 12, and 13. I excluded CX 7 and 17 from consideration. Tr. 8, 29.

Issues

1. Whether Complainant engaged in protected activity under the FRSA;

2. If Complainant engaged in protected activity and suffered an adverse personnel action,[3] whether the protected activity was a contributing factor in the adverse personnel action;

3. Whether Respondent would have taken the same adverse action in the absence of the protected activity.

4. Damages.

Contentions of the Parties

Complainant

Complainant asserts that on September 23, 2012 he advised Respondent's Trainmaster, Eric Herbeck, that a new rule[4] known as "Circular 6" or the "Ten Minute Rule" was unsafe because it did not allow conductors sufficient time to perform their mandatory review of train bulletins, orders, switch lists, and wheel reports so they could safely move their assigned trains. Complainant asserts that Herbeck disputed his concerns regarding Circular 6. Consequently, Complainant attempted to elevate his concerns and seek clarification from higher management including Assistant General Manager of Operations, Derrick Colasimone, and Chief Operating Officer, Keith Creel. In response to Complainant's attempt to consult higher management regarding his concerns, Herbeck after speaking with his immediate supervisor, Lance Osmond, informed Complainant that he was removed from service immediately. Following a company investigation on October 1, 2012, Complainant was found to have violated Respondent rules dealing with insubordination and delaying trains. Following the company investigation, Complainant was suspended from employment for 30 days by Derrick Colasimone. Complainant contends that his protected activity of reporting his safety concerns about Circular 6 was a contributing factor in his removal from service and suspension of employment.

Respondent

Respondent concedes that Complainant suffered adverse action in the form of removal from service and a 30 day suspension.[5] However, Respondent contends that Complainant was disciplined not for engaging in protected activity, but rather for insubordinate conduct i.e., disrespect and use of profanity toward an inexperienced Trainmaster who questioned why he was not out the door in 10 minutes as required by Circular 6. Respondent contends that Complainant was a bully who became enraged, was argumentative, used profanity, and walked out on Herbeck in the middle of their discussion. Respondent contends that Complainant taunted Herbeck and tried to intimidate him by threatening to involve higher management in their

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[3] Respondent does not dispute that Complainant suffered an adverse personnel action.
[4] Circular 6 was issued on August 17, 2012. JX 11.
[5] On February 10, 2016, Respondent filed a copy of Public Law Bd. 7227, Award No. 72 regarding the resolution of Complainant's union grievance concerning this matter. I take judicial notice that the Public Law Board reduced Complainant suspension from 30 to 15 days for purposes of computing damages only.

dispute. Respondent further contends that the only time Complainant raised a safety concern pertaining to Circular 6 was during the company's investigation hearing and that he, therefore, did not engage in protected activity on September 23, 2012. (R. Br at 33-34). Respondent asserts that Complainant belatedly fabricated the conversation that he allegedly had with Herbeck about his safety concerns, after the fact, when he knew he was going to an investigative hearing and could face disciplinary action.

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

Sworn Testimony[6]

Derrick Colasimone
(TR. 43)

Direct Examination

Derrick Colasimone testified at the hearing on October 28, 2015. He stated that his title is general manager for British Columbia. In the year 2012, his title was general manager, Michigan Division. He has been general manager for approximately two years. He has worked with Canadian National Railroad/Grand Trunk Western since 1983 in various roles and divisions. Tr. 43-45.

Colasimone had never met Dwight Bohanon prior to September 23, 2012, the date of Complainant's alleged misconduct. He had never told Complainant to bring issues to him personally. He received an email from Complainant in February of 2012 about a harassment claim against Mr. Tassin. Complainant's Exhibit 7 did not refresh his recollection as to whether he had told Complainant to bring issues to him. He did not correct Complainant's email of February 7, 2012, to say "don't call me." He did not recall talking to Complainant about an earlier issue in which he was denied lunch after 13 hours. Tr. 45-47.

He is familiar with the hours of service. The hours of service talks about activities that are covered service, which is considered working. An employee is obligated to accurately report his hours of service. The phrase "dressed and ready" means you have all your equipment on at the report time. Covered service is a different issue – it's when you start performing your job duties, not when you move the wheels of the engine. It's not prior to your on-duty time. Reading the daily operating bulletin can be covered service that happens during on-duty time, or it can be done prior to going on duty. Tr. 47-50.

An employee is not required to read anything until his on-duty time. When an employee gets to his on-duty time he has to read the daily operating bulletin and look at his switch list. He also is expected to talk with the yardmaster if that is required and check the bulletin book/circular book. In addition to the daily operating bulletins, there's the zone operating bulletin, and there might be a Battle Creek operating bulletin, depending on when he goes on duty. He would be expected to do all of these things after his report time. An employee would

[6] The summary of testimony is not intended to be a verbatim recitation of testimony, but is merely a summary of the key points of the witness' testimony.

be required to know about any applicable bulletins that apply to where he's going on duty. Tr. 50-52.

Colasimone does not know whose idea it was to promulgate Circular 6. He was not aware that it was being promulgated. He does not remember when he became aware of the circular. He is not aware of any study that was done to determine whether ten minutes is an appropriate time in which to perform all of the above tasks. He did not see anything to indicate that management consulted with either the representatives of the locomotive engineers or the conductors as to whether ten minutes was a reasonable time in which to perform their duties. He agrees that reviewing all of the above documents is essential to safe performance of an employee's job duties and that an employee should take the time necessary to do so. He did not understand Mr. Bohanon to indicate that he was discussing with Herbeck (Colasimone's manager) the appropriate amount of time necessary to review his work orders and bulletins prior to performing service. However, in his deposition of September 2014, he stated that he did understand this to be true. Tr. 52-55.

Colasimone's only knowledge of the conversation between Complainant and Trainmaster Eric Herbeck is what he read of it in the transcript of the investigation and the exhibits attached to the transcript. In making his decision regarding discipline, he relied only on the transcript and attached exhibits. He also reread the whole transcript before giving his deposition. He testified that, from his review of the transcript, this discussion between Complainant and Herbeck involved Complainant being late for work. However, in his deposition, Colasimone stated that he was aware that Complainant had a concern about the amount of time in which it was expected for him to get out onto the lead and start working. He agreed that all employees are allowed to make decisions that they feel are in the best interests of safety. Tr. 56-60.

There is no rule on the railroad regarding the use of profanity. He has heard conductors and engineers use profanity in the course of their job duties regularly, and they use it in the presence of trainmasters. He has also heard the trainmaster use profanity and has used it himself in the course of his duties. It is common language and is used every day. Whether it is wrong to use such language depends on the context of how they use it. Employees are told that that if they want clarification or have a concern about a safety issue, they have the right to clarify and elevate that issue by asking for assistance. There should be no repercussion for elevating the issue to the next level. Complainant did not violate any rule by calling Keith Creel, though it is highly unusual. It was not considered quarrelsome or insubordinate. There was also no rule violation in calling him to ask a question, and employees are told they have the right to do this with no repercussions. Tr. 60-62.

Colasimone testified that he did not know who pulled Complainant out of service. Any manager has the right to remove an employee from service. He believes that Lance Osmond was the divisional trainmaster for the triangle in 2012. His superior was Phillip Tassin, the superintendent. Depending on the circumstances, it could be either the assistant superintendent or the trainmaster who could pull an employee out of service. He does not remember where he was at the time of the issues giving rise to this claim. He does not recall being aware of union complaints with regard to Circular 6. He does not recognize the email chain in Complainant's Exhibit C-6 with John Karakian, the general chairman for the Brotherhood of Locomotive Engineers. It's possible that he did receive emails regarding Circular 6, but he does not

remember them, as he receives a lot of emails from Mr. Karakian. He did not have any role in the removal of Circular 6. Tr. 62-65.

As general manager, he has a morning conference call with his managers every day. He tries to be on it every day. They discuss anything pertaining to the execution of the operating plan and the Michigan Division. Circular 6 would not be brought up on a morning conference call. An employee could receive an efficiency test failure for failing to comply with Circular 6, as it would be a failure to follow instructions. He is not aware of any instructions to trainmasters as to handing out ET failures for not getting out the door in ten minutes, though there could have been instructions given out. Herbeck reports train delays in a system within Canadian National that everyone, including trainmasters, can monitor. Taking more than ten minutes to get out the door as required by Circular 6 might be the type of train delay that would be reported by management in this way. If a trainmaster is going to be delayed, he is supposed to notify his immediate supervisor and provide a reason for the delay. *See* Circular 6, J-11. Tr. 65-68.

An employee performance scorecard is a summary of an employee's performance. A service record is kept for each employee that identifies past discipline and test failures. After Complainant was pulled out of service, his service record was pulled up and Colasimone was alerted to it. Complainant was rated "exceeds", the highest rating level, on his employee performance scorecard. Colasimone was carbon copied on a note from Mr. Tassin in which Tassin states that he knows of two efficiency test failures within a year, and that he has some research to do to determine how they were removed. Colasimone responded via email stating, "how could we rate him exceeds if he claims we are harassing him?" He also stated that Complainant could have received his high rating because the trainmasters were unaware of the harassment complaint. However, Colasimone testified that having a prior harassment complaint would not impact Complainant's right to be rated exceeds. Tr. 68-71.

As a general manager, he can review performance reports and change the rating if necessary. In this same email chain, he said to Mr. Tassin, "change it, please." He does not recall what he meant by his comment. Mr. Tassin responded, "I will." Colasimone does not know whether Mr. Tassin changed anything. With regard to the harassment complaint mentioned above, he forwarded it to the human resources department, and they investigated it. The investigation revealed that Mr. Creel removed the E test failures after review of the situation. Mr. Tassin responded to the email chain stating that he would find out who removed the service failures and have them put back in, and Colasimone responded that it was "scary how much we think alike." Colasimone does not remember this correspondence and could not comment on what Mr. Tassin meant or what he meant by his response. Tr. 72-74.

Colasimone directed Mr. Tassin to issue the letter exhibited as Joint Exhibit 24. He never did anything to change or correct the letter and does not recall sending a letter to Mr. Tassin to direct him to do so. However, if he had directed Mr. Tassin to do something like this, he would have done it. Upon looking at the transcript, Colasimone confirmed that Herbeck testified that Complainant violated Rule A, safety, by not complying with Circular 6. That was the only testimony at the hearing as to how Complainant violated Rule A and B. Herbeck also stated that Complainant was in violation of Rule #104, "Duties of train and engine crew members," by not properly administering the trains and supervising the operation of his assignment due to not complying with Circular 6 and delaying the assignment. Colasimone had directed Herbeck to charge Complainant with delaying the assignment. CX-11. Tr. 75-78.

After receiving the write-up concerning the incident between Complainant and Herbeck, Colasimone directed Herbeck to find out why Complainant received a late call and to find out how long it took to drive from his residence to Pontiac, to see how long it takes him to get to work. He corroborated that Complainant had received a late call. Complainant was to be given two hours' notice to show up at work because of his late start. Colasimone told Herbeck to make sure Complainant was charged with delayed assignment, and Herbeck testified at the hearing that the assignment was delayed and Complainant violated Circular 6 by violating Rules A, B, and 104. The discipline letter he ordered Mr. Tassin to send said the same thing. Complainant was found guilty of violating each of these rules. Tr. 78-80.

Colasimone testified at the hearing that he believed Complainant directed profanity directly at Herbeck. At his deposition, he stated that this was one of the reasons he found Complainant guilty. However, he testified at the hearing that there was nothing about the profanity that resulted in Complainant being found guilty, that it was not directed at Herbeck, and that the guilty finding was based on his behavior. Herbeck had also testified that the profanities were not directed at him. Colasimone testified at his deposition that Mr. Vandendries, in his view, told the truth at the disciplinary hearing, although Vandendries' testimony was vague. Mr. Vandendries testified that one of the main topics of discussion on the locomotive was Circular 6. He stated that the tone and demeanor of Herbeck was in every respect normal, as was the tone and demeanor of Mr. Bohanon. There was nothing out of the ordinary. There was no testimony from Mr. Vandendries that Complainant became angry or visibly enraged. He didn't recall any requests to call a manger while they were on the locomotive. Colasimone confirmed that he believed all of this testimony to be truthful. Tr. 80-84.

When an employee comes to work, there is no time limit as to when they have to read all their required bulletins before they get out to the locomotive, as of October 1 or 2. There was nothing in Complainant's statement from the investigation that was insubordinate. He is not aware if anything has ever been done to remove from Complainant's record his guilt for violations of Rules A, B, or 104. Tr. 84-85.

Cross Examination

Colasimone testified on cross-examination that he is aware that it is against company policy to retaliate against individuals who bring forward complaints of harassment and individuals who raise safety complaints in good faith. The company's code of conduct addresses the company's policy with regard to anti-retaliation. RX-2. He is familiar with this policy, and they are expected to read it and sign off on it on a yearly basis. Tr. 86-87.

As a conductor, Complainant was part of the unionized labor force. Conductors reported to the Trainmasters. On the night of September 23, 2012, Complainant reported to Trainmaster Herbeck. At that time, Herbeck reported to Lance Osmond, Divisional Trainmaster, and Mr. Osmond reported to Phillip Tassin, Superintendent. Mr. Tassin reported to Colasimone, who reported to Jim Vena, Sr. Vice President of Operations. Mr. Vena reported to Keith Creel, chief operating officer and executive vice president, who reported to Claude Mongeau, CEO and president of the company. Mr. Mongeau reports to the board of directors.Tr. 87-90.

Safety is of the utmost importance on Grand Trunk Western. The company has health and safety committees, a joint union/management team, in various locations across the division. The committees observe the health and safety of the workforce and the work environment of their particular territory. They perform inspections and interact with customers and management. The safety committee is one way that employees can bring forward safety issues to the attention of the railroad. The company also has safety barbecues where management talks to employees and solicits feedback concerning safety issues. The company also lets it be known that their doors are always open to employees to come forward with safety concerns. Safety is very important to the company because there have been tragic accidents in the past. Tr. 90-92.

Unionized labor is empowered to take action when they observe a safety complaint. They can do this by going through the health and safety committee and speaking with the local manager. If a conductor were to notice a problem with one of the cars on his train, he would deem it a "bad order", meaning unsafe to move. He would be required to set it out in a specific track as designated by the yardmaster or manager, and then return to his train and continue to work. A conductor is not allowed to bad order a train car without approval. When a train is bad ordered, it causes delays. Tr. 92-93.

Canadian National has a safety hotline where people can call in anonymously and leave a voicemail stating a safety concern. If a conductor brings forward a safety issue and is not happy with his manager's response, he can escalate the issue by going to a supervisor's immediate supervisor, going to the health and safety committee, going to their union representative, or going to another manager. The company wants employees to bring forward safety concerns, if it disagrees that the concern is a bona fide issue. He personally encourages employees to bring forward safety concerns and has never disciplined an employee for bringing forward a safety issue. He is not aware of any other member of management under his supervision doing so either. Tr. 93-95.

PMRC testing stands for performance monitoring of rules compliance, otherwise known as an efficiency test. It involves ensuring that employees are complying with rules, regulations, and policies. The company is mandated by Canadian law to do efficiency testing and also simply has to in order to ensure that people are doing what they're supposed to be doing when they're at work. He believes that in 2012, trainmasters were responsible for doing 35 efficiency tests a month. The focus of those tests would depend on what issues arose in the past and which issues needed more attention. The company has issues that are rule violations that cause most of their derailments, called "control self rest rules", that it focuses on. It did not tend to focus on any given area more than others. If an employee was observed not to be in compliance with a rule, he would be given feedback on what was observed by the manager. He would be told what he'd done wrong, and the incident would go into the PMRC system as an efficiency test failure. This is not considered discipline. Tr. 95-97.

Colasimone testified that he has worked previously as a conductor and has also held other management positions where he has been directly and indirectly responsible for supervising conductors. Conductors are responsible for safely and efficiently operating their train, building a train, switching customers, and protecting their business. In light of his experience in the railroad industry, it's a reasonable expectation for a conductor to be out the door within ten minutes, as per the requirements outlined in Circular 6. He is not aware of any employee having been disciplined for notifying the yardmaster that he would need additional time. He does not

consider Circular 6 to be unsafe because it's an expectation of the company. If, while Circular 6 was in effect, an employee were to request additional time to read his switch list or daily operating bulletin, this would be a valid reason to take additional time. Tr. 97-99.

Colasimone was never responsible for either directly or indirectly supervising Trainmaster Herbeck, although he was under his jurisdiction at the time of the incident on September 23, 2012. He had met Herbeck briefly a couple of times. He learned about the incident when Complainant called him and told him he was being held out of service. He responded that he couldn't talk to him anymore and that he should get a hold of his local chairman. He stated that he could not have a conversation off the record. He recalled receiving the email with subject line, "Dwight Bohanon removal from service", sent by Herbeck. RX 5. He was being provided this information because he would need to know if an employee was out of service on his territory. If he disagreed with Herbeck's decision to take Complainant out of service, he could have put him back in service. However, he agreed with the decision because he felt that Complainant behaved belligerently toward Herbeck, used profanity in a context that was belittling, and insubordinate. He was throwing big names around and was trying to intimidate Herbeck because he was a young and inexperienced trainmaster. Colasimone would have been concerned for Complainant's safety if he had put him back in service that day because he was visibly upset and would not have been focused on the task at hand. He might have made a rash decision because of his anger. Tr. 99-102.

He does not recall investigating or being advised of an investigation regarding the efficiency test failures referenced by Mr. Tassin in his emails. He was only concerned with the harassment charge. After learning that Mr. Creel had instructed the efficiency test failure to be removed, he did not do any further investigation and did not give anyone any instruction to reinstitute the efficiency test failure. To his knowledge, the efficiency test failures were never reinstituted. The issue with Mr. Bohanon's missing efficiency test failures did not have anything to do with his decision to discipline him. Colasimone found Complainant's behavior inappropriate because he was trying to intimidate and belittle an inexperienced trainmaster by throwing around the name of a chief operating officer and executive vice president. In addition, Complainant had worked as a trainmaster for seven years and was using that to intimidate Herbeck. It was inappropriate for Complainant to try to intimidate and belittle an inexperienced trainmaster by throwing around the chief operating officer and executive vice-president's name. Tr. 104. It would not be normal for an employee to tell a trainmaster that they are going to call an executive level employee. He believes Complainant was playing with Herbeck's mind. Tr. 102-105.

Colasimone testified that he believed that the fact that Complainant left the discussion without asking to be excused showed that he was frustrated and did not like the way the conversation was going. There was nothing wrong with him expressing disagreement with the trainmaster regarding Circular 6. Employees disagree with trainmasters and with him quite regularly. However, in this case, it wasn't just a discussion. Complainant left the engine mid-discussion. He went in for a cigarette and came out waving the phone and said he had a phone call in to Keith Creel. He disregarded Herbeck's instruction to wait in the booking-in room. He then came back out and stated that they should call Derrick Colasimone. Tr. 105. He was doing everything he could to fluster and intimidate the trainmaster and make him think he's doing something wrong, to intimidate him. Tr. 105-106.

At the time Colasimone received Complainant's Exhibit 5, he had not made any decision with regard to whether Complainant would receive discipline as a result of this event. Before Complainant's investigative hearing was held, railroad management was planning to meet with his union about the incident to see if they could find common ground and see if Complainant would admit to doing wrong and apologize for his actions. That meeting never occurred because Mr. Creel wanted to hold the investigation hearing against Complainant, the purpose of which was to gather the facts and determine what really happened and if there had been any wrongdoing. Colasimone did not have any involvement in the actual hearing. After the investigation hearing, management receives the transcript and a summary from the hearing officer describing how the hearing went and what rules he determined were violated, along with a brief synopsis of the hearing. He has disagreed with a hearing officer's findings on many occasions. 106-108.

Colasimone made the decision to suspend Complainant based on his behavior. In making this decision, he considered the investigation hearing transcript and the exhibits to the transcript. He recalls Joint Exhibit 4. This exhibit described Mr. Bohanon's behavior and what happened, and was drawn out of the transcript. From the questions that were asked at the hearing, Colasimone determined that Herbeck's recollection was correct and assessed the discipline. He also reviewed Complainant's statement and determined that there were discrepancies between his statement and the transcript. He ultimately determined that Herbeck's statement of events was more credible because of the consistencies with Mr. Vandendries' statements and the consistencies between Mr. Bohanon's statement and Herbeck's recollections. The account of what occurred on the engine was exactly what Mr. Vandendries said. Outside and after, what Herbeck said was the same as what Complainant said, but just a little bit different. Complainant claimed that Herbeck said it was okay to call him (Colasimone), but he thinks the trainmaster would have called him and said we have an issue here and asked whether he wanted to talk to the employee. However, it was Complainant who called him and told him he was out of service, after the fact. Therefore he does not think Complainant's account reflects what happened. Tr. 108-111.

In his testimony, Mr. Vandendries described their behavior on the engine. He stated that they talked about the ten minute rule and his letter of caution and noted that there was profanity used by Complainant, but not Herbeck. Tr. 111. This conflicted with what Complainant said in his statement. Mr. Vandendries stated that Complainant simply left the engine, which supports Herbeck's statement. He does not believe that Complainant brought up his name and that of Mr. Creel simply to try to get clarification on Circular 6. Instead, he believes that Complainant used the suggestion to call management as a threat. He wanted to get the general manager and chief operating officer involved in something that could have gone to an immediate supervisor or anyone below him (Colasimone) for interpretation. He went to the number two in the company. Mr. Creel would not have had any involvement with the enactment or enforcement of Circular 6. Tr. 111-112.

Colasimone believes the part of Herbeck's statement where he states that Complainant said "If you want me out the door, I need to be called on time" and continued that he's about had it with this harassment and that it was time to put in another call to Keith Creel. It goes along with the rest Herbeck's statement about how Complainant was trying to intimidate him and was playing with Herbeck's mind. He also believes that, as described by Herbeck, Complainant's voice became progressively louder and he used expletives in stating that he was tired of

management's focus getting out the door in ten minutes and that they should just let him do his job. This was part of what he considered in making the disciplinary decision. Tr. 114. As he stated before, context matters in the use of profanity. In this case, he felt that the context in which Complainant's statements were made was worthy of discipline because it was an argument, and Complainant was using profanity and vulgarity and throwing big names around because he was trying to intimidate Herbeck, and was acting in a manner that was unbecoming of an employee. Tr. 112-115.

Colasimone believes Herbeck's testimony that he remained calm throughout the entire conversation and did not use profanity or raise his voice. He also believes Herbeck's statement that Complainant told him that "I did your job for seven years, and if you have a problem with the way I work, let's call Derrick Colasimone." He believes this was further intimidation because Complainant threatened to call Herbeck's immediate supervisor to get involved. Tr. 116. He also believes Herbeck's testimony that Complainant just left the engine without saying anything is consistent with insubordinate behavior. Colasimone does not believe Complainant's statement that Herbeck agreed to call him (Colasimone), since Herbeck instead called Mr. Osmond. He believes Herbeck's statement that Complainant walked up to the window of his car with a grin and stated that he had a voicemail out to Keith Creel. He found this to be further insubordination and considered it as part of his disciplinary decision. Tr. 115-119.

Colasimone also considered Complainant's testimony in making his decision to assess discipline in this case. He recalls reading that when he was told he was going to be held out of service one of the things Complainant said to Herbeck was, "Is this really what you want to do?" and that Herbeck responded, "Dwight, you were using profanity and arguing with me, then you walked away from me. Who does that? What would happen to me if I walked away from my boss?" He did not believe it and took it into consideration. Tr. 119-120.

The investigation report stated that, on the day of the incident, Complainant received all of his documentation by 9:21 a.m. Ramberg was the yardmaster at Flint. According to Joint Exhibit 8, he sent the Wheel, legal documentation needed to move the train, at 9:21 a.m. Tr. 120. Complainant was not waiting on any additional documents after receiving the Wheel. Complainant boarded the engine that morning at approximately 9:50 a.m. He did not contact Ramberg after receiving the Wheel to indicate that he needed more time to get on the engine. Tr. 121. He found that Complainant was in violation of Circular 6 because he did not comply with the instruction to call the yardmaster if he could not get out on time. He was not disciplined for having used profanity in the workplace, but instead was disciplined for his behavior. Tr. 120-122.

He is the person who decided to suspend Complainant for 30 days. He did not specifically tell anyone what rules to put in the letter of discipline and does not remember if he received the carbon copy of the letter of discipline, Joint Exhibit 24. The letter indicates that Complainant was disciplined for violation of U.S.O.R. Rule 600, switching safely and efficiently. There was nothing discussed at the investigation hearing with regard to this rule. He does not know why the rule is included in the letter. Tr. 122-123.

Before Complainant could return to duty, he had to meet with Colasimone according to railroad policy. During these meetings, he speaks with the employee about the expectations of him returning to work. The meetings are held with all employees who have been off work for an

extended period of time for any reason, and the railroad is still holding them today. He does not recall word for word what he told Complainant during this meeting and does not recall Mr. Creel's name coming up during this meeting. He did not tell Complainant that he received harsher discipline because he went outside the chain of command, nor did he tell Complainant that if he ever challenged the trainmaster again that he would be terminated. He did not tell Complainant that he could say anything he wanted in the meeting because anyone hearing about it afterward would believe him and not Complainant. No one else was present at the meeting. Tr. 123-125.

With regard to the removal from service and suspension process, Colasimone did not do anything differently with Complainant than he has done with other employees for whom he has assessed discipline. His decision to discipline Complainant did not have anything to do with his having raised a concern that Circular 6 was not safe. He has never factored a safety complaint into one of his disciplinary decisions. The current expectation with regard to how conductors and engineers are supposed to get out the door is that they're supposed to operate safely and efficiently. Tr. 125.

With regard to the email exchange that took place between Colasimone and John Karakian (Complainant's Exhibit 6). He did not take into account Mr. Karakian's concerns when assessing discipline against Complainant. He is not aware that Complainant ever raised concerns that Circular 6 would violate the federal hours of service rules. In the railroad's morning meetings, Colasimone and the other employees discuss train performance. Train delays matter because they are moving the commerce of the United States and Canada. CN Rail requires them to ship customers' goods on time. They tell their customers when they can expect delivery of the freight they've ordered. The railroad never puts delay ahead of safety. Mr. Bohanon's removal from service caused delay to the train he was responsible for operating that morning, and though he is not sure how much delay exactly. They would have had to call another man to take over the train, which would have taken two more hours as required by the collective agreement. Tr. 125-128.

In making his decision as to which employee's testimony to believe, he considered all the work that Complainant had to perform that day. Complainant's switch list (Joint Exhibit 16) indicates that he had an 11-car train with cars going to various places and three dangerous cars. Dangerous cars do not have any special marshalling or instructions, and Complainant did not have to do any switching or any activity to build the trains. He did not have to mind any other information on JX-16 before starting his work. In terms of reviewing the Wheel (JX-9), Complainant had to make sure this document matched the switch list. He would have to ensure that the cars were in the same order and that the three dangerous cars were there. Colasimone confirmed that the documents matched. Complainant did not have to do anything more than this in terms of reviewing the Wheel before getting out the door. Tr. 128-131.

The railroad has no written instruction with regard to the proper use of the chain of command and when it is acceptable to jump over a supervisor in order to elevate a complaint. Tr. 132.

Redirect Examination

Colasimone testified that Ramberg was not a witness at the investigation hearing. He believes Herbeck's statement that when he talked to Ramberg, all documents had been sent to the crew before 9:00 a.m. This would have been the switch list, along with anything else that Ramberg would have thought necessary. He does not know how many switch lists were sent. He only knows what was contained in the transcript. JX-16 is the 9:07 a.m. switch list. He does not know whether Complainant received an initial switch list that showed where the various cars were and on which tracks, in addition to the switch list with the correct order of the cars. If this occurred, he does not know how much time Complainant would have needed to review the switch lists, as none of this was in the transcript. Tr. 133-135.

The switch list was generated in Flint at 9:21 a.m., meaning printed off Ramberg's computer. Ramberg would have then had to fax it over to Pontiac. There is no evidence showing when the document was faxed. Colasimone did not review any of the documents Complainant had to read that day because they were not in the transcript. He does not know whether any of the phone calls were made by Complainant and is only aware of Complainant calling him. When the two spoke, he told Complainant that he did not want to discuss his safety concern while he was being held out of service and didn't want to have a sidebar conversation with him. When he read the transcript, he did not know what this conversation was going to be about. He didn't think Complainant was going to actually call Mr. Creel and just thought he was trying to intimidate the trainmaster. Tr. 135-140.

Colasimone did not recall whether Complainant had called him previously with problems. He believes Complainant had showed him an email about his claimed harassment that they had investigated. HR found that there was no harassment, and Mr. Creel removed the E (efficiency) tests. He never testified that he tried to change an E test. If he finds that there is a discrepancy with regard to what management knows and what it has evidence of, he has in the past changed employees' personnel records. He does not recall any discrepancies in this case. He does not remember ordering a change in Complainant's personnel records. Tr. 140-142.

Other than the investigation involving Complainant, there has been no other discipline for Circular 6. Circular 6 came into effect on August 17, 2012, and was only in existence for a short time, as indicated in the record. Tr. 142-143.

Prior to coming to his current position at Grand Trunk, Herbeck was a trainmaster in the north territory for approximately two years. Two years and seven months is not a lot of experience as a trainmaster, and thus, he considered Herbeck to be inexperienced. Prior to working in the north territory, Herbeck worked as a conductor, not a manager, at Grand Trunk. Tr. 144-145.

Colasimone believed the testimony of Mr. Vandendries that there were not raised voices or angry outbursts on the locomotive and no change in tone or demeanor by Complainant. Profanity had nothing to do with it. Mr. Vandendries testified that he never heard Complainant say he was going to call anyone on the locomotive. Therefore, Mr. Vandendries essentially corroborates Complainant in his statement that there was no angry outburst on the locomotive and that the conversation on the locomotive did not involve calling Mr. Creel or Mr. RambergColasimone. In order to elevate his complaint in this situation, Complainant should

have asked to get his supervisor involved in the discussion. There was nothing wrong with calling Colasimone directly. However, Complainant was supposed to follow the chain of command: he should have gone to Lance Osmond and then Mr. Tassin before coming to Colasimone. He intimidated the trainmaster by going right to the general manager. On the other hand, he violated no rules by skipping over the normal chain of command, as there is no rule that stipulates who you can and cannot call. Complainant is supposed to have no repercussions for exercising those rights. Tr. 145-148.

Complainant was compensated for the eight days that he was out of service prior to the investigation hearing on October 1, 2012. His collective bargaining agreement requires that an employee be paid until he receives written notice that he is being held out of service. Complainant's claim is for the 30 days for which he was issued a suspension, not for the eight days he was held out of service, but for which he was paid. When employees return from discipline, they typically meet with any manager. Colasimone met with Complainant because he was the one who suspended him from service and he wanted to clearly articulate his expectations going forward. Colasimone clarified that he did not remove Complainant from service, but he issued the 30-day suspension. Tr. 148-150.

Recross Examination

Colasimone testified that, when he reviewed Mr. Vandendries' testimony from the investigation hearing, he recalled that Mr. Vandendries did not remember much that occurred on the engine that morning and was very vague in his testimony. Some of his statements were more in line with Mr. Herbeck, and some were more in line with Complainant. In Colasimone's view, Vandendries did not remember a lot about an event he should have been able to recall – one where his trainmaster was talking to him about discipline and where a letter was going to be put in his file, and which involved an argument where a conductor was cursing and then walked off the engine. This supported Herbeck's claims. Tr. 150-152.

Ramberg says in his statement (JX 8) that he sent the Wheel to Complainant at 9:21 a.m. Colasimone believes this statement and relied on it in making his decision to assess discipline against Complainant. Tr. 152-153.

Redirect Examination

The Wheel was printed at 9:21 a.m. and 47 seconds in Ramberg's office in Flint, Michigan. Complainant would not have had independent access to that Wheel unless someone sent it to him. Tr. 153-154.

Recross Examination

Colasimone believes Ramberg's statement that he sent the Wheel at 9:21 a.m., after it was printed. Tr. 154.

David Durfee
(TR. 156)

Direct Examination

David Durfee is a conductor with Grand Trunk Western in Pontiac, Michigan, and is the local chairman of the union. He represents members of the SMART, Local 1709 out of Pontiac, on collective bargaining issues. SMART used to be called United Transportation Union (UTU). He is part of the safety team for the triangle: the Pontiac, Hamtramck, and Flint areas. He represented Complainant at the company investigation. Through his job he became familiar with Circular 6, which is known as the ten minute rule. It was issued on August 17, 2013. When it was issued, he thought that it was unsafe and that it was an impossible action. He called local managers, Lance Osmond and Eric Herbeck, and voiced his opinion that it is impossible to collect bulletins, go over TGBOs, verify hazardous materials, and train consists while getting out the door within ten minutes. He believes that other members of the local union complained as well, but does not know whether Mr. Bohanon complained. It may also have been raised by the union representing locomotive engineers, the BLE. Tr. 156-160.

After Circular 6 came into effect, Mr. Durfee would come into work and would call the yardmaster to tell him that he was not going to be able to be in compliance with Circular 6. He basically reported that every day it was in effect. He was never told that he would get an ET failure if he was not in compliance. On average, it would take him 30 to 35 minutes to perform the duties he needed to do before getting on the locomotive. These duties included reading daily operating bulletins regarding potential safety issues and doing switching of cars to ensure that hazardous loads were in the correct place. When building a train, it would be common to talk with the yardmaster to verify that he is on the same page. This work cannot legally be done prior to going on duty because once you start performing paperwork, you are on the clock. Tr. 160-163.

In Mr. Durfee's view, in enacting Circular 6, the railroad was trying "to get out the door and start moving." Train delay is an issue with the company. In the past, when management thinks there is a train delay, he has received a radio from the train dispatcher asking if he could explain the delays. Based on his experience, Grand Trunk Western treats train delay very seriously. Profanity is used in the railroad industry, and he cannot think of any days that he does not use profanity. It is common in the presence of and when talking to trainmasters and is used by both locomotive engineers and conductors. He is not aware of any exception being taken or anyone getting in trouble for using it. He is aware of one experience in which an employee used profanity directly to his supervisor and is not aware of any discipline arising out of the incident. Tr. 164-166.

Employees are permitted to elevate issues for clarification with supervisors, and there is no requirement he's aware of that he go to the next highest level. Complainant is also allowed to elevate issues to higher supervisors. It is not common to do so, but is permitted. He has elevated issues in the past and does not recall anyone saying they were intimidated by his actions. He knew Herbeck at the time of Complainant's investigation. He attended the investigation and received the discipline letter. Based on Joint Exhibit 24, Complainant was found guilty of violating the rules relating to Circular 6 and delaying trains. There have been no changes made to the discipline letter since. He also attended the meeting with Complainant when he returned to work. It is very rare that an employee meets with the general manager when he gets returned to work. He accompanied Complainant because he felt it was his obligation as a new local chairman to represent Complainant as one of his members. Tr. 166-170.

Mr. Durfee talked to Complainant on September 23, 2012, after he had been pulled from service. Complainant called and told him that he was being pulled from service for being argumentative and that the issue was over Circular 6. Complainant explained his point of view that Circular 6 was unsafe and that he thought the younger people would feel pressure to bypass the paper requirements, the TGBOs and OBs that would highlight the safety issues. Mr. Durfee got the impression that Complainant's concern and his discussion with Herbeck was over a safety issue related to Circular 6. The meeting with Complainant, Mr. Durfee and Mr. Colasimone took place in Detroit, MI. Complainant was told that he had better not confront another manager or he would basically lose his job, and that in the future it's not smart to circumvent vice presidents. Tr. 170-171.

Mr. Durfee has gotten to know Complainant and believes him to be a safety-conscious person. Complainant generally has well thought out comments and does not have a disgruntled type mentality. He has never witnessed Complainant involved in any kind of heated argument at any time with anyone. Tr. 172.

Cross Examination

As a local chairman of UTU, Mr. Durfee's main duty was to represent the collective bargaining agreement between the SMART Union and Grand Trunk. This role involved talking to members about their contract issues and representing members in investigation hearings. He is on the safety committee, and part of his role on the committee is to bring forward safety concerns from himself and members. The purpose of the safety committee is partly to help provide a safe workplace for GTW employees, including the members. When it comes to safety, he feels he has an obligation to speak out on issues. He agrees it is not appropriate for employees to lose their cool while working on the railroad, although it happens from time to time. He agrees that it is not appropriate to be disrespectful when raising safety or other concerns with management. Tr. 173-175.

He does not direct profanity at people when working on the railroad and does not believe it's appropriate to do so, although it's common to use a swear word in a conversation with someone. Having a heated exchange and using profanity as part of that exchange is common on the railroad. With regard to the other employee who directed profanity at his manager, Mr. Durfee does not think he was disciplined for this but does not know for sure. Tr. 175-176.

With regard to Circular 6, employees had the option to report to the yardmaster if they were not out the door within ten minutes of coming on duty and would still be in compliance with the rule. This is something Mr. Durfee did himself, and he was never disciplined for doing so. He believed Circular 6 was unsafe and expressed this opinion to Herbeck and Mr. Osmond. He was not disciplined for raising those concerns. He agrees that the railroad has a right to expect its employees to work safely and efficiently. Tr. 177-179.

In their phone conversation after Complainant was pulled from service, Complainant told Mr. Durfee that he had called Keith Creel. Mr. Durfee asked him why he had done so, as this was an unusual thing to do, in part, because of Mr. Creel's high level in the company. Complainant told him that, in his conversation with Herbeck, he had raised his voice loud enough to be heard over the engine and that he had used profanity. He stated that Herbeck had said something to the effect of "You know, in what other job can you talk like this to your boss."

He also stated that he had concerns about the new hires bypassing safety restrictions and trying to rush out the door. Mr. Durfee is fairly confident that Complainant relayed this concern to Herbeck. Keith Creel had stated that if Complainant had any problems in the future he was to go right to him. Derrick Colasimone responded to the voicemail when he was driving home, and when he found out that Complainant was removed from service he ended the conversation and told Complainant to contact his union representative. Tr. 180-187.

Prior to the investigation hearing, Mr. Durfee had requested a meeting with management to try to talk things out in order to prevent a disciplinary hearing. He was told by Phillip Tassin that the carrier wasn't going to meet prior to the investigation because there were conflicting statements and an investigation was needed to develop the facts. Sometimes these types of meetings do happen. The purpose of the meeting is to divulge the information in a more informal manner and to try and resolve the communication issue, not for the employee to admit responsibility. Complainant was adamant that he did not violate the rules, and Mr. Durfee does not believe that he would have accepted responsibility for his conduct on September 23, 2012. He has the impression that management was not going to step back unless Complainant admitted responsibility for his conduct. Tr. 187-189.

Mr. Durfee was happy with the investigation hearing and what came out in the evidence. He believes they got all the facts out. The notice of the investigation hearing and the hearing itself are governed by the collective bargaining agreement. Mr. Durfee's concern in being there as a representative is contract compliance. There is nothing in the contract that explicitly says what a manager may and may not consider in terms of assessing discipline. If the union takes issue with either the process of the investigation or the ultimate finding, Mr. Reineke would file an appeal with the general manager. It would then go to the Public Law Board, and an arbitrator would determine whether the discipline was warranted and could reverse the discipline. The Public Law Board also decides issues relating to contract compliance in the investigation process. Tr. 190-194.

In addition to Circular 6, Mr. Durfee has brought other safety issues forward to Herbeck. Herbeck addressed those issues and never disciplined him for bringing them forward. The same is true for other employees. Chris Williams is also very proactive in raising safety concerns, and he is not aware that Mr. Williams was ever disciplined. Upon reviewing Herbeck's statement, he agreed that if the events transpired as described, Complainant's conduct was inappropriate. He believes it's appropriate to tell a supervisor he's going to the next level of management with an issue. He thinks it would have been appropriate for Complainant to inform Herbeck that he had put a call in to Keith Creel, but not in a taunting manner. Tr. 196-202.

Redirect Examination

Having attended the investigation, Mr. Durfee did not think that the evidence at the investigation hearing supported Herbeck's written statement. Mr. Vandendries did not indicate that he was offended by anything that Complainant said during the conversation on the locomotive. Tr. 202-204.

When Mr. Durfee reported his objections to Circular 6, he did so by phone while he was off duty. This was different from Complainant's situation when he voiced his concerns. The information at the investigation indicated that Complainant had called the yardmaster at least

once and probably twice, which is no different than what Mr. Durfee would do on a daily basis. However, Complainant was found guilty of violating Circular 6 and delaying a train. Complainant told him that he called Keith Creel because he had previously written a letter of harassment against Mr. Tassin and because Mr. Creel informed him that he could go directly to him. If Mr. Durfee had been told by the COO to call him, he would have done so. If Colasimone had also told Complainant that if he had problems to give him a call directly, it would also be appropriate for him to call because he was following instructions. That doesn't happen with every employee, but if Complainant had done so, it wouldn't have violated any rules. Tr. 204-206.

Recross Examination

Mr. Durfee does not recall any member of GTW management asking whose statement he found more credible after the investigation hearing. He never talked to Colasimone about this. He saw Mr. Vandendries testimony and agreed that he couldn't remember a lot about that morning. The transcript of the investigation is the best record of what occurred on the train. When Grand Trunk removed Complainant from service, it caused delay because they had to call in a new conductor. The railroad therefore made a decision to accept delay when it took him out of service. There was a conflict in between the yardmaster and trainmaster as far as the start of Complainant's ten minute time. Though Complainant had a preexisting relationship with Mr. Creel, all employees had a right to call any of their supervisors. He agrees that it is not appropriate to taunt supervisors with threats to call high level management. Tr. 207-209.

Redirect Examination

There is nothing wrong with an employee telling his supervisor that he's going to call a superior. There's also nothing wrong with telling him that you want clarification of a safety issue. The information at the investigation hearing indicated that Complainant had called the yardmaster when he came on duty at 9:15, called again with regard to the switch list, and then had a conversation around 9:30. This is sufficient to comply with Circular 6, there is no rule violation. However, Complainant was found guilty of violating Circular 6. The only people who get to decide investigations are management. Tr. 209-211.

Recross Examination

Mr. Durfee does not recall the details of the yardmaster's statement at the investigation hearing. Tr. 212.

Redirect Examination

It was stated in the investigation record that Herbeck didn't know about the phone calls to Ramberg. Tr. 213.

Complainant, Dwight Bohanon
(TR. 214)

Direct Examination

Complainant Dwight Bohanon has been employed with Grand Trunk Western Railroad since 1996. He worked as a switchman until 1999. A switchman does a lot of similar tasks to a conductor. He was promoted to conductor in 1998. His home terminal during this time period changed between Hamtramck and Flint, and his home terminal when he was promoted to conductor was Flint, Michigan. In 1999 he took the position of yardmaster in Flint and stayed there until 2002. This is the same yardmaster position performing the same duties as Ramberg was involved in on September 23, 2012. He worked in the yardmaster position for approximately three years before becoming trainmaster in Flint and Pontiac. He was promoted into management in 2003 and held the positions of assistant trainmaster, trainmaster, divisional trainmaster, and chief train dispatcher. Tr. 214-217.

As a conductor and trainmaster, Complainant was responsible for obeying all safety rules and instructions. He left management in 2009 when his position as Chief Train Dispatcher in Troy, Michigan was eliminated after his employer purchased EJ&E Railroad. He then marked up on the ground as a conductor in Flint, maintaining his seniority. He remained responsible for knowing and following the rules. He worked with Keith Creel when he was a Trainmaster in Flint and felt that Mr. Creel was someone he could talk to. Mr. Creel supervised his work at that time. The Flint terminal also covers Pontiac. Tr. 217- 219.

Complainant took his responsibilities seriously and tried to follow the rules. He cared about the safe operation of the trains and about his service record. Prior to September 23, 2012, he never had any discipline on his service record. He had no ET failures, only the one that was removed by Mr. Creel. No trainmaster had ever told him that he was disrespectful or argumentative with them. As a conductor and trainmaster, he never took any exception if an employee expressed a sincerely held safety opinion. Profanity is used daily on the railroad, and all employees use it on a daily basis. He had heard Herbeck and other trainmasters use profanity. To his knowledge, it is not against the rules. Tr. 219- 221.

An efficiency test is a monitoring of train and engine employees concerning rules of compliance. Complainant received an efficiency test failure, noted above, and filed a harassment complaint to Derrick Colasimone. Colasimone indicated to him that he should call him if he ever had a problem. The E test failures were removed by Keith Creel. When he explained the situation to Mr. Creel, Mr. Creel told him that he knew him well enough, that he was just going to remove it and wasn't even going to talk to the individuals who gave him the E test failure. Mr. Creel then stated that if he had any issues, he should call him. After two or three E test failures, an employee can be charged, and this can be used against him for discipline. The employee performance scorecard is a yearly review of an employee. Complainant's 2012 employee performance scorecard, given to him by William Maranzano, states that he is a great worker with a positive attitude, always on time and ready to do what's necessary for the customer. CX-16. His overall performance was rated "exceeds", the highest rating an employee can receive. Tr. 221-226.

When Complainant first read Circular 6, his reaction was that it was unsafe because it didn't allow enough time for employees to retrieve and review the necessary paperwork required to operate the trains. He contacted his local chairman, David Durfee, to tell him he thought it was unsafe. He agreed with him and told him he was aware of it and was working on it. On average, it would take him about 30 minutes to read the paperwork and be prepared to go out on the locomotive. Prior to September 23, 2012, his standard procedure would be to have a conversation with the yardmaster when he went on duty to discuss the paperwork, so that he would know immediately how long it would take him once he started his shift. He has to ensure he has everything that's intended for him. As far as being in compliance with Circular 6 and calling the yardmaster, he did that every day. Tr. 226-228.

Prior to September 23, 2012, no one had ever told him he would receive an E test failure for not getting out the door in ten minutes. On September 23, he was working the R950 job. He was working on a calling window, which means they could call him to any train or assignment within a window of time. You have to be at work within two hours of receiving the call. He received his phone call for the R950 at 7:09, according to his cell phone records. CX-15. At 9:11 he received a call from Mr. Vandendries as he was in the parking lot getting out of his truck. He then walked into the building and greeted Mr. Vandendries, who told him they already had their daily operating bulletins but that he didn't have anything else. He picked up the DOBs and then called the yardmaster in Flint. Tr. 228-231.

He received multiple switch lists that day. The first one indicated how the cars were, and the second one showed how they should look after the train was built. The cars were not all on the same track. After getting his paperwork, his first task would have been to build the train according to the switch list. He had two conversations with the yardmaster. He first called the yardmaster when he arrived, and the yardmaster then called him to let him know he was faxing the wheel. The yardmaster also told him that the trainmaster was asking why they weren't out the door yet. He asked the yardmaster whether he had told the trainmaster they got a late call and he was still getting his paperwork, and the yardmaster responded that he didn't know whether the trainmaster knew about the late call, but that he thought he was already on his way down. Tr. 231-234.

The wheel was generated in the computer at 9:21. Complainant believes it was printed about 10 minutes later and then faxed to him in Pontiac. When he got on duty he read the daily operating bulletin, which was three to four pages long. He read the switch list and the wheel. He also had to go on the computer and find the current bulletins and print them out so he would have them to review, and he posted them so that they would be available for everyone else. Reviewing all these documents is essential to the safe operation of the train. The conductor is the number one person responsible for the safe operation of the train, and he took his responsibility seriously. Tr. 235-237.

Complainant left the book-in room around 9:40 or 9:41. He walked outside and saw the trainmaster's vehicle parked in between the building and their engine, a very short distance. He waited a couple minutes while the trainmaster was talking to the engineer, then walked up on the engine. Herbeck was there when he entered and was in the middle of talking about the ten minute rule. Herbeck told him that if you guys aren't out the door in ten minutes, we have to put you in ET failures because they're holding us as trainmasters accountable. Complainant asked him if he was going to put them in for an ET failure that day. He said no, because they got a late call that

day, but that in the future it would be an ET failure. Complainant asked about the letter of caution to Mr. Vandendries and whether they would be getting a letter of caution for it too, and Mr. Vandendries said he guessed so. Mr. Vandendries said he didn't think it was right that if you forgot to do something one time – he had forgotten to say "over" in Lansing one time – you received an ET failure for it and then a letter of caution. Tr. 237-240.

Herbeck said that he thought it was "bullshit" that they were targeting Flint and Pontiac guys because they don't have to see them every day, and Complainant agreed. He then stated that they can't always have their paperwork ready in ten minutes, and that to put them in for an ET test failure is wrong. He indicated that he was frankly unable to do it in ten minutes. He then stated that there were bulletins required for that day that weren't posted, and that if management truly intended for them to be out the door in ten minutes, they needed their bulletins posted and their paperwork ready to go when they went on duty. When he was describing this, he used profanity, including the F word and bullshit. At no point did he become enraged, angry or raise his voice. After he made these comments, he does not recall that Herbeck responded. He just stood there for a few minutes, and then Complainant walked off the engine. Herbeck did not indicate that he wanted to talk to him further. Tr. 240-242.

Complainant left the train because he was upset about the fact that Circular 6 was directing them to do something unsafe, and that Trainmaster Herbeck was telling them that he was told to enforce Circular 6 by issuing efficiency test failures. He did not intend any disrespect in walking out. He assumed that Herbeck was done talking to him and that he still had to speak with Mr. Vandendries. There is no local means to challenge an efficiency test failure. The only thing they can do is go to the supervisor and ask them to remove it or reconsider it, and then they can go to the next step. That's why he went to Mr. Creel – because no one lower would remove his E test failure. Up until he left the train, he had not said anything about calling anyone and had not directed any profanity at Herbeck. Tr. 242-243.

Shortly after, Herbeck came down off the train, and Mr. Vandendries followed him down. Herbeck stated that this was part of his job and he was doing what he was being told to do, and Complainant responded that he understood because he had done that job before. Complainant then asked if they could call someone else and elevate it to another supervisor because he knew Herbeck didn't issue the bulletin. Herbeck stated that they didn't need to call anyone else, and Complainant responded by asking if they could call Derrick Colasimone. He doesn't recall referencing Keith Creel at that point. Herbeck then said that they could call Colasimone. Complainant called, but he didn't answer. He then called Keith Creel, since Mr. Creel had instructed him to call if he needed to, and left a message. He was calling to explain that he thought Circular 6 was unsafe and because he was concerned because efficiency test failures were difficult to get removed. He told Herbeck that he had left a voicemail. Herbeck told him to wait there a minute, then walked from the door back to his vehicle. Complainant did not taunt Herbeck with a phone call to Keith Creel. He was trained to escalate safety issues and to seek clarification. This was his purpose in calling the higher level supervisors. He was not angry and did not intend to vent to either of these individuals. Tr. 243-248.

After Herbeck got in his vehicle, he took a call on his cell phone and again indicated to Complainant that he should wait. He then took Complainant into the lunchroom and told him that he was being removed from service for being quarrelsome and argumentative. He stated that this was on the instruction of Derrick Colasimone. Herbeck stated that Complainant was using

profanity and walked away from him, and asked, who does that? Complainant asked if this was really how he wanted to handle this, and Herbeck answered yes. He also explained to Herbeck that he wasn't walking away from him. At no time did he lose his cool with Herbeck or become visibly enraged or argumentative, and Herbeck did not indicate to him that he was intimidating him by calling his supervisors. At no time during the company investigation did Herbeck say he was intimidated by Complainant's request to call his supervisors. Tr. 248-250.

After Complainant was pulled out of service, he retrieved his things, got in his truck, and started to drive home. He called Colasimone again at 10:25 a.m. and told him he had been removed from service. Colasimone responded that if that was the case, they shouldn't be having the conversation. Complainant asked if they could have the discussion off the record because he wanted to discuss Circular 6, and Colasimone told him that since he was out of service, he needed to contact his local chairman. Complainant believes he spoke with David Durfee at 10:27 a.m. Tr. 250-251.

After he was pulled out of service, Complainant attended the company investigation and presented his statement. He has received the transcript and avers that this statement was true and accurate to the best of his recollection. He was off work for 38 days and was paid for eight of those days. During this time, he was stressed out and didn't know what to expect or what was going to happen next. He didn't know if he was going to be dismissed or suspended for six months. The charges against him were ones that they could have dismissed him for. He didn't go to the doctor at all. As a result of being stressed, he had headaches and sleeplessness on a daily basis. Both he and his wife worried about him being out of service, because that's his livelihood and how he supports his family. It caused fights between him and his wife. Tr. 251-253.

Complainant did not feel that he was guilty at all. If he had had a meeting with management prior to the investigation, he would not have taken responsibility for any rule violation. He did not think that he was guilty of violating any of the rules introduced at the hearing. Complainant was found guilty of violating Circular 6 and delaying the train. Today when he goes to work, it takes on average 30-35 minutes to review his bulletins and other documents before he gets on the train and starts moving. There was nothing like Circular 6 still out there when he returned to work. Tr. 253-254.

Complainant met with Derrick Colasimone, local chairman David Durfee, and Jason Reineke, general chairman for the UTU (now SMART Transportation Division), in Troy, Michigan. At the start of the meeting, Colasimone closed the door and told him that he was "meeting with Derrick" and not with General Manager Colasimone. Colasimone told him that he should feel free to say whatever he wanted because they were going to believe Colasimone anyway and not him. When Complainant stated that he did not agree with the discipline assessed, Colasimone responded that that was the discipline assessed, and that if he did anything like that in the future, he would no longer work for the CN, meaning Grand Trunk Western. Tr. 254-256.

Complainant felt that he was asserting a safety concern on September 23, 2012. He felt that this assertion along with his taking the time necessary to be properly prepared to safely perform his job duties was one of the reasons he was charged and disciplined. He did not do

anything that he believed constituted unbecoming conduct or insubordination that day. Tr. 256-257.

Cross Examination

Complainant testified on cross examination that safety on the railroad is a critical issue. Accidents on the railroad can be very serious, and he has attended funerals and driven people to the hospital who have been injured. He turns in safety issues quite often, on an almost daily basis. He has done so throughout his career, when he was a manager as well as when he was a conductor. He would voice any safety concern regardless of who the manager was. In most cases, he felt that GTW did its best to correct the concerns he voiced. He was never disciplined for having raised any safety issue other than the Circular 6 issue. He is familiar with CN's code of conduct, which prohibits retaliation against an employee for voicing a safety concern. When he was a manager, he was trained regularly in the code of conduct. Tr. 257-259.

As Complainant testified earlier, Mr. Creel agreed to remove his efficiency test failure from early 2012. To his knowledge, Mr. Creel was never told about his harassment complaint. They had had a working relationship since they met in 1999. Complainant has not had another efficiency test failure to this day. Tr. 260-261.

Lance Osmond, division trainmaster, issued Circular 6. Complainant knew how to get a hold of him if he needed to. Every day after Circular 6 was issued, he contacted the yardmaster to let him know if he could not be out the door within ten minutes, and he continues to do that today even though Circular 6 no longer exists. He felt that Circular 6 was unsafe because it didn't give the employees enough time to review the documents they needed to operate the train safely. Circular 6 says that "[i]t is expected that you will be out the door and on the engine ten minutes after being on duty." There is no reason that an employee cannot call the yardmaster if he cannot be out the door in ten minutes. Tr. 261-263.

In September of 2012, Complainant reported to Herbeck. Herbeck was the trainmaster on duty on September 23, 2012. Complainant knew that Herbeck had only been a trainmaster for a short time in his territory. He didn't know him that well, but had had prior work-related conversations with him. Tr. 263-264.

On September 23, 2012, Complainant received a late call. This means that they called him less than two hours prior to the on duty assignment, though normally they would call him at least two hours prior as per the collective bargaining agreement. They could have chosen to put him and Mr. Vandendries on duty two hours after they called them, but they chose not to. Complainant lives close to an hour away from Pontiac, so it takes him the two hours from the time he's called to get ready for work, pack the things he needs, and drive to work. He needs a two hour call, and contractually, employees are allowed a two hour call. The distance from his home to the yard is 45-55 minutes, depending on traffic. He reported for duty between 9:11 and 9:12, dressed and ready to go. He didn't do anything different that day than on a normal day. Tr. 264-265.

When Complainant entered the book in room, he saw that his switch list was already on the fax machine. He called the yardmaster to talk about his switch list and learned that he was still working on the Wheel. He reviewed the daily operating bulletins and the two bulletins that

had been issued since his last shift. The yardmaster then called and said he was sending the Wheel. The switch list that arrived on the fax machine contained the eleven cars identified in JX-9, plus other cars on the tracks that those cars came from. He would have had to have gone out and done some switching to put the train together. This is what he discussed with Ramberg. Ramberg told him that Herbeck was asking why he wasn't out the door yet, and he responded that he didn't know, but that Herbeck was already on his way down to the book-in room. Tr. 265-268.

After the Wheel arrived around 9:30, Complainant stapled it together, looked it over, put on his jacket and reflective vest, grabbed his radio, and walked outside. He probably received the JX-16 switch list around the same time he received the Wheel. He was not irritated by Herbeck asking why he was not out the door yet. When he got to the platform he saw Herbeck in the engine talking to Mr. Vandendries. He put his bag on the platform and then walked around to the other side of the engine. It took one to two minutes before he walked up on the engine. Tr. 268-270.

Complainant did not feel a sense of urgency to rush up on the engine and tell Herbeck to get off his train because he knew he had a light workload that day. He did feel an urgency to gather his paperwork and leave the book-in room as quickly as he could. He learned that Herbeck was issuing a letter of caution to Mr. Vandendries when he walked on the engine, but didn't know that when he was standing on the platform. At his deposition, however, he testified that there was no sense of urgency that he leave the book-in room in ten minutes because they had a very light workload that day. He also testified at the deposition that safety was his primary concern, and that moving in a timely fashion was his second concern. Complainant had already explained his delay to his direct supervisor, Ramberg, and would have explained it to Herbeck if he had asked him directly. Tr. 271-275.

Complainant got on the engine around 9:45. He heard Herbeck say something about if employees are not out the door in ten minutes it would be an efficiency test failure. This concerned him but did not upset him. He witnessed Herbeck give Mr. Vandendries a letter of caution and a fall safety talk. He heard Herbeck state that it was "bullshit" Battle Creek trainmasters were focusing on efficiency tests for the Flint and Pontiac employees. Complainant agreed. He then raised the ten minute rule issue. Herbeck responded with something along the lines of, that's what we're being told to do is get you guys out within ten minutes. Complainant offered Herbeck ways that they could get them out the door in ten minutes or closer to it. He mentioned that employees needed to be called on time and that they needed to have their paperwork printed off and ready to go. They discussed how in prior years that yard in Pontiac used to switch 300 cars in a day. He did not use any expletive when he referred to the 300 cars. He did state that the trainmasters "being sent down to run us out the door in ten minutes is fucking harassment. Then there was a time period of several minutes where nothing was said, and he walked off the engine. The engine is somewhat loud when it's running, so Complainant had to speak loud enough for Herbeck to hear him over the engine. Tr. 275-279.

The conversation made Complainant feel like he needed to get a breath of fresh air. He did not ask Herbeck's permission to leave the engine because he was not required to. He didn't ask Herbeck whether their conversation was over, and Herbeck never indicated that the conversation wasn't over, so Complainant just left. He was upset in that moment because he felt that complying with Circular 6 constituted a safety issue because employees couldn't always

retrieve all the necessary paperwork they needed in ten minutes. He was also upset because he thought that if he received an efficiency test failure, he wouldn't have any recourse. Efficiency test failures are not discipline, but they lead to discipline. Usually, discipline is issued after two to three efficiency test failures: the employee is scheduled for an investigation. Tr. 279-281.

Complainant has not been in management with the railroad since 2009. He knows several people who have been issued discipline for accumulations of efficiency test failures. He sees it every day. There is no exact number of efficiency test failures that leads to an investigation. Complainant does not have any documentation of this occurring and does not know what directives are issued to management in that regard. In the past, Complainant had successfully had an efficiency test failure removed from his record by Keith Creel. Tr. 282-283.

When Complainant left the engine, he had reviewed all the paperwork he needed to do his job. He then returned to the book-in room to retrieve his lighter that he had left there. He lit a cigarette and smoked it in the parking lot. As he was smoking, Herbeck came out of the engine and addressed him. He asked whether this was "really the kind of relationship you want to have." Up until then, Complainant did not think he had done anything inappropriate. Complainant responded with, "Well, this is obviously the kind of relationship you want to have because you're the one down here badgering me". Complainant responded that if this was really about them getting there work done, "just leave us alone and let us go to work." Herbeck responded that Complainant had to understand that this was Herbeck's job. Complainant then repeated that he could not always be out the door in ten minutes. Herbeck confirmed with him that he was called around 7:15 for his 9:00 call and asked what took him so long to get out the door. Complainant explained that he needed to read his bulletins and get his Wheel from the yardmaster. He did not tell Herbeck that between the time the Wheel was sent and the time he boarded the train, he was putting his paperwork away and putting his jacket on. Tr. 283- 286.

Herbeck said something to Complainant along the lines of "[w]hy can't you read your bulletins while you're going down the lead?", which is after the train is moving. Complainant responded that it was a safety issue to read the bulletins after the train had started moving. He believes that may have been the only time he used the word "safety" in his discussion with Herbeck. He told Herbeck that he had scanned the bulletins and had not read them thoroughly because they were not for the location they were operating that day. Herbeck asked him what was in the bulletins, and he was not able to tell him because he had just scanned them. Herbeck was referring to the ten minute bulletin, not to the two operating bulletins. Complainant then asked to call another supervisor, Derrick Colasimone. Herbeck said that wouldn't be necessary. Eventually Herbeck said, "Yes, we can call Derrick.". Complainant told Herbeck that Colasimone had told him to call him directly if he had any issues, but he didn't want to have to do that. Tr. 286-289 6.

When Complainant retrieved his phone from his bag to call Colasimone, Herbeck took his own phone and told Complainant he would come inside in a minute. Complainant then made three phone calls to Derrick Colasimone, beginning at 9:58. When Colasimone didn't pick up, he called Keith Creel and left a voicemail. He didn't call Mr. Creel again because he had already left a voicemail. At some point while Complainant was inside, Herbeck walked to his vehicle, got in, and got on his phone. While Herbeck was on his phone, Complainant went outside to talk to him. Complainant told him that he had just left a message for Keith Creel. Complainant

asked if they could just work now and finish this later, and Herbeck told him to sit tight for a minute. Tr. 289-291.

After waiting, Complainant began walking back over to Herbeck's truck. Herbeck was still on the phone and motioned for him to wait, so Complainant turned around and walked back toward the door. Herbeck returned to the book-in room and told Complainant that he was being removed from service for being argumentative and quarrelsome. Complainant asked him if this was really what he wanted to do, and he responded that Complainant was using profanity and arguing with him, and asked what would happen if he walked away from his boss? Herbeck then confirmed for him that he was being held out of service.Tr. 292-294.

After Complainant was removed from service, he spoke with Derrick Colasimone, who did not know anything about his situation. When Complainant told him that he was out of service, Colasimone told him that they shouldn't be talking and that Complainant needed to call his union representative. Complainant asked to speak with him off the record, and he declined. Complainant called his union representative, David Durfee, at 10:27. Tr. 294-295.

During Complainant's discussion with Herbeck, Herbeck did not threaten him except by saying that there would be efficiency test failures in the future for noncompliance with Circular 6. Herbeck did not talk any louder than was necessary to be heard over the engine. There are different contexts in which profanity can be used, and some are more aggressive than others. Swearing at someone is more aggressive than just swearing in general, and is not appropriate even on the railroad. Tr. 295-296.

Complainant participated in an investigation hearing following his removal from service. He was personally satisfied with the investigation. After 25 days, he was advised that he was going to be suspended form work for 30 days. Complainant never complained to anyone that Circular 6 was a violation of the hours of service rules or brought it up in his conversation with Herbeck or at the investigation hearing because Circular 6 by itself does not violate the hours of service rules. No member of management has ever indicated to him that he was held out of service because he made a safety complaint. Tr. 295-298.

During Complainant's meeting with Colasimone prior to returning to work, Colasimone told him that if he confronted a trainmaster he would no longer work for the railroad. He also said "work now and grieve later." Colasimone never said anything about safety in that meeting. In order to comply with Circular 6, there is nothing unsafe about a conductor calling a yardmaster and indicating that he needs additional time. Before an efficiency test failure is issued, there has to be noncompliance with the rule, or the manager has to interpret behavior as being noncompliant. Complainant knew that Circular 6 was issued under Lance Osmond's name. When Complainant had a question about interpretation of Circular 6, he didn't attempt to call Mr. Osmond and ask for guidance about how it should be applied. He didn't suggest calling Mr. Tassin either. Other than with regard to the events of September 2012, no one has ever accused Complainant of delaying a train. Tr. 298-300.

When Complainant was on the engine with Herbeck, there was nothing critical requiring resolution of the interpretation of Circular 6 before they could move the train. Complainant had already taken all the time he needed to safely perform his work. Once a train is put together, it is air tested, and a train that is air tested is ready to go. Tr. 300-301.

Complainant never sought or received any kind of medical care or treatment for the stress he experienced after being pulled out of service and during his suspension. He had some headaches and difficulty sleeping, for which he took over-the-counter medications. He did not experience any other physical impact as a result of the claimed emotional distress and harm of being removed from service. When Herbeck took the time to do the fall safety talk and to talk about the trainmasters in Battle Creek and about Circular 6, Complainant did not get the sense that he was trying to rush him out the door. Tr. 301-303.

The first switch list that Claimant received would have had the same eleven cars on it that ultimately showed up on the Wheel, but would have indicated that they were on different tracks and that he needed to switch them together and get them on Track 19 along with other cars that would have been on those tracks. It was for those eleven cars that he needed to know where the hazardous material was. When he reviewed the Wheel, he saw that those eleven cars had no special marshaling or placement instructions. Tr. 303-304.

Redirect Examination

When the September 2012 incident occurred, the locomotives were not attached to any cars. Those cars had not been air tested. Complainant had not been out to the cars at this point. On September 23, when he was told that he would be given efficiency test failures in the future, he had already told the yardmaster about his delays. He was still found guilty for rule violation and disciplined for violating Circular 6. Tr. 304-305.

It was Complainant's understanding that what Herbeck was telling him was that it really didn't matter what he was doing, they were going to get him out and working in ten minutes. He considered that to be a safety concern. He used the word "safety" with Herbeck when he was on the ground. Management would not talk with Complainant about these issues after he was pulled out of service. He had no opportunity to have a meeting prior to this investigation. He did not feel that he violated the rules. This type of safety complaint was different because it affected the departure of the train and would lead to delays. He had made it clear that this was going to happen just about every day and that he would be doing that because it was the safe thing to do. Tr. 305-306.

Recross Examination

Complainant had raised other safety concerns that could have caused delay to the railroad and was not disciplined as a result. On the day that he was pulled out of service by management, it caused delay. The complaint he was making affected the departure of the trains, and that it was the safe thing to do to take all the time he needed to get out the door after reviewing the necessary material. This was something he did every day before and after Circular 6. He did that in compliance with Circular 6. After Complainant received the Wheel at 9:30, he did not give the yardmaster an exact amount of time it would take him to get up on the train. Tr. 306-308.

Redirect Examination

Circular 6 was going to affect every train that Complainant was going to take. He was telling Herbeck that it couldn't be done in accordance with what management thought could be done. Circular 6 does not exist anymore, and every conductor is allowed to take the time to do his work safely, without the threat of an efficiency test failure and without the threat of a trainmaster asking him about it. Complainant did not believe that Mr. Osmond was the author of Circular 6. In his experience being a trainmaster, they would put things out and sign his name to them that he didn't author, including investigation notices. Tr. 308-309.

Recross Examination

Complainant does not know who authored Circular 6. Mr. Osmond was a manager whose name appeared on Circular 6. Herbeck reported directly to him. It's possible that he could have provided Complainant with clarification with regard to Circular 6. Complainant's words to Herbeck were best recollected when he wrote his statement (JX-17). Tr. 309-310.

Redirect Examination

Herbeck never suggested that clarification be taken to Mr. Osmond. Employees are permitted to move up the ladder to anyone for clarification. Tr. 311.

Eric Herbeck
(TR. 318)

Direct Examination

Eric Herbeck has been employed with Grand Trunk Western Railroad for close to 11 years. He spent six of those years as a conductor, two years as a trainmaster, and three years as a divisional trainmaster. He was promoted to divisional trainmaster in December of 2012. At the time of the exchange with Bohanon, Herbeck held the position of trainmaster in Pontiac, Michigan, and had been working as a trainmaster for approximately five months. Trainmasters supervise safe and efficient movement of trains. Engineers, conductors, and yardmasters all report to trainmasters. Yardmasters do not supervise employees. Tr. 318-319.

On September 23, 2012, Herbeck was responsible for managing the territory known as "the triangle," which includes Flint Yard, Pontiac Yard, and Detroit Yard, and any responsibility at any customer locations between those locations. Safety is the number one priority at GTW. Employees are trained thoroughly in the rules and equipment that they will be operating, and the company holds monthly safety summits known as health and safety committees. Senior leaders explain current events and trends happening across the division, and the employees working in the field have an opportunity to discuss and make suggestions regarding ways that safety could be improved. The safety committees include unionized local chairmen of both the BLE and the UTU representatives as well as representatives from all other divisions and the police department. The company also sends out a seasonal safety letter, and management spends a lot of time in the field talking about safety. Safety is important to the railroad because of the size of the trains and machinery. If employees don't follow the rules, a train could derail or another accident could occur, and it could be catastrophic. Tr. 319-320.

Herbeck is the leader of the safety committee in the triangle. The employees under his supervision are empowered to take action as it pertains to safety. All employees are represented at the safety committee meetings. In addition, employees are encouraged to bring safety issues up right away with the yardmaster, trainmaster, or train dispatcher, and not to wait until the meeting. If an employee is out in the field and they can't reach a direct supervisor, they are encouraged to take action on their own. Conductors are empowered to take a car out of service if they notice a problem. This happens every day, and it causes delay. The car is disconnected from the train and repaired if possible. He has never disciplined an employee for taking a car out of service. He has personally addressed many safety concerns raised by his employees, particularly as the winter approaches and there are concerns about snow and ice. He encourages his employees to report compacted snow and ice, which can cause the train to derail. When this is reported to him, he'll try to contact someone to go out and inspect the area and make necessary corrections. This causes delay. He has in the past removed a customer from service due to the condition of the track at their location, which also causes delay. He has never disciplined an employee for something that resulted in taking a customer out of service. Other things can also result in taking a customer out of service, such as garbage that creates a potential walking hazard. Tr, 320-325.

Delay matters to Herbeck because the customers are counting on their products to be delivered on time. Delay can also contribute to crew issues and having enough manpower at the right time for the train to arrive when it's supposed to. Therefore, the railroad does what it can to prevent delay, but accepts delay where there is a safety concern. Safety comes first before delay. He has never been instructed otherwise by his managers. If a conductor or engineer had a safety concern or complaint, they could contact the yardmaster or the manager directly by phone or radio, or they could contact the train dispatcher or local chairman or representative to have them relay the message. He has never told an employee that they could not raise safety complaints with him. It is fine for employees to bring safety complaints even if he doesn't think it's a bona fide issue. He takes every concern very seriously. He researches the issue and decides whether it is an immediate concern or whether they can wait to fix it. Tr. 326-327.

In September 2012, there was a general circular that instructed train crews to be out the door in ten minutes. If there was a reason why they could not be out the door in ten minutes, they were required to contact the yardmaster and explain why. Acceptable reasons to not be out the door in ten minutes include having an abnormal amount of paperwork that needs to be reviewed, malfunctions with the printer or paperwork not being readily available. The guideline seemed reasonable to him. Tr. 328-329.

Efficiency tests are designed to monitor performance and rule compliance. Critical switching rules are tested more than others. Efficiency testing is mandated by the Federal Railroad Administration and is not optional. It's also a teaching tool that helps a manager observe and document an employee's performance and compliance with the rules. In September 2012, he was required to do 35 efficiency tests on employees. He was never told by anyone in management that he should be conducting efficiency tests with regard to Circular 6 compliance. He was never told he should be issuing efficiency test failures to employees who were not out the door and on the engine in ten minutes. Tr. 329-330.

Herbeck did not know Complainant before September 23, 2012. He never had occasion to talk to his managers about Complainant, and Complainant had never raised any concerns regarding Circular 6. Before this litigation, Herbeck had never heard about Complainant's harassment complaint of February 2012. Before September 23, 2012, he had never experienced an employee becoming argumentative or insubordinate with him. Complainant's testimony regarding their interaction on the engine did not make sense to him. Tr. 330-331.

On September 23, 2012, he was working as the Pontiac trainmaster. At approximately 9:10 a.m., he noticed that the engine at the Pontiac book-in room was not moving. He contacted the yardmaster at 9:20 and asked if he had sent all of the paperwork down to R950 prior to the employees coming on duty. The yardmaster responded that he had sent all of the paperwork prior to 9:00 with the exception of the Wheel, which was sent at 9:21. At 9:30, he drove down to the book-in room because he had seen that the locomotive was still not moving. He climbed up to the engine and had a conversation with Engineer Joseph Vandendries with regard to a recent rule violation for which he was giving Mr. Vandendries a letter of caution. Tr. 331-332.

After they concluded the conversation, Complainant boarded the locomotive. Herbeck asked Complainant when he had come into the locomotive and why he had taken longer than ten minutes to get on the engine. Complainant appeared to become very angry, and his voice was much louder than it needed to be. Complainant stated that he had gotten a late call and that if I wanted him to get out the door on time then he needed to be called on time. Complainant stated that he had about had it with this harassment and that it was time to put out another call to Keith Creel, Chief Operating Officer. Herbeck asked Complainant how he felt he was being harassed. Complainant's voice at that point had already become progressively louder. Complainant stated that "this fucking place used to pump out 300-plus goddamned cars a day," and to get out the door in ten minutes or else, and that he's "tired of all this goddameed bullshit," and why can't I "let him do his goddamned job". Tr. 332-333.

Herbeck was caught off guard by Complainant's reaction, and he told him that it was an expectation that they were to follow the rules whether they like them or not. He got the sense that Complainant was mocking the rules. Complainant stood up and said that he was harassing him and that "this is just goddamn harassment." It caught Herbeck off guard because he jumped up out of his seat. Complainant also said that if Herbeck had a problem with the way he worked, they should call Derrick Colasimone, and that he did Herbeck's job for seven-plus years. Tr. 333-334.

Complainant then exited the engine and walked into the book-in room. He appeared visibly angry. Herbeck dismounted the locomotive and started to walk toward the building. As he was doing so, Complainant opened the door, held it for him, and told him to "come on in. Let's call Derrick Colasimone." Herbeck told him to go back into the building and that he would be there in a minute. He then walked over to his vehicle to call his supervisor, Lance Osmond, the Divisional Trainmaster. He told Mr. Osmond that Complainant was using profanity in a very aggressive and confrontational tone, and that he was stating that he was being harassed and that he was going to call Keith Creel. Mr. Osmond stated that he would call him back. Tr. 334.

While Herbeck was waiting for Complainant to call him back, Complainant exited the building and walked toward the vehicle with a grin on his face and his phone in his hand. He

told Herbeck that he had left a voicemail for Keith Creel. Herbeck told him to go back in the building. Osmond called him back and the decision was made to remove Complainant from service because of his behavior and for his own safety, since he appeared to be extremely angry. Tr. 335.

Herbeck exited the vehicle and asked Complainant to come into the building with him. He then told Complainant that he was being removed from service for being argumentative and quarrelsome. Complainant then changed his entire demeanor. He put his head down and appeared to be very surprised, and asked if there was another way they could solve the issue. Herbeck told him it wasn't up for discussion and that if he had questions, he should contact his local chairman. Complainant then walked away, commenting that this was unbelievable. That was the end of their discussion. Tr. 335-336.

Herbeck prepared a summary of his exchange with Complainant on the day of the event. RX-5. On that day, Complainant was assigned to the R-950, which regularly comes on duty at 9:00 a.m. Train movement would typically start anywhere from 5 to 20 minutes of being on duty. He first noticed that the R-950 was not moving at 9:10 a.m. He didn't take any action at this time. He called the yardmaster, Ramberg, at 9:20 because he could see that the locomotive was still not moving and was concerned as to what was going on with the assignment. The yardmaster informed him that he had sent all of the paperwork and told him that Complainant had gotten a late call. The Wheel was sent by computer at 9:21 a.m., which means he would expect the train to be moving by 9:31 a.m. The switch list is sent by fax because it includes manually written instructions. Tr. 336-338.

Herbeck made his way to the book-in room at 9:30 a.m. His discussion with Mr. Vandendries regarding the letter of caution took 15-20 minutes. The conversation was finished when Complainant boarded the engine at 9:50 a.m. He did not give Complainant a fall safety talk. The two did not have a discussion wherein he stated that it was bullshit that the Battle Creek trainmasters were issuing efficiency test failures to the Pontiac employees because they didn't have to see them every day. Complainant did not tell him that he had called the yardmaster and explained to him that he was going to need additional time. If an employee needs more than ten minutes to get out the door, and he provides a reasonable request, it will be granted to him. After his discussion with the yardmaster at 9:21 a.m., he did not speak with him again before Complainant was pulled out of service. Ramberg never told him that Complainant had indicated that he needed more time to get out the door. Tr. 339-342.

Keith Creel is the Chief Operating Officer of Canadian National Railway, the parent company of Grand Trunk along with many other companies. When Complainant told him it was time to put another call in to Keith Creel, he was intimidated. When Complainant raised his voice and used the words described in his earlier testimony, it made him extremely uncomfortable because it was confrontational. When Complainant suggested calling Derrick Colasimone, he felt like he was insulting him and indicating that he knew more than he did, and that he was willing to prove it by calling the general manager. He has never had another employee indicate that they were going to call Derrick Colasimone or Keith Creel. Tr. 342-343.

At no point during their exchange did Complainant raise any concern regarding Circular 6. Herbeck never threatened to give Complainant an efficiency test failure if he wasn't out the door in ten minutes, and he never intended to do so. He didn't discuss efficiency test failures

with Complainant that morning. Complainant did not suggest calling either supervisor in order to get an interpretation of Circular 6. When Complainant left the engine, Herbeck did not consider their conversation to be complete. When he followed Complainant into the book-in room, he did not agree to call Derrick Colasimone. He told Complainant to go back in the building and that he would be with him shortly. He then went to the car to call Mr. Osmond. If Complainant had responded in a calm and reasonable manner, he would not have had reason to call Mr. Osmond. During his conversation with Mr. Osmond, he did not discuss with him any complaints made by Complainant regarding Circular 6. He believes Complainant was pulled from service because of his confrontational behavior. He found this behavior to be disrespectful. When Complainant stated that he had a call out to Keith Creel, Herbeck was concerned because he didn't know what kind of relationship they had, but he couldn't allow Complainant to act the way he was acting. Tr. 344-347.

When Herbeck pulled Complainant from service, it caused delay to the R950 assignment that morning. It required them to call another conductor to replace Complainant, which caused at minimum a two-hour delay. At no time during their conversation did Complainant raise a concern that Circular 6 was unsafe. Complainant never stated that he was late because he was taking time to read bulletins. Herbeck would never expect Complainant to read bulletins while traveling down the lead because that is extremely unsafe and a violation of the rules. He did not swear at Complainant or raise his voice during their exchange. Complainant used profanity in a way that was aggressive and confrontational in tone. It was a situation that Herbeck had not dealt with before. Tr. 347-348.

Herbeck's statement prepared on September 23, 2012, is an accurate account of the events as they occurred that morning. He was the company witness at the investigation. He was the person responsible for identifying the work rules that would be put forward as potential rules that Complainant would have violated. No one told him which rules to enter. He didn't do anything different with Complainant's investigation than he had with others. He is not aware that Complainant offered two switch lists during the investigation hearing in this matter, even though Complainant testified at the hearing that he received two switch lists that morning. Complainant submitted one switch list at the investigation hearing. JX-16. At the investigation hearing, Herbeck read his statement, brought with him some additional items to enter into the investigation record, and brought work rules that Complainant may have violated. Tr. 348-351.

Ramberg also gave a statement about the events of that morning, which is the same as Herbeck's recall of those events. Complainant's assertion that Herbeck said that if you guys can't be out the door in ten minutes after you're on duty, you need to notify me or the yardmaster or there will be an E test failure, is not true. He also did not tell Complainant that he would not give him an E test failure for that day because he had a late call, but that he would in the future. Complainant did not ask Mr. Vandendries about his letter of caution or discuss the issue when they were on the engine that morning. Herbeck did not tell Complainant that he would receive an efficiency test failure if they did not comply with the peer-to-peer rules that morning. While they were on the engine, Complainant did not tell Herbeck about a previous failed efficiency test or a removal of an efficiency test failure by Mr. Creel. Tr. 351-354.

Complainant did not try to give Herbeck any constructive feedback that morning. His only suggestion was that if Herbeck wanted him out the door, he needed to be called on time. He never asked Complainant, "Is this the type of relationship you want to have?" He did not have a

discussion with Complainant regarding the bulletins that had been issued since he last worked. He never told Complainant he needed to comply with getting out the door in ten minutes or he would be sent home. Complainant did not suggest contacting a supervisor for the purpose of interpreting Circular 6. If he had agreed to contact Colasimone, he would not have called Lance Osmond. Tr. 354-355.

After the investigation, he had no involvement in the decision to issue discipline against Complainant. No one contacted him or consulted him about it. Complainant's confrontational tone while using profanity was what made him uncomfortable. No one has ever talked to him that way. Tr. 355-356.

It is common practice for the yardmaster to write on the switch list before sending it over. The yardmaster wrote on JX-16, the switch list from September 23, 2012. One of his notes states that an air slip test had been performed, indicating that the cars on the train were ready to go and did not require switching. This means that Complainant's testimony that he had a prior switch list and was going to have to build the train does not make sense. Air testing is done once switching has been completed and the cars are ready to go. JX-16 also states whether it's a load in which the situation lines 5, 6, and 7 were both loads, and that they did not require any special train placement. None of the hazardous materials on the train that morning had any special marshalling or placement instructions. Therefore, in terms of a work assignment for the R950, this was a very easy day. JX-9 does not support Complainant's testimony that he was going to do some additional switching that morning. Tr. 356-361.

Cross Examination

Herbeck normally talks to the yardmaster when he gets into work. He went to work in Pontiac on September 23, 2012, and Ramberg, the yardmaster, was in Flint. Ramberg told him that he had sent all the paperwork for the R950 with the exception of the consist Wheel before 9:00 a.m. This could have included a switch list for the Pontiac yard, but Herbeck did not know that based off the information that was entered in the investigation. If that was an accurate statement, then he doesn't know whether JX-16, which was printed at 9:07, was among those documents. Given that it was printed at 9:07, that document could not have been printed before 9:00. Ramberg normally supervises about six other jobs, some of which are in Flint. Ramberg might have to communicate with five other crews besides Complainant's crew, if they were all on duty at the same time. At 9:00 a.m., he could have been handling other matters. Tr. 362-365.

One of Herbeck's responsibilities is to determine the operational needs of the railroad. R950 would have been one of the things he looked at. During his deposition, Herbeck stated that he recalled them having to do some switching at Pontiac yard and working local industries between Detroit and Pontiac. That's something that 950 would normally do. If there are two different switch lists that conflict in information, that's something that Complainant would have to talk to the yardmaster about and reconcile any differences. He is not suggesting that every time paperwork is sent down, it is accurate. Because he did not have all the documents, Herbeck does not know whether Complainant received two different switch lists and needed to switch cars. Herbeck relied on Ramberg's statement that all the documents were sent before 9:00 because he had no reason to believe otherwise. He never went and checked to find out when all the additional documents were sent. When he pulled Complainant out of service, he did not ask him to give him all his paperwork for the train because there would be no reason to do that.

Because Herbeck was going to charge Complainant with delaying the assignment, he would have wanted to know what he was doing from the time he went on duty to the time he pulled him out of service. Despite this, Complainant's paperwork would not have been an important aspect of the investigation. Tr. 366-370.

Complainant would have done some switching between Pontiac and Detroit, which is something that this assignment normally does. He would need switch lists if he had pick-ups at local industries that required switching. Herbeck does not know about those switch lists. If there was more information and he had that information, it might change his idea of what needed to be done. When you take a badly ordered car out of the train, it causes delay. If you don't do that, it could cause a catastrophe. If you don't talk about ice building up in the flangeways at crossings, that could cause a derailment. If a train does derail, the delay is significantly greater and could possibly injure or kill someone. Therefore, they would want to take the time to make sure it's safe to go over that track. Tr. 370-371.

Herbeck knows Karen Sexton and was part of a crew that was efficiency testing her. She was pulled out of service that day for violating rules. Herbeck was not aware that she submitted a complaint alleging that this was in retaliation for refusing to accept cars at an industry because she felt they were unsafe. He maintains that he does not retaliate against employees. Tr. 372.

Herbeck testified that he didn't state that he was intimidated, embarrassed, or insulted by Complainant's conduct, either in his statement (JX-4) or his deposition. He indicated in his statement that at some point he called Lance Osmond, Division Trainmaster, for assistance. Up to that point he had not done anything to correct Complainant's alleged behavior, i.e., tell him not to use profanity or to keep his voice down. He didn't tell him he was offended by the discussion or do anything to warn him that his behavior was out of bounds. At this time, he didn't know that Complainant had a spotless record. Tr. 373-376.

Herbeck knows Mr. Maranzano, who was Complainant's supervisor. He does not think that Mr. Maranzano is a good trainmaster because he just quit by text one day. Herbeck didn't know that Mr. Maranzano had rated Complainant as a great worker with a great attitude who was always on time. Tr. 376-377.

JX-4 states the best of Herbeck's recollection of the events of September 23, 2012. He does not have anyindependent recollection of the events that occurred that day other than what is contained in this statement. Complainant acted inappropriately but not insubordinately when he was taunting Herbeck to come into the office and call Derrick Colasimone. All of Complainant's insubordinate, quarrelsome, argumentative behavior occurred on the locomotive. Mr. Vandendries was present for the entire exchange and would have been able to clearly hear the conversation. Herbeck is aware that Mr. Vandendries has indicated that there was nothing abnormal or unusual about that conversation. Tr. 377-380.

At the time Complainant got up and walked off the train, Herbeck was getting ready to respond after Complainant had said that he was harassing him and that he didn't have a clue. He was not speaking at the time Complainant got up. Herbeck would have thought that Complainant would have expected some sort of response given that what he had just said was not something that is acceptable to say to a manager. However, when Herbeck was questioned on this point by Mr. Wizauer at the (company) hearing, he stated that he did not know how

Complainant would have known that he was finished speaking. When Complainant left, Herbeck did not say anything to him or direct him to come back in the locomotive to finish the conversation. Tr. 380-381.

He asked Mr. Bohanon about the ten minute rule when they were on the locomotive. If an employee does not properly review the paperwork for that day, it could potentially cause a safety hazard. He would want every conductor to thoroughly review the paperwork. Employees are allowed to take the time they believe is necessary to safely perform their duties. The railroad also expects them to work efficiently. Circular 6 provides an avenue for an employee to say he needs more time: letting the yardmaster know why he could not be out the door in ten minutes. The employee has to provide a legitimate reason for the delay. Herbeck would consider anything regarding the conductor's normal job duties, including reviewing bulletins and paperwork and the Wheel, to be a legitimate reason to take extra time. Tr. 381-383.

Circular 6 is about preparing your normal documents and getting ready to go to work. Employees have an obligation to read and familiarize themselves with each of these documents and to make sure the switch list is accurate. If he has any concern about how the work is to be done, it's appropriate for him to spend time on the phone talking to the yardmaster. If he sees in the computer that there were changes to the bulletins, he'd need to take time to print them off and find out if anything in them applies to him. Herbeck did not do anything to determine how much time would be required to do all of this on the morning of September 23. Tr. 383-385.

Herbeck is aware that Complainant spoke with Ramberg twice that day. Herbeck never had any further follow-up with Ramberg other than asking him to provide a statement. He never spoke with him about Complainant's reasons for not being out the door in ten minutes. His initial conversation with Ramberg was at 9:20. He did not write down the times they spoke, but made a point to remember the time. He did not check the times with his phone records. Complainant did not argue with him about his obligation to be familiar with the daily operating bulletin, switch list, or Wheel. The only thing he had an objection to was that if Herbeck wanted him to be out the door in ten minutes, he needed to be called on time, and that he had gotten a late call. Tr. 385-387.

Prior to September 23, 2012, neither Complainant nor any other employee had told Herbeck that Circular 6 or any other rule was unsafe. He is not aware of any complainants regarding Circular 6 or its reasonableness. He does not know how Circular 6 got rescinded one day after the investigation of Complainant. He recalls Colasimone directing him to be sure to charge Complainant with delaying the train, but he would have done it anyway. He testified that Complainant was guilty of violating Circular 6 and delaying the train, Rules, A, B, and 104. Rule 104 relates to the duties and responsibilities of employees. He recalls saying that Complainant violated Rule 104 because he did not supervise the operation of his assignment due to the delay of this assignment and not complying with Circular 6. JX-1. Tr. 387-390.

Herbeck has a daily morning phone call with Ramberg. He also has a conference call to discuss operations on the railroad, among other things. A member of management leads this conference call, normally a superintendent. It would generally involve Tassin. Herbeck has the power to pull people out of service. If an employee is removed from service, the normal procedure is to call your supervisor to discuss it. Osmond did not tell him who he was calling in between their two phone calls. Therefore, he does not know who made the decision to pull

Complainant out of service. The final decision was not Herbeck's. He and Osmond discussed it and decided together to pull Complainant from service. However, at his deposition, Herbeck testified that he did not know who made the decision. Osmond would not have made the decision. They made this decision together during the second phone call. At his deposition when he was asked if he ever made a personal decision to pull Complainant out of service, he said, "No." When asked at the deposition who made the decision, he said, "I don't know." That was a false statement. They made the decision jointly. Tr. 391-396.

At the morning conference call, management talks about train delay. Train delay is tracked and is a huge issue for the company. It is the normal procedure for him to send emails to Mr. Tassin to explain why trains do not get out on time. Train delays are something that he has to explain. He is familiar with the Canadian National code of conduct. An employee has the right to elevate a dispute to a higher level. He agrees with Colasimone that an employee can elevate it to any level he wants. There is nothing wrong with Complainant's decision to seek either resolution of a dispute or clarification of a rule by calling Creel. It's just very odd. Complainant was not found guilty at his investigation of doing something very odd by calling Creel. There is nothing wrong with Complainant calling Colasimone to seek clarification of a rule or resolution of a dispute. It's just not something that would normally happen, and a lot of employees do not do it. Complainant is not guilty of a rule violation because he is different or more safety-conscious than other employees. Tr. 396-399.

The code of conduct says there should be no repercussions. Complainant testified that he wanted to call Colasimone regarding his work performance. The only subject Herbeck spoke with Complainant about regarding the way he worked was the subject of getting out the door in ten minutes and the ten minute rule. Complainant said to him, "If you have a problem with the way I work then let's call Colasimone." He never indicated to Complainant that he had a problem with the way he worked. Complainant made a statement saying that he had done Herbeck's job for seven years and that if Herbeck had a problem with the way he worked, then let's call Derrick Colasimone. He had asked Complainant for an explanation for not being out the door, and Complainant had responded that if he wanted him out the door then he needs to be called on time. Herbeck didn't call Colasimone himself because there was nothing to involve him with. Complainant did not have to ask his permission to call Colasimone. Tr. 399-401.

If Complainant was going to raise an issue with regard to a dispute they had, Herbeck would want to be present. However, it was very clear what had taken place up until that point. He had not indicated to Complainant that he had an issue with him. Complainant blew up and went on a rant saying that he was tired of being harassed and that he was going to call Keith Creel. This all occurred on the locomotive in the presence of Mr. Vandendries. When they were on the ground, and Complainant stated that he was going to call Colasimone, Herbeck didn't go with him because Complainant was taunting him and never showed any sincerity in wanting to actually speak with Colasimone. Complainant was trying to intimidate him. He thought he was trying to get him to back down by using Colasimone's name. He didn't see a valid reason for calling Colasimone because Complainant did not come across as being sincere. He does not remember testifying to that at the investigation hearing or during his deposition. He did not put it in his statement. Tr. 401-405.

Redirect Examination

Herbeck did not believe that Complainant was sincere in suggesting they call Derek Colasimone because of how he was acting. He was taunting him and waving him into the building. It was not normal at all. He did not take it like he was inviting him in for a polite discussion with his boss. Complainant did not make any effort to call Colasimone before Herbeck went to his truck to call his boss about Complainant's behavior. He now knows that Complainant made four phone calls in the span of two minutes to Colasimone after he made the phone call to his boss. While Complainant was making those phone calls, Herbeck was calling Osmond. Tr. 405-407.

Herbeck has not seen any switch lists for that morning other than the one presented as Exhibit 16. Complainant testified that he had to do some switching to build the train identified in Exhibit 16. Exhibit 16 does not indicate that Complainant would have any switching to do to build the train, as the exhibit shows that the air slip is in the knuckle and that it's okay to go. This indicates that the certification of the air test being performed has been completed and that the track is okay to go. It's ready, and doesn't have to be switched. The R950 is the assignment name. It does not have anything to do with the time of the train or its departure. Tr. 407.

He does not know one way or the other whether there was any switching to be performed in the yard that morning, but that is what the assignment normally does. When he testified in his deposition that there would be switching that morning, that was based on his general knowledge and understanding of what the job normally would do. No cars would have been switched or added to the train that is identified in JX-16 before it left the yard. He can confirm that from the documentation because the sequence of cars in JX-16 is identical to that in the Wheel, JX-9. Tr. 408-409.

When he called the yardmaster, Ramberg, at 9:20, the yardmaster indicated to him that Complainant had everything he needed in terms of paperwork for his duties the day. The yardmaster said that he had sent the Wheel at the time they were speaking, which was 9:21 as shown in JX-9. Based on that, his expectation of when Complainant was going to be out the door was that it would be ten minutes later, at 9:31. Complainant was not out the door by 9:31. Complainant did not indicate to him that he had made contact with the yardmaster to explain any delay beyond that caused by his late call. Ramberg's statement, JX-8, is consistent with his recollection of events that morning. Tr. 409-410.

Herbeck was not previously aware of any discrepancies between the Wheel and switch list. Comparing the two documents, he does not see any discrepancies. If Complainant had to perform switching in the yard to get his train ready to go, JX-16 would not say "Air slip in the knuckle, okay to go," because it would not be ready to go. If Complainant had switch lists for the work that might be done when he got to the E03 or the Conrail indicated on JX-16, this would not change the work he had to do in the yard before he left. When Herbeck testified previously that he did not care what all of the paperwork Complainant had for the day was, he meant that it is not normal for a trainmaster to be aware of every document that a train crew has because there can be several, and they are irrelevant to him. There was no indication from the yardmaster that Complainant might need more time than what was indicated in Circular 6, so it was not about the paperwork he had. It was about what Complainant and his assignment were doing at that time. Tr. 410-412.

No one asked him in his deposition about his feelings with regard to Complainant's behavior. He was not asked about this in the investigation hearing. When he prepared his statement, JX-4, he was not writing down his personal feelings relating to the incident. He was trying to explain the sequence of events that had occurred. He was intimidated by Complainant on the morning of September 23. He was embarrassed by his conduct and insulted by his behavior. He needed assistance from Lance Osmond because he was in a situation he hadn't been in before, as he had been told by Complainant that he was harassing him. So he called his supervisor and felt the need to explain to him what was going on, with Mr. Creel being the COO and his name being used in regards to harassment. He was concerned, as he had a situation that was not okay, and he felt the need to call his supervisor. He wanted to make sure he handled the situation appropriately. Tr. 412-413.

Given Complainant's behavior, he would not need to tell him to keep his voice down or that he was offended, or warn him that he was out of bounds. When he created his statement, JX-4, the events of the day were fresh in his mind. He was honest when he wrote down his statement and provided as best he could an accurate portrayal of the events that morning. He had no experience with Complainant prior to the events of September 23 that led him to dislike him. Ramberg never told him that he had received more than one phone call from Complainant that morning. Prior to Complainant's deposition, he did not know that Complainant had alleged that he had made a second phone call to the yardmaster. No one told him on September 23 that Complainant needed more time to complete his assignment. Tr. 414-415.

When they were on the train, he requested an explanation as to why Complainant had taken longer than ten minutes to get on the engine. Complainant's explanation was that he had gotten a late call and that if he wanted him out the door, he needed to be called on time. Complainant did not provide an explanation as to why it took him until 9:50 to get on the engine. When he put together his statement, he tried his best to put it in chronological order as to the events that occurred that day. There were a number of things that happened between when he asked Complainant about his delay in getting out the door and when Complainant suggested that he call Colasimone. His statement is 100% accurate with regard to the things that occurred between these events. Tr. 415-418.

There is no magic number of efficiency test failures that an employee receives before they are issued discipline. When railroad operations are safe, the efficiency of the railroad improves. This is because when an employee cuts corners and thinks he's getting the job done faster, it could lead to a derailment and then it could take twelve hours to re-rail. When an employee is following the rules and everything is rolling safely, you're not going to encounter a delay or derailment caused by lack of compliance with a rule. Complainant never indicated to him on September 23 that he wanted to call Mr. Colasimone or Mr. Creel to get an interpretation of Circular 6. Tr. 418-419.

Recross Examination

One aspect of Herbeck's job is to correct employees' behavior that is not in conformance with the rules. He did not say anything to Complainant as to how he was acting. When he went to the investigation, he was the company witness and was obligated to provide all the information he knew of that constituted a violation of the rules and present that to the

investigation. He didn't express any feelings during the investigation. His feelings would not constitute a rule violation for Complainant. It was very clear that Complainant's behavior that day was not acceptable. He never claimed at the investigation that Claimant's making him feel intimidated was a rule violation. It was never asked of him to explain his feelings, so he didn't. In his deposition, he was asked whether when he looked at the operational needs of the railroad that morning, R950 would have been one of the things that was his responsibility to look at, and he said yes. He also said he recalled them having to do some switching in Pontiac yard and working local industries between Detroit and Pontiac. He did not say anything about that being what they usually did or indicate that that was just the general duties of the R950. Tr. 419-422.

He does not know how many times he spoke with Ramberg about R950 on September 23. He most likely spoke with him before 9:00. Circular 6 clearly states that the expectation is ten minutes, and if you need more time, you ask for more time and explain why you need it. He did not know about the first call Complainant had with Ramberg at 9:15. Ramberg told him that Complainant had said he had gotten a late call, so it was his impression that they had a conversation, but he did not know at what time. He also stated at the investigation that he read Ramberg's statement after Complainant was removed from service. Ramberg could have indicated in his statement that he had a second phone call with Complainant. Tr. 422-424.

If Complainant received an earlier switch list that showed the cars on different tracks and then received the 9:07 one that showed them on the same track, he would have to reconcile that. He does not know what was said when that reconciliation occurred. He does not know whether there were mistakes or inaccuracies on JX-16. He never went out to check that switching was done on the R950 that day. He is not contradicting Complainant's testimony regarding the two switch lists, but is basing his testimony on the evidence he has been provided up to this point. He does not know whether there were other documents sent down before 9:00, although Complainant might have known. Tr. 424-426.

Redirect Examination

Comparing JX-16 to the Wheel (JX-9), he is able to confirm that there are no errors on JX-16. His understanding is that Complainant was an experienced conductor. After receiving these documents, it would take Complainant a minute or two to determine that there were no errors. It would take him a minute or less. Once Complainant received these documents, there is no indication that he would then do any switching that morning. He has not seen any facts throughout this investigation indicating that Complainant was going to do any switching that morning in order to build the train. Tr. 427.

When he gave his deposition, he did his best to answer the questions that were posed to him at the time. When he answered the question regarding whether Complainant or the R950 was going to do some switching in the Pontiac yard on September 23, he did not have specific recall of the switching for that assignment. He said the R950 was going to perform switching because it would have done so on a normal day. When he answered those questions in his deposition, he had neither the switch list nor the Wheel in front of him. Ramberg's statement did not say anything about a call with Complainant after 9:15. Complainant did not tell him on September 23 that he had spoken with the yardmaster after he received the Wheel. Tr. 428-429.

Recross Examination

When he testified at his deposition, he did not have JX-16. Exhibit 1 at his deposition was the transcript and exhibits from the October 1, 2012, investigation hearing, which included JX-16 and all the other joint exhibits. Tr. 429-430.

Redirect Examination

He recalls that at his deposition, the entire investigation transcript and exhibits were marked together as one exhibit. The hearing exhibits JX-1 through JX-23 encompassed one exhibit at his deposition, and were marked as Exhibit 1. When he was answering questions with regard to the switching performed on the R950, no one called his attention to or showed him the specific pages of the switch lists and the Wheel. They were not open and in front of him at that time. Tr. 431.

Documentary Evidence[7]

JX 1, Investigation Hearing Transcript Testimony[8]

Joseph Vandendries (TR. 39)

Joseph Vandendries has been employed with the Grand Trunk Western Railroad Company for 18 years. At the time of the incident that led to the investigation, he worked as a locomotive engineer, a position he had held since around 1997. He has also worked as a conductor. (TR. 39)

On September 23, 2012, Mr. Vandendries was called to work the R950 with Complainant in Pontiac, MI, at 9:00 a.m. He has not read or received a copy of the notice of investigation (EX-1). [The witness was given a copy of EX-1 to read at the investigation hearing.] He reported for work on September 23 at 8:57 a.m. Complainant was not there when he arrived for work. He does not recall when Complainant arrived that day. After reporting for work, he started getting paperwork, looking at bulletins, and getting his stuff done. He is familiar with EX-18, Circular 6, because he has seen it hanging on the wall in the Pontiac crew room. He understands the circular to mean that he was to be out the door to start work within ten minutes of his on-duty time. Therefore, on September 23, he would have been expected to be out the door by 9:10. He does not recall when he left the building that day. (TR. 39-42)

After leaving the building, he went to his locomotive. Trainmaster Herbeck boarded the locomotive while he was on it. Complainant was not on the locomotive at that time, but he didn't know why. He had a conversation with Mr. Herbeck regarding a letter of caution he was receiving. He does not recall whether Mr. Herbeck asked why his assignment had not yet started work. He did not take any exception to the manner in which Mr. Herbeck spoke to him. Complainant boarded the locomotive while Mr. Herbeck was on it, but he does not know how long it was before Complainant came on board. He heard the conversation between Complainant and Mr. Herbeck. They were talking about the 10-minute-rule (EX-18) and going over it. They

[7] Although I have examined each exhibit *in toto*, I will not discuss every single document, in the interest of judicial efficiency, but will only discuss key points, and will refer to necessary documents in my analysis.

[8] I have only summarized the testimony of Vandendries as the other witnesses were present at the hearing before me and testified consistently with their previous testimony.

were also talking about a shoving moment: like if the conductor tells them to back up, and they don't reply, they have to stop them. (TR. 42-44)

While he was speaking with Mr. Herbeck, Complainant's tone and demeanor was normal. Neither of them raised their voice longer than was necessary to be heard in the locomotive cab. There was nothing out of the ordinary about the conversation. He heard Complainant using profanity during the conversation. He did not hear Mr. Herbeck use any profanity. He heard the word "harassment" being used. He does not recall seeing Mr. Herbeck do anything to harass Complainant. He did not hear Complainant say that he was going to call anyone. He was inside the engine and about five feet away from the two men while they were having this discussion. He could clearly hear what was being said. He head Complainant say that he got a late call and was here at 9:13, and that if you want me out the door, I need to be called on time. He does not recall hearing Complainant say he had about had it with this harassment and that it was time to put in another call to Keith Creel. He heard Complainant say "we used to pump out 300 cars." Complainant was not talking in a louder than normal voice while making these statements. He could see Complainant while he was talking. He thinks Complainant was sitting. (TR. 44-46)

The conversation ended when Complainant walked out. He does not know whether Mr. Herbeck was finished talking to Complainant when he left the locomotive cab. He did not hear Complainant say why he was leaving the car. After Complainant left the car, he does not recall whether he (Mr. Vandendries) had any more conversation with Mr. Herbeck. (TR. 46-47)

Mr. Vandendries' engine was running at the time of his conversation with Mr. Herbeck and was located in the front of the book-in room. EX-8 gives a fair representation of where his locomotive was, except that the engine was facing the other way. (TR. 48)

After receiving his letter of caution, the next topic of conversation was the 10-minute rule (EX-18). The conversation at that time was not argumentative. He does not recall whether Mr. Herbeck asked him or Complainant why they were not out the door in ten minutes. After the discussion of the ten-minute rule and the discussion of shoving moves, he does not recall whether they addressed any other issues.

When Mr. Vandendries was on the engine, he and Mr. Herbeck went over the 10-minute rule and the issue of shoving back with the conductor. When they shove back, if they don't repeat it, the conductor is supposed to stop the move. Mr. Herbeck relayed this information to him. He does not recall exactly when he departed the engine after Mr. Herbeck left. He does not recall ever hearing the word "goddamn." (TR. 108-109)

With regard to the shove moves, the company refers to that as "peer-to-peer." The conversation on the locomotive was a three-way conversation between himself, Complainant, and Mr. Herbeck, about peer-to-peer and the ten-minute rule. (TR. 109-110) He did not hear Mr. Herbeck use profanity at any time. (TR. 110)

<u>JX 2, Notice of Investigation</u>

On September 26, 2012, Complainant was informed that an investigation would be held to determine whether he violated any Company rules, regulations and/or policies in connection

with his allegedly failing to properly perform his duties and follow instructions while working as conductor and allegedly being quarrelsome, insubordinate and/or exhibiting conduct unbecoming by arguing with Trainmaster Eric Herbeck between the approximate hours of 0900-1030 hours on September 23, 2012.

JX 3, Notice of Witness

On September 28, 2012, Complainant was informed that Engineer Joe Vandendries would be a witness at the investigation.

JX 4, Undated Statement, Eric Herbeck

Statement of Eric Herbeck concerning the events of September 23, 2012.

JX 5, Crew Information

JX 6, Employee Work History

JX 7, Map of Pontiac Yard

JX 8, Statement, Anthony Ramberg, Sept. 23, 2012

Ramberg stated that he sent R950's work around 9 o'clock on September 23, 2012. He was working first shift yardmaster in Flint. He talked to conductor Bohanan at 0915. Bohanan stated he got a late call around 0715. Ramberg sent his wheel around 0921, waited for Arman to release track and waited for schedule for train Id to run wheel.

JX 9, Train List With Manifest and Additional Documents

JX 10, Statement, Joseph Vandendries, Sept. 23, 2012

Vandendries stated he was on the engine talking about the ten minute rule.

JX 11, Circular 6

General Circular #6 dated August 17, 2012, signed by Lance Osmond, Division Trainmaster was addressed to all engineers, trainmen and all concerned:

> Effective immediately, it is expected that you will be out the door and on the engine 10 minutes after being on duty. If there are any issues as to why this can't be done, you will need to contact the yardmaster on duty either by telephone or radio as to the reason(s) you are prevented from being out the door in 10 minutes.

JX, 12, General Rules A-J

A. Safety. Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken.

B. Reporting and Complying With Instructions. Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with manager-issued instructions applying to their duties.

JX 13, General Rules 100-104

104. Duties of Train and Engine Crew Members. Determine the extent of their experience and knowledge of the rules, and instruct them, when necessary, how to perform their work properly and safely. Unless otherwise instructed, crew members on the head and of freight trains must write in the control compartment of the engine.

Conductor

1. Conductor supervise the operation and administration of trains, and are responsible for the freight carried by their train. They are responsible for insuring the freight is delivered with any accompanying documents to its destination or terminal. Freight conductors must maintain any required records. All persons employed on trains must obey the conductor's instructions, unless the instructions endanger safety or violate rules.

2. Conductors must advise the engineer and RTC of any restriction placed on equipment being handled.

All Crew Members

1. To ensure the train is operated safely and rules are observed, all crew members must act responsibly to prevent accidents or rule violations. At least two miles in advance of any restrictions or other known conditions that affect the safe operation of their train, crew members and the controlling unit must remind each other of the restrictions or conditions so that proper action can be taken.

JX 14, Personal Work Record

JX 15, Discipline Provision from Collective Bargaining Agreement

JX 16, Service Scheduling

JX 17, Statement of Complainant

JX 18, Map drawn by Complainant

JX 19, CN Recommended Practices and Procedures

JX 20, Portions of Code of Business Conduct

JX 21, Portions of Handout on Ethics/Reporting

JX 22, Complainant Closing Statement

JX 23, Santa Train Letters

JX 24, October 25, 2012 Discipline Letter

This letter signed by Phillip Tassin, General Superintendent, informs Complainant that Tassin has reviewed the transcript of the formal investigation, which was held on October 1, 2012, to develop the facts and determine his responsibility, if any, and whether or not he violated any Company rules, regulations and/or policies in connection with allegedly failing to properly perform his duties and follow instructions while working as conductor and allegedly being quarrelsome, insubordinate and/or exhibiting conduct unbecoming by arguing with Trainmaster Eric Herbeck between the approximate hours of 0900-1030 hours on September 23, 2012. The letter states that the record contains credible testimony and substantial evidence proving that Complainant violated USOR's General Rule A –Safety, General Rule B - Reporting and Complying with Instructions, General Rule H - Furnishing Information and Conduct, Rule 0100 - Rules, Regulations and Instructions, Rule 104 - Duties of Train and Engine Crew Members, and Rule 0600 – Switching Safely and Efficiently. The letter informs Complainant that he will be suspended from service for 30 days from October to 2012 through October 31, 2012, and that he must meet with General Manager Derrick Colasimone on Tuesday, October 30, 2012 in Troy Michigan.

JX 25, Complainant's OSHA Complaint

JX 26, Secretary's Findings

JX 27, Appeal of Seccretary's Findings

RX 2, GTW Code of Business Conduct

RX 5, Email of Herbeck, Sep. 23, 2012

CX 1, Operating Rules

CX 2, Safety Rules

CX 5, The Junction, Vol. 12, September 2012

CX 6, Emails regarding The Junction

CX 9, General Circular 7

On October 2, 2012, General Circular #7 was issued, advising employees that General Circular #6, dated August 17, 2012, has been canceled in its entirety. The circular is signed by Lance Osmond, Division Trainmaster.

CX 11, E-mails

On September 23, 2012, at 2:59 PM, Herbeck sent an email to Colasimone, Tassin, and Osmond describing his version of the events of September 23, 2012. In response, Colasimone

told Herbeck to make sure to charge Complainant with delay to assignment and complimented Herbeck, stating, "Job well done, we do not tolerate this type of behavior."

CX 14 and 14a, E-mails

On September 24, 2012, Colasimone forwarded Herbeck's September 23, 2012, e-mail to Creel. Creel commented after reading Herbeck's version of events that Complainant's response was completely unacceptable and he does not respect authority. He commented that Complainant had snapped and must accept responsibility for his actions.

Colasimone responded to Creel with copies to Vena and Tassin stating that Complainant had a different story and he suggested that Complainant's local chair and management sit down and see if they can find common ground where Complainant could admit to his errors and accept responsibility for his actions, and if not, they will hold a formal investigation. Colasimone commented that he did not believe Complainant's story for one second.

Vena responded that Complainant's name had come up before and asked, "What is his history?"

Tassin responded in an e-mail to Jim Vena and Colasimone stating that nothing shows on Complainant's record. One absence in the past 90 days, 0 discipline, 0 e-test failures. He stated that something stinks on the e-test failures because he knows of two of them within a year. Tassin stated that he has some research to do to find out how they were removed.

Colasimone then responded to Tassin asking, "How could we rate him Exceeds when he claims we are harassing him…?"

Tassin responded with, "Because he met the exceeds guidelines because someone removed his e test failures. The TM's are unaware of the harassment complaint.

Colasimone then responded to Tassin stating, "Change it ….please."

Tassin responded to Colasimone stating, "I will. I am also finding out who removed his failures and having them put back in. Then I will deal with whoever had the failures removed."

Colasimone then responded with, "Scary how much we think alike…"

I note that at the hearing, when questioned about this email exchange, Colasimone testified that he did not know what he meant when he asked how they could rate Complainant "exceeds" if he claims we are harassing him. He testified that he could not recall why he wrote that e-mail and that he does not know what relevance a prior complaint for harassment would have to do with whether an employee is highly rated. Tr. 72. He also testified that he does not know why he directed Tassin to, "Change it please." He stated that he does not recall what Tassin was supposed to change. Tr. 72-73. He also could not recall what he meant when he stated, "Scary how much we think alike." Colasimone testified that he could not remember any of this email exchange. Tr. 74.

CX 15, Cell phone records

CX 16, 2012 Employee scorecard

CX 18, Deposition, Vandendries

On April 29, 2014, Joseph Vandendries provided deposition testimony. He stated in relevant part that he was present on the locomotive during the conversation on September 23, 2012, between Bohanon and Herbeck. Neither side raised their voice during the conversation. The subject of the conversation between the two was the Ten Minute Rule. Bohanon disagreed with the rule. He testified that Bohanon used profanity and that profanity is used by employees on a regular basis. He has used profanity in the course of his employment and heard supervisors use profanity. He has heard employees used profanity in the presence of supervisors. Neither Bohanon nor Herbeck appeared angry during the conversation. The conversation about the Ten Minute Rule was a three-way conversation. He does not recall Herbeck using any profanity that day. Bohanon did not address Herbeck in an angry tone of voice. His tone of voice was normal throughout the conversation.

CX 19, Deposition, Tassin

On April 29, 2014, Phillip Tassin provided deposition testimony. He stated in relevant part that he received a phone call from someone whom he could not remember on September 23, 2012, who explained the situation and said that Complainant was being argumentative, cursing, things of that nature, and asked if he should be removed from service. He responded that Complainant should be removed from service.

He recalls that Complainant previously filed a harassment complaint against management and he was named in the complaint. It concerned an incident in which he alleged that Complainant had his hand inside a gondola. He believed that Complainant was lying and placed him in for an efficiency test failure. The efficiency test failure was later removed from Complainant's record by the Chief Operating Officer, Keith Creel. Complainant filed a harassment complaint against Tassin.

In the current case, he issued the suspension letter at JX 24. Prior to issuing the letter, he read the transcript of Complainant's investigation. He was not the sole decision-maker with regard to the findings as it relates to Complainant's guilt or innocence of the charges. He does not recall who was involved in the decision, but he knows that his supervisor, Colasimone was involved. In other instances he has made such a decision alone, but in this instance he had the input of someone else because he believes that Complainant called the Chief Operating Officer who somehow got involved. Colasimone was the person who told Tassin what the discipline was going to be. The letter indicates that Complainant was found guilty of General Rule A, General Rule B, General Rule letter H, Rule 100, Rule 104, and Rule 600. The letters says that he found credible testimony and substantial evidence that proved a violation of each of these various rule violations. He was directed by his superior to issue the discipline based on what was in the transcript. He believes Colasimone made the decision. Tassin agreed with the decision. He had reviewed the summary of the investigation by Mr. Wizauer.

Operating Rule 600 was not in any way referenced at the investigation and to his knowledge it was not charged. So the suspension letter is incorrect when it states that

Complainant was guilty of violating Rule 600. He does not know whether a corrected discipline letter was ever sent to Complainant or whether the union was ever advised that the discipline letter was in error. He also does not recall anything in the record regarding violating General Rule A. He does not believe Complainant was found guilty of violating General Rule A. He thinks that was a clerical error. He does believe there was evidence that Complainant violated General Rule B, Reporting and Complying with Instructions. He did not notify the yardmaster or trainmaster that he was going to exceed the 10 minutes issued in the circular. He believes Complainant violated General Rule H by yelling and cursing at a supervisor. It is his understanding that the profanities were directed at Trainmaster Herbeck. Complainant violated Rule 100, Rules, Regulations, and Instructions, by violating Rules B and H. He violated Rule 104, Duties of Trained and Engine Crew Members, by not notifying the trainmaster or yardmaster of a delay. He does not recall if Complainant testified that he spoke to the yardmaster, but it would not have mattered because he did not believe anything that Complainant said. He does not believe that Herbeck had anything to gain about lying about what Complainant said. He believes Complainant had everything to gain by lying. Therefore, he believed Herbeck.

He does not recall any of Vandendries testimony. It doesn't matter what Vandendries said because Tassin was not the decision-maker in this case. Regardless of his personal opinion, he was going to do exactly what Colasimone told him to do. Colasimone also directed that as part of the letter, he include that Complainant must meet with Colasimone on October 30, 2012.

General Circular 6 was withdrawn by Mr. Creel who said it was unnecessary. There is nothing in writing now that tells employees to be out the door in 10 minutes. They have a reasonable amount of time.

ANALYSIS AND CONCLUSIONS

As set forth below, the following findings of fact and conclusions of law are based upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In deciding this matter, the Administrative Law Judge is entitled to weigh the evidence and to draw inferences from it.

Applicable Law

The Federal Rail Safety Act ("FRSA" or "Act") provides for employee protection from discrimination if the employee has engaged in protected activity while employed by a railroad carrier engaged in interstate or foreign commerce. 49 U.S.C. § 20109 (a). The Act prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's protected activity. Section 20109(b)(1)(A) of the Act, relevant to the current claim, provides:

(b) Hazardous Safety or Security Conditions. -

> (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for -

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(A) reporting, in good faith, a hazardous safety or security condition [.]

On August 3, 2007, President Bush signed "The Implementing Recommendations of the 9/11 Commission Act of 2007," designated as Public Law No: 110-053, 121 Stat. 266. Under that law, Congress transferred authority for rail employees' whistleblower claims from the National Railroad Adjustment Board to the Department of Labor under OSHA. The August 2007 amendments also changed the legal burdens of proof standard for FRSA claims, requiring that they be harmonized with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), codified at 49 U.S.C. § 42121. The 2007 FRSA Amendments became effective on August 3, 2007, the date the statute was enacted.

The FRSA was amended further by Public Law 110-432, 122 Stat. 4892, Div. A, Title IV, section 419 (Oct. 16, 2008). The interim final text of regulations governing the employee-protection provisions of the National Transit Systems Security Act ("NTSSA"), enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Commission Act"), and the Federal Railroad Safety Act ("FRSA"), as amended by Section 1521 of the 9/11 Commission Act, became effective on August 31, 2010.

To satisfy his *prima facie* burden under the FRSA, the Complainant must prove, directly or indirectly, by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the FRSA; (2) his employer knew he engaged in the protected activity; (3) he was subjected to an unfavorable personnel action; and (4) his protected activity was a contributing factor that led to the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. Part 1979.109(a); *Rudolph v. National Railroad Passenger Corporation* (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013); *Henderson v. Wheeling & Lake Erie Ry*., ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); *see also Powers v. Union Pacific Railroad Co.*, ALJ Case No. 2010-FRS-30, ARB Case No. 13-034, slip op. at 10-11 (ARB March 20, 2015).

Even if complainant meets this burden of proof, the employer may nevertheless avoid liability if it can show by clear and convincing evidence that it would have taken the same adverse or unfavorable personnel action in the absence of Complainant's protected activity. *Hamilton v. CSX Transportation, Inc.* ARB No.12-022 (ARB April 30, 2013). *DeFrancesco v. Union Railroad Co.,* ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012) (noting that clear and convincing evidence denotes a conclusive demonstration).

Protected Activity

Complainant's Position

Complainant asserts that he engaged in protected activity on September 23, 2012, when he reported a safety concern to Trainmaster Herbeck, i.e., he told Trainmaster Herbeck that Circular 6 did not allow conductors sufficient time to perform their mandatory review of train bulletins, orders, switch lists, and wheel reports so they could safely move their trains.

Complainant testified that he received a late call for his assignment at the Pontiac, MI train yard on September 23, 2012, which normally would have started at 9:00 AM. Because he received a late call, he was allowed to report for work after 9:00 AM and his phone records show he was at the Pontiac yard by 9:11 AM. When Complainant arrived for work, he called the Yardmaster, Mr. Ramberg, who was located in Flint, Michigan and reviewed the switch lists which had been provided for the job. However, at the time of the conversation, Complainant had not yet received the Wheel report which was not generated by Ramberg until 9:21 AM and subsequently had to be faxed to Complainant. Complainant asserts that he received the report at approximately 9:30. Complainant testified that in their phone conversation he was advised by Ramberg, that Trainmaster Herbeck was coming to meet with the crew because the crew had not started performing work within 10 minutes of their 9:00 AM start time. Complainant asked Ramberg if Herbeck was aware that he had received a late call, but Ramberg had not told Herbeck about it. Before leaving the yard office, Complainant stated that he was required to print the current bulletins off the computer, review them, and post them on the office bulletin board. After receiving and reviewing all of the required paperwork, Complainant left the office at approximately 9:40 AM.

Complainant asserts that he boarded the locomotive at approximately 9:45 AM. When he entered the engine, Herbeck was talking to the engineer, Mr. Vandendries and discussing a letter of caution which Vandendries had received as a result of a work-related efficiency test. Herbeck told Vandendries and Complainant that, in the future, they would receive an efficiency test failure if they were not out the door performing work within ten minutes of their start time, pursuant to general Circular 6. As the conversation continued, Herbeck told Vandendries that he thought it was "bullshit" that he had been given a letter of caution about an efficiency test failure. Complainant agreed with Herbeck that the letter of caution was "bullshit" and also expressed his opinion that the Ten Minute Rule, i.e., Circular 6, was also "bullshit."

Complainant asserts that he told Herbeck that considering all the paperwork that train crews are required to review prior to starting work, it cannot always be completed in ten minutes. He testified that he told Herbeck that Circular 6 was directing conductors to follow an unsafe work procedure, and Herbeck was telling him that trainmasters had been instructed to enforce Circular 6 by issuing efficiency test failures. Complainant also told Herbeck that ordering crews out the door in ten minutes of arriving to work amounted to "fucking harassment." He told Herbeck that if management really wanted him out the door in ten minutes, they needed to post all the required bulletins and have the other paperwork ready when he reported for work.

Complainant asserts that he then walked off the engine to get a breath of fresh air and because Herbeck was still talking to Vandendries. He asserts that Herbeck exited the engine a few minutes later and they continued their discussion concerning Circular 6. Complainant asked Herbeck if they could elevate their discussion by calling higher management, Colasimone and Creel, for clarification of Circular 6. Herbeck initially stated it was not necessary to involve higher management, but later agreed they could call Mr. Colasimone. Complainant attempted to reach Colasimone and when he could not do so, he called Chief Operating Officer, Keith Creel and left him a voice mail. He then informed Herbeck that he had left Creel a voice mail. Herbeck told Complainant to sit tight for a minutes. He then got into his vehicle and began speaking on his cell phone. When he exited his vehicle, Herbeck took Complainant inside the

yard building and advised him that he was being immediately removed from service for being quarrelsome and argumentative, per the order of Derrick Colasimone.

After being removed from service, Complainant called Colasimone who advised him that it would be better if he discussed the matter with his union representative, David Durfee. Complainant then called Durfee and discussed the incident with him. He also went home and immediately prepared a written statement concerning the events of the day.

Respondent's Position

Respondent denies that Complainant engaged in any protected activity on September 23, 2012. Respondent asserts that Complainant never told Herbeck about any concerns he had about the safety of Circular 6 and that he invented the entire alleged conversation after the fact, when he knew he was facing a formal investigation and possible disciplinary action. Respondent asserts that Complainant was removed from service because he was late in getting out the door and immediately became enraged when Herbeck questioned why he was not out the door in ten minutes, as required by Circular 6. Respondent asserts that Complainant became angry, raised his voice louder than necessary to be heard, used profanity, and threatened to call higher management. Respondent characterizes Complainant's threats to involve higher management in the dispute as intimidating, bullying, belittling and taunting of a young, inexperienced trainmaster. Respondent further asserts that Herbeck never agreed to involve Mr. Colasimone and that he instead called his supervisor, Lance Osmond, for guidance.

Findings of Fact and Analysis of Credibility and Evidence

After reviewing all of the evidence of record, I make the following findings of fact regarding the events of September 23, 2012:

I find that on September 23, 2012, Complainant received a late call for duty. Based on the late call, he reported for duty at approximately 9:12 AM rather than 9:00 AM, as required. Upon reporting for duty, he called the yardmaster, Ramberg, at approximately 9:15 AM and informed him that he had received a late call. (CX 8). I find that by this call to Ramberg, Complainant informed the yardmaster that he would not be able to be out the door in ten minutes as required by Circular 6. Herbeck was unaware that this call had taken place at the time he boarded the locomotive and did not become aware of this until later, after the incident, when he read Ramberg's written statement. Nor was Herbeck aware that Complainant had received a late call until he read the written statement. (JX 1).

Complainant discussed the day's work with Ramberg and what he needed to do to properly order the cars. At the time of the phone conversation, Ramberg did not yet have the wheel report ready for Complainant. At approximately 9:31 AM, Ramberg called and said he had faxed the Wheel to Complainant and that the Trainmaster, Herbeck, was asking why Complainant's train had not yet left the yard. Complainant asked Ramberg if Herbeck was aware that he had received a late call, and Ramberg said he would tell him, but he thought Herbeck was already on his way to the booking room. After the conversation, Complainant reviewed the Wheel report and then proceeded to the engine. At approximately 09:45 AM, Complainant entered the locomotive, whose engine was running. (JX 17, Tr.

When Complainant entered the locomotive, Herbeck was talking with the engineer, Vandendries, to whom he had given a letter of caution. Herbeck inquired why Complainant was not out the door in ten minutes as required by Circular 6 and informed him that in the future he would receive an efficiency test failure for lateness because the company was holding trainmasters responsible. Complainant saw the letter of caution paperwork in front of Vandendries and inquired about it. Herbeck and Vandendries continued to discuss the letter of caution and at some point Herbeck commented that it was "bullshit" that trainmasters in Battle Creek were targeting Pontiac and Flint guys for efficiency test failures. Complainant agreed that it was "bullshit" and discussed with Herbeck the circumstances surrounding a prior efficiency test failure that he had received.

The conversation turned again to the "Ten Minute Rule", and Complainant complained that ten minutes was not sufficient time to review all of the necessary paperwork that a conductor needed to review to safely move the train. Herbeck informed Complainant that the company was holding trainmasters responsible if crews were not out the door in ten minutes. Complainant responded by stating that if they wanted him out the door in ten minutes, they should have his orders printed, Wheel ready, and bulletins posted like they should be, the way they used to do it when they were actually running trains. Herbeck laughed and Complainant stated words to the effect of, "We did, this Fucking place used to pump out 300 plus cars a day out of this yard at one time, and we had the paperwork ready for all the crews, we had several yard crews going on duty here not just one a day like now," and then said something to the effect of, "over this, out that, getting out the door in 10 minutes this, or else that" and he is "tired of all this Goddamn Bullshit and just let him do his Goddamn job."

Herbeck responded that the rule is now ten minutes and out the door and that is what they have to go by. Complainant responded that ten minutes is not always enough time to do everything that crews need to do and for the company to send guys down here to run them out the door and give efficiency test failures if they are not out the door and ten minutes is "Fucking Harassment" as far as he is concerned. Complainant also told Herbeck that he had done his job for seven years and that if Herbeck had a problem with the way he did his job, they should call Derrick Colasimone. Complainant then exited the engine abruptly.[9]

Although there is some dispute as to the exact words that were spoken, I find that Complainant admittedly used profanity several times during the conversation with Herbeck. I find however, that Complainant's use of profanity in the conversation was not something that was out of the ordinary and the use of the words, "bullshit" and "fucking" was not particularly shocking or offensive to Herbeck. Testimony of all witnesses confirmed that use of profanity was a common practice around the railroad and used by management as well as lower level employees and that it was thus part of the company culture. I find that Complainant did not direct the profanity towards Herbeck personally and did not refer to or describe Herbeck in a profane manner. Herbeck testified at the company hearing that the profanity was not directed at him. (JX 1)

I find that Herbeck perceived the tone of his conversation and Complainant's departure as disrespectful, and was not finished talking to Complainant at the time Complainant walked away.

[9] After a review of the entire record, I find that this was the gist of the conversation, although there was some disagreement over the exact words that were spoken.

However, he did not indicate to Complainant that he had more to say or that Complainant should not leave. It also was not apparent to Vandendries, who independently witnessed the conversation, that Herbeck was not finished talking when Complainant exited the locomotive. (JX 1). In his testimony at the company investigation, Herbeck presented conflicting testimony on this point. He first testified that he was "mid-sentence" when Complainant exited the locomotive, but later said he was "getting ready to respond" and was not talking. (Id.)

Shortly thereafter, Herbeck exited the locomotive followed by Vandendries. Herbeck asked Complainant words to the effect of, "Is this really the kind of relationship you want to have?" Complainant responded with words to the effect of, "obviously, it is the kind of relationship you want to have because you are the one down here badgering me. If you are worried about us getting the work done, and if that is what this is really about, just leave us alone and let us go to work."

Herbeck then questioned Complainant as to why if Complainant arrived at 9:15, he did not get on the engine until 9:45. Complainant and Herbeck then discussed the necessary paperwork including safety bulletins that Complainant needed to review before moving the engine. Complainant informed Herbeck that there were two bulletins that had been issued since he was last on duty, he had to print them off, and review them before starting work. Herbeck inquired as to why Complainant could not read them on the engine while going down the lead. Complainant replied that they had to be read before starting work and it was a safety issue because there could be something in the bulletins that affects how they operate. He also explained that he had been delayed by receiving the Wheel late and he needed to review it.

Herbeck again informed Complainant of the requirement to be on the engine with the wheels turning ten minutes after reporting for duty, and that Complainant had to comply with the rule. Complainant argued that the rule could not always be complied with and Herbeck informed him that he would comply with the rule or go home.

Complainant wanted to elevate the discussion by calling a higher authority for clarification of the rule and suggested that they call Keith Creel or Derreck Colasimone. Employees were supposed to be allowed to elevate concerns to higher management, without repercussions. Herbeck did not want to involve higher management in the dispute, but Complainant insisted, wanted to go into the building to get his phone and gestured to Herbeck to come in so they could call higher management. Herbeck instead went to his car and called his immediate supervisor, Lance Osmond, for assistance.

In the meantime, Complainant was attempting to reach Colasimone by phone and, when he was not successful, he left a voice message for Keith Creel. He then exited the building and went up to Herbeck's car, waved his phone, and said he had a voice message in to Keith Creel. I find that the reason Complainant wanted to call higher management was to discuss his perceived safety concerns with the Ten Minute Rule. Otherwise, it makes no sense that Complainant would want to involve higher management. But for his concerns about the Ten Minute Rule, it would just appear to higher management that Complainant was simply late in moving his train and argumentative.

Herbeck continued to remain in his car and talk to Osmond on his cell phone. Shortly thereafter, he exited his car and told Complainant to come inside the building with him. Inside

the building, Herbeck informed Complainant that he was being removed from service. Complainant asked on what grounds and Herbeck informed him that it was for being argumentative and quarrelsome. Complainant asked by whose instruction he was being removed. Herbeck told him it was per Derrick Colasimone. I find that Herbeck had not, in fact, consulted with Colasimone. Instead he had spoken with Lance Osmond and together they decided to remove Complainant from service. Furthermore, I find that Herbeck testified inconsistently at his deposition when he stated that he did not know who made the decision to remove Complainant from service on September 23, 2012. At the hearing before me, he admitted to providing false testimony in his deposition. (Tr. 394-395). This causes me to question his credibility.

In examining the testimony, there is a clear dispute as to whether Complainant did or did not raise safety concerns in his conversation with Herbeck. Complainant testified that he raised safety concerns, while Herbeck testified that no safety concerns were raised. I find that Complainant did raise safety concerns to Herbeck. In resolving this dispute, I have examined all of the evidence of record.

What is undisputed is that only three persons were present during the conversation: Complainant, Herbeck, and Vandendries. Respondent argues that only Complainant had a motive to lie about the conversation because he was trying to escape disciplinary action. However, arguably Herbeck would also potentially have a motive to lie about the content of the conversation to make himself appear more reasonable to higher management, to whom the situation had been elevated, and explain why he could not handle the situation himself.

The person with no immediate self-interest and thus the most independent and reliable would be Vandendries. Unfortunately, Vandendries appears to have not wanted to get involved in the situation and said as little as possible. Vandendries provided a statement (JX 10) that, while very short, confirms that one of the main topics of discussion in the locomotive was the Ten Minute Rule. In his written statement (JX 4), Herbeck confirmed that when Complainant entered the locomotive, he asked him why it had taken him longer than ten minutes to get on the engine. Complainant also confirmed that he was asked about his non-compliance with the Ten Minute Rule. In his deposition testimony on April 29, 2014, Vandendries again testified that a conversation took place between Complainant and Herbeck concerning the Ten Minute Rule and added that Complainant told Herbeck that he “disagreed” with the rule. (CX 18).

In his written statement, Herbeck claims that Complainant immediately became enraged and raised his voice louder than was necessary. However, in his testimony (JX 1, CX 18), Vandendries, a disinterested party, testified that Complainant’s tone and demeanor were normal and that there was nothing out of the ordinary about the conversation. He testified that Complainant did not raise his voice louder than necessary to be heard above the running locomotive. He testified that he did not consider the conversation to be argumentative. He testified at his deposition that Complainant did not look angry. (CX 18). Vandendries confirmed that Complainant used profanity and said the words, “bullshit,” “fucking” and "harassment." This is consistent with the statements and testimony of both Complainant and Herbeck.

Shortly after the incident, Complainant reached Colasimone by phone, but was directed to call his union representative. At approximately 10:27 AM, Complainant called David Durfee,

the local union chairman. Complainant, while the incident was fresh in his mind and before he knew he would be facing a formal investigation and possible disciplinary action, told Durfee that he had been pulled from service for being argumentative and that the argument was over Circular 6. Complainant explained to Durfee that he thought Circular 6 was unsafe and that younger people would feel pressure to bypass the paper requirements, i.e., bulletins that would highlight safety issues. Durfee testified that Complainant expressed safety concerns over Circular 6 in describing his conversation with Herbeck. Durfee also testified that he personally had also previously raised concerns that the "Ten Minute Rule" was unsafe and that it was impossible to collect bulletins, go over TGBOs, verify hazardous materials, and train consists while getting out the door within ten minutes.[10]

Complainant went home after the incident and immediately wrote a very detailed statement as to the events of September 23, 2012. In his statement and testimony, he admitted to using profanity, but said it was not directed at Herbeck personally. More importantly, Herbeck himself testified at the formal company investigation that Complainant did not direct any profanity at him. (JX 1 at 99).

In his statement, Complainant described several topics that were discussed in the locomotive including, *inter alia,* Vandendrie's letter of caution, Complainant's concerns that the Ten Minute Rule did not allow conductors enough time to review required paperwork, the fact that trainmasters had been directed to give efficiency test failures for not complying with the Ten Minute Rule, and his prior efficiency test failure for putting his arm in a gondola car. Complainant was very detailed about the content of the conversation with Herbeck. Vandendries testified that they also discussed shoving back moves at some length and they were having a three-way conversation. (JX 1).

Herbeck also prepared a statement following the September 23, 2012, incident. However, I find that his statement contains far fewer details as to the content of his conversation with Complainant and Vandendries, causing me to question the accuracy and credibility of his recollection. In viewing his statement, it appears that the only topic that was discussed was the "Ten Minute Rule" and that it was a very short conversation during which Complainant immediately became enraged and stormed off the engine. However, this does not coincide with the testimony of Vandendries or that of Complainant who testified that several other topics were discussed, which had no bearing on the current dispute, thus making it unlikely that Complainant would have totally fabricated the dialogue. Significantly though, the statement does confirm that the Ten Minute Rule was discussed and that Complainant expressed disagreement with the value of the rule.

I also do not find it credible that Herbeck, who testified that he had been employed by GTW for approximately 11 years, 6 years as a conductor, 2 years as a trainmaster, and close to 3 years as a divisional trainmaster was so young and inexperienced that he would have felt bullied, taunted, and intimidated by Complainant's use of profanity and disagreement with him, especially since Herbeck was the person who had authority over Complainant and not vice versa. Having considered the entirety of the evidence, I thus give more credence to Complainant's version of events than Herbeck's. I find that Complainant did express safety concerns to Herbeck over Circular 6 and the Ten Minute Rule.

[10] I note that Circular 6 was rescinded the day after Complainant's formal company investigation. (CX 9).

In its brief, Respondent argues that Complainant did not engage in protected activity because his alleged "safety concern" was not a hazardous condition, was not objectively reasonable, and was not raised in good faith. (R. Br. at 28-32). Respondent argues that Complainant's reading of Circular 6 was incomprehensible and objectively unreasonable. Respondent argues that on its face, Circular 6 (JX 11) allowed for employees to explain to the yardmaster why they could not be out the door in 10 minutes. Respondent thus argues that Circular 6 did not present a safety issue and that his purported concern about conductors being rushed out the door before they were properly prepared was not objectively reasonable.

I find, however, that evidence was presented through the testimony, not only of Complainant, but also through David Durfee, chairman of the union, that when Circular Rule 6 was issued, he too thought that it was unsafe and required an impossible action and voiced his opinion as union chairman to GTW management that it was impossible to collect bulletins, go over TGBOs, verify hazardous materials, and training consists while getting out the door within 10 minutes. He testified that he thought other members of the local union complained as well. This indicates to me that not only did Complainant have a subjective belief that Circular 6 presented a hazardous safety condition, but that his belief was objectively reasonable, as well.

Testimony of Complainant and Durfee established that it routinely took conductors more than ten minutes to review all necessary paperwork and get out the door. I decline to rule as to whether Circular 6 was, in fact, an unsafe requirement, as that is beyond my adjudicatory role. However, I find that Complainant's interpretation that crews were to be out the door in ten minutes or be in violation of Circular 6 was an objectively reasonable interpretation. Furthermore, Circular 6, on its face, does not state that the yardmaster will necessarily excuse crews who are not out the door within ten minutes. It only states that crews must contact the yardmaster as to the reasons they are not out the door in ten minutes. Therefore it would not be objectively unreasonable for an employee to believe that the yardmaster would have discretion as to whether or not to excuse tardiness. This could cause personnel to rush out the door without following proper safety procedures, creating the very safety concerns which Complainant claims he expressed.

The fact that Respondent rescinded Circular 6 the day after Complainant's company investigation also indicates that, at a minimum, Respondent did not find the Circular necessary and possibly that it recognized that it posed safety concerns. In his deposition testimony, Tassin testified that the company now has nothing in writing telling employees that they must be out the door in a certain number of minutes and that now Employees are allowed a "reasonable" period of time to get out the door and are expected to work "safely and efficiently." (CX 19). Accordingly, based on all of these considerations, I find that Complainant raised his safety concerns in good faith.

Accordingly, I find that Complainant engaged in protected activity on September 23, 2012, by telling Herbeck, albeit not in polite terms, that he thought the Ten Minute Rule was unsafe because it did not allow conductors sufficient time to perform their mandatory review of train bulletins, orders, switch lists, and wheel reports so they could safely move their trains.

Knowledge of Protected Activity

I find that Herbeck had knowledge of Complainant's protected activity on September 23, 2012. Herbeck did not immediately inform higher management that Complainant had voiced concerns that Circular 6 represented a hazardous safety condition. Rather, he only told higher management that Complainant was argumentative and insubordinate. However, I find that the evidence establishes that on September 24, 2012, Colasimone, Tassin, Creel, and Vena were aware that Complainant had a different version of events, although it is unclear from the record whether they had seen Complainant's written statement at that time. (CX 14A).

I find that in the course of the company formal investigation and at the investigation hearing, when Complainant was able to present his version of events, higher management including Colasimone, the decision-maker on Complainant's suspension, was aware that Complainant had engaged in protected activity. At the hearing, Respondent conceded that Complainant raised a safety concern, to the effect that Circular 6 or the Ten Minute Rule was not safe, at the company's investigation. (Tr. 31-32). Hearing testimony of Colasimone and deposition testimony of Tassin confirmed that they had read the transcript of the investigation and were thus aware of Complainant's safety concerns regarding Circular 6.

Unfavorable Personnel Actions

I find that Complainant suffered two unfavorable personnel actions. Respondent concedes that Complainant suffered an unfavorable personnel action in the form of a thirty day suspension from employment.

Following the incident on September 23, 2012, Herbeck sent Colasimone, Tassin and Osmond an email containing his version of the morning's incident. In response, Colasimone praised Herbeck, appeared to pass judgment on Complainant by stating "we do not tolerate this type of behavior," and directed Herbeck to charge Complainant with "delay to assignment." (CX 11). Herbeck testified that he personally identified the work rules that Complainant would be accused of violating at the company investigation. He testified that no one told him which rules to enter. (Tr. 350). Respondent asserts in its brief that this establishes that Herbeck alone decided to charge Complainant. (R. Br at 14).

I do not find Herbeck's testimony in this regard credible given that Colasimone clearly directed Herbeck to charge Complainant with delay to assignment on September 23, 2012. (*Id.*) Herbeck testified as to feeling intimidated and concerned that Complainant wanted to involve higher management in their dispute and testified that this was out of the ordinary. I therefore find it disingenuous to state that Herbeck would not have followed a directive of Colasimone to bring charges against Complainant. I find that the record supports that both Herbeck and Colasimone determined to accuse Complainant of rule violations pursuant to a company investigation.[11] Following the company investigation, Complainant was suspended from employment by Colasimone for 30 days. (JX 24). I take judicial notice that the suspension was subsequently reduced to 15 days by the Public Law Board 7227, Award No. 72.

[11] At the company hearing, Herbeck introduced into evidence Rule B and testified that he believed Complainant violated this rule by not complying with general Circular 6. He also introduced Rule 104 and testified that Complainant violated Rule 104 by "not properly administering the trains and supervising the operation of his assignment due to the delay of the assignment, not complying with general Circular Number 6 ….) (JX 1 at 23-24).

In his testimony Colasimone testified that he made the decision to suspend Complainant from employment and that he directed Tassin to issue the suspension letter. (Tr. 75, 108). In his deposition testimony, Tassin confirmed that he issued the suspension letter after reading the investigation transcript and that he felt the violations cited in the letter were supported by the investigation transcript, although he also admitted when specifically questioned that there was no evidence to support violations of Rule 600 or Rule A which Complainant was found guilty of violating in the letter. Tassin testified that he was going to do exactly what Colasimone told him to do, although in this instance, he agreed with the decision to suspend Complainant. Based on the testimony of Colasimone and Tassin, I find that the decision to suspend Complainant was made by Colasimone.

Although the parties did not specifically address the issue in their briefs, I also find that Complainant's removal from service by Herbeck and Osmond on September 23, 2012, was also an unfavorable personnel action.

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. 49 U.S.C. § 20109(a); *Ameristar Airways, Inc. v. Admin, Rev. Bd.*, 650 F.3d 563, 567 (5th Cir. 2011) (quoting *Allen v. Admin. Rev. Bd.*, 514 F.3d 468 (5th Cir. 2008). *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013). 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 Pacific Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (Feb. 29, 2012) (hereinafter *DeFrancesco I)*.

The Board recently observed in *Rudolph*, ARB No. 11-037, slip op. at 16, and *Powers*, ARB No. 10-114, 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 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. 29 C.F.R. § 1982.104(e)(2)(iv); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013) (citations omitted); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ Case No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006); Furthermore, neither animus nor retaliatory motive is required to prove causation under the FRSA, as long as protected activity contributed in any way to the adverse action. *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), slip op. at 3 (footnote omitted).

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 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.

Powers, slip op. at 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:

> 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.

Powers, slip op. at 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 I, supra*.

In this case, I find Complainant has shown by a preponderance of evidence the contributing factor element by temporal proximity between the protected activity and the adverse actions. Immediately following the protected activity, Complainant was removed from service by Herbeck. Three days later he received a notice that a formal investigation would be conducted on October 1, 2012. (JX 2). Following the October 1, 2012, investigation, he was suspended from October 2-31, 2012, by Tassin, at Colasimone's direction.

In his brief, Complainant also argues that Respondent presented shifting explanations for its actions and that this also constitutes circumstantial evidence that his protected activity was a contributing factor to the adverse action taken against him. Complainant argues that in its Motion for Summary Decision, Respondent described Complainant's complaint as nothing more than a "prolonged, profanity laden confrontation with his supervisor," but later changed its position to state that Complainant was disciplined because he embarrassed, intimidated, and insulted Herbeck. In examining the evidence, I do find, as Complainant asserts, that Herbeck testified that he did not mention being embarrassed, intimidated, and insulted by Complainant's behavior in his written statement prepared the day of the incident, during his testimony at the company's investigative hearing, or in his discovery deposition, although he made that assertion at the hearing before me. (Tr. 374-375, JX 4). I find that this change in story, or at a minimum, embellishment of his original account, constitutes circumstantial evidence that protected activity was a contributing factor in the adverse action taken against Complainant, and it also causes me to further question Herbeck's credibility.

Colasimone testified that he read the transcript of the company investigation prior to making the decision to discipline Complainant by suspension. At the hearing before me, Colasimone testified that based on the transcript, he believed the discussion between Complainant and Herbeck involved Complainant "being late for work." (Tr. 56). However, this conflicted with his prior deposition testimony in which he testified that when he read the transcript, he was aware that "Bohanon had a concern about the amount of time that it was expected for him to get out on to the lead and start working," (Tr. 57). Colasimone testified that

he relied on the transcript and its exhibits (which contained Complainant's written statement) in making his decision and that he made the decision to suspend Complainant. (Tr 58, 108). Colasimone also testified that he directed Tassin to issue the suspension letter at JX 24. Accordingly, I find that Complainant's protected activity in raising a safety concern about Circular 6 rushing crews out the door before they had time to review necessary safety paperwork was a contributing factor, albeit not the only factor, in Colasimone's decision to suspend him from employment for thirty days.

Accordingly, I find that Complainant has satisfied his prima facie burden under the FRSA. Specifically, I find that Complainant has proven by a preponderance of the evidence that he engaged in protected activity; that Respondent knew he had engaged in protected activity; that he was subjected to unfavorable personnel actions; and that his engaging in the protected activity was at least one reason for the unfavorable personnel actions.

Clear and Convincing Evidence

Respondent can still be relieved of responsibility if it can establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.

While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *Remusat v. Bartlett Nuclear, Inc.*, No. 1994-ERA-36 (Sec'y Feb. 26, 1996) *citing Yule v. Burns International Security Service,* No. 1993-ERA-12 (Sec'y, May 24, 1995). *See also White v. Turfway Park Racing Association,* 909 F.2d 941, 944 (6th Cir. 1990*), citing Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Brune v. Horizon Air Industries Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006) slip op. at 14, n. 49, citing BLACK'S LAW DICTIONARY at 577.

Respondent asserts that it would have suspended Complainant in the absence of any protected conduct because he was disrespectful, intimidating and insubordinate towards his supervisor. Respondent correctly states that courts must balance the leeway afforded employees who report reasonable safety concerns against "an employer's right to maintain order and respect in its business by correcting subordinates." *Mullen v. Norfolk Southern Corp.*, 2012-FRS-3 slip op. at 17 (ALJ April 30, 2012). However, as stated in *Formella v. U.S. Dept of Labor*, 628 F.3d 381 (7th Cir. 2010), the right to engage in protected activity permits some leeway for impulsive employee behavior. This principle derives from the broader labor context, where it has been recognized that a worker's statutory right to engage in concerted activity affords him some leeway to stray beyond the boundaries of workplace propriety without losing the protection of the statute. *Id.* At 391.

Respondent argues that Complainant was disciplined because he was disrespectful, intimidating, and insubordinate towards his supervisor, Herbeck and caused delay. Specifically, Respondent argues that Complainant was disciplined for directing profanity at Herbeck, and for taunting, intimidating, and playing with Herbeck's mind by threatening to elevate the dispute to higher management. While I briefly considered these in my contributing factor analysis, I will

examine each of these assertions separately in my analysis of the clear and convincing burden imposed by law on Respondent.

First, there is the issue of profanity and whether Complainant's use of such language was so disrespectful and abusive that it merited a suspension from employment. At the hearing, Colasimone testified that one of the reasons he found Complainant guilty and punished him was because he directed profanity directly at Herbeck. (Tr. 80, 81). However, I find that the evidence of record does not support Colasimone's assertion. All three persons who were present for the conversation on September 23, 2012, testified that Complainant did not direct profanity at Herbeck. I am especially convinced of this fact due to the testimony of Vandendries and Herbeck. Vandendries, a disinterested witness to the conversation between Complainant and Herbeck, testified that Complainant's tone and demeanor were normal and although he heard Complainant using profanity during the conversation, there was nothing out of the ordinary about the conversation. (JX 1). At his deposition, Vandendries testified that profanity is used by employees on a regular basis. He again stated that neither Bohanon nor Herbeck appeared angry during their conversation and that the conversation about the Ten Minute Rule was a three-way conversation. He stated that Bohanon did not address Herbeck in an angry tone of voice and his tone of voice was normal throughout the conversation. Even more convincing than Vandendries' testimony, however, was that of Herbeck who specifically testified at the company investigation that Complainant did not direct any profanity at him. (JX 1 at 99).

Further evidence regarding the common use of profanity at GTW was evident in the testimony of Colasimone, Durfee, Vandendries, Complainant, and Herbeck who all testified that profanity is routinely used by both management and lower level employees. In fact, Colasimone testified that there is no rule on the railroad regarding the use of profanity and that he has heard conductors and engineers use profanity in the course of their job duties regularly, and use it in the presence of trainmasters. He testified that he has also heard trainmasters use profanity and that he has used it himself in the course of his duties. He stated that it is common language and is used every day. (Tr. 60-61).

I thus find that the use of profanity was part of the company culture and nothing that should have been particularly shocking to Herbeck, particularly since he admitted, contrary to the belief of Colasimone, that it was not personally directed toward him and was not said in a threatening or aggressive manner. I do not find it credible that Complainant would have been suspended from employment for his use of profanity, absent his protected activity.

A second reason put forth for punishing Complainant was that he was trying to intimidate, bully, threaten or play with Herbeck's mind. Colasimone testified that he believed Complainant was trying to intimidate Herbeck and "play with Herbeck's mind" by threatening to call Keith Creel and himself. Colasimone characterized Complainant's requests to call higher management and his subsequent call to Creel as "taunting" and "throwing big names around" in an attempt to intimidate Herbeck.

However, I find these statements conclusory in light of Colasimone's full testimony and his absence from the actual scene of events. Colasimone testified that employees are told that if they want clarification or have a concern about a safety issue, they have the right to elevate the issue. He testified that there should be no repercussion for elevating an issue to the next level. He stated that Complainant did not violate any rule by calling Keith Creel and that it was not

considered quarrelsome or insubordinate. He stated that there is no rule violation in calling him to ask a question, and employees are told they have the right to do this with no repercussions. (Tr. 60-62, 94). Yet, later in his testimony, Colasimone testified inconsistently that Complainant was supposed to follow the chain of command and that he should have gone to Lance Osmond and then Mr. Tassin before taking his complaint to a higher level. He stated that Complainant intimidated Herbeck by going right to the general manager. Yet in the next sentence he stated that Complainant did not violate a rule by skipping over the normal chain of command and should not have repercussions for exercising those rights. (Tr. 145-148).

After reviewing the entirety of Colasimone's testimony, I find that Colasimone was inconsistent and conflicted about whether Complainant did something wrong by jumping the chain of command in going to higher management with his concerns on September 23, 2012. Although Colasimone clearly knew and stated the company policy that there should be no repercussions for elevating a concern to higher management, at the same time it was apparent to me in listening to his testimony that he found Complainant's actions of jumping the chain of command to be insubordinate, argumentative, and intimidating. If an employee who elevates a concern is thus perceived and is subsequently characterized as “bullying” and “playing with someone's mind” for wanting to seek involvement of higher management, then the company's stated policy, that an employee can elevate a concern without repercussions, is meaningless.

Furthermore, I do not find it convincing that Herbeck, who was clearly in a position of power and authority over Complainant, with the authority to remove him from service and bring charges against him, was bullied or intimidated by Complainant's statements. Although Respondent has portrayed Herbeck as a young, inexperienced trainmaster, I find that he, in fact, was an employee of 11 years with significant experience as both a conductor and trainmaster. Accordingly, I do not find that absent his protected activity, Complainant would have been subjected to unfavorable personnel action for trying to intimidate or bully Herbeck.

A third reason that Respondent has put forward as grounds for suspending Complainant was that he delayed movement of the train. However, it was clear from the evidence that Complainant received a late call to duty on September 23, 2012. Furthermore, the yardmaster confirmed that he was late in getting Complainant the necessary paperwork to review before the train could be moved and that he spoke with Complainant about the delay. Notably, the suspension letter did not state that Complainant was being punished for delaying movement, but only that Complainant failed to perform his duties and follow instructions by being quarrelsome, insubordinate and/or exhibiting conduct unbecoming by arguing with trainmaster Herbeck. (JX 24). In the summary of the company investigation, the investigating officer stated that there was not sufficient evidence developed to show that Complainant violated Circular 6 since the actual time the documents were received in the crew room could not be proven. (RX 1). It was also apparent from the testimony, that Herbeck was unaware of Complainant's conversations with the yardmaster in which he explained why he could not get out the door within ten minutes. I therefore am not convinced that Complainant would have been suspended from duty on grounds that he delayed movement of the train, absent his protected activity.

Respondent also asserts that Complainant would have been punished for walking out on Herbeck in the middle of their conversation. However, the testimony of Vandendries established that it was not apparent whether Herbeck was finished talking when Complainant exited the engine. (JX 1). Herbeck also testified that, although he did not believe the conversation was

finished, he was not actually speaking and was merely getting ready to respond when Complainant exited the engine. (Tr. 380-381). Herbeck neither called Complainant back nor told Complainant that he had walked out on him. I therefore find that Complainant could have reasonably concluded that Herbeck was finished talking at the time he exited the engine. I do not find it credible that Complainant would have been disciplined for walking out on Herbeck, absent his protected activity.

After consideration of all of the evidence and arguments of the parties, I find that Respondent has failed to establish by clear and convincing evidence, that it would have taken unfavorable personnel action against Complainant absent his protected activity.

CONCLUSION

I find that Complainant has established by a preponderance of the evidence that his protected activity was a contributing factor in his suspension from work. Furthermore, I find that Respondent has failed to establish by clear and convincing evidence, that it would have taken unfavorable personnel action against Complainant absent his protected activity.

Remedies Under The FRSA

The Act provides for the following damages and remedies:

> (d) REMEDIES.—
>
> (1) IN GENERAL.—An employee prevailing in any action under subsection (c) shall be entitled to all relief necessary to make the employee whole.
>
> (2) DAMAGES.—Relief in an action under subsection (c) (including an action described in subsection (c)(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 (c) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. § 20109(d). Thus the intent of the statute is to make the employee whole through reinstatement, back pay, and compensatory damages, and punitive damages are also available in appropriate cases.

Lost Wages

Under the FRSA, a prevailing employee is entitled to lost wages. There is no dispute that Complainant initially lost 30 days of wages which was later reduced to 15 days by the Public Law Board. Complainant is therefore awarded lost wages for fifteen days with interest.

As noted above, the FRSA specifically provides for "backpay with interest." 49 U.S.C. § 20109(d)(2)(B). This includes pre-judgment interest on any accrued back pay, as well as post-judgment interest for any period between the issuance of this Decision and Order and the payment of the award. Interest is calculated using the rate that is charged for underpayment of federal taxes under 26 U.S.C. § 6621(a)(2). Interest shall be calculated at the time of payment.

Other Compensatory/Special Damages

> An employer who violates the FRS employee protection provision may also be held liable for compensatory damages associated with mental and emotional distress. To receive compensatory damages, a complainant must demonstrate both: 1) objective manifestation of distress, such as sleeplessness, anxiety, embarrassment, and depression, and b) a causal connection between a violation of the Act and the distress. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993 SWD 001, slip op. at 17 (ARB July 30, 1999). A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996).

Although the testimony of health professionals can strengthen a complainant's case for compensatory damages, it is not required. *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (citing *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert denied, Burkee v. Busche*, 454 U.S. 897 (1981).) Rather, a complainant need only show that he "experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Jones, supra* (citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)). Nonetheless, a complainant must prove the existence and magnitude of emotional distress with "competent evidence." *Smith v. Esicorp, Inc.*, ARB No. 97-065, ALJ No. 1993-ERA-16 (ARB Aug. 27, 1998) (citing *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978)). Furthermore, the severity of the retaliation is relevant in determining the appropriate amount of compensatory damages owed. *Smith, supra.*

Complainant is seeking $20,000 for the pain, suffering, and emotional toll taken upon him and his family as a result of being suspended from his job. Although there was no medical testimony, Complainant credibly testified about the profound effect his suspension and uncertainty about whether he would lose his job had on his marriage and health. He testified that he suffered physical ailments such as headaches and difficulty sleeping which were severe enough to require medication. He testified that he suffered extreme stress about being out of service, because that is how he supports his family. The uncertainty about his employment caused fights between him and his wife.

While I found Complainant's testimony credible and I find that he suffered both physical and emotional harm as a result of the stress caused by his removal from service, formal investigation, and suspension from employment, Complainant did not do a thorough job of establishing the basis for an award of the $20,000 that he is seeking. I therefore cannot award

Complainant the large amount that he is requesting. I do find, however, that he has presented sufficient evidence to justify a nominal award of damage, and therefore I award Complainant **$8,000.00** in compensatory damages for emotional harm.

Punitive Damages

Punitive damages are granted to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant'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. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9; *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013); *see Leiva v. Union Pacific Railroad Co., Inc.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015) (noting that "illegal motive" is not necessary to sustain a punitive damage award under the FRSA). The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

Complainant argues that he is entitled to punitive damages in the amount of $150,000.00. In support of this award, Complainant argues that CX 14 provides a unique window into the mindset of Respondent's managers. I have examined that exhibit and Colasimone's testimony regarding the exhibit at length and do find it disturbing because it displays hostility and a willingness of senior managers to seek retribution against an employee for raising safety concerns and filing a harassment complaint. The e-mail exchange at CX 14a demonstrates hostility against Complainant and a predisposition to find against him.

I did not find Colasimone's testimony that he could not remember the e-mail exchange or why he wrote any of the statements in those e-mails to be credible. The e-mails on their very face, clearly exhibit an intent to retaliate against an employee who made a prior complaint. I am also disturbed by the rush to judgment as exhibited in the same e-mail exchange in which Colasimone on September 24, 2013, told his superior, Keith Creel, with copies to other members of management, that he did not believe Complainant for one second. Creel, who obviously received a very one sided account of events, also passed judgment on Complainant at this early stage, before the company had even conducted a formal investigation or Complainant had received an opportunity to present any evidence or testimony. Overall, I find that the conduct by the Respondent is sufficiently egregious to warrant an award of punitive damages. I find that an award of punitive damages is appropriate to ensure that this reprehensible conduct is not repeated.

In determining punitive damages, I have looked at the decisions of my colleagues in similar cases. Looking at the FRSA in particular, the following decisions recently awarded punitive damages, in the following amounts:[12]

(1) *Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No.2010-FRS-0018 (ALJ Timlin, Sept. 23, 2011) ($1,000 in punitive damages for two-day suspension).
(2) *Anderson v. Amtrak,* ALJ No. 2009-FRS-0003 (ALJ Berlin, Aug. 26, 2010) ($100,000 in punitive damages in light of conscious disregard of statutory obligations).
(3) *Santiago v. Metro-North Commuter Railroad Company, Inc.*, ALJ No. 2009-FRS-0011 (ALJ Geraghty, May 16, 2013) ($40,000 in punitive damages when railroad showed reckless indifference and disregard for its responsibilities under the FRSA).
(4) *Rudolph v. National Railroad Passenger corp. (Amtrak),* ALJ No. 2009-FRS-0015 (ALJ Stansell-Gamm, March 14, 2011) (punitive damages of $5,000 where there was a threat of disciplinary action).
(5) *Cain v. BNSF Railway Company,* ALJ No. 2012-FRS-0019 (ALJ Solomon, Oct. 9, 2012) ($250,000 in punitive damages where, inter alia, management employees conspired to defeat an employee's right to submit a medical claim and deprive him of his job).
(6) *Griebel v. Union Pacific Railroad Company,* ALJ No. 2011-FRS-0011 (ALJ Sellers, Jan. 31, 2013) ($100,000 in punitive damages when employee was discouraged from filing an injury report or consulting with an attorney and was threatened to be charged with dishonesty for doing so).
(7) *Smith v. Union Pacific Railroad Company,* ALJ No. 2012-FRS-0039 (ALJ Romero, April 22, 2013) ($25,000 punitive damages against railroad and $1,000 against supervisor when conduct was "egregiously reprehensible.")

Thus, reviewing the above cases, the punitive damages awarded ranged from $1,000 to $250,000. The lower amounts generally appear to relate to cases in which the discipline against the employee was minimal (a short suspension or warning) whereas (in general) the larger awards are in cases involving a termination coupled with culpable conduct. I find that the amount of $50,000 is in line with the above decisions and is an adequate amount to send a message to Respondent without being unduly burdensome.

Taking into account the reprehensibility of Respondent's conduct in this case (which was egregious, as discussed above), the harm to Complainant that resulted from Respondent's conduct (termination and associated damages), and the sanctions imposed in similar cases (and specifically the FRSA cases discussed above), Complainant is awarded punitive damages in the amount of **$50,000**.

<u>Abatement</u>

The Complainant seeks an order requiring Respondent to remove the discipline from Complainant's record. *Anderson v. Amtrak*, 2009 FRS 003 (August 26, 2010). The 30 day suspension follows Complainant into the future. He requests that I order Respondent to expunge

[12] I have not taken into consideration any subsequent history in these cases. Rather, I am using them as a guideline with respect to the magnitude of punitive damages awarded at the administrative law judge level.

the 30 day discipline from his personnel record. I find that such relief is appropriate and so order Respondent to expunge any reference to the discipline from Complainant's personnel record.

Attorney Fees And Costs

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant 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 application for fees, costs and expenses. Thereafter, Respondent shall have thirty (30) days from receipt of the application within which to file any opposition thereto.

ORDER

Based on the foregoing, Complainant's request for relief under the employee protection provisions of the FRSA is **GRANTED**. I hereby **ORDER** the following:

1. **Lost wages:** Respondent shall pay Complainant lost wages for 15 days with interest.

2. **Compensatory Damages**: Respondent shall pay Complainant **$8,000.00** in compensatory damages.

3. **Punitive Damages:** Respondent shall pay Complainant **$50,000** in punitive damages.

4. **Abatement**: The Respondents shall expunge from Complainant's personnel file all information or references pertaining to Complainant's removal from service and suspension.

5. **Attorney Fees and Costs**: The Complainant's attorney is hereby allowed thirty (30) days to file an application for fees. Respondent shall have thirty (30) days following service of the application within which to file any objection.

Digitally signed by CHRISTINE KIRBY
DN: CN=CHRISTINE KIRBY, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

CHRISTINE L. KIRBY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).