

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 November 2015

Case Number: 2014-FRS-00049

In the Matter of

**HAROLD ECHOLS,
Complainant**

v.

**GRAND TRUNK WESTERN RAILWAY CO.
Respondent**

Appearances:

Robert E. Harrington, Jr., Esquire
Chicago, Illinois
For the Complainant

Mary C. O'Donnell, Esquire
Detroit, Michigan
For the Respondent

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

I. PROCEDURAL BACKGROUND

This matter arises out of a claim filed under the employee protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53, 121 Stat. 266, 444-48 (2007), and Section 419 of the Rail Safety Improvement Act of 2008 ("RSIA"), Pub. L. No. 110-432, 122 Stat. 4848, 4892-93 (2008).

On July 11, 2012, Harold Echols (“Complainant” or “Mr. Echols”) filed a formal complaint with the U.S. Department of Labor (“DOL”), Occupational Safety and Health Administration (“OSHA”), pursuant to the FRSA, alleging that his employer, Grand Trunk Western Railway Company (“Respondent” or “GTW”) retaliated against him for reporting an on-the-job injury by offering to waive an investigation into his conduct on the day of the injury if he admitted to misconduct that caused the injury and accepted a sixty day suspension without pay, which would also trigger a forty-five day suspension for an unrelated incident that had been deferred. (RX G).¹ After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator, Region V, Chicago, Illinois, issued a final determination letter dated February 18, 2014 (“Secretary’s Findings”), finding reasonable cause to believe Respondent violated the FRSA.

By letter dated February 21, 2014, Respondent filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“Office” or “OALJ”). On September 16, 2014, after being assigned to the case and issuing three pre-hearing orders (ALJX 2, 3, and 4), I convened a formal hearing at the Kluczynski Federal Building in Chicago, Illinois, at which both parties were afforded a full and fair opportunity to present evidence and argument. At the hearing, Complainant offered seventeen exhibits, CX 1-17, all of which were accepted into evidence. (Tr. 7). I also accepted into evidence fifty-two exhibits offered by Respondent, RX A-ZZ. (Tr. 105, 138, 189, 199). Three witnesses testified at the hearing: Complainant; Steven Miller, Complainant’s trainmaster and supervisor for the relevant period; and Phillip Tassin, GTW’s superintendent for the Michigan division during the relevant period. The record remained open for the submission of post-hearing briefs, which were subsequently received from both parties. Complainant seeks \$30,484.61 in lost wages and vacation pay, \$5,000 in compensatory damages, and \$20,000 in punitive damages. (Compl. Post-Hearing Brief at 39-40).

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss below every exhibit in the record, I carefully considered all the testimony and exhibits in reaching my decision.

As will be explained in greater detail, I find Complainant has established that his protected activity was a contributing factor in the adverse action he suffered. However, Respondent has established by clear and convincing evidence that it would have taken the same disciplinary action against Complainant absent his protected activity. Consequently, Complainant’s claim for back pay, and compensatory and punitive damages is dismissed.

II. APPLICABLE LAW

The FRSA provides that a rail carrier may not retaliate against an employee for engaging in certain protected activities, including reporting a work-related personal injury. *See* 49 U.S.C. § 20109. FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C.

¹ The following references will be used: “Tr.” for the official hearing transcript; “CX” for a Complainant’s exhibit; “RX” for a Respondent’s exhibit; and “ALJX” for an Administrative Law Judge’s exhibit.

§ 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” to the respondent taking an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant’s protected activity. *See Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)).

Consequently, in order to meet his burden of proving a claim under the FRSA, Mr. Echols must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) GTW knew of the protected activity,² (3) he suffered an unfavorable personnel action,³ and (4) such protected activity was a contributing factor in the unfavorable personnel action. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012). The regulations governing cases brought under the FRSA are found at 29 C.F.R. Part 1982, and incorporate the General Rules of Practice and Procedure before the OALJ, which are found at 29 C.F.R. Part 18.

III. ISSUES PRESENTED

The parties do not contest that Complainant engaged in protected activity by reporting his injury on November 16, 2011. The parties also do not contest that Respondent knew of the protected activity. I find that the record supports these conclusions. Therefore, the issues that remain for adjudication are as follows:

1. Did Complainant suffer an adverse employment action when Respondent offered to waive an investigation of his conduct if he admitted to misconduct that caused his injury and accepted a sixty day suspension without pay, which would also trigger a forty-five day suspension from an unrelated incident?
2. If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent’s decision to take adverse action against him, i.e. was the protected activity a factor which, alone or in connection with other factors, tended to affect in any way the outcome of its decision?

² Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly indicated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” is only a factor to consider in the causation analysis. *See, e.g., Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

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

3. If so, has Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity?
4. If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

IV. CONTENTIONS OF THE PARTIES

Complainant. Complainant contends that on November 16, 2011, he sustained an injury while working as a brakeman for Respondent in a Michigan train yard. While accompanying a crew that was attaching empty train cars to an engine, Complainant noticed that one of the cars had a misaligned drawbar. Complainant attempted to follow Respondent's safety rules by pushing the drawbar into alignment, but he could not gain enough traction due to the position of the train car. Complainant lifted the drawbar into place and began feeling pain shortly after. Complainant notified his trainmaster of the injury and completed an injury report. Complainant was treated at a hospital for a pulled groin and subsequently had hernia surgery.

Complainant further contends that he received a notice of investigation from Respondent dated November 18, 2011. The purpose of the investigation was to determine whether Complainant had violated company rules in the course of performing the action that caused his injury. Respondent offered to waive the investigation if Complainant admitted to violating company policy by lifting the drawbar and if Complainant accepted a 105 day suspension without pay. Complainant signed the waiver and served the 105 day suspension because he feared Respondent would discipline him more harshly if the investigation continued. Complainant argues the waiver was retaliation for reporting his injury. Complainant contends he is entitled to back pay, compensatory damages, and punitive damages.

Respondent. Respondent contends that it disciplined Complainant because he admitted to violating a safety rule, not because he reported an injury. According to Respondent, Rule T-2 expressly directs employees to push, not lift, drawbars into alignment. Respondent asserts that it regularly tests employees on Rule T-2 compliance and disciplines employees who violate Rule T-2 in the absence of an injury. Mr. Echols repeatedly admitted to GTW that he violated Rule T-2 by lifting the drawbar. Mr. Echols also had a lengthy disciplinary history. The waiver and the resulting suspension were based solely on Mr. Echols' rule violation and his history of violating GTW's rules. By Mr. Echols' own testimony, his supervisors did not threaten or harass him when he reported his injury.

V. SUMMARY OF THE EVIDENCE⁴

L.I.F.E. Rule T-2

Much of the testimony in this case centers on Rule T-2, a safety rule promulgated by GTW that directs employees to take certain actions when realigning drawbars. The relevant section of the rule provides:

⁴ The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

To adjust a coupler/drawbar:

- a. Separate equipment at least 50 feet.
- b. Wait for all movement to come to a complete stop and for slack to adjust.
- c. Confirm that there are no other movements on the same track on which you are working.
- d. Stand to the side of the drawbar using firm footing. Keep hands clear of pinch points. Push, not lift or kick, the drawbar into position.
- e. Obtain help from a co-worker or jacking stick if the coupler cannot be adjusted with moderate effort.

(RX H).

Complainant – Harold Echols, Jr. (Tr. 53-140).

Mr. Echols testified that he was hired by GTW in 1996 to work in the railroad's maintenance of way department. (Tr. 54). Over the years, Mr. Echols transferred to several other positions at GTW. (Tr. 54-56). On November 16, 2011, Mr. Echols was assigned to work as a brakeman at Snow Yard in Lansing, Michigan. (Tr. 56-57). Along with conductor Ray Mowinski and Engineer Mike Dowell, Mr. Echols transferred empty multi-level train cars from Snow Yard to Cory Yard in Delta Township, Michigan. (Tr. 58-59). At Cory Yard, Mr. Echols and the crew received a list of train cars located on Tracks Five, Six, and Seven that were ready to be moved to a staging area in preparation for upcoming jobs. (Tr. 61-62). Mr. Echols, Conductor Mowinski, and Engineer Dowell gathered cars from Tracks Five and Six without incident. (Tr. 62).

Upon entering Track Seven, Mr. Echols observed that one of the multi-level cars due to be moved had a misaligned drawbar. (Tr. 64). Mr. Echols alerted Engineer Dowell of the misalignment and asked whether Mr. Gunn, a carman working at Cory Yard, was nearby to help realign the drawbar. (Tr. 66). Engineer Dowell attempted to contact Conductor Mowinski and Carman Gunn over the radio. (Tr. 66-67). When Carman Gunn did not respond to Engineer Dowell's radio messages and Conductor Mowinski, who was about 1000 feet away from Mr. Echols, responded over the radio by asking why there was a delay, Mr. Echols attempted to realign the drawbar by himself. (Tr. 67). Mr. Echols tried to push the drawbar into place, but could not obtain enough leverage due to the position of the train car. *Id.* Mr. Echols also did not have tools to assist him. (Tr. 67-68). Mr. Echols ultimately realigned the drawbar by lifting it into place. (Tr. 68). Mr. Echols testified that he did not feel any pain immediately after lifting the drawbar. (Tr. 69). Mr. Echols continued working, though he did not have to physically exert himself again. (Tr. 71).

As Mr. Echols approached the switch for Track Seven a short time later, he felt a tingling sensation and a pull, followed by a pressing sensation coming from his lower abdomen. (Tr. 70-71). Mr. Echols told Engineer Dowell and Carman Gunn that he did not feel well. (Tr. 71). While traveling in the engine back to Snow Yard, Mr. Echols contacted trainmaster Steven

Miller via radio to inform him of the injury. (Tr. 72). When Mr. Echols said that he did not feel well enough to drive, Mr. Miller offered to drive him to a hospital. (Tr. 73). Prior to leaving for the hospital, Mr. Echols completed an injury report form and wrote a statement indicating that he pulled his groin while moving the drawbar. (Tr. 74-76). Mr. Echols testified that he left the hospital with medication for pain and swelling and was told by doctors not to lift items over a certain weight. (Tr. 78). Ultimately, Mr. Echols required hernia surgery and physical therapy. (Tr. 130).

On November 17, 2011, Mr. Echols received a phone call from Randy Siebert, GTW's risk mitigation officer. (Tr. 78-79). Mr. Echols met with Mr. Siebert on November 18, 2011 to discuss the injury. GTW subsequently sent Mr. Echols a notice of investigation document dated November 18, 2011. (Tr. 80-81). The notice stated that GTW was going to hold a hearing in order to investigate the circumstances of Mr. Echols' injury and to determine whether Mr. Echols violated company rules on the day of the incident. (Tr. 81). While the hearing was originally scheduled for November 25, 2011, it was repeatedly postponed because Mr. Echols was out of work while recovering from his injury. (Tr. 83-84). After Mr. Echols was released for work by his physician, the hearing was scheduled for January 24, 2012. *Id.* On the day of the hearing, Mr. Echols met with his union representative, Greg Redmond, to discuss a waiver document GTW had prepared. (Tr. 86-87). The document provided that GTW would waive the investigation if Mr. Echols accepted responsibility for misconduct that caused his injury and agreed to a sixty day suspension without pay. (Tr. 86-87). The waiver would also trigger an additional forty-five day suspension that had been deferred from a previous incident. (Tr. 88). Mr. Echols testified that his conversations with Mr. Redmond led him to fear that GTW would be more aggressive in its discipline if he declined to sign the waiver. (Tr. 88).

Mr. Echols signed the waiver on January 24, 2012 and was suspended without pay for a total of 105 days. (Tr. 88-89). The suspension began retroactively on January 21, 2012 and continued through May 4, 2012. (Tr. 89).

On cross-examination, Mr. Echols testified that he had passed training tests regarding GTW's safety and operating rules and that he was periodically re-certified. (Tr. 96-97). In particular, Mr. Echols testified that he was trained on how to move drawbars pursuant to GTW's Rule T-2. (Tr. 97). Mr. Echols agreed that his training was adequate and testified that he knew violating the rules could result in personal injury. (Tr. 97-98). Mr. Echols also testified that upon discovering the misaligned drawbar, he followed several provisions of Rule T-2 by separating the train cars, communicating with Engineer Dowell, and receiving responses from Engineer Dowell. (Tr. 108-109). Mr. Echols testified that he knew Rule T-2 prohibited employees from lifting drawbars into alignment. (Tr. 117-118). Nevertheless, Mr. Echols conceded that he lifted the drawbar. (Tr. 110).

Mr. Echols also elaborated on his ability to request help from other crewmembers. Mr. Echols stated that he asked Engineer Dowell to send radio messages to Carman Gunn rather than attempt to contact Carman Gunn directly because Engineer Dowell's radio had more power and Carman Gunn was not in the area. (Tr. 111). While Mr. Echols' attempts to reach Carman Gunn through Engineer Dowell were unsuccessful, Mr. Echols admitted that he had the ability to

contact Conductor Mowinski directly. (Tr. 110, 113). Mr. Echols stated that he did not ask Conductor Mowinski for help, even though nothing precluded him from doing so. (Tr. 113).

Mr. Echols testified that after the injury, Mr. Miller expressed concern for his well-being and did not attempt to intimidate or threaten him while filling out the injury report. (Tr. 115). Mr. Echols thought Mr. Miller demonstrated professionalism while handling the injury. (Tr. 122). Furthermore, Mr. Echols did not feel threatened, harassed, or intimidated by any railroad supervisor for reporting his injury. (Tr. 123).

Stephen Miller (Tr. 16-53, 192-197).

Mr. Miller currently works for Illinois Central Railroad on a property owned by the indirect parent company of GTW. (Tr. 16, 28). In November 2011, Mr. Miller worked for GTW as a trainmaster and was responsible for the day-to-day operations of the train yard and the operation of the main line. (Tr. 17). Mr. Echols called Mr. Miller on November 16, 2011 to report his injury. *Id.* Mr. Miller interviewed Mr. Echols and provided him with an injury report. (Tr. 18, 23). Mr. Miller finalized the report and prepared an investigation summary. *Id.* Mr. Miller testified that he only learned about the manner in which Mr. Echols realigned the drawbar from information Mr. Echols provided while reporting his injury. (Tr. 27). On cross-examination, Mr. Miller testified that he had never experienced or observed GTW harass employees for reporting injuries. (Tr. 29).

According to Mr. Miller, Rule T-2 is part of the L.I.F.E. ruleset, which was developed with input from union and management employees. (Tr. 30). GTW trainmasters are required to assess employee compliance with the L.I.F.E. rules by administering thirty-five efficiency tests over the course of a month. (Tr. 30-31). Mr. Miller testified that he failed an employee in August 2013 for violating Rule T-2 during an efficiency test. (Tr. 32). The employee was removed from service, signed a waiver of investigation, and received a five day suspension. *Id.* Mr. Miller stated that while Rule T-2 has several subsections, each subsection is equally important due to the fact that a violation of any portion of the rule could lead to personal injury. (Tr. 34). Mr. Miller further testified that GTW does not discriminate between the various subsections of Rule T-2. *Id.*

Mr. Miller stated that Mr. Echols first reported that he lifted the drawbar when they spoke by phone as Mr. Echols traveled back to Snow Yard on November 16, 2011. (Tr. 34). Mr. Miller asked Mr. Echols why he lifted the drawbar instead of using the techniques outlined in Rule T-2. (Tr. 35). Mr. Echols reported that the drawbar was obstructed due to the placement of the car. *Id.* Mr. Miller asked Mr. Echols why he did not request help. *Id.* Mr. Echols indicated that Conductor Mowinski was available to assist, but that he did not ask for help. (Tr. 35, 37).

In response to my questions, Mr. Miller testified that all GTW employees were recertified on the L.I.F.E. rules, including Rule T-2 when the rules were revised in 2005. (Tr. 48). Mr. Miller also testified that aside from the August 2013 incident, he had no personal knowledge of an employee being disciplined for violating Rule T-2. (Tr. 49).

Phillip Tassin (Tr. 141-187).

Mr. Tassin is currently employed as a general manager for Illinois Central Railroad and works on a GTW property. (Tr. 142). In November 2011, Mr. Tassin worked for GTW as superintendent of the Michigan division. (Tr. 143). Mr. Tassin testified that prior to November 2011, GTW employees were taught the L.I.F.E. rules in a classroom environment and tested on their knowledge of the rules. (Tr. 145). Mr. Tassin testified that GTW assesses employee compliance with the L.I.F.E. rules through efficiency tests and by supervisor observation. (Tr. 146). According to Mr. Tassin, if a trainmaster observes a violation during an efficiency test, he is required to call an immediate supervisor to discuss the situation. (Tr. 147). Trainmasters can address rule violations through formal investigations or corrective coaching. *Id.* GTW routinely includes Rule T-2 in its efficiency tests of employees. (Tr. 148). Mr. Tassin testified that GTW does not distinguish between the various subsections of Rule T-2. (Tr. 156). According to Mr. Tassin, Rule T-2 was designed to prevent damage to equipment, derailment, and severe bodily injury. *Id.* Mr. Tassin also testified that GTW disciplines employees every time trainmasters become aware of a Rule T-2 violation, regardless of whether the violation occurred during an efficiency test. *Id.*

Mr. Tassin prepared a report that named all GTW employees who were disciplined for violating Rule T-2 in the absence of an injury report.⁵ (Tr. 149). Mr. Tassin testified to the following disciplinary actions taken against employees who violated the current version of Rule T-2:

1. A GTW employee was disciplined on January 20, 2010 for violating Rule T-2, among other rules. (Tr. 155). The employee signed a waiver for a thirty day suspension. *Id.*
2. A GTW employee was disciplined on May 11, 2011 for violating Rule T-2 during an efficiency test. (Tr. 154). The employee signed a waiver for a fifteen day suspension in addition to sixty days of deferred suspension. *Id.*
3. A GTW employee was disciplined on September 22, 2011 for violating Rule T-2. (Tr. 155). The employee signed a waiver for a thirty day suspension, which was deferred for one year. *Id.*
4. A GTW employee was disciplined on August 2, 2012 for violating Rule T-2. (Tr. 155). The employee signed a waiver for a fifteen day suspension. *Id.*
5. A GTW employee was disciplined on March 21, 2013 for violating Rule T-2 during an efficiency test. (Tr. 153). The employee signed a waiver for a fifteen day suspension. *Id.*

⁵ The report also listed Rule T-2 violations that occurred at GTW's sister railroad companies. For the purposes of this decision, I will not consider evidence that documents how the sister railroads respond to Rule T-2 violations because such entities are not named parties in this case.

6. A GTW employee was disciplined on May 16, 2013 for violating Rule T-2, among other rules. (Tr. 154). The employee signed a waiver for a thirty day suspension. (RX ZZ).

According to Mr. Tassin, the waiver signed by Mr. Echols was issued solely on the basis of the Rule T-2 violation. (Tr. 163). Mr. Tassin worked with other GTW officials to determine the disciplinary terms included in the waiver. *Id.* The length of the suspension was determined by reviewing Mr. Echols' prior disciplinary history, which Mr. Tassin described as "pretty extensive." *Id.* Mr. Tassin also testified that GTW became aware of Mr. Echols' Rule T-2 violation only because of the handwritten statement Mr. Echols provided with his injury report. (Tr. 165). According to Mr. Tassin, Mr. Echols' decision to file an injury report did not play any role in deciding the terms of the suspension. (Tr. 165). Mr. Tassin stated that he did not treat Mr. Echols' Rule T-2 violation differently because Mr. Echols reported an injury. (Tr. 166). Mr. Tassin acknowledged the waiver signed by Mr. Echols did not cite Rule T-2, but stated the waiver should have cited the rule. (Tr. 164).

On cross-examination, Mr. Tassin testified that the report did not reveal whether the various employees cited for Rule T-2 violations lifted a drawbar. (Tr. 170-176). Mr. Tassin also testified that corrective coaching is only available to employees who do not have multiple rule violations in their disciplinary record. (Tr. 179).

Based on my questions, Mr. Tassin testified that it was not possible to determine how many employees have violated Rule T-2 but were not disciplined. (Tr. 186-187). Mr. Tassin also stated that while an employee may not be disciplined for a first-time violation of Rule T-2, a second offense, or a long history of violations would warrant discipline. (Tr. 187).

VI. DISCUSSION

I find that Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a). I further find there is no genuine dispute that Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(4) when he reported his injury to Steven Miller on November 16, 2011. I also find that there is no genuine dispute that Respondent knew of Complainant's protected activity.

Based on the record, I find that Complainant observed a misaligned drawbar on a multi-level train car while performing his duties at Corey Yard on November 16, 2011. Complainant attempted to follow Rule T-2 by pushing the drawbar into place, but could not obtain enough leverage to do so because of the positioning of the car. Complainant had the ability to ask his conductor for help, but did not do so. Instead, Complainant lifted the drawbar into place in violation of Rule T-2. A short time later, Complainant felt pain in his abdomen and was diagnosed with a pulled groin. Complainant timely reported his injury to his supervisor and stated he lifted the drawbar into place. Respondent initiated an investigatory hearing, but offered to waive the proceedings if Complainant admitted that his own misconduct caused the injury. The waiver provided for a sixty day suspension without pay and triggered an additional forty-five day suspension from an unrelated incident. Complainant signed the waiver and served a 105 day suspension without pay. Respondent routinely monitors employee compliance with Rule T-

2. Furthermore, Respondent disciplines employees who violate Rule T-2 in the absence of an injury report.

Complainant now asserts that Respondent's actions constitute a violation of the FRSA under section 20109(a)(4). Respondent counters that Complainant has not met his burden of proving 1) that he suffered an adverse action, and 2) that his protected activity was a contributing factor to the adverse action. Respondent further counters that, even if I find that Complainant met his burden of proof, Respondent has successfully rebutted Complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of Complainant's protected activity. I consider each of these issues in turn below.

a. Adverse Employment Action

The FRSA prohibits an employer from taking adverse action, including discharge, demotion, suspension, reprimand, or "any other discriminatory action," against an employee who engages in protected activity. 49 U.S.C. § 20109(a). The Administrative Review Board applies the Supreme Court's "materially adverse" standard when determining what constitutes an adverse action under the FRSA. *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15 (ARB Mar. 29, 2013). Under this standard, an employer's action is materially adverse if it is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). One of the considerations of whether an action is materially adverse is its effect on an employee's pay, terms, and privileges of employment. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sept. 2008). Furthermore, employment actions are presumptively adverse if they are considered discipline by policy or practice; are routinely used as the first step in a progressive discipline policy; or implicitly or expressly reference potential discipline. *See Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010).

Complainant asserts that the waiver of investigation constitutes an adverse action under the FRSA because it "was simply one recognized method, pursuant to the terms of a collective bargaining agreement...to handle on-property internal discipline at GTW." ⁶ (Compl. Post-Hearing Reply Brief at 4). In particular, Complainant notes that the document was titled "Waiver of Investigation - Discipline + Serving Previous Deferred." (Compl. Post-Hearing Brief at 25.) Complainant argues the waiver was a non-negotiable form of discipline in that its terms could not be changed and that rejecting the waiver would have likely resulted in more harsh discipline through the hearing process. (Compl. Post-Hearing Brief at 26.) Complainant also notes that the adverse actions in *DeFrancesco, supra* and *Leiva v. Union Pacific Railroad Company, Inc.*, ARB Nos. 14-016 and 14-017, ALJ No. 2013-FRS-19 (ARB May 29, 2015) involved waivers, though Complainant concedes the findings regarding adverse action were not contested before the ARB.

Respondent argues that a preponderance of the evidence demonstrates that the waiver was not an adverse action because Complainant admitted that he violated Rule T-2 and

⁶ Complainant also alleges other adverse actions in his brief. (Compl. Post-Hearing Brief at 23). Because I find that the waiver constitutes an adverse action, I do not consider Complainant's additional arguments.

voluntarily signed the waiver. (Resp. Post-Hearing Brief at 9-11.) According to Respondent, Complainant cannot voluntarily participate in a process and then claim it is an adverse action. (Resp. Post-Hearing Brief at 12.)

Respondent's arguments are unpersuasive. The waiver signed by Mr. Echols contains nearly all the elements of adverse action as defined by the case law. First, GTW's policy and practice, as documented by the collective bargaining agreement, allows for waivers to be used as a form of discipline. (RX L). The waiver signed by Mr. Echols complies with GTW's policy and practice by using language from a template included in the collective bargaining agreement. (CX 11). Second, Mr. Echols' waiver expressly references discipline in both the title of the document ("Waiver of Investigation-Discipline + Serving Previous Deferred") and above the signature line ("I agree that no appeal of the discipline assessed will be made by me or on my behalf"). *Id.* Third, the waiver adversely affected Mr. Echols' pay and the privileges of his employment in the form of a relatively lengthy suspension without pay. Given these factors, a waiver could dissuade a reasonable worker from engaging in protected activity. I therefore find the waiver signed by Mr. Echols constitutes adverse action under the FRSA. Mr. Echols' voluntary decision to sign the waiver rather than proceed with the hearing is of no legal consequence.

b. Contributing Factor

To establish causation, Complainant need only show that his report of a work place injury was a contributing factor in the unfavorable personnel action, not a substantial, significant, "or even predominant one." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). In other words, whether or not the protected activity is a "contributing factor" in an FRSA whistleblower case is not a demanding standard. A "contributing factor" means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision." *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him; rather Complainant need establish only that the protected activity affected in any way the adverse action taken, notwithstanding other factors an employer cites in defense of its action. *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015).

Furthermore, Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish that his disclosure of the workplace injury was a contributing factor to his suspension. *Powers v. Union Pacific Railroad Company*, ARB 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) ("It is well established that to prove contributing factor under the FRSA and whistleblower statutes that adopt the AIR 21 standard of proof, complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action." (Internal citations omitted)).⁷ Neither

⁷ See also *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."); *Marano* 2 F.3d at 1141 (holding that an employee "need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged

motive nor animus is required to prove causation under the FRSA as long as protected activity contributed in any way to the adverse action. Furthermore, evidence that an employer lacked a retaliatory motive “does not rebut complainant’s evidence supporting contributing factor.” *Powers v. Union Pacific Railroad Company*, ARB 13-034 at 26.

Complainant argues his injury report was a contributing factor because it directly “started the disciplinary process in motion. In other words, GTW would have never known about the alleged rule violations had he not told them about it in the first place while engaging in protected activity” (Compl. Post-Hearing Reply Brief at 13.) Respondent argues that *Kuduck v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014) undermines *DeFrancesco* and its progeny. (Resp. Post-Hearing Reply Brief at 8.) According to Respondent, Complainant must show evidence of animus in order to establish that his protected activity was a contributing factor. (Resp. Post-Hearing Brief at 12-18.)

As discussed *supra*, it is well established that animus is not required to prove causation under the FRSA. The evidence in this case demonstrates that Complainant’s injury report triggered Respondent’s decision to offer a waiver of investigation. Based on the testimony, Respondent only became aware of Complainant’s injury through the report. Where such a report sets the disciplinary process in motion, the chain of events is sufficient evidence of a contributing factor. See *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015); *Koziara v. BNSF Ry. Co.*, No. 13-CV-834, 2015 U.S. Dist. LEXIS 2382, at *25-26 (W.D. Wisc. Jan. 9, 2015). Therefore, I find Complainant’s protected activity was a contributing factor in the adverse action.

c. Statutory Affirmative Defense

Once an employee demonstrates that the protected activity was a contributing factor, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. In a case where the FRSA-protected activity involves the filing of an injury report, yet the employer alleges that the adverse action was instead related to the complainant’s unsafe conduct, the focus in determining whether the respondent meets the required affirmative defense is on whether the employer establishes that it would have taken the same action against an uninjured employee who engaged in identical unsafe conduct. See *DeFrancesco v. Union Railroad Company*, ARB No. 13-057, OALJ No. 2009 FRS-0 (ARB Sept. 30, 2015) at 10. This analysis requires balancing the railroad employer’s ability to maintain and enforce legitimate workplace safety rules against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries. Respondent may satisfy this burden with evidence of extrinsic factors that would independently lead to the decision to take adverse action. *Menendez v. Halliburton, Inc.*, ARB No. 12-026, 2013 WL 1385561, at *9 (ARB Mar. 15, 2013). At a minimum, the following factors should be examined:

prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” (Emphasis in original)).

1. Absent an injury report, does respondent routinely monitor employee compliance with the rules complainant is charged with violating?
2. Does respondent consistently impose equivalent discipline against employees who violate the rules complainant is cited with violating, but who were not injured as a result of the violation?
3. Are the rules complainant is charged with violating routinely applied?
4. Are the rules complainant was charged with violating vague and subject to manipulation and use as pretext for unlawful discrimination?
5. Does the evidence suggest that in conducting its investigation, respondent was genuinely concerned about rooting out safety problems, or does the evidence suggest that its conduct was pretext designed to unearth some plausible basis on which to punish complainant for the injury report?

See DeFrancesco, ARB No. 13-057, at 11-12.

Respondent asserts that its evidence clearly and convincingly demonstrates that it would have disciplined Mr. Echols had he violated Rule T-2 without engaging in protected activity. Respondent's argument relies on the following: Mr. Tassin's report and testimony regarding disciplinary actions GTW has taken against employees who violated Rule T-2 absent an injury report, Mr. Miller's testimony that he disciplined an employee for violating Rule T-2 during an efficiency test, Mr. Echols' lengthy disciplinary record, and Mr. Echols' admission that he violated Rule T-2. (Resp. Post-Hearing Brief at 18-19.)

Complainant takes issue with Respondent's evidence for several reasons. First, Complainant notes that Mr. Tassin's report searched hundreds of employees from GTW and only identified a small number who were disciplined for violating Rule T-2. (Compl. Post-Hearing Reply Brief at 19.) Second, Complainant argues the report fails to prove that any of the Rule T-2 violations included in Mr. Tassin's report involved employees who lifted a drawbar. (Compl. Post-Hearing Brief at 34-36.) Third, Complainant notes that Mr. Miller worked for a sister railroad in August 2013, not GTW itself, when he disciplined an employee for violating Rule T-2. *Id.* Finally, Complainant notes that the waiver signed by Mr. Echols does not explicitly reference Rule T-2. (Compl. Post-Hearing Brief at 36.)

Taking into account Complainant and Respondent's arguments, I turn now to analyze the factors outlined in *DeFrancesco*, ARB No. 13-057, at 11-12.

First, I find that GTW routinely monitors employee compliance with Rule T-2 absent an injury report. The record demonstrates that GTW trainmasters administer multiple efficiency tests over the course of a month in order to test employee compliance with the L.I.F.E. rules, including Rule T-2. (Tr. 30-31, 146, 148). GTW supervisors also monitor employee compliance with Rule T-2 through routine observation. (Tr. 146).

Second, I find that Respondent consistently imposes equivalent discipline against employees who violate Rule T-2, but who are not injured as a result of the violation. In reaching this conclusion, I also find that there is no meaningful distinction between the various subsections of Rule T-2. In other words, a Rule T-2 violation related to drawbar movement is equivalent to any other type of Rule T-2 violation. Mr. Tassin's report identifies six GTW

employees who were disciplined between January 2010 and May 2013 for violating Rule T-2 absent an injury report. (RX ZZ). The discipline includes both fifteen day suspensions and thirty day suspensions.⁸ *Id.* While Mr. Echols served a 105 day suspension, I find that only sixty days can be attributed to the Rule T-2 violation. The remaining forty-five days were assessed for an unrelated incident and would have been served at some point before April 2012 even if Mr. Echols had not violated Rule T-2. (RX UU). Mr. Echols' sixty day suspension is therefore substantially equivalent to the discipline administered to uninjured employees who violated Rule T-2.⁹

Third, I find that Respondent routinely applies Rule T-2. Mr. Tassin's report indicates that GTW employees were disciplined for Rule T-2 violations before and after Mr. Echols' injury. Furthermore, GTW formally trains its employees in the procedures outlined in Rule T-2 and regularly monitors compliance throughout the month with efficiency tests.

Fourth, I find that Rule T-2 is not vague or subject to manipulation and use as pretext for unlawful discrimination. The rule, a portion of which is quoted *supra*, provides clear and unambiguous instructions for employees who are coupling and uncoupling rail cars. Many of the metrics included in the rule are objective and leave little room for vague application.

Finally, I find that Respondent did not use Complainant's injury as pretext to find a plausible basis on which to punish Complainant for his injury report. Respondent did not have to unearth any information, as Mr. Echols voluntarily told multiple GTW officials that he engaged in conduct that violated Rule T-2. During Mr. Echols' initial phone call with Mr. Miller, Mr. Echols said that he lifted the drawbar and did not ask for help from Conductor Mowinski, as required by Rule T-2. (Tr. 35). Mr. Echols' handwritten statement from the day of the injury concedes that he lifted the drawbar because he could not push it into place. (CX 5). Mr. Echols also discussed the manner in which he realigned the drawbar with GTW's risk mitigation officer two days after the injury. (CX 6). Respondent's decision to discipline Complainant for violating Rule T-2 was a response to his repeated admissions that he violated the rule, not a pretextual punishment for reporting an on-the-job injury.¹⁰

⁸ One employee's fifteen day suspension also triggered a sixty day suspension that had been deferred. (RX ZZ).

⁹ While Mr. Echols' sixty day suspension is longer than any of the suspensions included in Mr. Tassin's report, Mr. Tassin's testimony indicates that Mr. Echols' extensive disciplinary history factored heavily into GTW's decision regarding the length of Mr. Echols' suspension. Given that the report does not list the prior disciplinary histories of each disciplined employee, I do not find a meaningful distinction between a sixty day suspension and a thirty day suspension. Furthermore, even if the discipline assessed to Mr. Echols was not equivalent to the discipline assessed to uninjured employees, I find that the remaining factors in this analysis demonstrate that Respondent has met its clear and convincing burden.

¹⁰ Complainant argues that Respondent's failure to cite Rule T-2 in the waiver demonstrates that Respondent's actions were motivated by a desire to punish an employee for reporting a workplace injury, not a legitimate concern over safety rule compliance. While the waiver itself fails to specify that the misconduct Mr. Echols admitted to was a violation of Rule T-2, the record clearly establishes that Mr. Echols was disciplined for lifting the drawbar into place.

Conclusion

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, Respondent had knowledge of that protected activity, he experienced an adverse action, and his engagement in the protected activity contributed to his experience of the adverse action. However, Respondent has demonstrated by clear and convincing evidence that would have taken the adverse action despite Complainant's engagement in the protected activity. Respondent is therefore not liable pursuant to the FRSA.

ORDER

Accordingly, it is hereby **ORDERED** that the relief sought by Complainant is **DENIED** and the July 11, 2012 complaint is **DISMISSED**.

SO ORDERED.

STEPHEN R. HENLEY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).