



**Issue Date: 19 September 2019**

Case No: 2014-FRS-00119

OSHA No: 5-2700-13-019

*In the Matter of:*

**SCOTT FIGGINS,**  
*Complainant,*

v.

**GRAND TRUNK WESTERN RAILROAD COMPANY,**  
*Respondent.*

### **DECISION AND ORDER DISMISSING COMPLAINTS<sup>1</sup>**

This matter arises under the employee protection provisions of the Federal Rail Safety Act, as amended, 49 U.S.C. § 20109 (“FRSA” or “Act”), with implementing regulations at 29 C.F.R. Part 1982. The FRSA prohibits an employer from discriminating against, or taking an unfavorable personnel action against, an employee because the employee reported a work-related injury or engaged in other protected whistleblowing activity. Mr. Scott Figgins (“Complainant” or “Mr. Figgins”) claims that Grand Trunk Western Railroad (“Employer” or “Grand Trunk”) suspended him for absences in November and December 2012 in violation of the Act. Mr. Figgins further claims that Grand Trunk violated the Act by dismissing him for actions he took on December 31, 2012, and January 5, 2013.

### **FACTUAL FINDINGS**

Grand Trunk is a railroad carrier within the meaning of 49 U.S.C. § 20109. JX 3. It is a subsidiary of Canadian National Railway, and it operates in Michigan, Illinois, Indiana, and Ohio. *Id.* Grand Trunk’s primary mainline, which connects Chicago, Illinois and Port Huron, Michigan, serves as a connection between railroad interchanges in Chicago and rail lines in Eastern Canada and the Northeastern United States. *Id.* Mr. Figgins began his employment with

---

<sup>1</sup> Citations are abbreviated as follows: Complainant’s Brief (“C. Br.”); Respondent’s Brief (“R. Br.”); ALJ’s Exhibits (“ALJ”); Complainant’s Exhibits (“CX”); Joint Exhibits (“JX”); Respondent’s Exhibits (“RX”); and Hearing Transcript (“Tr.”).

Grand Trunk in 1998. Tr. at 238. Mr. Figgins was employed by Grand Trunk as a conductor, and had worked in that position for 14 years. *Id.*; JX 12 at 7.<sup>2</sup>

During the course of his employment with Grand Trunk, Mr. Figgins received Family and Medical Leave Act (“FMLA”) approved medical leave. JX 7; JX 9; JX 18; Tr. at 243-44. Mr. Figgins originally requested leave for anxiety in 2003, when he was diagnosed with anxiety neurosis and insomnia by Dr. DeLeon. RX 10 at Ex. 1; Tr. at 324. He was granted FMLA leave for his anxiety. Tr. at 243-44. Mr. Figgins also intermittently requested FMLA leave to deal with his wife’s bipolar disorder.<sup>3</sup> *Id.*

In 2011, Mr. Figgins again visited Dr. DeLeon to address his anxiety issues. *See* JX 8; Tr. at 331-32. Dr. DeLeon prescribed Mr. Figgins Zoloft and Xanax. Tr. at 335. Mr. Figgins informed Grand Trunk’s medical personnel of his Zoloft prescription, and was approved to take Zoloft on the job after submitting a medical information form. *See* JX 10; JX 11; Tr. at 336. Mr. Figgins also requested FMLA to continue to deal with his wife’s mental issues and his own anxiety. JX 8; Tr. at 331.

On November 20 and 21, 2012, Mr. Figgins did not go into work due to flu-like symptoms. JX 5 at 2899; Tr. at 258. Later, on December 11, 12, and 15, 2012, Mr. Figgins again did not go into work due to flu-like symptoms and bronchitis. *See* JX 5 at 2899; Tr. at 263-64. Mr. Figgins received a doctor’s note from Hope Urgent Care as a “work excuse” on December 11, 2012, covering the period of December 11 through December 16, 2012. *See* JX 5 at 2906; Tr. at 263-64.

At the time of Mr. Figgins’s absences in November and December 2012, the only written rule governing attendance at Grand Trunk was General Rule I—Duty-Reporting or Absence (“Rule I”). *See* JX 5 at 2915; Tr. at 190. In relevant part, Rule I states that “[e]mployees are required to work regularly and without excessive layoffs.” JX 5 at 2915. However, although Rule I did not specifically define how Rule I was enforced, nor did it outline the specific number of absences that would trigger a violation, there was an unwritten policy that management used to issue discipline to employees. *See* Tr. at 56.

Pursuant to this unwritten rule, management monitored employee attendance in two ways. *See id.* at 57. First, employees were expected to be available 90% of their workable days. *Id.* Days considered “workable” excluded rest days, vacation days, personal days, FMLA leave, and medical leaves of absence. *Id.* at 111. However, sick days were considered unexcused, even if employees provided doctor’s notes. *Id.* at 169.<sup>4</sup> Moreover, absences in the form of sick days

---

<sup>2</sup> When citing to exhibits that feature transcripts with page numbers, page number citations will reflect the transcript page numbers. However, when citing to exhibits that are not transcripts, page number citations will reflect the Bates stamp numbers.

<sup>3</sup> At the hearing, the parties stipulated that when Mr. Figgins’s anxiety was first diagnosed by Dr. DeLeon back in 2003, “the only identifying cause triggering [Mr. Figgins’s anxiety] was family issues with his wife and children . . . principally his wife’s medical condition.” Tr. at 330. The parties also stipulated that “there is no record . . . of any attendance violation or discipline arising out of [Mr. Figgins] taking a day identified for FMLA.” *Id.*

<sup>4</sup> Mr. Phillip Tassin, Grand Trunk Superintendent until May 2013, explained the difference between excused medical leaves of absence and unexcused sick days. *See* Tr. at 189. He noted that medical leaves of absence

were counted towards the 90% workable days requirement. *Id.* Second, management would monitor “patterns of absenteeism.” *Id.* at 57. Patterns of absenteeism referred to the practice of taking unexcused absences in conjunction with excused rest days, vacation days, personal days, etc. *Id.* at 110. For instance, Mr. Phillip Tassin, Grand Trunk Superintendent until May 2013, testified that he would find a pattern of absenteeism if an employee’s scheduled days off were Monday and Tuesday, and the employee regularly took unexcused absences on Sunday. *Id.* at 190.

In order for management to have started monitoring an employee’s attendance records in these two ways and to contemplate discipline pursuant to Rule I, the employee would first have needed to be identified on the “Top 10 Report.” *Id.* at 110. The Top 10 Report was an email generated by administrative staff and sent to management to identify those employees who had the most unexcused absences. *See id.* After management received the Top 10 Report, they would review it by terminal, and request to have the cited employees’ work attendance records pulled. *Id.* At that point, management would review the work attendance records to check for compliance with the 90% workable days rule and identify any patterns of absenteeism.<sup>5</sup> *Id.*

In this case, Mr. Eric Herbeck, Grand Trunk Division Trainmaster, ultimately contacted an administrative assistant and asked her to pull Mr. Figgins’s work attendance record. *Id.* at 60. Upon reviewing Mr. Figgins’s attendance record from November 19 through December 16, 2012, Mr. Herbeck determined that Mr. Figgins’s absences were both excessive and patterned. *Id.* at 60, 116. Specifically, Mr. Figgins’s work attendance record shows that he had 5 unexcused sick days out of a total of 20 workable days in the 28-day period between November 19 and December 16, 2012. JX 5 at 2899.

Accordingly, with unexcused absences accounting for 25% of the workable days in this 28-day period, Mr. Figgins did not meet the 90% of workable days threshold. *Id.* Moreover, the work attendance record shows that all 5 of Mr. Figgins’s unexcused sick absences were attached to scheduled and excused rest days. *Id.*

As a result of Mr. Figgins’s apparent violation of the 90% workable days rule and pattern of absenteeism, Mr. Herbeck scheduled a formal investigation for Mr. Figgins’s attendance. *See* Tr. at 60, 110. On the same day that Mr. Herbeck set up Mr. Figgins’s investigation, Mr. Herbeck scheduled an attendance investigation for Mr. Jeff Henry, Mr. Figgins’s colleague. *Id.* at 62-63. Mr. Henry’s investigation pertained to his attendance in a different time period than Mr. Figgins’s. *Id.* at 116.

Ultimately, on December 19, 2012, Grand Trunk sent Mr. Figgins a notice of investigation regarding his absences during the period of November 19 and December 16, 2012. JX 5 at 2886-87.

---

typically referred to “extended leave,” in which employees would be required to provide doctors notes for illness such as “the flu or cancer” and receive approval from Grand Trunk’s medical department. *Id.*

<sup>5</sup> Mr. Herbeck testified at the hearing that there was no fixed formula for assessing what timeframe management used to evaluate employee attendance. Tr. at 112. However, Mr. Tassin testified that managers were supposed to use a 28-day period of review, constituting four weeks of data. *Id.* at 169.

On December 21, 2012, Mr. Figgins received a doctor's note from Dr. DeLeon for his days off on November 20 and 21, 2012 and the period of December 18 through 25, 2012. JX 5 at 2905; Tr. at 317. December 21, 2012 was the first time that Mr. Figgins obtained medical documentation relating to his absences on November 20 and 21, 2012. Tr. at 317. Mr. Figgins obtained the doctor's notes for the purpose of presenting them at the formal investigation. *Id.*

After rescheduling, the investigative hearing was set for January 4, 2013. JX 5 at 2887. Prior to the investigative hearing, Mr. Figgins remained on duty.

On December 31, 2012, Mr. Figgins was working as a conductor at Pontiac, Michigan. JX 12 at 7. A train derailment near the Holly Subdivision delayed Mr. Figgins's train. JX 12 at 10; Tr. at 268-69. This derailment was caused by track conditions. JX 12 at 10. Unable to reach his destination before the end of his shift, a relief crew was sent to replace Mr. Figgins's crew on track Main No. 1. *See id.* at 10-11, 48. As Mr. Figgins briefed the relief conductor, Mr. David Foster, he handed him the train's track authority for Main No. 2 with a pile of other paperwork.<sup>6</sup> *Id.* at 41-42. The authority that Mr. Foster received had been voided, which was indicated by Mr. Figgins's signature at the bottom of the page. *Id.* at 42-43. However, Mr. Figgins had neglected to put a large "X" across the track authority, as mandated by General Rule 1009—Voiding Mandatory Directives ("Rule 1009"). *Id.* at 42, 1337; JX 54.

Mr. Foster, not seeing the "X" and not yet noticing that Mr. Figgins voided the track authority for Main No. 2 at the bottom of the page, saw an Amtrak train coming up Main No. 2 and contacted the dispatcher. JX 12 at 41-42. The dispatcher told Mr. Foster that the track authority for Main No. 2 was voided, and Mr. Foster proceeded to notice Mr. Figgins's signature at the bottom of the page. *Id.* at 42-43. Mr. Foster looked around the cab and found the valid track authority for Main No. 1, which was left on a control stand by Mr. Jesse Wilson, Mr. Figgins's engineer. *Id.* at 41-42; Tr. at 439. Mr. Figgins continued to work after this incident. Tr. at 285-86.

Mr. Figgins had his investigation hearing on January 4, 2013, concerning the absences in November and December 2012. JX 5 at 2886-87. At the investigative hearing, Mr. David Durfee, local union chairman and Mr. Figgins's hearing representative, argued that employees with doctor's notes could not be disciplined by Grand Trunk for absences connected with those doctor's notes. *Id.* at 44. Moreover, Mr. Durfee entered OALJ and Administrative Review Board ("ARB") decisions into the record at the investigative hearing to argue that any discipline imposed by Grand Trunk against Mr. Figgins for his absences would be in violation of § 20109(c) of the FRSA. *See Id.*

Mr. Tassin, Grand Trunk Superintendent at the time of the investigation in January 2013, was responsible for deciding whether to discipline Mr. Figgins. *See Tr.* at 170. As part of his review process, Mr. Tassin read the investigative hearing transcript, including Mr. Durfee's position that disciplining Mr. Figgins for his medically excused absences would be in violation of § 20109(c) of the FRSA. *Id.* at 170, 173. Mr. Tassin had seen this argument before in other investigative hearings. *Id.* at 172. Furthermore, upon reading the cases that Mr. Durfee entered into the record in support of his argument, Mr. Tassin noticed Mr. Figgins's counsel's fax label

---

<sup>6</sup> "Track authority" authorizes a locomotive to occupy a given area of track. R. Br. at 9.

at the tops of the pages. *Id.* at 174. Mr. Tassin also noticed Mr. Figgins’s counsel’s business cards scattered throughout the crew rooms. *Id.* at 205. As a result of these factors, Mr. Tassin expected that Mr. Figgins would file an FRSA claim if discipline was issued against him. *Id.* at 173-75, 204-05.

On the same day, after the conclusion of his hearing, Mr. Figgins received a notice of investigation regarding the December 31, 2012 incident. JX 12 at 1320. The investigation hearing for this incident was to be held on January 10, 2013. *Id.* Mr. Figgins was greatly distressed by this notice of hearing. *See* Tr. at 290, 358-59.

When Mr. Figgins arrived into work at the Pontiac Yard the next morning, he appeared to be stressed. JX 16 at 78. Mr. Figgins’s coworkers, Mr. Steele and Mr. Sims,<sup>7</sup> were worried about his condition. *Id.* at 80-81. Mr. Figgins also explained that he felt both “depressed from the news . . . about the investigation” and “unsafe to work that day.” Tr. at 292-93. Mr. Figgins had a conversation with Mr. Steele in the locker room, and Mr. Figgins attested at both the investigative hearing and the hearing in this matter that he told Mr. Steele: “[w]ith all this harassment going on around here, I’m surprised someone hasn’t killed someone.” JX 16 at 92; Tr. at 294. Mr. Steele testified at the investigative hearing, however, that Mr. Figgins told him that “he was stressed out about what was going on with him and that he was thinking about killing somebody.”<sup>8</sup> JX 16 at 77-78.

Mr. Steele further testified at the investigative hearing that he was not concerned by the statement, and that Mr. Figgins had followed up this statement with “just kidding.” *Id.* at 78-79. However, in the statement that he wrote soon after the incident, Mr. Steele did not note that Mr. Figgins said he was “just kidding,” and Mr. Steele instead wrote, “[t]he first thing that [Mr. Figgins] said to me . . . was that he was stressed out! And thinking about killing somebody!” *Id.* at 828. Further, Mr. Steele wrote, “I felt that [Mr. Figgins] would be un-SAFE to work with.” *Id.*

Mr. Figgins noted at the investigative hearing that he “[didn’t] recall saying that [he] was just kidding.” *Id.* at 92. Mr. Figgins also stated that he could understand how “[Mr. Steele] could have misconstrued where [sic] I said killed someone.” *Id.* at 88.

After Mr. Figgins’s remark, Mr. Steele contacted Mr. Herbeck. JX 16 at 825; Tr. at 99. After informing Mr. Herbeck of his concerns, Mr. Steele put Mr. Figgins on the phone. JX 16 at 825; Tr. at 101. Mr. Figgins explained that he thought that Mr. Herbeck was trying to fire him, that he felt ill, and that he needed to go to the hospital. JX 16 at 825; Tr. at 101-02. However, Mr. Figgins did not want to go to the hospital in an ambulance due to his claustrophobia. JX 16 at 825; Tr. at 102, 296. Mr. Herbeck offered to drive Mr. Figgins, instead. JX 16 at 825; Tr. at

---

<sup>7</sup> Mr. Steele is now retired, but was formerly an engineer with Grand Trunk and was a local union chairman representing engineers. JX 16 at 77; Tr. at 292, 434. Mr. Sims is a conductor employed by Grand Trunk. Tr. at 292.

<sup>8</sup> Although it is unclear where exactly Mr. Sims was at the time that Mr. Figgins made the alleged remark to Mr. Steele, the record reflects that Mr. Sims was not present to hear the remark. *See* JX at 84; Tr. at 366. Furthermore, there is no evidence in the record to reflect that anyone aside from Mr. Steele heard Mr. Figgins’s remark.

103. At this time, Mr. Figgins informed Mr. Herbeck that he would take a Xanax for his anxiety, which Mr. Herbeck acknowledged. JX 16 at 825; Tr. at 102.

Roughly one hour later, Mr. Herbeck arrived at Pontiac Yard. JX 16 at 825; Tr. 102. He was met by Mr. Roger Frasure. JX 16 at 825. Mr. Frasure spoke with Mr. Figgins. RX 11 at 16. Mr. Figgins did not wish to speak with Mr. Herbeck, as Mr. Figgins believed Mr. Herbeck was trying to get him fired. *See* JX 16 at 825. Mr. Frasure drove Mr. Figgins to the McLaren Hospital, and Mr. Herbeck followed. RX 11 at 19-20; Tr. at 297.<sup>9</sup> Mr. Herbeck had requested written statements recounting the morning's events from Mr. Steele and Mr. Sims. *See* JX 16 at 828-29. After arriving at the hospital, Mr. Herbeck read Mr. Steele's statement, which mentioned that Mr. Figgins had made a statement about "killing someone." JX 16 at 826; Tr. at 105-06. Mr. Herbeck immediately alerted Mr. Figgins's nurse and called Grand Trunk's police department. JX 16 at 826; Tr. at 106.

After being cleared from the hospital, Mr. Figgins was taken back to the Pontiac Yard and into Grand Trunk's offices. Tr. at 370. Mr. Frasure brought Mr. Figgins to meet Officer Slaughter, a railroad police officer for Grand Trunk, to give a statement about the incident. JX 16 at 834; Tr. at 370. Mr. Figgins began to give a statement to Officer Slaughter, but was advised during a phone call with Mr. Durfee not to give a statement while on medication. Tr. at 370-71. However, from the brief interview he was able to conduct with Mr. Figgins, Officer Slaughter wrote an incident report noting that Mr. Figgins said, "[h]e is under a lot of stress and remembers saying because of the stress it makes you feel like you want to kill somebody." JX 16 at 834.

Moreover, Officer Slaughter's report noted that upon returning to the interview room after giving an update to another officer, "Mr. Figgins said his earlier statement was not accurate because of the medication and he wanted [Officer Slaughter] to give him [Officer Slaughter's] notes or shred them." *Id.* Mr. Figgins denied making the statement about stress and "wanting to kill somebody" to Officer Slaughter, but could not recall whether he told Officer Slaughter to hand over or shred his notes. Tr. at 371-72.

Following the interview with Officer Slaughter, Mr. Figgins was given a drug test and Grand Trunk arranged for a cab to take Mr. Figgins home. JX 16 at 834; RX 11 at 25; Tr. at 299. Mr. Figgins left work shortly thereafter in the cab. JX 16 at 847. As Mr. Figgins left, Mr. Frasure informed him that he was being held out of service pending a medical evaluation. *Id.*

On January 9, 2013, Grand Trunk sent Mr. Figgins a notice of investigation for the events of January 5. JX 16 at 817. Before the investigation could be held on January 14, 2013, Mr. Figgins took a prolonged medical leave of absence. *See* Tr. at 372. The investigation into the December 31, 2012 incident, as well as the January 5, 2013 incident, had to be rescheduled. After multiple attempts at rescheduling, Mr. Figgins's investigations were finally scheduled for June 3, 2013. JX 16 at 822.

---

<sup>9</sup> Although Mr. Herbeck claims that he drove Mr. Figgins to the hospital, both Mr. Figgins at the hearing and Mr. Frasure at his deposition claim that Mr. Frasure drove Mr. Figgins because Mr. Figgins did not want to interact with Mr. Herbeck. *See* JX 16 at 825; Tr. at 105.

On January 30, 2013, Mr. Figgins was suspended by Mr. Tassin for 30 days pursuant to Rule I for his absences in November and December 2012. JX 23. Mr. Tassin issued this 30-day suspension consistent with a progressive discipline policy that generally imposed more or less discipline depending on the employee's prior work record. Tr. at 207, 209. In this case, Mr. Tassin considered the fact that Mr. Figgins had been suspended for 15 days in November 2011. *Id.* at 207. However, the fact that Mr. Tassin expected Mr. Figgins to file an FRSA claim against Grand Trunk did not impact his decision to issue the 30-day suspension. *Id.* at 193, 205-06.

Prior to suspending Mr. Figgins for excessive absenteeism, Mr. Tassin had disciplined numerous employees under Rule I for similar conduct. *Id.* at 193, 196; RX 4. Discipline issued for prior Rule I violations included actual and deferred suspensions<sup>10</sup> of 5, 10, 15, and 30 days. *See* RX 4. In some cases, employees were even terminated. *Id.* Moreover, some of these disciplinary actions were taken after waivers of investigation. Tr. at 193.

A waiver of investigation (“waiver”) referred to a situation when an employee admitted his violation of a Grand Trunk rule without going through the formal hearing process, and accepted the punishment deemed necessary by management. *Id.* When an employee took a waiver, it functioned as a “plea bargain” and often resulted in a lesser penalty than would have resulted through the standard investigative process. *Id.* at 194. Mr. Henry, the Grand Trunk employee who was accused of violating Rule I around the same time as Mr. Figgins, accepted a waiver and received a 10-day deferred suspension. *Id.* at 208-09.

Mr. Figgins's 30-day suspension started on May 2, 2013, after he finished his medical leave of absence. JX 3. On May 7, 2013, Mr. Figgins filed a complaint with the Secretary of Labor alleging that Grand Trunk retaliated against him in violation of the FRSA. JX 1.

On June 3, 2013, two investigation hearings were held: one regarding the December 31, 2012 track authority incident, and another regarding the series of incidents on January 5, 2013. JX 12; JX 16.

On July 1, 2013, Mr. Bistis, who replaced Mr. Tassin as Grand Trunk Superintendent in May 2013, issued a notice of dismissal for the January 5, 2013 incidents. JX 21. Specifically, Mr. Bistis found that Mr. Figgins violated General Rule G—Drugs and Alcohol (“Rule G”) in connection with his possession of Xanax “and/or being under the influence of a controlled substance,” and General Rule H—Furnishing Information and Conduct (“Rule H”) in connection with the remark Mr. Figgins made to Mr. Steele about “killing somebody.” *See id.*

That same day, Mr. Bistis issued an additional notice of dismissal for the track authority incident on December 31, 2012. JX 22. Specifically, Employer found that Mr. Figgins violated General Rule 1009—Voiding Mandatory Directives (“Rule 1009”). *See id.*

---

<sup>10</sup> Mr. Tassin explained that the “only difference” between a deferred and actual suspension is that an employee who received a deferred suspension would not “lose money” as a result of his suspension. Tr. at 207. Mr. Tassin further explained that an employee who accepted a waiver of investigation would typically be offered a deferred suspension in lieu of an actual suspension. *Id.*

On July 31, 2013, Mr. Figgins filed a supplemental complaint with the Secretary of Labor alleging Grand Trunk terminated him in violation of FRSA. JX 2.

### **PROCEDURAL HISTORY**

On May 7, 2013, Mr. Figgins filed his initial complaint with the Secretary of Labor. JX 1. Mr. Figgins alleged that Grand Trunk violated 49 U.S.C. § 20109(c)(2) by suspending him in retaliation for his compliance with the orders or treatment plan of his treating physician during November and December 2012. *Id.*

On July 31, 2013, Mr. Figgins filed a supplemental complaint with the Secretary of Labor. JX 2. Mr. Figgins again alleged that Grand Trunk wrongfully retaliated against him by dismissing him for following the orders or treatment plan of his treating physician on January 5, 2013. *Id.*

On June 6, 2014, the Secretary dismissed Mr. Figgins's May 7, 2013 complaint, finding that Mr. Figgins had not engaged in a protected activity. JX 3. Furthermore, the Secretary also dismissed Mr. Figgins's wrongful termination complaint. *Id.* The Secretary explained that even though Mr. Figgins had established a prima facie case under 49 U.S.C. §§ 20109 and 42121(b) in his supplemental claim, Grand Trunk had established, by clear and convincing evidence, that it would have dismissed Mr. Figgins absent any protected activities because "Complainant had communicated to another employee while working, his desire to kill someone." *Id.*

Mr. Figgins objected to the Secretary's findings and requested a hearing on June 13, 2014. On August 28, 2014, I set a hearing for May 19 and 20, 2015, in Detroit, Michigan. The parties filed a joint motion on April 17, 2015, requesting that the hearing date be suspended. I granted the parties' request, and amended the scheduling order, allowing for the submission of motions for summary decision up to June 19, 2015.

On June 19, 2015, Grand Trunk submitted a Motion for Summary Decision. On July 13, 2015, Mr. Figgins timely filed a response brief to Grand Trunk's Motion for Summary Decision. Grand Trunk filed a Reply Memorandum in Support of its Motion for Summary Decision on July 31, 2015.

On September 23, 2016, I issued an Order Granting in Part and Denying in Part Grand Trunk's Motion for Summary Decision and Order Permitting Amendment of Complaint ("Order on Summary Decision").

First, on Mr. Figgins's initial claim, I granted Grand Trunk's Motion for Summary Decision on the issue of whether Mr. Figgins was suspended in violation of § 20109(c)(2) for his absences during November and December 2012. I found that Mr. Figgins failed to provide evidence to show that his illnesses arose during the course of employment.<sup>11</sup> I denied Grand

---

<sup>11</sup> At the time of drafting my Order on Summary Decision, the Third Circuit in *Port Authority Trans-Hudson Corp. v. Dep't of Labor*, 776 F.3d 157, 162 (3d Cir. 2015) [hereinafter "*PATH*"] held that § 20109(c)(2) only extends to workers following a doctor's treatment plan for illnesses and injuries that occur during the course of employment. Moreover, the District of Kansas, the Eastern District of Louisiana, and numerous ALJs adopted the Third Circuit's

Trunk's Motion for Summary Decision on the issue of whether Grand Trunk suspended Mr. Figgins in retaliation for the perceived filing of an FRSA case, in violation of § 20109(a)(3).<sup>12</sup> I found that Mr. Figgins provided evidence to show that Grand Trunk perceived that he had filed a claim with the Occupational Safety and Health Administration ("OSHA"), and that the temporal proximity of the adverse action could constitute circumstantial evidence of causation. I denied Grand Trunk's Motion for Summary Decision on the issue of whether Grand Trunk would have suspended Mr. Figgins in the absence of his protected activity. I found that Grand Trunk did not show sufficient evidence to conclude that there was no dispute of this material fact.

Second, on Mr. Figgins's supplemental claim, I denied Grand Trunk's Motion for Summary Decision on the issue of whether Mr. Figgins was terminated for engaging in protected activity under § 20109(c). I found that Mr. Figgins provided evidence to show that he engaged in protected activity on January 5, 2013 and was disciplined in response to performing this protected activity.

On April 10, 2017, I issued an Order Granting in Part Mr. Figgins's Motion to Compel. In the Order, I compelled Grand Trunk to produce its Safety Action Management Plans from 2011 and 2012. Moreover, I granted Grand Trunk the opportunity to provide a proposed Protective Order regarding the Safety Action Management Plans, based on Grand Trunk's contention that the plan(s) could contain proprietary information.

On April 19, 2017, I issued a Protective Order upon receiving a jointly executed Stipulation for Protective Order from the parties.

---

decision in *PATH*. See *Miller v. BNSF Ry. Co.*, 2016 WL 2866152 (D. Kan. May 17, 2016); *Jones v. Ill. Cent. R.R. Co.*, No. 15-635, 2015 WL 5883030 (E. D. La. Oct. 8, 2015); see also *Krok v. Grand W. R.R. Co.*, 2014-FRS-00058 (Dec. 28, 2015); *Sprinkle v. BNSF Ry. Co.*, 2015-FRS-00005 (Jan. 15, 2016); *Casey v. Pac. Harbor Lines, Inc.*, 2015-FRS-00040 (Dec. 2, 2015). However, in *Williams v. Grand Trunk Western Railroad Company*, Nos. 14-092, 15-008, 2016 WL 7742872 (ARB Dec. 5, 2016), published just months after my Order on Summary Decision, the Administrative Review Board ("ARB") held that § 20109(c)(2) extends to both work and non-work related illnesses and injuries. 2016 WL 7742872 at \*2-3. Accordingly, pursuant to *Williams*, Mr. Figgins argues that my decision on this issue should be vacated. See C. Br. at 46. Alternatively, Mr. Figgins contends that my decision on this issue should be stayed pending the Sixth Circuit's resolution of the appeal in *Williams*. *Id.* at 47. However, after conducting the hearing and briefing in this matter, and before I drafted this decision, the Sixth Circuit in *Grand Trunk Western Railroad Company v. United States Department of Labor*, 875 F.3d 821, 831 (6th Cir. 2017) overturned the ARB's decision in *Williams* and held that § 20109(c)(2) only extends to injuries and illnesses that occur during the course of employment. Therefore, because the Sixth Circuit provides binding precedent in this matter and it is undisputed that Mr. Figgins's absences in November and December 2012 were not work-related, my decision to grant Grand Trunk's Motion for Summary Decision on Mr. Figgins' initial § 20109(c)(2) claim stands.

<sup>12</sup> In Mr. Figgins's response brief to Grand Trunk's Motion for Summary Decision, he raised the § 20109(a)(3) issue for the first time, after having failed to raise it in both his initial and supplemental complaints. However, I found that Mr. Figgins provided sufficient new factual allegations to support the amendment, and that his § 20109(a)(3) claim was reasonably within the scope of his § 20109(c) claim.

On April 25-27, 2017, I conducted a formal hearing in Detroit, Michigan. At the hearing, ALJ Exhibits 1-7, Complainant's Exhibits 1-2, 5,<sup>13</sup> 7-8, 10-11, 13-14, Joint Exhibits 1-57, and Respondent's Exhibits 1-4,<sup>14</sup> 8-12 were admitted into evidence.<sup>15</sup>

During the hearing, seven witnesses testified: (1) Eric Herbeck, Grand Trunk Division Trainmaster; (2) Phillip Tassin, Grand Trunk Superintendent until May 2013; (3) Mr. Figgins, Complainant; (4) David Durfee, Grand Trunk Brakeman/Conductor and Former Local Chairman for Sheet Metal, Air, Rail, Transportation Union ("SMART"); (5) Vicki LaForte, Grand Trunk Leave Administrator; (6) Peter Bistis, Grand Trunk Superintendent starting May 2013; and (7) William Maranzano, Grand Trunk Yardmaster.<sup>16</sup>

On May 25, 2017, both Mr. Figgins and Grand Trunk submitted post-hearing briefs.

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

---

<sup>13</sup> CX 5 is the personal work record of Mr. Henry. See Tr. at 17. I admitted CX 5 with the proviso that the entries post-dating Mr. Figgins's attendance issue, those from June 26, 2014, September 8, 2014, and April 22-24, 2015, will not be considered.

<sup>14</sup> RX 4 is a chart summarizing disciplinary actions taken by Grand Trunk against employees for violating Rule I. I provisionally admitted RX 4 with the proviso that Grand Trunk's counsel was to provide Mr. Figgins's counsel with the underlying disciplinary letters for the disciplinary actions summarized in the chart. Tr. at 198-99. Upon receiving the underlying disciplinary letters, I gave Mr. Figgins's counsel 30 days to object to RX 4. *Id.* at 199. However, after 30 days, Mr. Figgins's counsel did not file an objection.

<sup>15</sup> Grand Trunk also sought to introduce RX 5-7. Tr. at 644. RX 5-7 are three decisions of the Public Law Board ("PLB"). The PLB's opinion in RX 5 found that substantial evidence supported Grand Trunk's decision to suspend Mr. Figgins for 30 days in connection with his attendance in November and December 2012. The PLB's opinion in RX 6 found that substantial evidence supported Grand Trunk's decision to terminate Mr. Figgins in connection with the incidents of January 5, 2013. The PLB's opinion in RX 7 found that substantial evidence supported Grand Trunk's decision to terminate Mr. Figgins in connection with the track authority incident on December 31, 2012. Mr. Figgins objected to the admission of all three decisions. See Tr. at 644-46. Therefore I gave the parties 30 days to brief the issue of the admissibility of the three PLB decisions. On May 25, 2017, Grand Trunk filed Grand Trunk's Memorandum in Support of Admission of Public Law Board Decisions ("Grand Trunk's Memorandum"), and Mr. Figgins filed Mr. Figgins's Brief in Opposition to Grand Trunk's Motion to Admit into Evidence Three Written Decisions by the Public Law Board ("Mr. Figgins's Brief"). The PLB is provided for by the Railway Labor Act to resolve minor labor disputes. See Mr. Figgins's Brief at 2. The PLB only interprets the application of the collective bargaining agreement to facts in question, and the PLB does not conduct its own investigation of the facts. *Id.* Instead, railroad management conducts its own investigation, and the PLB accepts the facts as presented. *Id.* Upon review of the parties' arguments and the PLB opinions themselves, I find that the opinions, RX 5-7, are irrelevant and inadmissible. Pursuant to OALJ regulations, all relevant evidence is admissible unless the evidence's "probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 29 C.F.R. § 18.403. However, evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401. In this case, I do not find that any of the three PLB decisions have the tendency to make the existence of any consequential fact more or less probable. The opinions do not engage in fact-finding, nor would they add anything of substance to the record. The opinions, each three short paragraphs long, merely draw bare conclusions from bits of information found elsewhere in the record as currently constituted. Accordingly, I will not consider the PLB opinions, RX 5-7, in my decision.

<sup>16</sup> When asked to describe the position of yardmaster, Mr. Maranzano stated, "I always relate it to almost like an air traffic controller but for trains." Tr. at 592.

provisions, regulations, and pertinent precedent. Although I do not discuss every exhibit in the record, I have carefully considered all of the testimony and exhibits in reaching my decision.

### **ISSUES**

The issues to be decided in this case are:<sup>17</sup>

1. Whether Mr. Figgins established by a preponderance of the evidence that he engaged in protected activity(ies) under the FRSA;
2. Whether Mr. Figgins established by a preponderance of the evidence that he suffered an unfavorable employment action(s) from Grand Trunk;
3. Whether Mr. Figgins established by a preponderance of the evidence that his protected activity(ies) was a contributing factor in Grand Trunk's unfavorable employment action(s);
4. If Mr. Figgins met his burden, whether Grand Trunk established by clear and convincing evidence that it would have taken the same unfavorable employment action(s) against Mr. Figgins in the absence of his protected activity(ies); and
5. If Grand Trunk did not meet its burden, what relief, if any, is Mr. Figgins entitled to under the FRSA?

### **LEGAL STANDARD**

The Act incorporates by reference the rules and procedures applicable to whistleblower cases brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). See 49 U.S.C. § 20109(d)(2)(A). AIR-21 contains a two-part burden-shifting framework for evaluating whistleblower cases. *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at \*31 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017).

The first part focuses on the relation between adverse action suffered by an employee and that employee's protected activity. See *id.*; see also *Harp v. Charter Comms., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). The Complainant bears the burden at this point, and he or she must show, by a preponderance of the evidence, that: (1) he or she engaged in protected activity; (2) he or she suffered an adverse action; and (3) the protected activity was a contributing factor in the adverse action. *Palmer*, 2016 WL 5868560 at \*9 fn. 74, \*31; *Dietz v. Cypress Semiconductor Corp.*, No. 15-017, 2016 WL 1389927 at \*4 fn. 24 (ARB Mar. 30, 2016); see also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3d Cir. 2013); *Harp*, 558 F.3d at 723 (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)); *Heim v.*

---

<sup>17</sup> See Tr. at 11-12.

*BNSF Ry. Co.*, 849 F.3d 723 (8th Cir. 2017) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014)).<sup>18</sup>

Should a Complainant meet this burden, the second part is implicated. The second part, sometimes called the “same action defense,” allows the employer to escape liability if it establishes, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at \*31, 36. If employer fails to meet its burden at this point, the claim succeeds.

## DISCUSSION

### **A. Protected Activity**

The FRSA protects employees who engage in three categories of protected activities. *See* 49 U.S.C. § 20109(a)-(c).

First, § 20109(a) protects any employee from “discharge, demot[ion], suspen[sion], reprimand, or . . . [any other] discriminat[ion]” in retaliation for: (1) providing information to Federal, State, or local regulatory and enforcement agencies, a member of Congress, or a supervisory authority regarding any conduct which she reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) refusing to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security; (3) filing an FRSA complaint or participates in a FRSA proceeding; (4) notifying or attempting to notify the railroad carrier or Secretary of Transportation of a work-related personal injury or illness; (5) cooperating with a safety or security investigation; (6) furnishing information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property; or (7) accurately reports hours on duty. Protection under § 20109(a) also extends to retaliatory acts taken by an employer who merely perceives that an employee engaged in, or plans to engage in, any of the aforementioned protected activities.

Second, § 20109(b) protects any employee from “discharge, demot[ion], suspen[sion], reprimand, or . . . [any other] discriminat[ion]” in retaliation for: (1) reporting hazardous safety or security conditions; (2) reasonably refusing to work when confronted with hazardous safety or security conditions related to the performance of his duties; or (3) reasonably refusing to authorize the use of equipment, track or structures in hazardous safety or security conditions.

Third, § 20109(c)(2) protects any employee from “discipline, or threaten[ed] discipline” in retaliation for: (1) requesting medical or first aid treatment, or (2) following orders or a treatment plan of a treating physician.

---

<sup>18</sup> The circuit courts list a four prong test, including a knowledge requirement, which the ARB has avoided. *See Folger v. Simplex Grinnell, LLC*, No. 15-021, 2016 WL 866116 at \*1 fn. 3 (ARB Feb. 18, 2016) (adopting a three prong test). The ARB has specifically explained, for the purposes of the AIR-21 whistleblower framework, that there is no explicit knowledge requirement. *Id.* The ARB noted, however, that the knowledge requirement “might be implicit in the causation requirement.” *Id.*

## 1) Initial Claim

Mr. Figgins argues that he engaged in protected activity pursuant to 49 U.S.C. § 20109(a)(3) because Mr. Tassin, Grand Trunk Superintendent at the time of Mr. Figgins' investigative hearing for excessive absences in January 2013, expected him to file an FRSA claim if discipline was imposed for his absences in November and December 2012. *See* C. Br. at 51.

On the other hand, although Grand Trunk does not deny that Mr. Tassin acknowledged that he expected Mr. Figgins to bring an FRSA claim if disciplined, Grand Trunk claims that because Mr. Figgins's union made the § 20109(c) argument at the investigative hearing and Mr. Figgins did not do so personally, Mr. Figgins cannot claim to be protected by § 20109(a)(3). *See* R. Br. at 42.

First, I find that Mr. Tassin expected Mr. Figgins to file an FRSA claim against Grand Trunk. At the hearing in this matter, Mr. Tassin testified that he read the investigative hearing transcript as part of his process of weighing potential discipline for Mr. Figgins, including Mr. Durfee and the union's position that disciplining Mr. Figgins for his medically excused absences would be a violation of § 20109(c) of the FRSA. *Id.* at 170, 173. Mr. Tassin noted that he had seen this argument made before in prior investigative hearings. *Id.* at 172. Furthermore, while reading the cases that Mr. Durfee entered into the record in support of his argument, Mr. Tassin testified that he noticed Mr. Figgins's counsel's fax label at the tops of the pages, in addition to Mr. Figgins's counsel's business cards scattered throughout Grand Trunk's crew rooms. *Id.* at 174, 205. As a result of these factors, Mr. Tassin testified that he expected Mr. Figgins to file an FRSA claim if he decided to impose discipline against him. *Id.* at 173-75, 204-05.

Accordingly, because the record shows that Mr. Tassin expected Mr. Figgins to file an FRSA complaint, and § 20109(a) protects an employee against suspension in retaliation for an employer's mere perception that an employee filed, or plans to file, an FRSA complaint, I find that Mr. Figgins engaged in protected activity pursuant to § 20109(a)(3). Although Grand Trunk argues that the union's argument made under § 20109(c) at the investigative hearing "cannot be protected activity imputed to [Mr.] Figgins as a matter of law," the protected activity that I have found is not dependent upon whether Mr. Figgins or the union made the argument under § 20109(c). Instead, consistent with § 20109(a), my protected activity finding stems from the substantial evidence in the record showing that Mr. Tassin perceived that Mr. Figgins would file an FRSA claim against Grand Trunk.

## 2) Supplemental Claim

Mr. Figgins argues that he engaged in protected activity on January 5, 2013, pursuant to 49 U.S.C. § 20109(c)(2) when he requested medical treatment, stopped working, and took a Xanax to quell his anxiety. C. Br. at 16. More specifically, Mr. Figgins argues that because Dr. DeLeon prescribed him Xanax for anxiety and panic attacks, his decision to request medical treatment, stop working, and take a Xanax was "all part of the 'treatment plan or order' recommended by Dr. DeLeon." *Id.*

Further, Mr. Figgins argues that his anxiety attack on January 5, 2013, was work-related for four reasons: (1) he was at work, during working hours, when the anxiety attack occurred; (2) the attack was a result of “intense stress and anxiety triggered by a fear of being fired without cause and ‘harassment’ by his supervisor;” (3) he was transported to the hospital by Grand Trunk personnel “immediately after he took the Xanax;” and (4) Dr. Kwon, a psychiatrist who saw Mr. Figgins as a patient on January 11, 2013, concluded that Mr. Figgins’ panic attack “was caused or related to . . . working conditions which were the ‘main reason’ for the panic attack.” *Id.* at 16-17.

Mr. Figgins also argues that he complied with Grand Trunk’s prescription medication policy when he told Mr. Herbeck that he was done working for the day, prior to taking the Xanax in his car. *Id.* at 20. Specifically, Mr. Figgins argues that he “notified his immediate supervisor [Mr. Herbeck] that he was going to take a Xanax, as required by the policy.” *Id.* at 22. Next, Mr. Figgins argues that he “advised [Mr. Herbeck] that he could not safely perform his duties if he took a Xanax, as required by the policy.” *Id.* Finally, Mr. Figgins argues that both he and Mr. Herbeck agreed that he was “done working for the day,” and they proceeded to make arrangements for him to be transported to the hospital. *Id.*

On the other hand, Grand Trunk argues that Mr. Figgins did not engage in protected activity on January 5, 2013, pursuant to 49 U.S.C. § 20109(c)(2) because “[Mr. Figgins] cannot show he was following the orders or treatment plan of a physician at all, let alone following a treatment plan or doctor’s orders relating to a work-related illness.” R. Br. at 30. To the extent that Mr. Figgins had a treatment plan or doctor’s orders, Grand Trunk argues that he was not supposed to work “when he medicated with Xanax.” *Id.* Grand Trunk argues that Dr. DeLeon “filled out several forms authorizing [Mr. Figgins] to take other prescription medication at work,” however Xanax was not one of them. *Id.* at 33.

Further, Grand Trunk argues that Mr. Figgins’s anxiety “was not a work-related ailment, and therefore any treatment plan [Mr. Figgins] claims he was under regarding Xanax is not covered by [§ 20109(c)(2)].” *Id.* at 36. In support of that argument, Grand Trunk alleges that Mr. Figgins “was first diagnosed with anxiety disorder and prescribed anti-anxiety medication in January 2003, due to non-work-related factors in his personal life, including difficulties coping with his wife’s mental health condition.” *Id.* at 36-37. Grand Trunk also argues that “[a]t each subsequent visit to Dr. DeLeon to treat for his anxiety issues/panic attacks, [Mr. Figgins] never once cited work as a factor in his condition.” *Id.* at 37.

Moreover, Grand Trunk argues that Mr. Figgins’s anxiety attack on January 5, 2013 could never be considered work-related, as a matter of law. *Id.*

First, Grand Trunk argues that the ultimate question is “whether [Mr. Figgins’s] treatment plan or doctor’s orders as they existed on January 5, 2013 pertained to a work-related illness,” and further asserts that the record makes clear that “all of [Mr. Figgins’s] doctor’s visits for anxiety up to that point confirmed his anxiety illness was driven by factors unrelated to work.” *Id.*

Second, and “more fundamentally,” Grand Trunk argues that “considering a mental condition to be ‘work-related’ just because it manifests in the workplace, even in response to alleged workplace stressors, would dramatically expand the scope of work-relatedness under the FRSA beyond all rational limits.” *Id.* at 38.

Determining whether or not Mr. Figgins engaged in protected activity as a matter of law on January 5, 2013, requires delving into multiple complicated questions. First, however, I address one issue briefed by the parties that does not prove to be complicated: the work-relatedness requirement of 49 U.S.C. § 20109(c)(2).

In *Grand Trunk Western Railroad Company v. United States Department of Labor*, 875 F.3d 821, 831 (6th Cir. 2017), the Sixth Circuit overturned the Administrative Review Board’s decision in *Williams v. Grand Trunk Western Railroad Company*, Nos. 14-092, 15-008, 2016 WL 7742872 (ARB Dec. 5, 2016) and affirmed the Third Circuit’s decision in *Port Authority Trans-Hudson Corp. v. Dep’t of Labor*, 776 F.3d 157, 162 (3d Cir. 2015) by holding that § 20109(c)(2) only extends to workers following a doctor’s order or treatment plan for illnesses or injuries that occur “during the course of employment.” In my Order on Summary Decision, I agreed with the court in *Jones v. Ill. Cent. R.R. Co.*, No. 15-635, 2015 WL 5883030 (E. D. La. Oct. 8, 2015) by finding that “during the course of employment” is a temporal requirement that covers workers suffering from illness or injury at work, “irrespective of the injury’s cause.”

Accordingly, although Grand Trunk argues that my Order on Summary Decision and *Jones v. Ill. Cent. R.R. Co.* were wrongly decided, the law of the case doctrine applies in this case and my decision stands: because neither party disputes that Mr. Figgins’s anxiety manifested during the course of employment on January 5, 2013, Mr. Figgins has satisfied the work-relatedness requirement of § 20109(c)(2).

Other questions, such as the requisite form and specificity of a doctor’s orders or a treatment plan under § 20109(c)(2), whether Dr. DeLeon provided Mr. Figgins with legally sufficient doctor’s orders or a treatment plan under § 20109(c)(2), and if Dr. DeLeon did in fact provide Mr. Figgins with legally sufficient doctor’s orders or a treatment plan, whether Mr. Figgins followed those orders or treatment plan on January 5, 2013, are not as easy to resolve. The case law offered by the parties provides little assistance.

I need not, however, answer these questions nor need I make an overall finding on protected activity because, as I outline in more detail below, I find that Grand Trunk has proven by clear and convincing evidence that it would have terminated Mr. Figgins whether he engaged in protected activity under the FRSA or not.

With that said, although I need not decide whether Mr. Figgins engaged in protected activity on January 5, 2013, I assume for the sake of argument in the adverse action, contributing factor, and same action defense sections of my analysis that Mr. Figgins was able to successfully demonstrate that he did.

## **B. Adverse Action**

The FRSA broadly defines adverse action. *See* 49 U.S.C. § 20109(a)-(c). Under both § 20109(a) and (b), employees are protected from “discharge, demot[ion], suspen[sion], reprimand, or . . . [any other] discriminat[ion].” Under § 20109(c)(2), employees are protected from “discipline, or threaten[ed] discipline.” Section 20109(c)(2) further notes that “discipline” means “to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.”

### **1) Initial Claim**

It is undisputed that Mr. Figgins was suspended for 30 days by Mr. Tassin in connection with the attendance investigation. *See* C. Br. at 7; R. Br. at 12. Furthermore, Mr. Figgins’s suspension letter from January 30, 2013 is included in the record before me. JX 23. Accordingly, I find that Grand Trunk took adverse action against Mr. Figgins when Mr. Tassin suspended him on January 30, 2013.

### **2) Supplemental Claim**

It is undisputed that Mr. Figgins was terminated by Grand Trunk. *See* C. Br. at 10-11; R. Br. at 21-24. Furthermore, Mr. Figgins’s two termination letters from July 1, 2013 are included in the record before me. JX 21-22. Accordingly, I find that Grand Trunk took adverse action against Mr. Figgins when Mr. Bistis discharged him on July 1, 2013.

## **C. Contributing Factor**

Under the AIR 21 legal framework, the contributing factor standard is “broad and forgiving.” *Deltek, Inc. v. Admin. Rev. Bd.*, 649 Fed. App’x 320, 329 (4th Cir. 2016) (*citing Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)). The protected activity “need only play some role in the adverse action, even an ‘[in]significant’ or ‘[in]substantial role suffices.” *Palmer v. Canadian Nat’l Ry.*, No. 16-035, 2016 WL 5868560 at \*31 (ARB Sept. 30, 2016) (brackets in original); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep’t of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). The complainant may satisfy this “rather light burden by showing that her protected activities tended to affect [her] termination in at least some way,” whether or not they were a primary or even a significant cause of the termination. *Deltek, Inc.*, 649 Fed. App’x at 329 (*quoting Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original).

The complainant may satisfy his burden through direct or circumstantial evidence. *Palmer*, 2016 WL 5868560 at \*32. “Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation.” *Feldman*, 752 F.3d at 348 (citation omitted); *see also Sharkey v. JP Morgan Chase & Co.*, 660 Fed. App’x 65, 67 (2d Cir. 2016) (noting that a “temporal proximity” of less than a month between the protected activity and the unfavorable personnel action could support a prima facie inference that the protected activity was a contributing factor) (*citing Zann Kwan v. Andalex*

*Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013)). Moreover, the ARB has held that a number of months may still be sufficient to establish an inference of causation. *Warren v. Custom Organics*, No. 10-092, ALJ No. 2009-STA-030, slip op. at 6 (ARB Feb. 29, 2012) (citing three cases which held that between thirty days and seven to eight months is sufficient to show temporal proximity).

If the complainant's protected activity and the employer's non-retaliatory reasons both play a role in the termination, "the analysis is over and the employee prevails on the contributing-factor question." *Palmer*, 2016 WL 5868560 at \*31. The employee does not need to show that the employer's stated reasons were pre-textual, although doing so can be sufficient to show that protected activity was a contributing factor. *Id.*

### 1) Initial Claim

Although there is no direct evidence in the record, Mr. Figgins has shown through temporal proximity that his protected activity was a contributing factor in Grand Trunk's decision to suspend him. The record does not make clear precisely when Mr. Tassin reviewed the hearing transcript for Mr. Figgins's attendance investigation, noticed Mr. Figgins's counsel's fax label at the tops of the pages of the cases submitted by Mr. Durfee, and saw Mr. Figgins's counsel's business cards scattered throughout Grand Trunk's crew rooms. However, the record does make clear that the investigative hearing took place on January 4, 2013. *See* JX 5. Moreover, the record shows that Mr. Tassin issued Mr. Figgins's suspension letter on January 30, 2013.

Therefore, at the longest, assuming that Mr. Tassin learned of Mr. Durfee's FRSA argument on the day of the investigative hearing and that knowledge was sufficient to lead him to expect that Mr. Figgins would ultimately file an FRSA complaint, there was less than a month separating Mr. Figgins's protected activity and the issuance of his suspension.

Accordingly, I find that the temporal proximity between Mr. Figgins's protected activity and suspension is more than sufficient to establish an inference of causation. Grand Trunk maintains that Mr. Figgins's protected activity was not a contributing factor in his suspension and that it suspended Mr. Figgins for violating a "neutral attendance policy that it applies to all employees." R. Br. at 46. Moreover, Grand Trunk argues that evidence shows that "eleven other individuals . . . were disciplined by [Mr. Tassin] for violating the attendance rules during the relevant period," and Mr. Tassin's "disciplinary decisions demonstrate that there is no causal connection between [Mr.] Figgins's alleged protected activity and the discipline decision." *Id.* However, at the contributing factor stage of the analysis, Mr. Figgins's "rather light burden" is merely to show that his protected activity "tended to affect" his termination in "at least some way." *See Deltek, Inc.*, 649 Fed. App'x at 329.

By establishing the temporal proximity between his protected activity and suspension, Mr. Figgins has met his burden.

## 2) Supplemental Claim

Assuming for the sake of argument that Mr. Figgins's activity with respect to the use of Xanax on January 5, 2013 is protected under the FRSA, there is direct evidence in the record showing that his protected activity was a contributing factor in Grand Trunk's decision to terminate him.

On July 1, 2013, Mr. Figgins received two termination letters from Grand Trunk. *See* JX 21-22. In the first termination letter, JX 21, Mr. Bistis, who replaced Mr. Tassin as Grand Trunk Superintendent in May 2013 and made the decision to terminate Mr. Figgins, notes that Mr. Figgins was being terminated in part for his violation of Rule G in connection with his possession "and/or being under the influence of a controlled substance" on January 5, 2013. Moreover, Mr. Bistis testified at the hearing in this matter that he terminated Mr. Figgins in part for his use of Xanax on January 5, 2013, in violation of Rule G. *See* Tr. at 535-36.

Therefore, given the direct evidence in the record, and assuming that Mr. Figgins's use of Xanax on January 5, 2013 is protected activity under the FRSA, Mr. Figgins has successfully demonstrated that his protected activity was a contributing factor in Grand Trunk's decision to terminate him.

### D. Same Action Defense

Should the complainant meet his or her burden of proof, the respondent may still prevail if it shows, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at \*31, 36. "It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have." *Id.* at \*33 (citing *Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at \*7 (ARB Apr. 25, 2014)) (emphasis in original).

Clear and convincing evidence is the "intermediate standard" between mere preponderance of the evidence and beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 424 (1979). Clear and convincing evidence requires that "the ALJ believe that it is 'highly probable' that the employer would have taken the same adverse action in the absence of the protected activity." *Palmer*, 2016 WL 5868560 at \*33 (citing *Speegle*, 2014 WL 1758321 at \*6). Were the clear and convincing standard quantified, "the probabilities might be in the order or above 70% . . ." *Id.* (quoting *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979)) (omission in original).

### 1) Initial Claim

Upon review of the substantial evidence in the record, I find that Grand Trunk has proven by clear and convincing evidence that Mr. Tassin would have suspended Mr. Figgins for his excessive absences in violation of Rule I absent any protected activity.

First, I find that Mr. Tassin credibly testified that although he did expect Mr. Figgins to file an FRSA claim against Grand Trunk if discipline was issued, this fact did not play a role in

his decision to suspend Mr. Figgins for 30 days. *See* Tr. at 173, 205-06. Instead, the record shows that Mr. Tassin suspended Mr. Figgins pursuant to a progressive discipline policy that imposed more or less discipline for rule violations depending on the employee's prior work record. *Id.* at 207, 09.

In Mr. Figgins's case, a review of his personal work record shows a history of disciplinary infractions and suspensions from 2003 - 2011, including two deferred suspensions of 10 and 15 days in 2011. JX 10 at 2902. Moreover, Mr. Tassin noted at hearing that the 30-day suspension at issue represented the natural progression of discipline for an employee who had been suspended for 15 days only a year earlier. *See* Tr. at 207. Notably, Mr. Durfee, local union chairman and Mr. Figgins's representative at hearing for the attendance investigation, also testified in this matter that Grand Trunk had a progressive discipline policy and that a 30-day suspension pursuant to Rule I for absenteeism was "normal." *Id.* at 430.

Second, Grand Trunk submitted into evidence a chart entitled "Rule I Discipline from January 2011 through April 2013." *See* RX 4. In this chart, Grand Trunk provides an incomplete list of employees disciplined by Mr. Tassin for violating Rule I between February 2011 and April 2013.<sup>19</sup> *Id.* Moreover, the chart notes the length of discipline issued for each cited employee and a precise description of the conduct triggering the Rule I violations. *See id.* A review of this chart makes clear that both before and after suspending Mr. Figgins, Mr. Tassin disciplined numerous employees under Rule I for excessive absenteeism. *Id.* Specifically, Mr. Tassin issued actual and deferred suspensions of 5, 10, 15, and 30 days, and even issued dismissals in some cases. *See id.*

Furthermore, the chart cites multiple occasions when Mr. Tassin suspended and dismissed employees for conduct that was very similar or even worse than Mr. Figgins's. *See id.* For instance, the chart notes a 30-day actual suspension issued for the "failure to work a regular basis . . . [with] absen[ce] 16% of workable days," in addition to a 30-day actual suspension for the "failure to work on a regular basis" issued just four months before Mr. Figgins suspension. *Id.*

In sum, a thorough review of this chart makes clear that the 30-day suspension issued by Mr. Tassin against Mr. Figgins for his excessive absences, accounting for 25% of the workable days between November 19 and December 16, 2012, was nothing more than ordinary practice in the course of business at Grand Trunk.

Third, to the extent that Mr. Figgins cites the lesser 10-day deferred suspension issued by Mr. Tassin against Mr. Henry for a similar Rule I violation as evidence of Mr. Tassin's animus against Mr. Figgins, it is important to note that Mr. Henry accepted a waiver of investigation. CX 5; Tr. at 208-09. Consistent with this waiver of investigation and his acceptance of the charges against him, Mr. Henry was entitled to leniency and a lighter application of discipline against him. *See* Tr. at 194, 208-09, 226-28.

---

<sup>19</sup> Mr. Tassin testified that the chart only notes employees that were disciplined after going through the standard investigative hearing process, and does not include those employees who may have received lesser sentences by means of a waiver. Tr. at 231.

Moreover, although Mr. Figgins argues that he was not offered a waiver of investigation, the record shows that neither Mr. Figgins, nor his union representative, Mr. Durfee, approached Grand Trunk with the admission of guilt and acceptance of responsibility that is usually required for Grand Trunk to grant a waiver. *See id.* at 193-94, 392-93.

Mr. Durfee testified that he spoke with Mr. Herbeck about the waiver issue prior to Mr. Figgins's investigation. *Id.* at 392. However, when asked to describe what he said in that conversation with Mr. Herbeck, Mr. Durfee noted, "I told Mr. Herbeck that we had excuses for the sick days, asked for dismissal, and basically said with the sickness, it's a whistleblower case if it's not dismissed because it's covered under his doctor's instructions." *Id.* at 392-93. I am aware that Mr. Herbeck testified that this conversation never happened, and that he did not speak with Mr. Durfee at all prior to the investigative hearing. *See id.* at 93. However, even if the conversation did happen in the way that Mr. Durfee described it, Mr. Durfee failed to note anything about Mr. Figgins admitting guilt and accepting responsibility for his actions. *See id.* at 193-94, 392-93.

Even putting aside the waiver issue, a review of Mr. Henry's personal work record makes clear that the 10-day suspension issued against him by Mr. Tassin was consistent with Grand Trunk's progressive discipline policy. *See CX 5.* Prior to receiving his 10-day suspension in January 2013, the last entry in Mr. Henry's "discipline history" was March 2011 for violating Rule I. *Id.* As a result of this violation, Mr. Henry received a letter of reprimand. *Id.* Accordingly, as noted by Mr. Tassin at the hearing in this matter, Mr. Henry's discipline increased from a "letter of reprimand to a [10]-day suspension," and that appears to be a "normal progression" of discipline. *Tr.* at 209.

Therefore, for the reasons described above, I find that Grand Trunk has proven by clear and convincing evidence that Mr. Tassin would have suspended Mr. Figgins for his excessive absences in violation of Rule I absent any protected activity.

Accordingly, because Grand Trunk has successfully established the same action defense, Mr. Figgins's initial claim fails.

## **2) Supplemental Claim**

Grand Trunk asserts that absent any alleged protected activity, Mr. Figgins would have been terminated for: (1) "having Xanax and taking it while on duty and on Company property," in violation of Rule G; (2) making "remarks about 'killing someone' [in violation of Rule H], which prohibits 'vicious conduct;'" and (3) failing to void the track authority with an "X" on December 31, 2012. *R. Br.* at 21-24.

First, I note that if I assume Mr. Figgins's activity with respect to the use of Xanax on January 5, 2013, is protected under the FRSA, it cannot be said that Grand Trunk's Rule G justification for Mr. Figgins's termination can succeed under the same action defense. Accordingly, I instead focus my discussion on Grand Trunk's two other alleged justifications for Mr. Figgins's termination. Most importantly, as I discuss below, I find that Grand Trunk has

established by clear and convincing evidence that it would have terminated Mr. Figgins for his remark about “killing someone” on January 5, 2013, in violation of Rule H.

The record makes clear, and Mr. Figgins even personally acknowledges, that on January 5, 2013, Mr. Figgins made a remark to Mr. Steele on the job at Pontiac Yard about “killing someone.” See JX 16 at 77-78, 92; Tr. at 294. With that said, however, Mr. Figgins disputes the way that Mr. Steele characterized the remark in a written statement given to Mr. Herbeck on the same day of the incident and in testimony at Mr. Figgins’s investigative hearing on June 3, 2013. See JX 16 at 88, 92. Moreover, Mr. Figgins also disputes the way that Officer Slaughter characterized Mr. Figgins’s recollection of the remark on Grand Trunk’s incident report form. Tr. at 371.

At Mr. Figgins’s investigative hearing on June 3, 2013, Mr. Steele testified that Mr. Figgins told him that “he was stressed out about what was going on with him and that he was thinking about killing somebody.” JX 16 at 77-78. Moreover, although Mr. Steele further testified at the investigative hearing that he was not concerned by the statement, and that Mr. Figgins had followed up the remark with “just kidding,” he wrote in his written statement on the day of the incident that “[t]he first thing that [Mr. Figgins] said to me . . . was that he was stressed out! And thinking about killing somebody!” *Id.* at 828. Further, after noting Mr. Figgins’s remark about “killing somebody,” Mr. Steele also wrote in his written statement that, “I felt that [Mr. Figgins] would be un-SAFE to work with.” *Id.*

Furthermore, after Mr. Figgins was finished at the hospital on January 5, 2013 and returned to Pontiac Yard, he met Officer Slaughter, a railroad police officer for Grand Trunk, to give a statement about the incident. JX 16 at 834; Tr. at 370. In his report, Officer Slaughter noted that Mr. Figgins said, “[h]e is under a lot of stress and remembers saying because of the stress it makes you feel like you want to kill somebody.” JX 16 at 834. Officer Slaughter also noted that upon returning to the interview room after giving an update to another officer, “Mr. Figgins said his earlier statement was not accurate because of the medication and he wanted [Officer Slaughter] to give him [Officer Slaughter’s] notes or shred them.” *Id.*

On the other hand, Mr. Figgins attested at both the investigative hearing and the hearing in this matter that he told Mr. Steele, “[w]ith all this harassment going on around here, I’m surprised someone hasn’t killed someone.” *Id.* at 92; Tr. at 294. However, Mr. Figgins also stated at the investigative hearing that he could understand how “[Mr. Steele] could have misconstrued where [sic] I said killed someone.” JX 16 at 88. Moreover, Mr. Figgins noted at the investigative hearing that he “[didn’t] recall saying that [he] was just kidding [to Mr. Steele].” *Id.* at 92.

Furthermore, Mr. Figgins denied making the remark about “wanting to kill somebody” on the morning of January 5, 2013 to Officer Slaughter, but could not recall whether he told Officer Slaughter to hand over or shred his notes. Tr. at 371-72.

With that said, I cannot determine the exact words used by Mr. Figgins in his remark on January 5, 2013. However, I find that he invoked the notion of “killing somebody” in his remark, and that Mr. Steele took the remark very seriously when he heard it. Although Mr.

Steele testified at the investigative hearing, nearly five months after the incident, that he was not concerned by Mr. Figgins's remark and that Mr. Figgins had followed up the remark with "just kidding," I find that Mr. Steele appeared to be very concerned in the immediate wake of Mr. Figgins's remark.

After hearing the remark, Mr. Steele promptly contacted Mr. Herbeck to express his concerns about Mr. Figgins's unusual behavior. *See* JX 16 at 825. Moreover, Mr. Steele authored a statement that same day in which he noted that "[t]he first thing that [Mr. Figgins] said to me . . . was that he was stressed out! And thinking about killing somebody!" *Id.* at 828. Further, he also noted that, "I felt that [Mr. Figgins] would be un-SAFE to work with." *Id.*

Of critical importance for the purpose of analyzing Grand Trunk's same action defense, the record shows that Mr. Bistis, the Grand Trunk Superintendent in July 2013 who made the decision to terminate Mr. Figgins pursuant to Rule H, also took Mr. Figgins's remark very seriously. *Tr.* at 532.

With regard to Mr. Steele's testimony at the investigative hearing that he was not concerned by Mr. Figgins's remark, Mr. Bistis noted at the hearing in this matter, "I believed that the circumstances that a union leader, to call a manager that concerned is so far from the norm, that never happens . . ." *Id.* at 523. Moreover, when pushed at the hearing in this matter to elaborate even further on the disparity between Mr. Steele's written statement and testimony at the investigative hearing, Mr. Bistis credibly testified at length:

Like I stated, the fact that he called, being a union leader, called a manager, a company manager and made this allegation, extremely rare, extremely not the norm for a union leader to do something like that. If he thought [Mr. Figgins] was joking . . . he would never [have] made that call. Nobody would ever make that call of severity, in my opinion. He made that call, and then he wrote this letter. He wrote . . . five things on the letter, and that was the first thing he said. And he did feel that he was unsafe? I would imagine so. So that's what I took the severity, and in my position, I just didn't have the luxury to get that one wrong. I don't have the luxury to guess if Donny Steele is serious or not serious, or if Mr. Figgins was serious or not serious. I can't get that decision wrong.

*Id.* at 530.

Mr. Bistis also relied on Officer Slaughter's incident report and Mr. Figgins's comments therein when evaluating the seriousness of Mr. Figgins' remark. *Id.* at 531. When asked to testify about how Officer Slaughter's report factored into his assessment of the incident, Mr. Bistis noted, "[t]hat [Mr. Figgins's remark about 'killing somebody'] was really said . . . in my mind, there's no other reason to want your statement back once you've said something like that. If you didn't say it, why would you care? Why would you want it back from the police officer?" *Id.*

For the reasons outlined above, Mr. Bistis ultimately concluded that Mr. Figgins's remark violated Rule H and warranted dismissal. *Id.* at 524-527.

Among other adjectives, Rule H prohibits employees from being “insubordinate,” “quarrelsome,” and “vicious.” *See* JX 54. Mr. Bistis stated at the hearing in this matter that although he knew of employees who had been disciplined pursuant to Rule H for being “insubordinate” or “quarrelsome,” he admittedly had never heard of an employee being disciplined or dismissed for “vicious conduct.” Tr. at 526.

Importantly, however, Mr. Bistis highlighted the unprecedented nature of Mr. Figgins’s remark and testified that he had never previously heard of conduct in which an employee mentioned the notion of “killing somebody.” *Id.* at 527. Further, Mr. Bistis characterized Mr. Figgins’s remark on January 5, 2013, as “unique.” *Id.*

Even Mr. Durfee, the local union chairman and Mr. Figgins’s hearing representative for the Rule G and H investigation, recognized the serious and unprecedented nature of Mr. Figgins’s remark. Mr. Durfee testified at the hearing in this matter that during his time at Grand Trunk, he had never before heard of an employee remark about “killing someone” *Id.* at 437. Moreover, Mr. Durfee testified that he agreed that Grand Trunk rules prohibit employees from making such remarks. *Id.*

The record establishes that on January 5, 2013, Mr. Figgins made a remark in which he invoked the notion of “killing somebody.” Although I cannot determine the exact words that Mr. Figgins used in making that remark, I find that Mr. Steele took the remark very seriously and immediately reported it to Mr. Herbeck. I also find that Mr. Steele, soon after reporting the remark to Mr. Herbeck, drafted a written statement in which he emphasized two things: (1) Mr. Figgins’s remark that he was “thinking about killing somebody,” and (2) his personal belief that Mr. Figgins “would be un-SAFE to work with.”

Moreover, testimony from Mr. Bistis establishes that Mr. Steele’s serious reaction to the incident led Mr. Bistis also to view the matter very seriously when weighing discipline for Mr. Figgins. I find that Mr. Bistis decided to terminate Mr. Figgins pursuant to Rule H because: (1) Mr. Figgins’s remark in the workplace about “killing someone” was unprecedented, and (2) when evaluating the potential threat posed by Mr. Figgins to the workplace, he “just didn’t have the luxury to get that one wrong.”

For these reasons, I find that Grand Trunk has established by clear and convincing evidence that Mr. Bistis would have terminated Mr. Figgins for his remark about “killing someone” on January 5, 2013, absent any alleged protected activity.

Accordingly, because Grand Trunk has successfully established the same action defense, Mr. Figgins’s supplemental claim fails, even if his activity with respect to the use of Xanax on January 5, 2013, is protected under the FRSA.

Finally, although I have already found that Grand Trunk has succeeded in establishing its same action defense with regard to Mr. Figgins’s remark on January 5, 2013, I find that Grand Trunk has failed to establish by clear and convincing evidence that it would have terminated Mr. Figgins pursuant to Rule 1009 for neglecting to void the track authority with an “X” on December 31, 2012.

Grand Trunk argues that independent of any alleged protected activity, Mr. Bistis would have terminated Mr. Figgins pursuant to Rule 1009 for failing to void the track authority with an “X” on December 31, 2012. R. Br. at 21. In support of this argument, Grand Trunk notes that “[e]mployees look for ‘X’ as a conspicuous marker to ensure a relieving crew member does not allow a freight train to occupy a track without authority.” *Id.* at 22. Additionally, Grand Trunk points to Mr. Bistis’s testimony noting that track authorities are “the number one thing when you’re operating on dark territory,” and that he “d[idn]’t know how to stress the importance of track authority.” *Id.*

However, Mr. Bistis testified at the hearing in this matter that had the Rule G and H investigation not existed, he “probably would not have” terminated Mr. Figgins for the track authority violation. Tr. at 554. Further, while noting that it “would be a tough decision,” Mr. Bistis explained that in evaluating Mr. Figgins’s track authority violation, “everything was kind of all rolled into one collective situation that I was thrown into . . . .” *Id.* Mr. Bistis also noted that he “took everything into account,” including all of the evidence at the Rule G investigation for Mr. Figgins’s use of Xanax on January 5, 2013, when he made his decision to terminate Mr. Figgins for the track authority violation. *Id.* at 488.

With that said, assuming that Mr. Figgins’s activity with respect to the use of Xanax on January 5, 2013, is protected under the FRSA, Mr. Bistis admitted by making the statements above that he would not have terminated Mr. Figgins for his track authority violation, absent his protected activity.<sup>20</sup>

Moreover, Mr. Bistis testified at the hearing in this matter that prior to allegedly terminating Mr. Figgins independently for his track authority violation, he had never before heard of an employee being disciplined for violating a “redundancy” of track authority.<sup>21</sup> *See id.* at 498, 507.

---

<sup>20</sup> Mr. Bistis made the statements at issue in his testimony at the hearing in this matter on April 26, 2017. On April 27, 2019, Mr. Bistis was called back to testify a second time and he attempted to recant these statements. When asked why he initially testified that he would not have terminated Mr. Figgins if it was not for the Rule G and H investigation, Mr. Figgins noted, “I took it as if that was the only thing I was dealing with, with not—not having his whole history in the picture. Like Mr. Thompson [Mr. Figgins’s attorney] was asking me that, standalone, would that be something that you would be dismissed for, say with a clean record, and I would not have.” Tr. at 629. Further, Mr. Bistis testified that “given Mr. Figgins’s work record at the time in June 2013,” he would have terminated Mr. Figgins for the track authority violation “regardless of the Rule G and H investigation.” *Id.* However, I find that Mr. Bistis’s efforts in his second day of testimony were insufficient to defeat his statements from day one. On day one, Mr. Bistis clearly noted that had the Rule G and H investigation not existed, he “probably would not have” terminated Mr. Figgins for the track authority violation. Moreover, Mr. Bistis explicitly stated that he took the evidence from the Rule G investigation into account when he made the track authority decision. With that said, I find that nothing about his statements from day one suggests that Mr. Bistis was really discussing the role of Mr. Figgins’s work history more broadly, as he appears to have attempted to suggest in his testimony on day two.

<sup>21</sup> “Redundancies” of track authority refer to the “at least six or seven” individual steps required of Grand Trunk employees to ensure the locomotive’s proper track authority. *See* Tr. at 498-509.

Additionally, although Mr. Bistis testified that both the conductor and engineer of the relieved crew have the joint responsibility to conduct “peer-to-peer” review<sup>22</sup> in order to ensure proper track authorities for the relieving crew, and the relieving crew has the joint responsibility to conduct “peer-to-peer” with the relieved crew to ensure that they have the proper track authorities, Mr. Bistis acknowledged that Mr. Figgins was the only employee charged with discipline in connection with the incident. *See id.* at 498-509.

Further, Mr. Durfee testified at the hearing in this matter that when there are investigations involving track authority rules that apply to both a conductor and engineer, the standard practice is for both employees to be charged. *Id.* at 443-44.

For these reasons, I find that Grand Trunk has failed to establish by clear and convincing evidence that Mr. Bistis would have terminated Mr. Figgins for neglecting to void the track authority with an “X” on December 31, 2012.

### **CONCLUSION**

Considering the foregoing, and on review of the entire record, I find as follows on Mr. Figgins’s initial claim: Mr. Figgins engaged in protected activity because Mr. Tassin expected him to file an FRSA complaint; Grand Trunk took adverse action against Mr. Figgins when it suspended him for 30 days on January 30, 2013; Mr. Figgins’s protected activity was a contributing factor in Grand Trunk’s decision to suspend him; and Grand Trunk demonstrated by clear and convincing evidence that it would have suspended Mr. Figgins absent his protected activity.

Considering the foregoing, and on review of the entire record, I find as follows on Mr. Figgins’s supplemental claim: assuming for the sake of argument that Mr. Figgins was able to demonstrate that his activity with respect to the use of Xanax on January 5, 2013, is protected under the FRSA, Grand Trunk took adverse action against Mr. Figgins when it terminated him on July 1, 2013; Mr. Figgins’s protected activity was a contributing factor in Grand Trunk’s decision to terminate him; and Grand Trunk demonstrated by clear and convincing evidence that it would have terminated Mr. Figgins absent his protected activity.

Therefore, because Grand Trunk has successfully established the same action defense in both Mr. Figgins’s initial and supplemental claims, Mr. Figgins’s claims fail.

---

<sup>22</sup> When asked to define “peer-to-peer” review, Mr. Herbeck stated, “[i]t’s employee engagement as a team, reminding each other of the rules and requirements and keeping each other well of their task to be performed and how they are going to do it, and it’s used to basically open up dialogue between the crew.” Tr. at 88-89.

## **ORDER**

Accordingly, it is **HEREBY ORDERED** that Mr. Figgins's complaints against Grand Trunk under the FRSA are **DISMISSED**.

**SO ORDERED.**

**PAUL R. ALMANZA**

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions, or orders to which you object. You may be found to have waived 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, 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, 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).**