

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 September 2015

Case Number: 2014-FRS-00057

In the Matter of

CURTIS HOLMQUIST
Complainant

v.

WISCONSIN CENTRAL RAILROAD
d/b/a CANADIAN NATIONAL RAILWAY (CN)
Respondent

and

BRIDGET A. BRINE
Party-in-Interest

Appearances:

David E. Schlesinger, Esq.
Nicholas D. Thompson, Esq.
Nichols Kaster, PLLP
Minneapolis, Minnesota
For the Complainant

Susan K. Fitzke, Esq.
Jessica J. Schroeder, Esq.
Littler Mendelson, P.C.
Minneapolis, Minnesota
For the Respondent

Before: Stephen R. Henley
Administrative Law Judge

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRSA” and “Act”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. Part 1982. Jurisdiction for this case is vested in the Office of Administrative Law Judges (“OALJ”) by this statute, under subsection 20109(c)(2)(a), which applies the rules and procedures set forth in 49 U.S.C. § 42121 (b), relating to whistleblower complaints under the Aviation Investment and Reform Act for the 21st Century, known as “AIR 21.”

In general, Section 20109(a) of the Act prohibits a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because (s)he: a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, or gross fraud, waste, and abuse of federal grants or other public funds intended to be used for railroad safety or security, if the information is provided, to a federal, state, or local regulatory or law enforcement agency; any member of Congress; or person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; c) filed a complaint related to the enforcement of provisions of the Act; d) notified the railroad carrier or the Secretary of Labor of a work-related personal injury or work-related illness of an employee; e) cooperated with a safety or security investigation relating to any accident or incident resulting in an injury or death to an individual or damage to property occurring in connection with railroad transportation; or f) accurately reported hours on duty pursuant to 49 U.S.C. Chapter 211.

Additionally, Section 20109(b) prohibits a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because (s)he: a) reported in good faith a hazardous safety or security condition; b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures unless the condition is corrected immediately, or the equipment, track, or structures are repaired properly or replaced; and c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the act prohibits a railroad carrier, or an officer or employee of a railroad carrier from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician, except a railroad carrier’s refusal to permit an employee’s return to work following medical

treatment shall not be considered a violation of the Act if the refusal is pursuant to the Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

Procedural History

Curtis Holmquist ("Complainant") began working for Wisconsin Central ("Respondent" or "CN"), or one of its predecessor railroads, in 2000.¹ He has held a variety of positions, including maintenance, trackman, machine operator and foreman and is currently a structures carpenter in Respondent's Duluth, Minnesota docks. (Tr. 138; 185-87; 236). On July 9, 2012, Complainant was ordered to act as an Employee-in-Charge ("EIC") of a rail grinding train. He had never piloted a rail grinder prior to this date. After the shift, Complainant called his supervisor, Tony Hardy, and left a message for him that he did not feel comfortable or safe piloting the rail grinding train and asked him to get someone else. Respondent subsequently disqualified Complainant from holding any CN positions requiring him to act as an EIC, not just those piloting rail grinding trains. Complainant thereafter filed a complaint with the Secretary of Labor on January 28, 2013, later amended on October 29, 2013, alleging Respondent violated the Act by disqualifying him as an employee in charge because of his refusal to carry out orders for which he is not or did not believe himself to be qualified.² Following an investigation, the Secretary, acting through his agent, the Area Director for the Occupational Safety and Health Administration (OSHA), dismissed the complaint on February 10, 2014 as untimely filed. (ALJX-1; RX 24).

Complainant timely appealed to the Office of Administrative Law Judges ("OALJ") (ALJX 2) and the case was assigned to the undersigned on March 10, 2014. After one continuance, a *de novo* formal hearing was held in St. Paul, Minnesota on September 9-10, 2014. All parties were present and the following exhibits were received into evidence: Administrative Law Judge Exhibits ("ALJX") 1-9 (Tr. 5);³ Complainant's Exhibits ("CX") 1-6, 8-30 and 32⁴ (Tr. 460) and Respondent's Exhibits ("RX") 4-22, 24-33, 38-40, 41⁵ (Tr. 538, 541). Eleven witnesses, including Complainant, testified at the hearing.

¹ Wisconsin Central Railroad is a freight carrier operating primarily in Minnesota and Wisconsin acquired by the Canadian National Railway ("CN") in 2001.

² Complainant initially alleged that his supervisor notified him on July 9, 2012 that he was disqualified from all jobs that required or could require him to obtain track time or other Road Worker Protection ("RWP") authority. Complainant submitted "this extreme and groundless restriction has eliminated the vast majority of jobs and work for which [he] is eligible." On October 29, 2013, Complainant filed an *Amended Complaint* alleging that the disqualification from all jobs requiring track time or other RWP authority was not an immediate disqualification from all employee in charge ("EIC") positions within the company but rather constituted evidence of an intent to disqualify, which did not occur until receipt of the disqualification letter on July 31, 2012. Complainant subsequently testified that the first he learned anything about being disqualified was on July 31, 2012. This is consistent with Respondent's evidence.

³ On May 6, 2014, Respondent moved to dismiss the complaint arguing it was untimely as the alleged adverse action occurred on July 9, 2012, over 200 days before the complaint was filed with OSHA on January 28, 2013. On July 21, 2014, I issued an order denying Respondent's motion to dismiss (ALJX 5) finding a genuine factual dispute as to when Complainant received notice of the adverse action. On August 7, 2014, Respondent moved for summary decision, submitting there is no evidence of a protected activity or, if so, no connection to the alleged adverse action. On September 3, 2014, I denied the motion as there again appeared to be a genuine factual dispute whether Respondent engaged in a retaliatory act in July 2012. (ALJX 7).

⁴ CX 32 was subsequently withdrawn. (Tr. 540).

⁵ Jointly marked as CX 33.

The parties were granted leave to file post-hearing briefs. Complainant and Respondent filed their respective briefs on December 4 and 5, 2014, and reply briefs on December 15, 2014. Supplemental briefs were submitted on March 30, 2015,⁶ April 14, 2015⁷ and April 21, 2015.⁸ The parties' briefs and the testimonial and documentary evidence submitted at trial were considered in rendering this decision.⁹

⁶ Respondent filed a copy of another ALJ's March 15, 2015 decision in *Hunter v. CSX Transportation Inc.* (2014-FRS-00128)(Mar. 24, 2015) dismissing an FRSA complaint finding that Complainant did not engage in protected activity under section 20109(b)(1)(A) because his "hazardous condition" was "beyond work-related safety conditions under the rail carrier's control."

⁷ Complainant's April 14, 2015 responses were two letters. The first argued *Hunter* can be distinguished on its facts. The second discussed the ARB's recent decision in *Powers v. Union Pacific Railroad Co* explaining what plaintiffs must prove to establish a prima facie case and submits that Respondent's reliance on *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014) is misplaced and does not stand for the proposition that the 8th Circuit has "specifically rejected the [ARB's] contributory factor analysis" and Complainant need not prove retaliatory intent.

⁸ Respondent's April 21, 2015 reply again submits that this court should follow the analysis set forth in *Hunter* and find that the alleged hazardous conditions in this case were beyond the rail carrier's control.

⁹ Complainant filed the instant retaliation complaint on January 28, 2013; he amended it on October 29, 2013. On November 4, 2013, while this complaint was pending, Complainant and his spouse filed for chapter 7 bankruptcy (*In re Holmquist*, No. 13-50951 (ECF No. 1. (Bank. D. Minn. Nov. 4, 2013); and Bridget Brine was appointed chapter 7 trustee. Complainant did not disclose the instant FRSA complaint on his bankruptcy petition. As Ms. Brine did not find any assets to liquidate, Complainant and his spouse received a discharge on February 4, 2014. OSHA dismissed the retaliation complaint on February 10, 2014. Complainant appealed on February 19, 2014 and the matter was assigned to me on March 10, 2014. On August 26, 2014, Complainant made a specific demand to settle this matter. On September 5, 2014, the Bankruptcy Court granted Complainant's motion to reopen his case and disclose the instant retaliation complaint, with an \$11,095.00 exemption if assets were recovered. On September 9, 2014, the retaliation complaint proceeded to hearing. Neither Complainant nor his counsel notified this Court or Respondent's counsel that Complainant had previously filed for bankruptcy, that he received a discharge or that the Bankruptcy Court granted his request to reopen his case. The first time this court was made aware of the bankruptcy was on May 26, 2015, when Complainant moved to join the Trustee as a necessary party. Complainant's current counsel, Mr. Thompson, now avers that the bankruptcy trustee has retained him to represent her in the instant matter as she has an interest in the action. Respondent objected to the joinder motion in writing on June 14, 2015 submitting, in part, that "Not only had Holmquist filed for bankruptcy and obtained a no asset discharge in February 2014, after failing to disclose his claims against [Respondent] on his bankruptcy petition, leaving him with no interest in his claims, but he litigated this matter for months thereafter, all the while concealing this fact from [Respondent]. Holmquist and his counsel also concealed that Holmquist had his bankruptcy estate reopened on September 6, 2014, for the sole purpose of disclosing the [instant matter] to the bankruptcy court. Holmquist and his counsel, however, continued to deliberately withhold this highly relevant information from [Respondent] and this court, and without standing or authority to do so, went to trial on claims that Holmquist did not own. Holmquist's deception, which is consistent with his pattern of self-serving dishonest behavior, and his counsel's shocking lack of candor have impermissibly damaged [Respondent], and impugned the integrity of the forum. [Respondent] adamantly opposes Holmquist's motion to join a party, and requests that this claim be dismissed in entirety because Holmquist's claims are judicially estopped, he lacked standing to try them, and, as a result of his shocking lack of candor and misrepresentation to the court." Complainant replied on June 29, 2015 asserting, in part, that his failure to disclose this retaliation claim was inadvertent and he subsequently disclosed, curing any defect. Complainant submits that when "respondent's rhetoric is pushed aside and the facts and law are viewed dispassionately, it is evident that Holmquist and his counsel complied with the rules of this court and the law." And "if Holmquist and his lawyers had the bad intentions Respondent ascribes them, they would never have disclosed the mistake (either to the bankruptcy court or this Court)."

I need not rule now on that part of Respondent's motion to dismiss based on lack of standing and judicial estoppel as I find the instant complaint should be dismissed on the merits. I also need not determine now whether Complainant's apparent lack of candor towards this tribunal was inadvertent or intentional. Should circumstances

Positions of the Parties

Complainant. Complainant started with one of CN's predecessor railroads on May 16, 2000. He did not have any major problems until Tony Hardy became his supervisor in 2009. With little railway experience under his belt, Hardy emphasized productivity over safety. On July 9, 2012, Hardy told Complainant to pilot a rail grinding train,¹⁰ something Complainant had never done before. Complainant did his best but determined it was more than he could handle. Consequently, after the shift, Complainant called Hardy and asked that he get someone else to pilot the rail grinding train for the next day's shift, reiterating his discomfort in acting as an employee in charge ("EIC") of a rail grinding train. However, Hardy ordered Complainant to pilot the rail grinder. Complainant declined and called a CN risk management official, who informed him that he had made a good-faith challenge and that someone else would be found to pilot the train. CN management subsequently accepted Hardy's recommendation that Complainant be disqualified from being an EIC for all track positions because of his refusal to pilot the rail grinding train. Contemporaneous with the disqualification, Complainant's Vac-Track helper position was abolished. Because of the disqualification, Complainant was unable to get track authority for any other position. The only job he was qualified for, that did not require moving more than 100 miles away, was at the Duluth, Minnesota docks, which did not require EIC authority but paid at least the same wage.

Complainant asserts his 2012 disqualification for all track authority positions was in retaliation for exercising his rights under the FRSA for refusing to be an EIC on a rail grinding train because he felt unqualified. Given that CN has now withdrawn the EIC disqualification letter from all appropriate personnel files, Complainant has withdrawn his request that CN be ordered to reinstate his EIC rights and remove the disqualification from the records. Complainant has also withdrawn his request for back pay with interest. (Tr. 544). Complainant now seeks \$100,000.00 compensation for emotional distress and other compensatory damages and \$250,000.00 in punitive damages. (Tr. 546). *Complainant's Post-Trial Memorandum of Law*, dated June 16, 2014, at pages 14-17.

Respondent. On July 9, 2012, Complainant was asked to pilot a rail grinding train, something he was capable of doing given he was trained and qualified on all rules required to properly obtain track authority. He did, and was asked to pilot the rail grinding train again the next day, July 10, 2012. Despite his training and experience, Complainant told his supervisor that he did not feel safe, comfortable or qualified to obtain track authority for a rail grinding train. He was then informed by his supervisor that another employee would perform the assignment. Because Complainant said he did not feel safe, comfortable or qualified to obtain track authority piloting a rail grinder, Respondent took the safer course of action and disqualified Complainant from holding any position that would require him to perform this task, not just piloting a rail grinding train. Complainant did not engage in protected activity in this case. Even if he did, there is no

change such that I am required to reach such a finding, I will do so at that point and Complainant may be asked to explain why he did not notify this Court at the September 9, 2014 hearing that the the Bankruptcy Court granted his motion to reopen his case to add the instant complaint on September 5, 2014. However, I agree with Complainant that there appears to be no compelling reason not to grant his motion to join the trustee. Accordingly, said motion is hereby GRANTED. Bridget A. Brine, Trustee is joined as a Party-in-Interest.

¹⁰ Rail grinding trains ride along the track and grind down them down increasing the rail's life by reducing the friction between the rail and the train. (Tr. 305-06).

connection between the protected activity and discipline imposed. Even if there is such a nexus, CN would have taken the same action, regardless of the protected activity. Finally, even if he prevails, Complainant has presented no evidence he has suffered any emotional distress related to this claim and he is not entitled to punitive damages. Post-Hearing Brief of Respondent CSX Transportation, Inc., dated June 16, 2014, at pages 12, 18.

Timeliness of Complaint

On January 28, 2013, Complainant filed a complaint with OSHA, amended on October 29, 2013, alleging Respondent violated the FRSA by disqualifying him as an employee in charge because of his refusal to obey an order for which he was not or did not believe himself to be qualified.

Respondent contends that the claim is time barred because Complainant was told on July 9, 2012 of Respondent's intent to disqualify him from holding positions requiring EIC authority.¹¹ Respondent submits that Complainant did not file his complaint within 180 days after notification of this adverse act. Complainant submits that his direct supervisor, Mr. Hardy, did not tell him on July 9 or 10 of his intent to disqualify him; rather, it was in a July 26, 2012 letter from CN management. Complainant submits the first time he learned of the disqualification was when he received the July 26, 2012 letter on July 31, 2012. This testimony is consistent with Mr. Hardy's testimony that he did not tell Complainant on July 9 or 10, 2012 that he was seeking or intended to seek his disqualification from all positions requiring track approval authority. (Tr. 68). I find Complainant learned of the adverse action, namely the notice of intent to disqualify, on July 31, 2012.

The statute of limitations to file a complaint is 180 days from when the adverse action allegedly occurred.¹² The period runs from the date the employee receives final, definitive and unequivocal notice of the discharge or other discriminatory act. *Corbett v. Energy East Corp.* (ARB No. 070044, Dec. 31, 2008).

Since neither the statute, the implementing regulations, nor an executive order establishes the method for computing the 180 day limitation period for filing a complaint under the Federal Railway Safety Act, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 then in existence are applicable.¹³ See 29 C.F.R. § 18.1(a).

If the 180th day is a Saturday, Sunday or holiday, the period does not expire until the next business day. *Gladitsch v. Neo@Ogilvy*, No. 11-CIV-919 (SDNY May 21, 2012). Thus, where a complainant filed his FRSA whistleblower complaint on the 181st day following his

¹¹ Complainant's initial complaint alleged "The next day [July 10, 2012], Hardy [complainant's supervisor] told Complainant of his intent to disqualify him.

¹² See 49 U.S.C. 20109(d)(2)(A)(ii).

¹³ On May 19, 2015, the United States Department of Labor published a Final Rule implementing revised Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. See Final Rule, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 80 FED. REG. 28,767 (May 19, 2015) (hereafter "New Rules"). The effective date and compliance date for these revised rules is June 18, 2015, 80 FED. REG. at 28,768.

discharge, but that day was a Monday, the complaint was timely since 29 C.F.R. § 18.4(a) moves the time period to the next business day where the last day of the period is a Saturday, Sunday or legal holiday observed by the Federal government.

Complainant had to file his retaliation complaint on or before January 27, 2013, which is within 180 days of learning of his disqualification on July 31, 2012. However, January 27, 2013 was a Sunday. Given the first business day was January 28th, the day Complainant filed his complaint with OSHA, I find the instant complaint timely filed.

APPLICABLE LAW

The FRSA, under which Mr. Holmquist brings his claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *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. § 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” motivating the respondent to take 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 action. *See Menefee v. Tandem Transportation 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)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action,¹⁴ and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under the FRSA, Mr. Holmquist must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) CN knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.¹⁵

¹⁴ An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l Railroad 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 Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

¹⁵ Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly reiterated that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr.

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 Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).¹⁶

Issues

Did Complaint engage in a protected activity when he reported to his supervisor on or about July 9, 2012 that he did not feel safe piloting a rail grinding train and refused to be an EIC on a rail grinding train on or about July 10, 2012 after being ordered by his supervisor to do so?

If so, did he suffer an adverse employment action when Respondent disqualified him from being an employee in charge involving all jobs requiring track time or other roadway worker protection authority?

If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent’s decision to disqualify him as an employee in charge, i.e. was it a factor which, alone or in connection with other factors, tended to affect in any way the outcome of its decision?

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?

If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

Joint Stipulations

The parties, by their joint oral stipulation, agree to the following undisputed facts:

Complainant makes no claim for lost wages or per diem damages. (Tr. 132-33).

30, 2013). *See also Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis).

¹⁶ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed.Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). *See also Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011), at 31-32 ; *see also Kudak v. BNSF Railway Company* 2014 U.S. App. LEXIS 19099 (8th Cir. Oct. 7, 2014)(“[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

Summary of Testimony¹⁷

Tony Hardy (Tr. 38-114)

I started working for Wisconsin Central in January 2007. (Tr. 39). Before that, I was a team leader at FedEx. Canadian Northern (CN) is the parent company of Wisconsin Central. In July 2012, I was promoted to track supervisor. I left Minnesota in August 2013 when I was transferred to British Columbia, where I am still a track supervisor for CN. (Tr. 41). I worked with Mr. Holmquist and viewed him as an “okay” employee. (Tr. 42). In my deposition, I agreed that Mr. Holmquist was a good employee. I have been trained on protected activities under the FRSA. I know that reporting a safety condition or violation is protected activity under the FRSA as is refusing to work under hazardous safety or security conditions. (Tr. 45-46). I agree that an employee has the right to challenge an order he believes is unsafe. That is called a good-faith challenge. (Tr. 47). WC has a policy that it will not retaliate against an employee who makes a good-faith challenge.

A grinding train is a train that has a piece of equipment that grinds overflow off a rail. WC contracts out for use of a grinding train, either by the hour or by the day. On July 9, 2012, I instructed Mr. Holmquist to pilot a grinding train. I was asking him to get track authority. (Tr. 49). CX 27 appears to be a note by Mr. Holmquist that says “took train from Twig to Steelton, got done 8 p.m., left Tony a message. Please find someone else.” I told him to pilot the grinding train on July 10, but he told me that he did not feel comfortable providing protection for the rail grinding train in unfamiliar territory. (Tr. 51-53). I told him that “Curt, yeah, you do know the territory.” So I told him to get over here and pilot the grinding train. After I told Mr. Holmquist to get over here and pilot the grinding train, I got a call from Mr. Hunt; he is from risk mitigation. (Tr. 54-55). Mr. Hunt told me that he just got a call from Mr. Holmquist who told him that he didn’t feel safe piloting the grinding train. (Tr. 55). I didn’t consider this a good-faith challenge, although I did agree that it was in my deposition. (Tr. 56). RX 25 is a copy of the Respondent’s On-Track Safety Rules including Rule 805 that deals with good-faith challenges. It says that “Any employee has the right to refuse any directive to violate an on-track safety rule, and promptly notify their supervisor when the safety provisions to be applied at the job site do not comply with CN rules.” (Tr. 57). But the rule says, “refuse a directive to violate the on-track safety rules.” I did not ask him to break a rule. (Tr. 58). But I do think it is not consistent with the rules for Mr. Holmquist to be piloting a rail grinding train and obtaining track authority if he didn’t feel comfortable with it. But all I did was ask him to do a task. When he said he wasn’t comfortable doing it, I got someone else to do it. So I didn’t force him to do the job that he said he was unsafe doing. (Tr. 58).

Rule 805 also says that “if an employee making the challenge is still not satisfied that the on-track safety procedures are in compliance, the next level supervisor will be contacted.” (Tr. 60). That is when I contacted Mr. Bjork, about 30 minutes after Mr. Holmquist said he wasn’t comfortable piloting the train. I recommended to Mr. Bjork that Mr. Holmquist be disqualified from being an employee in charge. (Tr. 61). After that, I had no further discussion with Mr. Bjork about the subject of disqualifying Mr. Holmquist from being an employee in charge. I

¹⁷ The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

don't think CN disqualified Mr. Holmquist because he made a good-faith challenge. But I admit in my deposition I said, "yes" to the question "Did CN disqualify Mr. Holmquist for making a good-faith challenge?" (Tr. 62). I eventually got someone else to pilot the rail grinding train. I don't remember how long the train was idling. I subsequently handed Mr. Holmquist a letter of disqualification. (Tr. 63; CX 2). It is dated July 26 and says, "this letter is to inform you that you are disqualified from holding a position which requires you to be the Employee in Charge. This disqualification is a result of your request to Lance R. Hunt, Risk Mitigation Officer, to be removed from your current position as Trackman/Vac Truck Helper." I agree that is wrong. Mr. Holmquist never asked to be removed from his position as a Trackman/Vac Truck Helper. (Tr. 64). But I did not write this letter and did not read it before I printed it off and gave it to Mr. Holmquist. Other than telling me that he didn't feel comfortable getting track authority in a particular area on the rail grinding train, Mr. Holmquist never told me that he felt uncomfortable getting track authority in any other situation. (Tr. 66). Exhibit 27 is Mr. Holmquist's calendar and it shows that I gave him the disqualification letter on Tuesday, July 31. Before giving him this letter, which I had not read beforehand, I had not told him that I was going to disqualify him. (Tr. 68). I found out he was being disqualified when I gave him the letter. Mr. Holmquist responded to me the same day. He said he did not feel comfortable signing the letter.

An "employee in charge" (EIC) provides protection for a work group or for himself. (Tr. 70). A person can stand at the side and watch for trains or traffic to notify the crew of something that is coming their way. Track authority is protection on the rail. You get it by calling the RTC, which is the rail traffic controller. You can do that on a computer or by the radio. I am not aware offhand of any other employee who has lost employee in charge rights. But it is my testimony that being disqualified from being an EIC is not a negative thing. (Tr. 71). It is a safety concern. If an employee does not feel comfortable or safe doing a certain job on a regular basis on the railroad, it is our duty to make sure he is not put in that situation. (Tr. 71). But after receiving the EIC disqualification, Mr. Holmquist could not work a lot of the jobs he had been working before. Mr. Holmquist only told me he did not want to get track authority for the grinding train; he did not tell me he had a problem getting track authority every day.

A job abolishment means you move positions around to support the work force. Essentially it means that the railroad has too many people working in a particular area and we abolish some of their jobs and move them elsewhere. In July 2012, I could recommend that jobs be abolished. (Tr. 73).

In July 2012, I received a promotion to track supervisor. (Tr. 79). I would pretty much plan the work day, different projects, changing rail, changing ties, everything to keep the railroad safe. The area I was responsible for was part of Superior Sub and a small portion of Proctor. The railroad has a policy that we don't retaliate against someone who raises a safety concern. Mr. Holmquist wasn't disqualified for using a good-faith challenge. He was disqualified for saying he didn't feel comfortable for providing protection in unfamiliar territory using track authority. (Tr. 82-83). I don't believe what Mr. Holmquist did, with regard to objections to piloting the rail grinding train, was a good faith challenge as defined in the on-track safety rules. (Tr. 83-84; Exhibit 25). EIC is defined as a rules-qualified employee that is providing on-track safety for a roadway worker, roadway worker group, or other employees. (Tr. 85).

RX 6 is a June 11, 2012 job abolishment notice for Mr. Holmquist for the proctor bucket gang, a position under my supervision. In July 2012, his normal assignment or position was a Vac Truck Helper. He would assist the Vac Truck on the rail, cleaning up. RX 13 is an abolishment notice for Curt Holmquist for the vac truck helper position. It was abolished in July 2012 and we added a vac truck position with a class B license. We had 5 other abolishment notices come out at the same time. (Tr. 91). Mr. Holmquist's objections to piloting the rail grinding train did not have anything to do with abolishing the Vac Truck Helper position.

The first time I asked Mr. Holmquist to pilot the rail grinding train was on July 9 and I asked him on the phone and he said, "okay." He then took the rail grinding train from Twig to Steelton. I think he tied up in Steelton. I did not speak to Mr. Holmquist on the evening of July 9 after the train had been tied up. The next time I talked to him was the next day when I called him and said, "Curt, I need you to pilot the rail grinding train the rest of the way on the Steelton Sub – I mean the Superior Sub." (Tr. 94). Mr. Holmquist told me he thought it was unfamiliar territory. I told him, "You've been working here 14 years, this is your area. You have been here 14 years, you know this area." Mr. Holmquist told me that "he didn't feel safe and comfortable piloting the grinding train and getting the track authority." (Tr. 95). So I told him, "Well, no worries, I will get somebody else to do it." I did, and we only had about an hour delay. After I got off the phone with Mr. Holmquist, I got a call from Lance Hunt, from risk mitigation. He said that "I got a call from Curt who said he didn't feel safe and comfortable on the rail grinding train. Don't let him do it today." I called Dan Bjork and said, "Curt just piloted the rail grinding train the day before and he said he don't feel safe and comfortable doing it today." I said "If he don't feel safe giving the track authority out of the rail, I think we ought to disqualify him from being an employee in charge. (Tr. 98). Once Mr. Holmquist said he didn't feel safe and comfortable providing track authority on the rail, I thought it was a good idea to disqualify him as Employee in Charge because of safety reasons and concerns. When you are on the rail, you got lives at stake and "if he didn't feel safe and comfortable doing that, it was for his advantage, and the other employees and general public, that we disqualify him from employee in charge." (Tr. 99-100).

Mr. Holmquist did not talk to me about any fires the rail grinding train had been causing or any concerns that he might have regarding missing tools to measure the mill of the rail. He did not raise any concerns that rail traffic control wanted someone with a computer to be grinding and obtaining the right authority for the rail grinding train. Employees still use the radio to get track authority. Mr. Holmquist did not ask me any questions or clarify what was required of him in terms of piloting the rail grinding train. Mr. Holmquist did not tell me that he thought piloting the rail grinding train would be in violation of any law, rule or regulation. (Tr. 102). RX 15 is the letter Mr. Holmquist put under my door.

I am telling the court that I pretty much told Mr. Holmquist after he told me he wasn't comfortable piloting the rail grinding train, "no worries, I will let somebody else do it." (Tr. 106). I admit I never mentioned this in my deposition.

Holmquist did not lose any money by changing jobs. [RX 33]. According to his W-2s for 2010-2013, he earned the following from CN:

2010 - \$53,277.49
2011 - \$53,114.49
2012 - \$53,708.99
2013 - \$57,325.63

Michael W. Nagle (Tr. 114-143).

Before I retired on May 30 of this year after 39 years of service, I worked in the track department at Wisconsin Central. I was also general chairman of the union. I pretty much did everything during my time with the railroad, from trackman to welder to foreman to track inspector, machine operator and truck driver. I was general chairman of the union in July 2012. I spoke to Mr. Holmquist at that time about a rail grinding train. He called me saying he was out on the rail grinding train and had issues with the RTC getting on his case a bit about not having a computer to do track authorities. He didn't feel comfortable on that, felt like he was having to do foreman duties and basically did not feel qualified as a foreman. I told him he could make a good-faith challenge. (Tr. 116, 120).

To be an employee in charge, you have to have on-track protection. That allows you to get track authorities and protect yourself or other people. When he spoke to me, it was the first day he was piloting the grinding train and said he didn't feel comfortable. I remember he called me again and said that they had given him a letter to sign disqualifying him from employee in charge positions. I told him not to sign the letter. (CX 2). I remember telling him on the day he called me about having trouble on the grinding train that if he felt unsafe, he could make a good-faith challenge. That means if someone is telling you to do something that you do not feel is proper protection or a rule violation, you can make a good-faith challenge on that. The employee can go to the supervisor and tell them that they do not think it is safe. If they can't resolve it, they then go up to the next supervisor until the issue is resolved. The reason I told him not to sign the letter is because in order to disqualify on something, he would have a right to a hearing, unless he voluntarily signed a waiver to a hearing. (Tr. 122). Rule 31 of the collective bargaining agreement says that if you are going to discipline an employee, they are entitled to an investigation. (CX 15). In my opinion, disqualifying Mr. Holmquist was discipline and he was entitled to an investigation, where he would have the right to testify and call witnesses on his behalf. The reason I thought it was discipline is that it was taking away his ability to use his seniority, because he couldn't work on the track in the positions that he had generally held prior to the disqualification. CX 19 is a grievance I filed on Mr. Holmquist's behalf. We never actually had the investigation. Mr. Holmquist's case was discussed at our labor-management resolution committee in November 2012. At that conference, there was an agreement to remove the letter from Mr. Holmquist's file. I called Mr. Holmquist after the meeting and told him that they had agreed to take it out of his file.

When Mr. Holmquist called me and said that he was being asked to pilot the rail grinding train, I told him that he was going to have to pilot the train unless he could show that it would be unsafe for him to do so. (Tr. 135-6). You don't have to work as an employee in charge to be

qualified on the on-track safety rules. Holmquist is currently a structures carpenter on the Duluth, Minnesota docks. Being disqualified as EIC prevented Mr. Holmquist from doing the types of jobs he had been working the entirety of his career on the tracks. (Tr. 139).

Jackie Demski (Tr. 143-183)

I am a workforce coordinator for CN. When there is a vacant position, the track supervisors or senior managers will instruct me to put the position on the bulletin. Per union agreement, union members have seven days to bid on the position. I collect the bids and award it accordingly to the most senior member who bid, provided they have the required qualifications. (Tr. 145). While I am actually employed by Illinois Central, we refer to ourselves as CN. I also oversee employees that are at Wisconsin Central. Occasionally, the supervisors or managers will decide that a position or gang is no longer needed so per union agreement, we need to give the employees written notification that their position is being abolished. They then have seven days to decide where they are going to displace to or bump. So, essentially, the employee who loses his or her job has to bid for a new job. Some of the positions require that you be an employee in charge, or "EIC." I knew that Mr. Holmquist had been disqualified from being an EIC, as I typed up the disqualification letter. (CX 2). I emailed it to Mr. Hardy to give to Mr. Holmquist. (CX 24).

I met with Mr. Hardy on July 10, 2012 and took notes. (CX 30). Mr. Hardy told me to abolish 6 positions. (Tr. 151). The last position is the one that was added, Curt Holmquist. Mr. Hardy told me he was abolishing Mr. Holmquist's position because there are 2 positions assigned to the Vac Truck gang, one being the helper and the other an operator. Due to the operator always being available, the decision was made to abolish the helper position, which essentially could not operate the Vac Truck, and create a second position as an operator of the Vac Truck. July 10 is the first time this qualification was added to that position. I have been with CN for 27 years and I don't recall a time when the Vac Truck Helper position was not in existence. (Tr. 153). While the Vac Truck Helper position did not require a B license, the Vac truck operator position did and Mr. Holmquist lost his position. He then had to bid on a new position. I sent an email to Rick Hasbrouck asking if Mr. Holmquist could displace a junior employee. (CX 16).

A labor-management conference was held in February 2013. I was present. The railroad agreed to remove the disqualification from Mr. Holmquist's personnel file. (Tr. 159). I never told Mr. Holmquist the disqualification had been removed and I don't know if anyone else did either. Until my deposition in this case, the letter had only been removed from one of three files, the one Mr. Holmquist could see. It had not been removed from two of the files in the computer system that I see showing the qualifications needed to bid for a position. This was just an oversight on my part. (Tr. 160). It did not impair Mr. Holmquist's ability to get a better position with the railroad because I was at the labor management conference so I knew the letter had been withdrawn. But Mr. Holmquist never actually bid on any positions. We eliminated the Vac Truck Helper position and created a second operator position. EX 5 is the April 9, 2012 abolishment notice for the Trackman position on the Proctor Bucket Gang #1, held at the time by Curt Holmquist. EX 6 is the June 11, 2012 abolishment notice for the Proctor Bucket Gang #1. EX 9 is the action that Mr. Holmquist made going from loader operator to the trackman Vac

Truck Helper position on July 2, 2012. EX 10 is the list of jobs Mr. Hardy told me to abolish and EXS 11 is the position Mr. Hardy was directing me to bulletin. (Tr. 171). EX 16 is the staff action for Mr. Holmquist effective July 31, 2012 going from Vac Truck Helper on the lake zone to trackman position on section Gang Proctor #2. EX 14 is the disqualification notice for Mr. Holmquist. EX 17 is a bid form for Mr. Holmquist for the Structures Carpenter position in Duluth and EX 20 is the final award list [dated August 10, 2012] showing Mr. Holmquist was awarded the Structures Carpenter position.

Curtis Holmquist (Tr. 183-302)

I am 40 years old. I started working with the railroad on May 16, 2000. I stopped going to high school in 1990 or 1991 and I delivered furniture for a couple years. I laid carpet then went to the railroad. I have been married for 10 years, but am currently going through a divorce. (Tr. 185). We separated in July 2013. We have a boy, age 9 and a step-daughter, age 16. Before the events in question, I had been just about everything on the railroad, except an inspector. I was a machine operator, foreman, trackman, section man, on the bucket gang and a Vac Truck helper as well. Before the events in question, I had never worked on the docks. There is a lot of iron ore dust and it gets in your ears, eyes, mouth and nose. It is just a dirty place to work. So even though I could have bid on jobs at the dock before July 2012, I did not want to work there.

CX 10 is my 2008 performance review. My supervisor said, “uses safe work practices” and “works well with others.” I received a “skilled railroader” rating. CX 9 is my 2009 performance review. Mr. Hardy rated me and said, “Curt gets along very well with others.” I was again given an overall rating of “skilled railroader.” (Tr. 192). CX 8 is my 2010 performance review. There is a comment that says, “works well with his co-workers.”

When I first met Mr. Hardy, I was at Proctor Section. He stood in front of us and getting to know him. He said, “There’s a new sheriff in town” and set off a precedence of being dominant over us. (Tr. 195). He would point at his eyes and at us, like “I’m watching you.” He would say, “You’re wasting my time and money.” He would pull up at a job and just stare at us until the job was done. He would say things like “90% of the women in Duluth are ugly.” I told Mr. Bjork who said he was green and would work on him.

Track authority is where you get protection so the segment of track you are on doesn’t have other trains on it. EIC provides protection on the tracks. Before July 2012, I had made what I thought was a good-faith challenge. (Tr. 198). Then, in July 2012, Tony Hardy instructed me to pilot a rail grinding train. (RX 20). Before that day, I had never been on one before. I kept a calendar and wrote notes from time to time because of the unprofessional acts by Mr. Hardy. (CX 27).

My experience piloting the grinding train on July 9 was that it was loud, mayhem, debris, fires, tripping hazards. I requested track authority on the 9th both by radio and phone. The RTC preferred computer because it made his job easier. (Tr. 205). I had never been trained on a computer. After finished on July 9, I called and left a message for Mr. Hardy asking him: “Can you please find somebody else, preferably a foreman with a computer, because that is what they

wanted.” I also wrote in my calendar “took train from Twig to Steelton. Got done at 8 p.m. Left Toney message, ‘please find someone else to go with it.’”

I knew that Mr. Hardy wanted me to pilot the grinding train again on July 10 because he had mentioned it the day before. That is why I left him the message on the 9th. On the 10th, I was with Mr. Joe Jahoula when Mr. Hardy called and told me to “get my ass down to Steelton Yard and pilot that train.” I said, “I don’t feel qualified” and “I am not comfortable on doing the grinding train,” - because he wanted the whole Superior Sub done and I didn’t know the whole Superior sub. I told him my concerns and he said, “You have been here long enough, you should know the whole Superior sub.” I said, “Tony, these are different railroad combined into one and I haven’t been much further than past Pokey.” He said, “Just do it. You got a radio. Just do it. Get your ass down there and do it.” I went back into the section building and called from a phone and told him again that “I don’t feel comfortable or qualified to do this job, Could you please find somebody else.” He said, “Curt, just do it.” I then called Mr. Lance Hunt and told him my situation. He said, “Don’t worry about it. It is called empowerment and it is a good faith challenge.” He then said, “Give me five minutes to make a call.” He got back and told me to go back to the section, they are going to find someone else to pilot the grinding train. I did not speak to Mr. Hardy again on the 10th. I never told Mr. Hardy that I had a problem requesting track authority related to any other job duties than working on the rail grinding train. (Tr. 213). My concern was related specifically to the rail grinding train and the fact that I was going to a place I had never been. (Tr. 214).

I loved working as a Vac Truck helper. On July 17, I received notification that my job was abolished. I then received a letter of disqualification from Mr. Hardy on July 31, 2012. (CX 2; Tr. 217). Mike Nagle and Lance Hunt both told me not to sign it. I knew that Mr. Nagle had filed a grievance on my behalf. He called me after the meeting in February and told me that they had verbally agreed to take the letter out of my file but also said, “But we will see if they do, if it actually happens”. (Tr. 219). I never received any communication from the railroad that the letter was removed or from Mr. Nagle. Now that I know the letter is removed, I will bid on jobs back at Pokegama Yard. At the time my Vac Truck Helper job was abolished, Jackie Demski told me the only job I could hold down is at the Duluth docks because it didn’t require an EIC. I have been at Duluth ever since. Losing the right to be in any position that requires an EIC has affected me because I really enjoyed working at Pokegama Yard. Work at the docks does not involve changing rail and the stuff we did on the tracks. It is dusty and dirty. (Tr. 222). Emotionally, I brought home a lot of hatred, resentment and unhappiness. (Tr. 222-223).

I did not document anything about Mr. Hardy’s behavior in my calendar. I don’t have a class B license. I knew that after my position as a Vac Truck Helper was abolished, then anybody who was going to work on a Vac Truck had to have a Vac Truck license. (Tr. 242). On July 9, 2012, I understood that, as a pilot for the grinder, I was responsible to obtain track authority, or protection, for the train. There were two other persons on the train with me, a contract engineer and another trackman. He was not a WC employee but came along with the grinding train. The first day I piloted the grinding train and got track authority for it as it moved from Twig to Steelton, about 20 miles. It took about 12 hours. I was able to get track authority both by radio and telephone. I did not ask Mr. Hardy to clarify my duties and responsibilities as a pilot of the rail grinding train. (Tr. 250). The 9th was a very stressful day. I didn’t think I

could pilot the grinder safely, but someone else could. (Tr. 252). I would feel safe, comfortable and qualified to provide protection for a rail grinding train in operation from Steelton to Bear Creek. (Tr. 255). I admit that I didn't tell Mr. Hunt that I thought piloting that rail grinding train on July 10 was going to violate any laws, rules or regulations. I didn't identify any federal law that I thought would be violated if I piloted the rail grinding train. (Tr. 260).

I have not been diagnosed with anything because of what happened. (Tr. 271). I couldn't sleep. I'd have nightmares. I was a little depressed. I had stomach aches. At my deposition, I did say I don't know any physical responses when I was asked, "Did you have, or do you recall having, any physical symptoms that you attribute to the claimed retaliation that you believe you suffered by making a good-faith challenge in July of 2012?" I also did not mention stomach aches in the deposition. Part of the stress I experienced was from having to work for Mr. Hardy, in general, as a supervisor and also my position being abolished and also being disqualified from holding positions as an Employee in Charge. (Tr. 275). I was prescribed medication and I was told I was suffering from depression. I was taking pills for that. (Tr. 284). I am no longer taking the pills. After the disqualification is when I had more problems in my marriage. Mr. Hardy did not cause the divorce. My wife moved out of the house a year ago and took my son with her, and my step-daughter as well. That has been a pretty stressful and traumatic experience for me. (Tr. 286). I started seeing Dr. Buffington, my family doctor, as a result of the issues pertaining to my divorce. He prescribed medication for anxiety and depression. I don't recall if anyone prescribed medication because of my complaint as it pertained to Mr. Hardy and the railroad.

Mr. Nagle told me in February that the railroad agreed to withdraw the disqualification letter. I did not know 100% that the letter was withdrawn, just hearsay. I never made an effort to bid another position back in the track department because I never got a letter. I did not try and contact Jackie Demski and ask about my rights or what jobs I was eligible for. (Tr. 289).

I never told Mr. Hardy that I did not want to be an Employee-in-Charge in general. I was physically intimidated by Mr. Hardy. I make more money now in my current position than I did as a Vac Truck Helper. (Tr. 298). I have visitation rights with my son. My wife started moving stuff out of the house in July of 2013.

Mr. Hardy did not tell me before I received the disqualification letter of the railroad's intent to disqualify me from EIC positions. (Tr. 299). I don't remember if Mr. Hardy told me on July 9, 10, 11 or 12 that he intended to ask or request that I be disqualified from EIC positions.

Joseph Jahoula (Tr. 302-326)

I am a track foreman on the Lake Zone territory for CN. A track foreman protects his men and the equipment when following the track. I have worked for CN since 1998. I am currently involved in a lawsuit against CN. Mr. Holmquist is a co-worker. I wouldn't consider us friends. We have worked together since 2000 or 2001. I don't work with him now, since he moved to the docks. (Tr. 304). I think Mr. Holmquist is a hard worker. He showed up on time and worked safely. An EIC is the one person who takes charge by directing other railroad personnel or contractors on the property. A rail grinding train is designed to grind the rail, the

ball of the rail, and to create a longer life in the rail. You can cause derailments if the rail is not grinded properly. I've acted as an EIC of a rail grinding train. It is more difficult than being an EIC of the other track positions, which I have also been an EIC. You are working with different personnel that you are not used to working with. The rail grinding trains can have five to eight different guys on the train and it is usually about 200 feet long. (Tr. 306). It is a lot more responsibility and requires a lot more knowledge than EIC responsibilities being a Vac Truck helper. I agree it is conceivable that somebody could be comfortable being an EIC in every other track position but not as a rail grinding train. (Tr. 307). I am aware of at least one other CN employee who asked not to be the EIC for the rail grinding train. He was not disqualified as being an EIC generally. Tony Hardy was his supervisor. He was also my supervisor in August 2012 when I had an incident with a rail grinding train. I was told to do the same job that Mr. Holmquist, run the rail grinding train as an EIC. We were traveling down to Steelton and I got reports there were fire flare ups. I stopped an hour and a half early. I told Mr. Hardy that I stopped because I did not have enough water and the danger while operating the rail grinding train without enough water. Mr. Hardy was very upset and told me that I was not in charge of the railroad, that it costs lots of money to run the grinding train every day. He made it clear to me that I should still be grinding on the rail. (Tr. 314). I was supposed to start work the next day at 7:00 a.m. but showed up at 7:01. Mr. Hardy wanted to take me out of service and send me home. I don't know of anyone who has been taken out of service for being a minute late. I called Mr. Bjork and told me I was having a disagreement with Mr. Hardy. The three of us had a sit-down. I was eventually fired. I believe reporting Mr. Hardy to Mr. Bjork contributed to my termination. (Tr. 318). That is what my lawsuit is about.

Mr. Holmquist told me on more than one occasion that he didn't want to be responsible to get track authorities. He didn't want the pressure associated with performing a job like that. I did not receive any discipline for stopping the rail grinding train in August 2012. Mr. Hardy did not send me home after I was a minute late. I worked that day. I don't know the type of rail grinding train Mr. Holmquist was piloting in July. When I spoke to Mr. Bjork, he told me that even Mr. Hardy did not have the authority to stop the rail grinding train that day; that it should have been cleared with him, that would have been the normal protocol. (Tr. 321). The reason the railroad gave for my termination was because I released track authority putting my crew members in danger.

While Mr. Holmquist told me he did not want to be a foreman, he did not tell me he did not want to be an employee in charge. Those are two different positions. (Tr. 326).

Shane M. Johnson (Tr. 336-351)

I'm a track repair foreman for CN. Basically, I am in charge of a small crew and responsible for their safety and planning track maintenance on a smaller scale. Mr. Holmquist called me the afternoon he was on the grinding train and expressed concern that he was instructed to pilot the train into territories he was unfamiliar with and was worried about the safety of the situation. He told me Mr. Hardy ordered him to go to the entire Superior Sub, which included the Proctor-Adolph area, an area he was not familiar with. (Tr. 338).

I made a good-faith challenge once when Mr. Hardy told me to spray a chemical de-icer on some switches, which I had never used before and I thought was safety hazard. I also filed a harassment complaint against Mr. Hardy. He seemed agitated. A few days later, he came up to me and put his finger in my chest and said, "Don't let me catch you in a dark alley." That scared me. (Tr. 343).

I was aware that Mr. Holmquist was disqualified from being an EIC. I knew he bumped into a position in Twig, Minnesota because I was the foreman there. He worked there a couple days, before the company removed him because they said he was not qualified to be in that position.

I have an injury claim against CN. The incident with the de-icer occurred in late winter 2009, early 2010. I was never disciplined for refusing to spread the chemical. Mr. Hardy brought me into his office the next morning to talk but it was more of a shouting match. But I did not receive any discipline for reporting the de-icing incident.

Todd S. Washburn (Tr. 363-383)

I've been a janitor at CN for 28 1/2 years. I know Mr. Holmquist through work. He is not a close friend; we are coworkers, I just see him around. I am aware that Mr. Holmquist was disqualified from being an EIC. I was in front of the section building the day he was disqualified. He came up to me and said, "I've been disqualified from all track jobs." The poor guy was shaking like a leaf. (Tr. 365).

I got injured about 4 years ago after I stepped on a rusty nail. Mr. Hardy's treatment of me got worse after that.

Daniel A. Bjork (Tr. 382-454)

In July 2012, I was the senior manager of the Lake Zone district. I was Tony Hardy's supervisor. In July 2012, part of my compensation was a bonus of between 20-30% of my yearly salary. On July 10, 2012, Lance Hunt, the risk mitigation specialist, called me to discuss an incident involving Mr. Holmquist. Hunt told me that Holmquist had relayed a safety concern to him – that he had been asked to operate or act as EIC for the rail grinding train and that Holmquist said he didn't feel qualified or comfortable doing it. (Tr. 385). Hunt never told me that Holmquist said he didn't feel qualified acting as an EIC generally. Just that he had a safety concern for operating or being an employee in charge of the rail grinding train. CN's policy is that employees should report things that are unsafe and refuse to follow an unsafe order. Good-faith challenges, on-track safety issues are brought up at the time with the employee in charge. If the supervisor doesn't remedy the situation, you are supposed to go to a different supervisor or to HR. I agree it is important for the EIC of a rail grinding train to feel comfortable acting as the EIC for the rail grinding train. It could be a safety issue if he is uncomfortable. Mr. Hunt did tell me that Mr. Holmquist had a safety concern that he didn't feel comfortable operating the grinder. It would be against CN policy to retaliate against Mr. Holmquist for refusing to operate the rail grinding train on July 10, 2012. (Tr. 388). I don't think the disqualification of Mr. Holmquist was punishment. I am only aware of two other employees who were disqualified from being an

EIC, both for violating workplace rules. I agree being disqualified from being an EIC is a form of discipline. (Tr. 390). Mr. Hardy recommended I disqualify Mr. Holmquist from being an EIC and I disqualified Mr. Holmquist from being an EIC, not just from the rail grinding train, from all positions requiring an EIC.

I disciplined Mr. Hardy for harassment, not following safety rules and making sexually explicit comments. (Tr. 395). Rail grinding trains cost \$50/minute. I am aware of 6 employees with long tenures at CN who made complaints about Mr. Hardy.

My productivity bonus is based on the company as a whole, not myself or my territory or my supervisors. (Tr. 404). As a senior manager, my bonus, every year I get a bonus, is 30 percent of my base salary. In July 2012, I was a senior manager overseeing daily operations. I am familiar with the railroad's policy against retaliation. It is in our Code of Conduct. (RX 27). I am also familiar with our Operating Rules, which govern the operation of trains and roadway equipment across our railway system. (RX 26). Everyone who goes out on the track has to be qualified on the operating rules and on-track safety. (Tr. 412). An employee in charge is a person that is capable of taking on-track protection for protecting men and equipment from the movement against trains or other roadway equipment. One of the ways to get protection is through taking track authority. If proper protection is not obtained, it could result in injury, death or derailment. One is considered qualified to take track authority by going through the training program and passing the exam. I was aware of complaints made because of Mr. Hardy's conduct. After giving him some behavioral coaching, he improved. Hardy is an aggressive manager and wants to get things done. We had to keep reminding him that he had to lead by example and follow the rules and procedures in place. He has gotten a lot better. (Tr. 421).

I made the decision to disqualify Mr. Holmquist. He brought a safety concern that he didn't feel comfortable being an EIC providing protection for on-track equipment, which in this case was a rail grinder. But if he didn't feel safe for that, I decided it was a safety risk to have him out on the track. If he didn't feel comfortable taking track authority in a territory that he had worked for his 12 or 14 years, then I felt he could no longer be an employee in charge. There is no difference in how you take track authority for a rail grinding train versus any other piece of equipment. No one ever told me that Mr. Holmquist didn't feel safe only obtaining track authority for a particular piece of equipment.

As a pilot for a grinding train, Mr. Holmquist had to move the rail grinder from point A to point B safely. He did that by obtaining track authority. His duties or responsibilities would not change because it was a rail grinder or just travelling across the territory. It would just take more time. I know Mr. Holmquist was familiar with the area he was asked to pilot the grinder because he had worked that area basically his entire career. So, he should have been very familiar with that area because he worked it. (Tr. 423). Before I made the decision to disqualify Mr. Holmquist, no one brought to my attention any safety concerns that Mr. Holmquist had with regard to piloting the train, before I got the call from Lance Hunt. In my call with Hunt, he told me Holmquist didn't feel safe, comfortable or qualified to take track authority for the grinding train. (Tr. 425). When someone says that, it is unsafe to put him on the track and I can't allow it. I directed Mr. Hardy to prepare the disqualification. (RX 22). RX 32 is an LMRC rail grinder. It is a switch and crossing grinder, like the one Mr. Holmquist was piloting.

I approved the abolishment of Mr. Holmquist's vac helper job.

I agree that I cannot take an adverse employment action against an employee if they engage in reporting an unsafe condition, even if I think that's the safest thing to do. No matter what the reason, I can't retaliate. (Tr. 437). It is Mr. Johnson and Mr. Jahoula's opinion that being the EIC of a rail grinding train is harder than the other positions that Mr. Holmquist held. I don't think so. (Tr. 439). I have no reason to disagree with Mr. Holmquist when he says he couldn't hear the radio. I am aware that Mr. Hardy said it only took about an hour to get someone up to pilot the grinding train after Mr. Holmquist said he wouldn't do it. (Tr. 453).

Lance R. Hunt (Tr. 474-495)

I'm the risk mitigation officer for CN. I handle personal injury claims. I am not part of the track department. I do not have supervisory responsibilities over any employees. Around July 10, 2012, Mr. Holmquist called me regarding a rail grinder train. He said he was assigned to be the EIC of a rail grinding train and it was his second day. He was experiencing anxiety type symptoms. He said he may need to go to the hospital and told me that his mind was cloudy and that he probably wasn't able to do his job safely. (Tr. 476). He did not tell me that he thought piloting the rail grinding train or obtaining protection for the rail grinding train would be in violation of any law, rule or regulation. I told him "don't do anything. Hold tight. I'll get back to you." I hung up and contacted the legal department. I called Curt back and told him he needed to empower himself and remove himself from that position. I then contacted Mr. Bjork to bring him up to speed. (Tr. 479). I believe I told him that Mr. Holmquist was having anxiety with his job that day and I told him to remove himself from that particular job. A few weeks later, Curt came into my office and showed me the disqualification letter. (CX 14). I told him he needed to talk to his union. I did not say, "That's retaliation." (Tr. 483). I don't recall using the words "good-faith challenge" on July 10 or the day he showed me the letter. (Tr. 484).

When he called me on July 10, Mr. Holmquist needed help because at that time being in charge and getting track authorities was causing him so much anxiety that it was clouding his ability to think. (Tr. 490). He never told me that Mr. Hardy already let him off the hook and said he didn't have to do it. Mr. Holmquist's concern was related to the specific job of having to pilot a rail grinding train that day.

Richard D. Hasbrouck (Tr. 495-511)

I am a manager of engineering for CN for about a year and a half. Before that, I was a track supervisor and assistant track supervisor. From 2000-2008, I worked for the Federal Railway Administration, first as a track safety inspector and then a chief inspector. (Tr. 498). I am familiar with 49 C.F.R. § 214.343. When I moved to British Columbia, I asked Tony Hardy to come with me. Mr. Holmquist did attempt to bump into a job under my supervision in August 2012, but he wasn't qualified because he was disqualified as an EIC. (Tr. 505).

In order to get track protection and be an employee in charge, you need to be qualified on the rules. You need to take annual testing. CX 16 is an August 20, 2012 email from Jackie

Demski to me, cc'd Mr. Bjork related to a job that Mr. Holmquist was trying to bump in to under my supervision and the fact that he was disqualified from holding a position in which he had to act as an employee in charge. He actually worked a few days in the job before we learned he had been disqualified.

Curtis Holmquist (Recalled) (Tr. 512-537)

I saw Dr. Ouelette on or about May 6, 2010. It was a referral for a possible ADHD diagnosis from Dr. Chapman. (Tr. 515). Before May 6, 2010, I don't remember seeing any other psychiatrist, psychologist, counselor or other mental health professional. I don't have any medical records for any visits before May 6, 2010. I also am not aware of any doctor's visits from May 6, 2010 that are not documented in EX 40. I saw Dr. Ouelette again on or about June 30, 2010. I am not sure if he is a psychiatrist, psychologist or social worker. The treatment notes for June 30, 2010 reflect that I told Dr. Ouelette that the yearly testing requirements had changed from open book to closed book and I had a good deal of difficulty with it. (Tr. 525). But I passed all the tests. The notes also reflect that I told Dr. Ouelette I had some anxiety with work changes and a pattern of reported harassment by a new foreman. I believe I was prescribed some medication, a mild stimulant. (Tr. 527). The notes also reflect that I reported a significant pattern of physical, verbal and psychological harassment upon me by Mr. Hardy to human resources in 2010 but nothing has changed. (Tr. 528). I did not go back to Ouelette after June 30, 2010. The records reflect the next time I saw any medical care provider, counselor, psychologist or psychiatrist related to a mental health or stress related condition was on August 21, 2013 when I went to Dr. Buffington. (Tr. 531). That was related to my marital difficulties. Dr. Buffington diagnosed me with adjustment disorder with a depressed mood. He gave me some medication. I saw him again on September 16, 2013. He diagnosed me with anxiety state unspecified. The notes reflect that I told him my marital issues were affecting my ability to sleep and concentrate. I saw Dr. Buffington again on October 7, 2013, again to discuss some of the emotional issues I was having as a result of my marital difficulties. The visits with Dr. Buffington from August 2013 to 2014 were mostly related to my marital difficulties and divorce. I remember talking to him about my family, my wife and kids, a lot. (Tr. 535).

Some of my emotional distress was related to my EIC disqualification.

Essential Findings of Fact

On July 9, 2012, Complainant piloted a rail grinding train for the first time. There was no accident, no derailment, no breakdown or any other problem. However, although he had the requisite training and qualifications, Complainant did not feel comfortable piloting a rail grinding train and believed he could not handle it. After the shift was over, Complainant called Tony Hardy, his direct supervisor, and left a voicemail message that he believed he could not safely pilot the rail grinding train the next day and that Hardy should find someone else to do it. However, Hardy ordered Complainant on July 10, 2012 to pilot the rail grinding train. Complainant told again Hardy he was uncomfortable and felt he was not qualified to function as an employee in charge of a rail grinding train. Hardy told him to "get down there. Just do it."

After Hardy ordered Complainant to pilot the rail grinder despite Complainant's uneasiness, Complainant called Lance Hunt, CN risk management specialist, who told him he had made a good-faith challenge. Hunt told Complainant he would ensure someone else would act as EIC for the rail grinding train that day. Hunt then called Daniel Bjork and told him that Complainant had relayed a safety concern to him – that he had been asked to operate or act as EIC for the rail grinding train and that Holmquist said he didn't feel qualified or comfortable doing it. Hunt never told Bjork that Holmquist said he didn't feel qualified acting as an EIC generally, just that he had a safety concern for operating or being an employee in charge of the rail grinding train.

Hardy talked to Bjork and recommended Bjork disqualify Complainant from being an EIC; Bjork subsequently disqualified Complainant from all positions requiring track approval authority, not just from the rail grinding train. Bjork was never told that Holmquist's piloting concerns extended only to rail grinders.

While Complainant only voiced concerns about serving as EIC on the rail grinding train, there is no practical difference in how one takes track authority for a rail grinding train versus any other piece of equipment. Complainant honestly did not feel comfortable, qualified or safe piloting a rail grinder. No one ever told Bjork that Complainant didn't feel safe only obtaining track authority for a particular piece of equipment. Because of Complainant's refusal to pilot the rail grinding train, Bjork disqualified Complainant from any position in which he had to act as an employee in charge, not just piloting a rail grinding train. This decision was based solely on safety concerns, and a well-founded objectively reasonable belief that it was a risk to have Complainant out on the track, regardless of the piece of equipment involved.

Complainant was informed of the disqualification on July 31, 2012.¹⁸ As a result, he could no longer hold positions in the track department. The only position he could find was on the Duluth docks as a structures carpenter. This new position resulted in no loss of pay or reduction in benefits.

Respondent removed the disqualification from Complainant's personnel file in February 2013 and Complainant's union representative, Michael Nagle, immediately told him the day it was removed.¹⁹ (EX 31; Tr. 127, 297-98). Nagle also told Complainant that the railroad does not always follow up with a letter, or words to that effect. (Tr. 298). No written confirmation was sent by Respondent and Complainant never attempted to find out the status of the withdrawal. Complainant remained in the same job and, although eligible, did not bid for any other positions

¹⁸ In response, Complainant wrote a letter to Respondent that his discomfort was tied to piloting the rail grinder, not to EIC generally. (RX 15). Respondent did not take any action to amend the disqualification.

¹⁹ The disqualification letter was located in three computer files – Complainant's personnel file, a PAP system file and a workforce development file. Complainant could only see his personnel file. Demski used the workforce development file to award jobs. (TR. 160-3). There was testimony that the disqualification letter was only removed from two of the three files where it was retained, the personnel file and the workforce development file, sometime after the labor-management conference on February 12, 2013. The disqualification letter retained in the PAP system file was not removed until July 2014. Complainant submits this is evidence of his inability to obtain positions. I disagree. The letter in the PAP system, removed in July 2014, was not used to bid on jobs. The reason Complainant never moved back into an EIC job is because he never bid on any, not because a disqualification letter prevented him from getting such jobs in the first place.

as of the date of the hearing. (Tr. 224-26). Other than job assignments, the disqualification had no other employment impact on Complainant.

Standard

Complainant alleges Respondent violated FRSA when it disqualified him from all positions requiring him to act as employee in charge, not just piloting a rail grinding train, after he told his supervisor that it was not safe for him to pilot a rail grinding train. The FRSA provides, in relevant part, that an officer or employee of a railroad carrier engaged in interstate commerce:

shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist;²⁰

49 U.S.C. § 20109(b)(1)(A),(B).

As noted above, actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). See 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a complainant must demonstrate that: (1) his employer is subject to the Act and he is a covered employee under the Act; (2) he engaged in protected activity, as statutorily defined;²¹ (3) he suffered an unfavorable personnel action;²² and (4) the protected activity was a contributing

²⁰ (2) A refusal is protected under paragraph (1)(B) if—

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

²¹ By its terms, FRSA defines protected activities to include acts done “to notify, or attempt to notify, the railroad carrier or Secretary of Transportation of a work-related personal injury or work-related illness of an employee.”

²² The term “unfavorable personnel action” includes making charges against an employee in a disciplinary proceeding and suspending, terminating, placing on probation or making notes of reprimand on an employee's record.

factor in the unfavorable personnel action. See 49 U.S.C. § 42121(b)(2)(B)(iii); *De Francesco v. Union RR Co.*, ARB No. 10-114, ALJ case No. 2009-FRS-009 (Feb. 29, 2012), Decision and Order of Remand, slip op. at 6, fn. 20, citing *Williams v. Domino Pizza*, ARB 09-092, ALJ - 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11 (ARB June 29, 2007).

The term “demonstrate,” as used in AIR 21 and FRSA, means to prove by a preponderance of the evidence.” Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by “clear and convincing evidence” that it would have taken the same unfavorable personnel action in the absence of Complainant’s behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii)(iv).

There is no dispute that Respondent is a “railroad carrier” and Complainant is a covered “employee” within the meaning of 49 U.S.C. § 20109(a).²³

Issue No. 1 - Protected Activity

Respondent disputes that Complainant engaged in protected activity on July 9 and 10, 2012 when he told his supervisor that it was not safe for him to pilot the rail grinding train and he should find someone else. I disagree.

Section (b)(1)(A). Reporting in good faith a hazardous safety or security condition. I find that reporting a safety concern based on an employee’s belief that he or she is not qualified to perform a certain task and, by doing so, may result in significant property damage or harm to self and others, is fairly encompassed by the broad language and congressional intent in the FRSA to protect those who report their safety concerns without fear of retaliation. I find Complainant’s report to his direct supervisor that he was uncomfortable operating the rail grinding train on July 10, 2012 and that he, the supervisor, should find someone else was a report of a safety concern, namely a subjective belief by a train operator that he was not capable of operating a rail grinding train in a safe manner.²⁴ (Bjork at 388).

Section (b)(1)(B). Refusing to work when confronted by a hazardous safety or security condition related to the performance of employee’s duties when made in good faith with no reasonable alternatives available and a reasonable person would believe there is an imminent danger of serious injury. Again, nothing prohibits the safety concern being derived from an employee’s perceived inability to act as an EIC for a rail grinding train. This was not a theoretical exercise for Complainant. Instead, operating a rail grinding train was something he honestly believed was, at that moment, out of his comfort zone after piloting a rail grinding train the day before. To Complainant, doing so could have led to derailment or serious injury; that

²³ See CX-41, *Union Pacific Railroad Company’s Answers to Complainant’s Interrogatories, Requests for Production and Requests for Admission*, dated March 15, 2013 and Tr. at 29-31.

²⁴ On this point, I again find that the (b)(1)(A) allegation was reasonably within the scope of the facts upon which the original complaint was based and Respondent was not misled in its preparation of its case by Complainant’s amendment of his complaint to specifically add a claim under section (b)(1)(A), given that the evidence on it and (b)(1)(B) is substantially similar.

none occurred is not relevant for purposes of determining whether Complainant engaged in protected activity. Being uncomfortable piloting a locomotive is a “safety concern” under the FRSA. Holmquist called his supervisor to tell him and give him time to find another EIC. I am not questioning whether Holmquist’s concerns regarding piloting the rail grinder were real or legitimate, just whether he reasonably believed he was incapable on July 10, 2012 of acting as EIC of a rail grinder. He appeared to default on the side of caution and restraint. Given the circumstances, it was not reasonable for Holmquist to personally find a replacement and he did what he believed was the right thing to do; he notified his supervisor the night before and left a message in plenty of time to find an alternate EIC. The irony is that had Holmquist piloted the rail grinding train on July 10, 2012 despite grave misgivings about his competence to do so, and an accident ensued, the first question from Employer would likely have been why didn’t you notify your supervisor and tell him of the discomfort you felt operating the train the day before? While Holmquist may have been trained, tested and qualified to operate a rail grinding train, he did not feel it was safe to do so on July 10, 2012. I find reporting that concern to his supervisor under the circumstances was protected activity.

Respondent submits that Complainant cannot establish the “necessary prerequisites” because he did not identify any hazardous safety or security condition. Respondent submits that the types of “hazards contemplated by the statute are only those which can be addressed and remedied by the railroad, such as defective equipment, hazardous structures or facilities, or defective or damaged sections of track.” *Respondent Closing Brief* of December 5, 2014 at 29. I read no such limitation into the Act.

A “safety hazard” can be the individual’s good-faith belief that he is not qualified to operate an otherwise functioning and fully operational piece of equipment. In other words, protected activity does not have to be Holmquist reporting, for example, that one of the wheels on the rail grinder was damaged. It covers Holmquist’s belief that he was not qualified to pilot the grinder. That Respondent “had no control over Holmquist’s thoughts or feelings” is irrelevant as it relates to protected activity. Complainant’s refusal to work after reporting he was not comfortable piloting the rail grinder does fall within a broad reading of “refusal to work when confronted by a hazardous safety or security condition,” i.e., his own performance-based limitations in operating a specific piece of equipment.²⁵

Good-Faith Refusal

In *Davis v. Union Pacific Railroad Co.*, No. 12-CV-2738, 2014 WL 3499228 (W.D. La. July 14, 2014), the court addressed the parameters of “good faith” under the FRSA and determined that a plaintiff had to “actually” believe at the time of the protected report the validity of its contents. According to the court, “if the plaintiff did so believe, then his activities were in good faith and protected under the Act.” Likewise, in *Ray v. Union Pacific RR. Co.*, 971 F. Supp. 2d 869, 882-883 (S.D. Iowa 2013), relying on ARB dicta, the court concluded that “good faith” requires a complainant to actually believe in the alleged violation that he is reporting. Although the Seventh Circuit has not yet addressed the issue, courts in the Seventh Circuit and

²⁵ Given the Court’s finding on (b)(1), (2), I need not decide whether complainant also engaged in protected activity under (a)(2).

elsewhere have required the “good-faith” belief to also be objectively reasonable. *Armstrong v. BNSF Rwy Co.*, Case No. 12-C-7962, 2015 BL 288038, slip op. at 8-9 (N.D. Ill. Sept. 4, 2015).

Based on the statutory language of “good faith”²⁶, and in light of the above principles, in order to invoke employee protection under the work refusal section, Complainant had to have actually believed on July 9 and 10, 2012 that he could not safely operate the rail grinder; and that he had no reasonable alternative but to refuse the rail grinder assignment. I find Complainant’s assertion that he refused his work assignment on July 10, 2012 in good faith was subjectively and objectively honest.

Issue No. 2 - Adverse Action

Respondent does not concede that Complainant’s disqualification issued on July 26, 2012 qualifies as an “adverse employment action,” focusing on the nature of the disqualification letter.

Concerning an adverse personnel action or event, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB determined that the deterrence standard established by the U. S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Under the *Burlington Northern* standard, the test is whether the employer’s action could dissuade a similarly situated reasonable worker from engaging in protected activity.²⁷

An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l Railroad 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 Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005). While the disqualification was not punishment, Complainant was not allowed to bid on any EIC jobs and could not hold any position in the track department. Even if there was no loss in pay, no change in benefits, and that the Duluth job was closer to home, I find the EIC disqualification led to a significant change in job responsibilities, resulted in Complainant being open to fewer work assignments and reduced his opportunities for advancement within the

²⁶ *See, e.g.*, BLACK’S LAW DICTIONARY 693 (6th ed. 1990) (“In common usage, [good faith] is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.”); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (“In all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.”) (internal brackets omitted).

²⁷ *See Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2, slip op. at 20 (ARB Feb. 28, 2003) (an action must constitute a tangible employment action; that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

company and, from the time it was issued until the time it was withdrawn from the personnel file, constituted an adverse action under the FRSA.²⁸

Issue No. 3 - Contributing Factor Analysis²⁹

To establish causation, Complainant need only show that his refusal to work because of a hazardous safety condition was a contributing factor in the unfavorable personnel action, “not a substantial, significant or even predominant one.” *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, __ F.3d __, 2013 WL 600208 (3d Cir. Feb. 19, 2013). In other words, whether or not the protected activity is a “contributing factor” in a FRSA whistleblower case is not a demanding standard. *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012) cited with approval in *LeDure v. BNSF Ry. Co.*, ARB Case No. 13-044, ALJ Case No. 2013-FRS-020, footnote 17, slip op. at 7-8 (June 2, 2015). 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.” *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish that his disclosure of the work place injury was a contributing factor to his dismissal. *Armstrong* at 11; 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.”). Additionally, the question is not whether CN had a good reason for its adverse action, but whether the prohibited discrimination was a contributing factor “which, alone or in connection with other factors, tends to affect in any way” the decision to take an adverse action. *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013); *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). Protected activity and employment actions are inextricably intertwined, i.e., where the protected activity directly leads to the unfavorable employment decision or the decision cannot be explained without discussing the protected activity. *Benjamin v. Citationshares Management, LLC.*, ARB Case No. 12-029, ALJ Case No. 2010-AIR-001, slip op. at 12 (ARB Nov. 5, 2013).

The evidence does demonstrate that Wisconsin Central’s decision to disqualify Mr. Holmquist on or about July 31, 2013 from any position in which he had to act as an employee in charge was based, at least in part, on the reporting of his July 9, 2013 safety condition; the former would not have happened without the latter. In other words, if Mr. Holmquist had not told Mr. Hardy on July 9, 2013 that he felt that it was not safe for him to pilot the rail grinding train and his refusal to do so the next day, Wisconsin Central management would not have initiated the subsequent informal investigation, and would not have disqualified Complainant from all EIC positions. In other words, I find the protected activity was a contributing factor in the adverse personnel action because, but for Complainant’s report, Respondent would not have

²⁸ Because Respondent had permanently withdrawn the July 2012 disqualification letter in two locations by February 2013 and the third by the summer of 2013, and Complainant appears to have been made whole, there is arguably no longer any adverse action. See *Ciofani v. Roadway Express, Inc.*, ARB No. 05-020, ALJ No. 2004-STA-46 (ARB Sept. 29, 2006) (complaint moot as Respondent had permanently withdrawn suspension letters that Complainant alleged were issued in response to protected refusals to drive under the STAA).

²⁹ Before he made the decision to disqualify Complainant from EIC positions, Bjork was aware that Complainant had told Hunt he did not feel safe piloting the rail grinding train. (Tr. 385; 425)

issued the disqualification letter. In contrast, there is no evidence linking Complainant's protected activity to Respondent's decisions to successively abolish two positions he encumbered.

This Court is not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating that an employer took any unfavorable personnel action after a report of a safety concern. Rather, a "contributing factor" is established here because the basis for Complainant's disqualification cannot be discussed without reference to the protected activity. Simply put, Complainant's refusal to pilot the rail grinding train set in motion the chain of events resulting in the eventual adverse employment action. See *DeFrancesco v. Union Pacific Railroad Co. supra*; see also *Ray v. Union Pacific R.R. Co.*, 2013 WL 5297172, ___F. Supp. 2d ___ (D. Iowa 2013) ("If [Complainant] had not reported the alleged work-related injury, [Respondent] would not have undertaken an investigation into either the honesty of [Complainant's] statement . . . or the timeliness of [his] injury report, and Complainant would not have been terminated.") and *Koziara v. BNSF Ry. Co.*, No. 13-CV-834, 2015 U.S. Dist. LEXIS 2382 (W.D. Wis. Jan. 9, 2015), 2015 U.S. Dist. LEXIS 2382, 2015 WL 137272.

Bjork had actual knowledge of the protected activity. He was specifically told that Holmquist refused to pilot the train because he was uncomfortable and personally did not feel he was qualified. Even if he was not specifically told Holmquist's concern was limited to the rail grinder, Bjork still knew that Complainant told his supervisor he was not comfortable piloting a train. That is still a safety concern. Bjork then disqualified Holmquist from all EIC positions. He would not have done so but for the report of a safety concern. While there is no evidence of animus or a retaliatory motive, as noted, animus is not required at the contributing factor stage.³⁰

Issue No. 4 - Affirmative Defense

Once an employee demonstrates that the protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same adverse action in any event. The clear and convincing evidence standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.' See *Santiago v. Metro-North Commuter RR. Co.*, ARB Case No. 2013-0062, ALJ Case No. 2009-FRS-011 (June 12, 2015), slip op. at 3. It is a high burden and one which I find Employer has met in this case.

Respondent submits it would have disqualified Complainant from all EIC positions regardless of the protected activity. I agree. I recognize that Respondent presented no evidence that it ever disqualified any other employee who raised safety concerns about piloting a rail grinder by extending the disqualification to all EIC positions. In fact, the evidence showed that

³⁰ Respondent cites to *Kuduk supra* in support of its argument that motive is now relevant to a contributing factor analysis and Complainant cannot show a retaliatory motive in the disqualification. Respondent takes a rather expansive reading of *Kuduk*. Regardless, given the discipline in *Kuduk* was unrelated to the protected activity and caused by an independent intervening event, I find the case clearly distinguishable from the facts of the instant case, where the protected activity and the adverse action are intertwined. Moreover, *Kuduk* was decided on summary judgment motions rather than, as here, after a full hearing on the merits.

another employee who was supervised by Tom Hardy had also requested that he not be the EIC for a rail grinding train and *he* had not been disqualified from EIC positions generally. I also acknowledge that other employees considered piloting a rail grinder more difficult or requiring greater knowledge and responsibility.

Nonetheless, while Bjork may have been ultimately incorrect with regard to the limited extent of Complainant's concern to operating as an EIC in a rail grinding function, I find that Bjork reasonably interpreted Complainant's statements to Hardy and others on July 9 and 10, 2012 as extending to a concern for piloting all trains, not just rail grinders. Complainant's raising legitimate concerns to his supervisor regarding his discomfort and inability to pilot the rail grinder was the only reason Bjork subsequently disqualified Complainant.

Moreover, I find that Complainant was vague and ambiguous at the time and in his testimony as to his reasons for not wanting to operate the rail grinding train, including his alleged unfamiliarity with the area of track which was directly controverted by Mr. Hardy and Mr. Bjork. Given his lack of clarity to his supervisors and his clear anxiety on taking on the responsibility for EIC of the rail grinding train and in light of the safety role of an EIC and his being trained and meeting the annual qualifications, it was understandable, and indeed, responsible for Mr. Bjork to conclude that he was unable to operate safely in any EIC position. An otherwise qualified worker cannot dictate to his employer what job(s) he or she will or will not do on a daily basis. To find otherwise would give any railway employee license to tell supervisor that he or she does not want to do his job because of general unclearly expressed safety concerns precluding ability to do the job, notwithstanding employer's position of proper training and successful completion of the job in the past.

Finally, I find that Bjork credibly testified as to his reasons for removing Complainant from EIC positions and his ownership of that decision. Bjork was well aware of Hardy's aggressive management style; he credibly testified as to his distinguishing between how he handled that style versus why he independently came to the conclusion that leaving Complainant as an EIC was unsafe. He credibly testified and distinguished between why his action was not disciplinary in nature, but how it could be perceived as such.

I find Respondent has established by clear and convincing evidence that it would have disqualified Holmquist from all EIC positions based on his relatively inchoate concerns about piloting the rail grinder. It was a reasonable action in reaction to an employee's strident declaration that he was uncomfortable piloting rail grinders and it was reasonable for Bjork to conclude that a safety concern piloting rail grinders, a train Complainant was qualified to pilot, extended to all trains. In regard to the Respondent's clear and convincing evidence burden, the ARB does not require I superimpose my opinion on the conclusions of a company's personnel office. My role is not to question whether Respondent's decision to disqualify Holmquist was wise or based on sufficient 'cause' under Wisconsin Central or CN personnel policies, but only whether all the evidence taken as a whole makes it highly probable that CN would have disqualified Holmquist from all positions requiring track authority absent the protected activity.³¹

³¹ The FRSA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012).

The decision to disqualify Complainant from all positions requiring track authority was reasonable given the level of unease he vocally demonstrated on July 9 and 10, 2012. An employee cannot tie his or her willingness to work to a particular piece of equipment, when he or she is capable to do so. Complainant was otherwise trained, tested and qualified to obtain track authority. He repeatedly and forcefully stated did not feel comfortable or safe piloting a rail grinder. That the subsequent disqualification was then extended to all pieces of equipment was reasonable given the inherent safety concerns involved. Whether this court would have made the same decision, or limited the disqualification to rail grinders, is not the issue as “federal courts do not sit as a super-personnel department that re-examines” employment decision. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014). Here, the decision to disqualify Complainant from all positions requiring track authority would have happened regardless of the protected activity.

Conclusion

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, that Respondent had knowledge of that protected activity, that he experienced an adverse action, and his engagement in the protected activity contributed to his experience of the adverse action. However, Respondent demonstrated by clear and convincing evidence that it 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 claim and relief sought is **DENIED**.

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

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

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

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

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