



Issue Date: 24 August 2016

Case Nos.: 2014-FRS-00050 (Erik Yoder)
2014-FRS-00052 (Lesley B. Howard)

In the Matters of:

ERIK YODER,
Complainant,

v.

CSX TRANSPORTATION,
Respondent,

and

LESLEY B. HOWARD,
Complainant,

v.

CSX TRANSPORTATION,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINTS

These consolidated matters arise under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the “Act” or the “FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, and the regulations at 29 C.F.R. Part 1982.

PROCEDURAL BACKGROUND

On February 18, 2014, the Occupational Safety and Health Administration (“OSHA”), after investigating Complainants’ complaint, issued findings in this matter that concluded that, although Complainants engaged in activity protected under the FRSA, their activity was not a contributing cause in their termination.

On February 25, 2014, Complainants objected to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”). On February 13, 2015, I issued an Order Granting in Part and Denying in Part Respondent’s Motion for Summary Decision. On February 18, 2015, I held a formal hearing in this matter in Indianapolis, Indiana,

and on March 3, 2015, I held a continuation of the hearing by telephone to allow Complainants to cross-examine one of Respondent's witnesses. At the hearing I admitted into evidence several exhibits: ALJ's Exhibits ("ALJX") 1-7; Joint Exhibits ("JX") 1-20; Complainants' Exhibits ("CX") 1-2; and Respondent's Exhibits ("RX") 1-34, and 37-55. At the hearing, Lesley Howard ("Mr. Howard"), Erik Yoder ("Mr. Yoder"), David Harris ("Mr. Harris"), and Scott Conner ("Mr. Conner") testified. Both parties submitted post-hearing briefs.

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, the arguments of the parties, and the applicable regulations, statutes, and case law.

ISSUES

In each of these consolidated matters, the parties dispute the following issues (*see* "Complainants' § 18.7 Prehearing Statement of Position"; "Respondent CSX Transportation, Inc.'s Pre-Hearing Statement"):

1. Whether Mr. Yoder and Mr. Howard have proven by a preponderance of the evidence that they engaged in protected activity under the FRSA;
2. If so, whether Mr. Yoder and Mr. Howard has proven by a preponderance of the evidence that their protected activity was a contributing factor in their May 30, 2013 termination;
3. If so, whether Respondent has proven by clear and convincing evidence that it would have terminated their employment notwithstanding their protected activity; and
4. As may be applicable, the amount of Mr. Yoder's and Mr. Howard's economic and compensatory damages and the amount of any punitive damage award.

TESTIMONY

Mr. Howard's Testimony

Mr. Howard testified that he worked as a freight conductor for CXS from 2002 to 2013. (Tr. at 30-31). He stated that as a conductor he completed paperwork, worked with train engineers to operate trains, and "d[id] pretty much all the physical labor with the train." (Tr. at 31). He testified that he "loved" his job. (Tr. at 31).

Mr. Howard stated that on April 13, 2013, he arrived at the Avon Yard, a CSX train yard in Indianapolis, Indiana, at about 5:40 a.m. to report for a shift that began at 6:00 a.m. (Tr. at 32. *See* Aerial Photograph of Avon Railyard, JX 3). He was to perform work on the Q00813 train, which ran from the Avon Yard to the Crestline Yard in Ohio, and which Mr. Howard described as "the hottest train that we had on that side of the railroad." (Tr. at 32). Mr. Howard stated that the procedure for operating the Q00813 was to spend the night near the Crestline Yard and then return to the Avon Yard the next day. (Tr. at 33).

On the morning of April 13, the Avon Yard yardmaster informed him that the waiting train was “on the fuel pad tied down.” (Tr. at 33). Erik Yoder, the locomotive engineer for the Q00813, arrived at the Avon Yard at about 5:45 a.m., and Mr. Howard and Mr. Yoder met to brief the work they would perform. (Tr. at 33-34). Mr. Howard stated that they informed the yardmaster by telephone that they were going to walk to the train. (Tr. at 34). Because of other operations being performed, Mr. Howard stated, he and Mr. Yoder crossed over one set of railroad tracks, where they waited for a train to pull out. (Tr. at 34-35). After this train departed, the two men crossed the second set of tracks. (Tr. at 35).

Mr. Howard stated that while crossing:

I heard Erik trip and fall. I heard a boom. I turned around and looked. He was on the ground laying, but . . . it happened so fast that he was . . . by the time I turned around and looked at him, he’s standing up and he’s brushing himself off. I’m like, “Oh,” you know, [expletive]¹, “are you okay?”

(Tr. at 35-36). Mr. Howard stated that Mr. Yoder told him “I’m fine,” and “let’s just get across the tracks. We on live tracks; let’s get over to the train.” (Tr. at 36). Mr. Howard estimated that between two to three seconds passed between Mr. Yoder falling and hitting his mouth on a steel rail, Mr. Howard stopping and turning to ask Mr. Yoder if he was okay, and Mr. Yoder brushing himself off and responding that he was okay. (Tr. at 103-05). Because of the “urgency” of crossing “live tracks” in the railyard, “it was almost instantaneous” that Mr. Yoder stood back up. (Tr. at 103-04). He stated that Mr. Yoder had bags in both hands, and that when he turned, Mr. Yoder was on the ground but was still holding the bags. (Tr. at 68).

Mr. Howard stated they continued to the fuel pad, which Mr. Howard estimated took between fifteen and twenty seconds, arrived and boarded the waiting train. (Tr. at 65-66). Mr. Howard testified that onboard—and at several other points during the trip to the Crestline Yard—Mr. Yoder again assured him that he was “fine.” (Tr. at 36). The trip “took six to seven hours,” and was “pretty uneventful.” (Tr. at 37).

Mr. Howard stated that at the Crestline Yard another crew boarded the train, and after briefing the replacement crew he and Mr. Yoder took a taxi to a hotel. (Tr. at 38). Mr. Howard stated that the next morning, while traveling back to the Avon Yard, Mr. Howard thought that Mr. Yoder mentioned “that he [thought] he might have chipped his teeth . . . with his fall yesterday,” and that Mr. Yoder told him that he had told his wife about his tooth and she asked if CSX would “compensate” or “fix [his] teeth.” (Tr. at 38-39). Mr. Howard stated that he had “no input at all” in response to Mr. Yoder’s comments. (Tr. at 39). Mr. Howard stated that although Mr. Yoder informed him that Mr. Yoder’s wife had asked if CSX would compensate Mr. Yoder for his teeth, Mr. Howard was not aware at that time that the Federal Employers Liability Act (“FELA”) gave railroad employees the right to sue employers for injuries incurred on the job. (Tr. at 77-78).

Mr. Howard stated that on the return trip to Indianapolis, Mr. Yoder called the local chairman of his union to report his chipped tooth, and then asked Mr. Howard to “stick around just in case [Mr. Yoder] needed [Mr. Howard] to give a statement about what happened.” (Tr. at

¹ Deleted in transcript.

40). Mr. Howard stated that he understood that Mr. Yoder had made the decision to report his chipped teeth after Mr. Yoder called the union representative. (Tr. at 79-80). Mr. Howard stated that Fred Hibben, a union representative, was waiting for Mr. Yoder at the Avon Yard because of Mr. Yoder's phone call. (Tr. at 80-81). Mr. Howard stated that he waited at the Avon Yard to meet with Mr. Hibben "in case someone needed [Mr. Howard] to give a statement," and that no CSX manager asked for him to remain at the Avon Yard. (Tr. at 82). He stated that Mr. Yoder met with Mr. Hibben, and that Mr. Yoder and Mr. Hibben proceeded to the second floor, where the trainmasters' offices were located. (Tr. at 82-83). At some point, Mr. Howard himself was asked to come to the second floor; he stated that at that point, Mr. Yoder had already verbally reported his chipped teeth to CSX management. (Tr. at 83-84).

Mr. Howard went to a conference room on the second floor and met with trainmasters Nick Martin and Scott Moore. (Tr. at 41). He stated that Mr. Martin, who Mr. Howard "kind of knew . . . personally," took Mr. Howard aside and asked, "Did this really happen?" (Tr. at 41). Mr. Howard replied, "Yeah, it really happened." (Tr. at 42). Mr. Howard stated that when he spoke to Mr. Martin aside from the others, he provided facts regarding Mr. Yoder's injury that were consistent with Mr. Yoder having suffered an injury, but that he was not actually reporting an injury. (Tr. at 85).

Mr. Hibben told Mr. Howard that he would need to give a statement about the April 13 incident. (Tr. at 41). Mr. Howard provided the following statement:

While walking across the departure tracks to board the Q00813 with [engineer] E. L. Yoder I heard him fall. I then turn [sic] around and he was on the ground.

/S/ Lesley B. Howard 574380 4/14/13.

(JX 7. *See* Tr. 43). He stated that with his written statement, he did not intend to report an injury. (Tr. at 87). Mr. Howard stated that as a conductor, he was required to write a statement about an on-the-job incident. (Tr. at 44). He testified that this information was accurate and complete. (Tr. at 43-44). Mr. Howard stated that he did not know if Mr. Yoder had chipped his tooth at the time he heard him fall, or after he turned around and asked Mr. Yoder if he was "okay." (Tr. at 43-44).

Mr. Howard stated that he did not report an injury to anyone on April 14; furthermore, he stated, nobody from CSX ever told Mr. Howard that they interpreted his two-sentence statement as a report of Mr. Yoder's injury. (Tr. at 89-90).

Mr. Howard testified that he waited until April 14 to write the statement "[b]ecause [Mr. Yoder] told me he was okay" "multiple times." (Tr. at 44-45). He stated that working on a railroad was a physical job and that he did not report "bumps, bruises, and scrapes" that were a routine part of the job if a coworker assured him that the coworker was "okay." (Tr. at 45).

Mr. Howard testified that a surveillance video from CSX cameras recorded on the morning of April 13 at the Avon Yard was of "terrible" quality and that "I don't know how you can determine one way or the other if we fell or we didn't fall." (Tr. at 46. *See* JX 8). Mr. Howard stated that he did not know the duration of the video. (Tr. at 64-65).

Mr. Howard stated that he was removed from service on April 19. (Tr. at 46-47. *See* JX 9). He stated that he was terminated by letter on May 30. (Tr. at 47-48. *See* JX 12). He stated that he understood that he had been terminated because CSX believed that he had “misrepresented the facts of what happened” and for “reporting an injury late.” (Tr. at 48). Mr. Howard stated that he was terminated for violating CSX rules that prohibited employees from dishonesty (Rule “GR-2”) and that required that employees report injuries (Rule “GS-5”). (Tr. at 92). He stated that he did not dispute that he did not report Mr. Yoder’s injury, but did dispute whether he had an obligation to report it. (Tr. at 92). He stated that he disputed CSX’s determination that he had been dishonest. (Tr. at 92).

Mr. Howard stated that he did not in fact misrepresent any facts about the April 13 incident. (Tr. at 48). He stated that he reported the incident to CSX management as soon as Mr. Yoder himself reported it. (Tr. at 48-49). He stated that he learned that Mr. Yoder chipped his teeth the morning of April 14, while traveling by taxi from the hotel to the Crestline Yard, or on the engine traveling to the Avon Yard. (Tr. at 49).² He stated that Mr. Yoder had performed all of the essential duties of a locomotive engineer on April 13. (Tr. at 49).

Mr. Howard stated that before April 13, he perceived that CSX management reacted to on-the-job injury reports negatively, in that a reported injury “kind of puts a bull’s eye on your back . . . you’ll kind of be harassed and picked on for the rest of your railroad career.” (Tr. at 51-52).

Mr. Howard testified that that he worked for CSX for almost nine years, and was familiar with the company’s Safety and Operating Rules. (Tr. 68-69). He stated that one such rule was the Injury Reporting Rule (Rule “GS-5”). (Tr. at 69). He stated that he knew that that rule required that employees report their injuries, and the injuries of coworkers, to supervisors at the time an injury occurred. (Tr. at 70). Mr. Howard stated that he did not recall noticing that Mr. Yoder’s teeth were chipped on April 13; however, as noted above he stated that during a CSX investigation into the incident, he testified that he did notice that Mr. Yoder’s teeth were chipped while they were in the Avon Yard. (Tr. at 71-73. *See* JX 11 at 168).

Mr. Howard stated that he did not report Mr. Yoder’s chipped teeth on April 13 because Mr. Yoder stated that he was “okay,” and Mr. Howard took him at his word. (Tr. at 74). He stated that he did not report the chipped teeth to Matt Sanders, the trainmaster at the Crestline Yard, on April 14, during a discussion with Mr. Sanders because he felt that it was not his responsibility to report it to Mr. Sanders after Mr. Yoder told Mr. Howard that he was okay. (Tr. at 75-76).

² At the hearing Mr. Howard was asked, “... when did you first know that Erik [Yoder] chipped his teeth?” He responded, “[t]he morning after when he mentioned it to me. The morning after either, like I said, in the taxi ride to the train or on the engine.” (Tr. at 49:14-17). During the CSX investigation of the incident, however, Mr. Howard stated that he first learned of Mr. Yoder’s chipped teeth immediately after the fall. Specifically, Mr. Howard was asked, “[h]e [Mr. Howard] gets up and you guys get up on the train. And you get your train ready to leave, correct?” Mr. Howard responded, “After I asked him again was he okay. And I looked at him, kinda making sure he wasn’t bleeding, you know. *And just by him talking to me I could see that he had chipped his teeth, and that was it.*” (JX 11, at 168 (emphasis added)).

Mr. Howard testified that he believed that he was fired because he was working with Mr. Yoder at the time of Mr. Yoder's injury, and that he "fel[t] like I was penalized for him falling and chipping his teeth." (Tr. at 93-94).

Mr. Yoder's Testimony

Mr. Yoder testified that he began working for CSX [then Conrail] in 1999 as a freight conductor, and that he was promoted to locomotive engineer in 2002. (Tr. at 107-08). He stated that he worked as a locomotive engineer through April 13, 2013. (Tr. at 109). As an engineer, he operated "big heavy locomotives and the freight trains that are behind them," moving "millions of dollars of equipment and freight across the road." (Tr. at 110).

Mr. Yoder stated that on April 13, 2013, he was assigned to a train traveling to the Crestline Yard with Mr. Howard; he stated that he was familiar with that route. (Tr. at 111). He estimated that he arrived at the Avon Yard at 6:45 or 6:50 a.m., and prepared for work. (Tr. at 111). He began crossing the yard to the waiting train on the fuel pad, carrying with him several bags of ice and equipment. (Tr. at 112). He stated that as he crossed the yard to the train, he and Mr. Howard positioned themselves between two sets of railroad tracks such that one train crossed the yard in front of them, and another behind them. (Tr. at 112-13). After the train in front of them passed, they continued, and began to cross the tracks, with Mr. Yoder following Mr. Howard. (Tr. at 113). Mr. Yoder testified that he:

caught my [his] toes on the rail and went falling face first, landed on the ice bags that I had cradled against my chest with my backpack slung over my shoulder. I got up as soon as I hit, more or less; I was worried about the train traffic around us and I just told him [Mr. Howard], "Let's get to our train."

(Tr. at 113). Mr. Yoder estimated that it would take one to two minutes to walk from the parking lot across the tracks to the waiting train on the fuel pad, without stopping. (Tr. at 145). On April 13, he did stop about halfway across the yard to let a train pass, and waited for it to clear him and Mr. Howard by twenty-five feet, as a safety precaution. (Tr. at 146). He stated that he carried several bags of ice cradled in his left arm, a backpack (or "grip"), and a flashlight in his right hand. (Tr. at 147). Mr. Yoder stated that he went "straight down" without breaking his fall, and fell into "ballast" (*i.e.*, rock) and mud. (Tr. at 148-49). As he fell, his teeth struck the rail, he testified. (Tr. at 148).

Mr. Howard stopped and turned around, and asked Mr. Yoder if he was okay, Mr. Yoder stated, likely after Mr. Yoder had recovered and was standing back up. (Tr. at 149). After checking to make sure he had all his equipment, Mr. Yoder and Mr. Howard continued to the waiting train. (Tr. at 150). The fall did not result in any bruising or cuts to Mr. Yoder's face, arms, or hands; he stated that he was wearing gloves and, he believed, a long-sleeved shirt. (Tr. at 150-51). He stated that he was not sure if at the time he was "surprised" at not being bruised or cut, or whether he was "just in shock . . . that I had been so clumsy and fallen and felt ridiculous." (Tr. at 151). Mr. Yoder testified that he "felt fine. I had no pain, no suffering, nothing that would indicate that I had anything worth reporting." (Tr. at 114). He stated that he later felt "some shock" that he hadn't experienced any pain from the chipping, and he was a "little surprised" that he hadn't been cut or bruised in the fall. (Tr. at 151-52).

Mr. Yoder stated that tripping and falling was “very brief, a few seconds,” and estimated that it took between two to six seconds to trip, hit his teeth, stand back up, and begin to walk towards the waiting train. (Tr. at 148-50). He stated that when he and Mr. Howard arrived at the fuel pad, it was “[b]usiness as usual. He got up there. I followed. We did what was necessary to get the train out of the yard,” which they accomplished. (Tr. at 114). Mr. Yoder stated that he did not recall whether Mr. Howard asked him how he was doing during the trip to the Crestline Yard, though he was “sure” that he had given their working relationship. (Tr. at 115). He stated that he “felt fine” during the trip; his mouth “felt funny,” but he was not aware “what exactly had happened to it.” (Tr. at 115). He stated that he felt “no pain.” (Tr. at 115).

Mr. Yoder stated that he noticed “pretty quickly” that his mouth felt “a little odd” and not “like my normal mouth should feel.” (Tr. at 153). He did not tell anybody about the fall at that point, however. (Tr. at 153). Mr. Yoder stated that he “discovered [upon going back to his hotel room] it was a little difficult to chew food without teeth, or parts of my teeth.” (Tr. at 116). When asked to explain what he meant, he responded, “[w]ith food in my mouth, it was an area missing from what I would normally be suing to chew with, so it was difficult to chew food without that portion of my teeth, and I was feeling food up in that area that was once occupied.” (Tr. at 117). Mr. Yoder stated that he then looked in the bathroom mirror and saw that one-third of his left front tooth, as well as one-half of the tooth “one immediately to the left of that” in the upper half of his jaw, were gone. (Tr. at 117-18). Mr. Yoder stated that he eventually had his teeth fixed. (Tr. at 115-16). He stated that his teeth did not hurt at all between the period when he chipped them and when they were fixed. (Tr. at 116).

Mr. Yoder called his wife and discussed his injury that night, and he stated that she informed him that he would need to describe the nature of the injury when filing an insurance claim. (Tr. 118-19). Mr. Yoder stated that after arriving at the Crestline Yard, he did not think to call CSX to report his chipped tooth because he “didn’t think to bother anybody at home”; because “I didn’t really have anybody’s number at home”; and because the “people that were [on duty] when I went on duty were no longer there.” (Tr. at 119). On cross, he stated that he did have one road foreman’s phone number. (Tr. at 154). He stated that he did not feel like he needed medical attention that day, and that his chipped tooth had not and would not interfere with his job performance. (Tr. at 119-20).

Mr. Yoder stated that the next day, he did not report the chipped tooth to the trainmaster at the Crestline Yard, because he planned to report it when he returned to the Avon Yard, which he understood to be the proper procedure for reporting an injury. (Tr. at 120-21). He called Mr. Hibben, his union representative, on the return trip, because he believed that reporting an injury would “draw attention from CSX” and he wanted to see “what [Mr. Hibben] would recommend.” (Tr. at 121-22). Mr. Yoder was “torn” about reporting the injury: he believed that in making an insurance claim, he would have to report how his teeth were chipped, but he also did not want to put himself in the “bull’s eye.” (Tr. at 122). Mr. Yoder stated that he was not considering whether to file a FELA claim, and that he had never filed such a claim. (Tr. at 122).

At the Avon Yard, Mr. Yoder met with the trainmasters Mr. Martin and Mr. Moore, and with the Avon Yard terminal superintendent, David Harris. (Tr. at 123). He completed a PI-1A “Employee’s Injury and/or Illness” form (JX 5) and a written statement (JX 6). (Tr. at 123-24). He testified that he completed the form accurately to the best of his ability. (Tr. at 158). On cross, Mr. Yoder admitted that he had written on the PI-1A form that his injury was the fault of

“Avon Yard track and maintenance not providing safe walking conditions” (JX 5 at 2), but that he did not actually believe that the Avon Yard was less safe “than normal,” and that he had made that statement regarding yard conditions because he felt that Mr. Harris was attempting to blame him for his injury. (Tr. at 158-60).

Mr. Yoder continued working until April 19, 2013, when he was pulled from service; he was then placed on administrative leave pending CSX’s internal investigation by letter dated April 22, 2013. (Tr. at 125-26. *See* JX 10). During the course of the investigation, Mr. Yoder came to understand that he was charged with making a dishonest statement and with late reporting. (Tr. at 127). He was terminated by a letter dated May 30, 2013, several weeks after the conclusion of the investigation (which included a hearing). (Tr. at 127. *See* JX 13). Mr. Yoder testified that he had never heard of CSX terminating or disciplining an employee for making a dishonest description of an on-the-job injury. (Tr. at 127-28).

Mr. Yoder had been trained to report injuries, and he stated that he followed that training by reporting the injury “[w]hen I finally realized what the situation was.” (Tr. at 129). On April 14, after having spoken to his wife and to Mr. Howard about his injury, he “could have” told Mr. Sanders, the Crestline Yard trainmaster, about his injury, and Mr. Hibben, the union representative, “indicated” to Mr. Yoder that he should have reported his injury the previous day; they arranged to meet at Avon. (Tr. at 155-56). He stated that he was trained to report on-the-job injuries. (Tr. at 161). He stated that he reported the injury “as soon as I was able to” but not “as soon as [he was] aware of it.” (Tr. at 162).

Mr. Yoder testified as to a video taken by a CSX camera on the morning of April 13, 2013. (Tr. at 160-61). Mr. Yoder stated that he was aware that CSX cameras “existed,” but was not aware “to the extent that they were able to use the cameras.” (Tr. at 129). He testified that he had the opportunity to review the video with his union representative “minutes before” CSX’s internal investigation hearing; he was not aware of any refusal by CSX to provide the video for review before the hearing. (Tr. at 160). He stated that on the video he could see “forms” and that he could see “one form disappea[r] and you could still see the other person,” but that he could “not actually see the person on the ground nor the fall; you could just see the person disappear.” (Tr. at 161).

Mr. Yoder testified that he believed that he spoke to Mr. McMahon, his counsel, after meeting with CSX management on April 14; he testified that he did not recall testifying in a deposition that he contacted Mr. McMahon before meeting with management, though he did not dispute having made that testimony. (Tr. at 156-57).

Mr. Harris’s Testimony

Mr. Harris testified that he had worked for CSX for about eighteen years, most recently as the terminal superintendent at the Avon Yard. (Tr. at 169-70). As terminal superintendent he supervised overall train operations at the Avon Yard, hired and trained employees, and participated in “incident derailment investigation.” (Tr. at 171). He directly supervised five trainmasters and one superintendent, and indirectly supervised 350 employees, between three-hundred and 320 of whom were engineers and conductors. (Tr. at 171). In 2013 (and through the time of the hearing), Mr. Harris reported to Scott Conner, CSX’s Great Lakes Division manager. (Tr. at 172).

Mr. Harris stated that engineers and conductors are trained in CSX's Safety and Operating Rules via yearly training, which includes required testing, and that they undergo a certification process about every three years. (Tr. at 172-73). Mr. Harris stated that Rule GS-5 requires that employees who suffered an on-the-job injury report that injury to a supervisor before the end of their "tour of duty." (Tr. at 173-74. *See* EX 11-3). The Rule also requires that if an employee becomes aware of a coworker's injury, the employee must report the injury. (Tr. at 174).

Mr. Harris stated that he was responsible for handling reports of unsafe working conditions in Avon Yard, and that he had been trained by CSX in how to handle an employee's injury report. (Tr. at 175). If an injury was not so serious as to require immediate medical attention, then the employee would be instructed to complete a PI-1A form. (Tr. at 176). That form is "used to help investigate what really happened and come up with a root cause for the injury." (Tr. at 176). Mr. Harris stated that CSX investigated the circumstances of employee injuries, "[m]ainly to figure out what happened and keep it from happening again." (Tr. at 176-77). Investigations do not involve disciplining employees, he stated. (Tr. at 177).

Mr. Harris stated that he became aware of Mr. Yoder's injury on the evening of April 14, 2013, a Sunday. (Tr. at 177). Mr. Martin, the trainmaster, contacted Mr. Harris between 6:00 and 7:00 p.m., while Mr. Harris was at home, and Mr. Harris traveled to the Avon Yard after speaking to Mr. Martin. (Tr. at 177-78). He met with Mr. Martin and asked for a "synopsis" of what had been reported. (Tr. at 178). He then met with Mr. Yoder, Mr. Howard, and Mr. Hibben and "asked a few questions about . . . what had happened." (Tr. at 178). Mr. Martin had already obtained statements from Mr. Yoder and Mr. Howard. (Tr. at 178-79). Mr. Harris stated that the information Mr. Yoder wrote in a statement was consistent with what Mr. Yoder told Mr. Harris on the evening of April 14. (Tr. at 179. *See* JX 6).

Mr. Harris described the walkway across the Avon Yard to the fuel pad, which he was familiar with from viewing CSX's surveillance video and from observing employees. (Tr. at 179-81). He stated he had received a safety complaint during a monthly Safety Committee meeting in October 2012 about the condition of the yard: that "there were some bad walking conditions or muddy conditions on that walkway," which he attributed to a drainage issue. (Tr. at 181). Neither Mr. Yoder nor Mr. Howard attended the Safety Committee meeting where the complaint was raised. (Tr. at 182). The drainage issue was resolved, and the employee who complained about the walkway did not complain any further. (Tr. at 182). This was the only complaint about the walkway of which Mr. Harris knew. (Tr. at 183).

Mr. Harris stated that on April 14, Mr. Howard was asked to complete a statement regarding Mr. Yoder's fall (JX 7) because he was working with Mr. Yoder and might have had pertinent information about the incident. (Tr. at 185). Mr. Harris stated that he interpreted Mr. Howard's statement to mean that Mr. Howard did not see Mr. Yoder fall, but heard him fall, and that he turned and saw Mr. Yoder on the ground. (Tr. at 185). Mr. Harris stated that he did not interpret Mr. Howard's statement to be a report of a personal injury, as Mr. Howard did not mention an injury in his statement. (Tr. at 185-86).

Mr. Harris stated that he spoke with Mr. Yoder face-to-face in a CSX conference room on April 14, while Mr. Howard and Mr. Hibben were present. (Tr. at 186-87). Mr. Harris stated that Mr. Howard did not participate at all in the discussion; although he was there "[t]o

corroborate Mr. Yoder's story," Mr. Harris stated, Mr. Howard did not at any time report Mr. Yoder's injury. (Tr. at 187-88).

During the face-to-face meeting, Mr. Yoder told Mr. Harris that he had fallen while crossing the yard, striking his teeth on a rail and chipping them. (Tr. at 186-87). Mr. Harris testified that Mr. Yoder had visibly chipped teeth and did not have any bruising, swelling, scratches, or other indicia of injury, which was significant to Mr. Harris; he stated that it was hard to believe that Mr. Yoder could fall and "come out unscathed without at least a scratch on his face" or an injury to his hands. (Tr. at 186-87). Mr. Harris informed Mr. Yoder that Mr. Yoder would have to complete a PI-1A form. (Tr. at 187). Mr. Harris stated that he did not tell Mr. Yoder what to write on the PI-1A form, and was not aware of anyone helping Mr. Yoder complete the form. (Tr. at 190).

Mr. Harris stated that he contacted his supervisor, Scott Conner, CSX's Division Manager of the Great Lakes region, before asking Mr. Yoder to complete the PI-1A form, as part of CSX's injury protocol; anytime there was an injury, he stated, "we get everybody on the [phone]," including the CSX Manager of Safety, the Assistant Division Manager; and the Superintendent of Train Operations. (Tr. at 188-89). During the call Mr. Harris discussed with other CSX managers the need to have Mr. Yoder complete the PI-1A form and their plan for investigating the incident. (Tr. at 189).

Mr. Harris was concerned by safety issues Mr. Yoder listed on the form, including a "lighting issue" and "unsafe walking conditions," and he stated he wanted to address those issues. (Tr. at 190). CSX investigated the issue by walking in the area where Mr. Yoder stated that he fell and taking pictures, and determined that the walkway was "adequate." (Tr. at 190-91). According to Mr. Harris, there were no signs of a fall on the morning of April 15, when CSX investigated the area and took photographs of it. (Tr. at 191; 195. *See* RX 3 at 14-24). CSX also obtained surveillance video from the morning of April 13 and "we reviewed that several times"; reviewing the video was "basically protocol." (Tr. at 191-93). Additionally, CSX "did a reenactment" by timing the walk from the point where Mr. Yoder and Mr. Howard paused to allow a train to pass to the fuel pad; the walk was timed at 35 seconds. (Tr. at 191-92).

Mr. Harris testified as to the video. (Tr. at 200-09. *See* JX 8). He stated that the video showed that during a forty second span, "two figures walk across after the train cleared, walk across the walkway and climb up onto their train on the main line." (Tr. at 209). Mr. Harris stated that the video showed Mr. Howard and Mr. Yoder stopping to let a train pass by them, then walking across the yard to board the waiting train. (Tr. at 193-94). He did not see either of the individuals fall at any point on the video, nor he did see either of the individuals stop walking after they had stopped to let another train pass. (Tr. at 209). He stated that the reenactment had taken thirty-five seconds, and during the reenactment he did not stop or slow down at all. (Tr. at 210). The CSX surveillance video included timestamps, which showed that Mr. Yoder and Mr. Howard walked the same distance in thirty-six seconds, Mr. Harris stated. (Tr. at 192). He stated that he did not observe either employee fall in the video. (Tr. at 194). He stated that the video quality was "grainy." (Tr. at 194). He stated that a third-party had enhanced the video by improving its quality. (Tr. at 194-95). He stated that CSX had other surveillance cameras in the Avon Yard, but that none had recorded Mr. Yoder's and Mr. Howard's walk. (Tr. at 194). Mr. Harris stated that after viewing the original and enhanced versions of the video, "[m]y view is that it did not occur the way that Mr. Yoder alleges it did." (Tr. at 195).

Mr. Harris stated that he did not make the decision to charge either Mr. Yoder or Mr. Howard with rule violations, but was involved in the decision. (Tr. at 197). He stated that based on his investigation, he believed that Mr. Yoder violated Rules GR-2 (prohibiting employee dishonesty) and GS-5 (the injury reporting rule), and that Mr. Howard violated GS-5 because “he did not report when there was an injury and . . . the teeth was the evidence that there was something different with Mr. Yoder that needed to be reported.” (Tr. at 198). Mr. Harris stated that he “really [did not] know” how Mr. Yoder’s injury occurred, but that “[i]t really wasn’t” important to discern how it had occurred “[b]ecause my charge was to investigate . . . the nature of the injury.” (Tr. at 199).

Mr. Harris stated that CSX held an investigation, including an internal hearing regarding the charges leveled against Mr. Yoder and Mr. Howard. (Tr. at 200). He participated in the hearing as a witness, and testified regarding the surveillance video. (Tr. at 200). He stated that he agreed with CSX’s decision to terminate Mr. Yoder’s employment, because he did “not believe what was reported to us was factual,” as it “just didn’t match up . . . what he said happened and what the evidence we had from the recreation, from the video; from everything that we did, it didn’t match up.” (Tr. at 210-11). Mr. Harris stated that he also agreed with the decision to dismiss Mr. Howard, “[b]asically for the same reason—it didn’t match up.” (Tr. at 211).

Mr. Harris testified that employee injuries had some effect on his annual bonus; he stated that “one injury is not going to kill you in a bonus potential if you’re driving and doing things the right way.” (Tr. at 212). He stated that CSX has a policy prohibiting retaliation against employees for reporting injuries, and that that policy included consequences “up to dismissal.” (Tr. at 213). Mr. Harris testified as to a letter sent by Michael Ward, the CEO of CSX Transportation, to all CSX Transportation managers; Mr. Harris understood the letter to state that “harassment, intimidation, or retaliation in connection with injury reporting will not be tolerated, period.” (Tr. at 213-14. *See* RX 27). Mr. Harris testified as to the Training Tracks Online Training for Anti-Retaliation “Policy for Protection Against Retaliation of Railroad Workers” (an online training module); he stated that he completed the training on April 8, 2013, and had taken a short test during the training. (Tr. at 214-215. *See* JX 15). Mr. Harris stated that he had also had face-to-face training in anti-retaliation policies, including a training by Lisa Gray, who worked in CSX’s Safety Department, in May or June 2013; the training was designed to comply with Federal law and regulations and included a list of “do’s” and “don’ts” of what to do when an employee comes and reports an injury.” (Tr. at 215-17. *See* RX 29).

Mr. Harris testified that he had complied with the training following Mr. Yoder’s injury report. (Tr. at 217). He stated that he “[a]bsolutely” did not take any action against Mr. Yoder because he reported an injury, and that he did not take any action against Mr. Yoder for reporting an unsafe working condition. (Tr. at 217). Mr. Harris stated that to his knowledge Mr. Howard never reported a workplace injury—or unsafe working conditions—to Mr. Harris, Mr. Yoder, or to anyone else, nor did he provide information regarding Mr. Yoder’s injury to any government or law enforcement agency. (Tr. at 217). He stated that he did not take any action against Mr. Howard because he thought Mr. Howard might report Mr. Yoder’s injury or provide information about it to a government or law enforcement agency. (Tr. at 218).

On cross, Mr. Harris stated that witnesses to employee injuries did not fill out PI-A1 forms, but rather gave statements if asked. (Tr. at 221-222). He stated that employees who had

knowledge of on-the-job injuries and who were asked about those injuries by management but did not give information would be in violation of CSX rules. (Tr. at 222). He stated that Mr. Martin asked Mr. Howard to make a statement about Mr. Yoder's injury, because CSX wanted to know if Mr. Howard had information about the injury Mr. Yoder reported to CSX. (Tr. at 223).

Mr. Harris testified that he believed that an employee would not be in violation of GS-5, the rule requiring employees to report injuries, if the employee did not report a bruise that was not life-threatening, did not hinder the employee's ability to do his job, and did not hurt so severely that the employee required a doctor's attention. (Tr. at 224). Mr. Harris distinguished between being "hurt" and being "injured"; he stated that if a person was punched in the arm they would be hurt, but if the arm broke, they would be injured. (Tr. at 225). He stated that to comply with CSX rules, an injury would need to be reported when it was manifest. (Tr. at 226). Mr. Harris stated that he believed Mr. Yoder's injury manifested itself "[t]he minute his teeth were chipped." (Tr. at 233).

Mr. Harris stated that he did not "necessarily agree" that Mr. Howard would never have been charged if Mr. Yoder did not report his chipped teeth to CSX, and stated that "if Mr. Yoder was different, Mr. Howard has an obligation to report . . . whether Mr. Yoder reported it or not." (Tr. at 226).

Mr. Harris stated that video surveillance was not used for rules compliance in the normal course of a workday. (Tr. at 229).

Mr. Harris stated that if during the course of an investigation into an employee's injury, CSX management determined that a coworker witnessed the injury and the coworker was "in a situation where they could clearly see that that employee was injured . . . [then] they would be subject to the exact same rules violation." (Tr. at 231). If the coworker reported that he "saw [the employee] stumble over here but I . . . went to the other end of the yard and I didn't think anything of it . . . that would not constitute a rules violation." (Tr. at 231). He stated that he was not familiar with a coworker having been disciplined because he witnessed an employee injury but didn't report it before being asked to make a statement. (Tr. at 232).

Mr. Conner's Testimony

Mr. Conner stated that he had worked for CSX Transportation for nearly twenty years, and that he was currently employed as the Division Manager for the Great Lakes Division, a position he had held since January 2011. (Tr. at 234). As Division Manager he was responsible for the overall operation and performance for the Great Lakes Division, "from safety to budgetary responsibilities to serving our customers." (Tr. at 234-35). He stated that he had the ultimate responsibility for all transportation employees in his Division. (Tr. at 238).

Mr. Conner stated that in April 2013, he received a phone call from Mr. Harris notifying Mr. Conner that Mr. Yoder had reported an injury to his trainmaster, Mr. Martin. (Tr. at 238). (He testified that he had no prior interactions with Mr. Yoder. (Tr. at 238-39)). Mr. Conner initiated an investigation "to understand where [Mr. Yoder] fell . . . and if there was a condition that . . . we needed to be aware of to ensure we can protect it and/or get it corrected." (Tr. at 240). He stated that he instructed managers to gather information from witnesses to the incident and from surveillance cameras and radio transmissions. (Tr. at 240-42).

The Division ultimately prepared a report regarding the incident. (Tr. at 242. *See* RX 3). He stated that the report included statements from Mr. Yoder, Mr. Howard, and many others, including staff at the hotel where Mr. Yoder and Mr. Howard stayed on April 13 and the drivers who transported them to and from the Crestline Yard on April 13 and 14. (Tr. at 243). Mr. Conner stated that he never spoke to Mr. Howard, and that he only relied on the statement Mr. Howard made. (Tr. at 243. *See* RX 3 at 7). Mr. Howard in his statement did not report Mr. Yoder's injury, Mr. Conner stated. (Tr. at 244).

After completing the investigation, Mr. Conner stated that "it just didn't add up." (Tr. at 244-45). He stated that he compared Mr. Yoder's and Mr. Howard's statements with the video, and "in the video you never see anyone fall." (Tr. at 245). Also, the reenactment "just didn't add up" given the "timeframe." (Tr. at 245). At that point, Mr. Conner testified, "we're really dealing with a situation where . . . we've got to determine if the employees are being dishonest." (Tr. at 245).

Mr. Conner stated that the video was "pretty compelling" and that it would have been difficult to make the decision without the video. (Tr. at 283). He stated that Complainants were not visible while standing behind the passing train, but "[t]hey said the time line that when that car cleared, that's when they started to cross the tracks, and that's when [in] their account that he fell . . . [O]nce the car clears and they get across the tracks, at that point, they are visible." (Tr. at 285). He stated that he viewed the video three to four times initially, then reenacted it, then viewed it several more times, before making the decision to charge Complainants. (Tr. at 293). Mr. Conner stated that he viewed the unenhanced version of the video, which was "just as effective" because he was familiar with the railyard and "what to be looking for within the layout [and so] I was able to distinguish from the unenhanced version with relative ease."³ (Tr. at 294).

Mr. Conner was responsible for employee discipline, and specifically for "reviewing all the facts" and "assessing the discipline." (Tr. at 245-46). He stated that, according to the terms of the Collective Bargaining Agreement ("CBA"), a document called an assessment that included a description of the incident, the violation, and witnesses was generated by a field manager. (Tr. at 246). CSX's Field Administration Department then reviewed the assessment and graded the violation according to a document entitled "Individual Development and Personal Accountability Policy for T&E Employees" (RX 12) as "minor," "serious," or "major." (Tr. at 246-48). Then, a charge letter was sent from the Field Administration Department to the employees, the employee's union representative, and any witnesses. (Tr. at 248. *See* JX 9-10).

Mr. Howard and Mr. Yoder were both charged with "major" offenses, which was typical for an alleged violation of Rule GR-2 (employee dishonesty). (Tr. at 248). Mr. Howard and Mr. Yoder were both withheld from service by the charge letters, which was typical for employees charged with major offenses. (Tr. at 250). The charge letters also defined the protocol for the employees' hearings. (Tr. at 250-51). The hearing was conducted before a trainmaster who worked in a different division, to "provide them a more impartial hearing." (Tr. at 251). Mr. Conner was not involved in the hearing, but did review a transcript, the exhibits, including the video, and the hearing officer's notes (RX 7). (Tr. at 251-52). After reviewing the hearing

³ He stated that the video was enhanced for "persons that may not be as equipped and experienced" with the railyard. (Tr. at 294).

transcript, Mr. Conner was “probably more resolute” that “this did not happen the way that they had reported it to occur.” (Tr. at 252-53).

Mr. Conner testified that the fact that Mr. Yoder reported an injury did not lead him to conclude that Mr. Yoder or Mr. Howard had not been truthful. (Tr. at 253-54).

Mr. Conner stated that there was also a basis for discipline because Mr. Yoder had reported his injury “late,” and Mr. Howard “just did not report.” (Tr. at 254).

Mr. Conner testified that the charges of dishonesty “warrant[ed] dismissal.” (Tr. at 254). He stated that this was the case because, given the number of employees at CSX, “there’s very little time that they’re actually supervised. So they’re self-supervising, a large responsibility.” (Tr. at 254). He stated that he did not know Mr. Howard’s and Mr. Yoder’s “motive” for being “untruthful.” (Tr. at 254-55). Mr. Conner stated that he did not discern a motive for the allegedly false report, nor did he try to discover one, as “I really don’t have the luxury of trying to determine a motive.” (Tr. at 289). He did not speak to either employee before assessing discipline, which was typical unless a union representative requested a meeting, and neither employee through their union requested a meeting. (Tr. at 255). Mr. Conner stated that he had some discretion in assessing employee discipline, and could weigh input from the local management team and employees’ history in deciding what discipline to assess. (Tr. at 291).

Mr. Conner had dismissed other employees for dishonesty. (Tr. at 256-62). He dismissed two employees for not reporting a locomotive defect; one of the employees who did not report the defect did report an injury during the trip in which the defect was discovered. (Tr. at 256-58. *See* RX 13-15). He dismissed two employees for “basically stealing time . . . claiming payroll that they were not entitled to.” (Tr. at 259-60. *See* RX 16-19). One of the employees had reported an injury nine years before being dismissed. (Tr. at 260). Mr. Conner dismissed another employee after determining that the employee had claimed FLMA benefits to which he was not entitled, in violation of GR-2; that employee had reported an injury ten years before being dismissed. (Tr. at 260-61. *See* RX 23-25). Finally, Mr. Conner dismissed an employee after determining that he had lied during an investigation into a train striking his personal vehicle. (Tr. at 261-62. *See* RX 20-22). That employee had reported an injury ten years before he was dismissed. (Tr. at 262).

Mr. Conner testified that in 2013, fourteen work-related injuries, including Mr. Yoder’s, were reported to CSX within his Division. (Tr. at 262-63). Other than Mr. Yoder, no employee who reported a work-related injury in 2013 was charged with a rules violation in connection with the incident that resulted in the injury. (Tr. at 263). Ten of those employees continued to work for CSX; one retired; one was dismissed for an unrelated major violation; and one’s seniority was forfeited. (Tr. at 263-64). Mr. Conner stated that he was not involved in the decision to forfeit the employee’s seniority, but that he was involved in the decision to terminate the employee for the major violation. (Tr. at 264).

In 2014, nineteen work-related injuries were reported to CSX within Mr. Conner’s Division. (Tr. at 264). One employee was charged with late reporting and was assessed a five-day suspension; none of the other employees were disciplined; and all of the employees continued to work for CSX. (Tr. at 264).

CSX had a policy that prohibited retaliation for reporting work-related injuries, and the consequences for retaliation could include dismissal. (Tr. at 264-65). Mr. Conner received a letter from Michael Ward, CSX's then-President and CEO, in 2010, stating that it was prohibited to retaliate against employees who reported injuries. (Tr. at 265. *See* RX 27). Mr. Conner was trained in CSX's Policy Protection Against Retaliation for Railroad Workers. (Tr. at 265-66. *See* JX 15). He completed the Training Tracks course sometime in April 2013, and passed an exam in the course. (Tr. at 266. *See* RX 30). He received annual training in the company's policy for employees who reported injuries administered by CSX's safety and compliance department. (Tr. at 266-67. *See* RX 29).

Mr. Conner stated that he did not take any action against Mr. Yoder because Mr. Yoder reported an injury. (Tr. at 267). He stated that to his knowledge, Mr. Howard never reported any workplace injury of any kind, or provided any information regarding Mr. Yoder's injury to any governmental agency. (Tr. at 267). He stated that he never took any action against Mr. Howard because he believed that Mr. Howard might report an injury or unsafe condition, or because he believed that Mr. Howard might provide information about Mr. Yoder's injury to a governmental agency. (Tr. at 268).

Mr. Conner was eligible for a bonus, based on "operational initiatives or targets," a "budget component or target," and a "safety element." (Tr. at 255-56). He stated that one injury report did not have a material impact on his bonus as far he knew. (Tr. at 256).

On cross, which occurred by telephonic conference on March 3, 2015, Mr. Conner stated that before he made his decision to terminate Mr. Howard's and Mr. Yoder's employment, he reviewed a transcript from CSX's hearing, including the statement of Mr. Yoder's dentist. (Tr. at 281-82. *See* JX 11 at 203). He stated that the statement from Mr. Yoder's dentist "didn't really speak to the real issue which was the lie . . . told by Mr. Yoder and Mr. Howard . . . I didn't give [the dentist's opinion] much weight in my decision." (Tr. at 295). He stated that it was "difficult for me to put my head around" Mr. Yoder's lack of lacerations and bruises after the alleged fall. (Tr. at 295-96).

Mr. Conner stated that if Mr. Howard had "solely" made a "late report, that would not necessarily result in termination." (Tr. at 290). He also stated that if Mr. Yoder had reported unsafe conditions but had not been injured, that he would not have been accused of lying about unsafe conditions. (Tr. at 290).

DISCUSSION

Under the FRSA, a railroad carrier "may not discharge . . . or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act" involving one of various statutorily protected activities. 49 U.S.C. § 20109(a); 29 C.F.R. § 1982.102(b). The protected activities include "notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4); see also 29 C.F.R. § 1982.102(b)(1)(iv).

Section 20109 incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. § 42121(b); 49 U.S.C. § 20109(d)(2)(A). To prevail, a complainant must establish by a preponderance of the evidence

that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an adverse personnel action; and (3) the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii). If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity. 49 U.S.C. 4121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(a)-(b).

Mr. Howard Did Not Engage in a Protected Activity Because He Did Not Notify or Attempt to Notify CSX of a Work-Related Injury

Mr. Howard on April 14, 2013, made this written statement: "While walking across the departure tracks to board the Q00813 with [engineer] E. L. Yoder I heard him fall. I then turn [sic] around and he was on the ground." (JX 7. See Tr. at 43.)

Mr. Howard testified that he did not intend this statement to be an injury report. (Tr. at 87). The statement itself does not include any information about an injury. Mr. Howard testified that he also made several verbal statements to trainmaster Nick Martin on April 14, 2013, but he testified that he did not report an injury with those statements. (Tr. at 85). Furthermore, neither Mr. Harris (Tr. at 187-88) nor Mr. Conner (Tr. at 267-68) testified that they interpreted Mr. Howard's statement to be an injury report.

Accordingly, there is no evidence that Mr. Howard notified, or attempted to notify, CSX (or any other entity) of a work-related injury, and therefore Mr. Howard has not established by a preponderance of the evidence that he engaged in protected activity as defined by 49 U.S.C. § 20190(a)(4). Mr. Howard's complaint must therefore be dismissed.⁴

Mr. Yoder Did Not Engage in Protected Activity Because His Notification of a Work-Related Injury Was Not Made in Good Faith

A complainant's report of an on-the-job injury is protected only if that report was made in "good faith." 49 U.S.C. § 20109(a). In determining whether a report was made in "good faith," the "relevant inquiry [is] whether, at the time he reported his injury to Defendant, Plaintiff genuinely believed the injury he was reporting was work-related." *Ray v. Union Pac. R.R. Co.*, 971 F. Supp. 2d 869, 884 (S.D. Iowa 2013) (emphasis in original).

In a case involving a hotline report of a violation, the Administrative Review Board has explained that for a complainant to make a report in good faith, he or she must believe the facts contained in that report:

The provision of information is protected activity only when the complainant actually believes in the existence of a violation. Here, the finding that Walker did not make his hotline report in good faith is a finding that Walker did not actually believe the charge he made in that call. Therefore, regardless whether it

⁴ Given my resolution of Mr. Howard's complaint, I need not address whether or not his hearing testimony concerning Mr. Yoder's alleged fall was truthful. In the event it is subsequently determined that Mr. Howard engaged in protected activity, I find in the alternative that Respondent terminated Mr. Howard solely for dishonesty. See below at 19-23.

otherwise provides sufficient information about safety to qualify as a protected activity, Walker's hotline call cannot qualify as protected activity.

Walker v. American Airlines, No. 05-028, ALJ No. 2003-AIR-17, 2007 WL 1031366, at *12 (ARB Mar. 30, 2007) (citation and internal marks omitted). This rationale applies equally here – if, at the time Mr. Yoder made his injury report on April 14, he did not actually believe it to be true, it could not have been made in good faith.

Mr. Yoder has not established by a preponderance of the evidence that on April 14, 2013, he in good faith reported having chipped his teeth at the Avon Yard the previous day. I make this determination after comparing his testimony at the hearing against the evidence of record. Mr. Yoder's version of the incident as presented at the hearing, although consistent with Mr. Yoder's April 14, 2013 report and Mr. Howard's April 14, 2013 written statement, is simply not credible. Because I find that Mr. Yoder's hearing testimony concerning the existence of the alleged fall was not credible, I find that Mr. Yoder did not actually believe the facts as stated in his April 14, 2013 report at the time he made that report, and thus find that his report was not made in good faith. Accordingly, I find that Mr. Yoder did not engage in protected activity when making his April 14, 2013 report.

I find that Mr. Yoder's hearing testimony concerning the existence of the alleged fall is not credible for several reasons. First, and most importantly, the surveillance video establishes that Mr. Yoder did not fall in the Avon Yard as he testified. Mr. Yoder testified that after one train crossed the yard in front of them and another behind them, and after the train in front of them passed, they began to cross the tracks. (Tr. at 112-113). It is at this point, Mr. Yoder alleges, that he tripped on the track and fell. (Tr. at 113.) Mr. Yoder also testified that it took between two and six seconds to trip, fall, respond to Mr. Howard's question about whether he was OK, and begin walking towards the train. (Tr. at 148-150).

I have reviewed the surveillance video of the yard (JX 8) in detail.⁵ It is grainy and appears to have time-stamped frames one second apart. While the video has its limitations, and would not suffice to identify Complainants if that were necessary, it nevertheless suffices to show that Complainants did not pause when crossing the yard. Specifically, the video establishes that Complainants did not stop for any period of time, let alone two to six seconds, between when the train in front of them passed and when they boarded the waiting train. I recognize that the quality of the video leaves something to be desired; but having reviewed the video several times,⁶ one can make out Complainants as they cross the yard and board the waiting train, and specifically one can make out the movement of those figures after the train passes and they start crossing the yard. At the outset, Complainants are somewhat difficult to discern (JX 8 at 6:23:08 to 6:23:11), but as they move across the yard (especially from JX 8 at 6:23:14 on) they become much easier to see and it is obvious from the sequence of images that the same figures that were initially somewhat difficult to discern are the same figures that

⁵ There is no dispute that the video depicts Complainants crossing the yard on the morning of April 13, 2013. First, the video is a Joint Exhibit. Second, Mr. Yoder acknowledged it depicted him and Mr. Howard. (See Tr. at 161).

⁶ It is much easier to see Complainants on the surveillance video crossing the yard when the video is playing as opposed to seeing them in still screen-shots of the video. (See Tr. at 206 (Mr. Harris testified that "[i]t is easier to see [Complainants on the video] when it's moving")).

ultimately boarded the waiting train. What is critical is that at no time from the passage of the train immediately before the figures start crossing the yard is there any pause in their progress across the yard. The video simply is not consistent with the fall alleged by Mr. Yoder and corroborated by Mr. Howard.

Second, I find it inherently implausible that Mr. Yoder did not immediately realize that he had chipped one-third of one front tooth, and one-half of another tooth. (Tr. at 114-15.)⁷ At the hearing, Mr. Yoder was asked if, during the run to Crestline that day (which, according to Mr. Howard, took six to seven hours, Tr. at 37), he was aware that he had chipped his teeth during the fall. He responded, “[m]y mouth felt funny, but I didn’t know exactly what had happened to it.” (Tr. at 115). He also said that he felt “no pain” in his mouth. (Tr. at 115). To find Mr. Yoder’s testimony – which is not inconsistent with his April 14 report – credible, I would have to believe that he never ran his tongue over the two chipped teeth during that six to seven hour run, because doing so would have indicated part of the teeth were missing. That is simply beyond belief.

Moreover, evidence in the record indicates that Mr. Howard noticed Mr. Yoder’s chipped teeth before they left the Avon Yard, Tr. at 72-73, and also that Mr. Yoder told Mr. Howard before they left the yard that he chipped his teeth. (JX 11, at 45-46 (during CSX’s investigation, Mr. Howard stated that once they got into the cap of the train after the fall, Mr. Yoder “was like I think I might have chipped a couple of teeth”); JX 11 at 168). This evidence is also inconsistent with Mr. Yoder’s incredible testimony that he did not immediately realize he had severely chipped his teeth. Indeed, this testimony is inconsistent with Mr. Yoder’s own statement during CSX’s investigation, where he said he noticed he chipped his tooth by feeling it with his tongue and his lips in the time period between the fall and walking towards the train. (JX 11 at 26-27). There is no explanation for the discrepancies in Mr. Yoder’s accounts. Additionally, Mr. Yoder himself essentially admitted that his April 14 report (*see* JX 5 at 2) falsely described the yard’s conditions (Tr. at 158-60), which further undermines his credibility.

Third, the timestamps on the video indicate that Complainants crossed the Avon Yard in thirty-six seconds. (JX 8 at 6:23:03 to 6:23:39; *see also* Tr. at 206). Mr. Harris testified that when reenacting the incident he crossed the yard, without pausing, in thirty-five seconds. (Tr. at 210).⁸ I recognize the possibility that Complainants may have been walking much faster than Mr. Harris did when he reenacted the walk. Nevertheless, were I to credit Mr. Yoder’s testimony that the fall was “very brief, a few seconds” (Tr. at 148) or “[b]etween two to six seconds” (Tr. at 149), had Mr. Yoder injured himself in the manner he described, it is unlikely that Complainants would only have taken one second more to cross the yard than it took Mr. Harris during the reenactment.

⁷ As summarized above, the chips to Mr. Yoder’s teeth were significant: one-third of his left front tooth, as well as one-half of the tooth “one immediately to the left of that” in the upper half of his jaw, were gone. (Tr. at 117-18). When asked if, after his fall, and after he had gotten up and started to cross to the waiting train, he knew whether he was injured, Mr. Yoder testified that he “felt fine” and “had no pain, no suffering, nothing that would indicate that I had anything worth reporting.” (Tr. at 114).

⁸ Mr. Conner testified that when they did the re-enactment, they also had a person of approximately Mr. Yoder’s height walk the distance as Mr. Harris was taller than Mr. Yoder. Even so, “the timeframe, again, it just didn’t add up.” (Tr. at 245).

Fourth, as Respondent notes, Mr. Yoder testified that “despite having reportedly fallen face first onto a steel rail surrounded by rocks and mud, without throwing out his arms to catch himself . . . [Mr. Yoder] did not have any bruises or cuts that would suggest such a fall.” Respondent’s Br., at 20. Although Mr. Yoder testified that he was wearing gloves and a long-sleeved shirt (Tr. at 150-51), I find it implausible that after falling face-first onto a railroad track, he would not sustain any injury other than two chipped teeth. I also find that the statement from his dentist, “[p]lease understand that lack and facial lacerations does not necessarily indicate that trauma did not occur,” JX 11 at 203, does not establish that Mr. Yoder chipped his teeth as he testified – the statement merely indicates that trauma can occur without lip and facial lacerations, not that the trauma in this case occurred without those lacerations.

In short, based on his incredible testimony as to the existence of the alleged fall—testimony that is consistent with his April 14, 2013 report—I find that Mr. Yoder could not have possibly believed, at the time he made the report of his injury, that it was truthful. I therefore find that Mr. Yoder did not report an injury in good faith. Accordingly, I find that Mr. Yoder did not engage in protected activity and his complaint must be dismissed.

Assuming Arguendo That Complainants Had Engaged in Protected Activity, and That the Protected Activity Was a Contributing Factor in the Adverse Actions, I Would Still Dismiss the Complaints

Even if Complainants had engaged in protected activity, and even if the protected activity had been a contributing factor in the termination of their employment, I would still dismiss the complaints in this matter because Respondent established by clear and convincing evidence the affirmative defense that it took the adverse action solely for legitimate and non-retaliatory reasons and that it followed a clear, consistently applied company policy in doing so.⁹ Simply put, if Complainants had engaged in protected activity, the evidence clearly and convincingly establishes that Respondent terminated them not for their protected activity, but for dishonesty.

The Administrative Review Board has explained the meaning of “clear and convincing evidence” as follows:

The plain meaning of the phrase “clear and convincing” means that the evidence must be “clear” as well as “convincing.” “Clear” evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. “Convincing” evidence has been defined as evidence demonstrating that a proposed fact is “highly probable.” The burden of proof under the “clear and convincing” standard is more rigorous than the “preponderance of the evidence” standard and denotes a conclusive determination, i.e., that the thing to be proved is highly probable or reasonably certain. In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), the Supreme Court defined “clear and convincing evidence” as evidence that suggests a fact is “highly probable” and immediately

⁹ As explained below at 20-21, this is a case where it would be difficult if not impossible for Respondent to show what it would have done if Complainants had never engaged in protected activity. I have thus followed two Administrative Review Board cases indicating what an employer would have to show to establish the affirmative defense in a case where an investigation precipitated by protected activity resulted in adverse action.

tilts” the evidentiary scales in one direction. We find that the Court’s description in *Colorado v. New Mexico* provides additional useful guidance for the term “clear and convincing” evidence, and we incorporate it into our application of the ERA whistleblower statute.

Speegle v. Stone & Webster Constr., Inc., No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (footnote omitted).

The Board has recognized that in certain cases where a report of an injury or an unsafe condition precipitated an employer’s investigation of the circumstances underlying a report, which in turn resulted in an employer taking adverse action against an employee, an employer can establish its affirmative defense. For example, in *Benjamin v. Citationshares Mgt., LLC*, No. 12-029, ALJ No. 2010-AIR-001 (ARB Nov. 5, 2013), the ARB considered a situation where an employee’s protected activity, consisting of his making two safety reports and attempting to surreptitiously record a meeting he had been ordered to attend concerning those reports, was inextricably intertwined with the adverse actions he suffered. *Id.*, slip op. at 2-4, 13. After finding that the complainant had established that he engaged in protected activity that contributed to the adverse actions he suffered, the Board outlined how the employer could establish the affirmative defense even though the protected activity and the adverse actions were inextricably intertwined:

The burden now shifts to ... [employer] to demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity. Typically, respondents meet this burden of proof by showing what they would have done if protected activity had never actually occurred. Arguably, that is an impossible burden in this case. Here, ... [complainant’s] report of safety concerns arguably was the single catalyst for the adverse actions taken against him. Consequently, in remanding this case, we leave open the question of whether the statute permits ... [employer] to meet its burden under AIR21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred.

Id., slip op at 13. Similarly, in a case involving an injury report that led to an investigation of an employee’s conduct and an adverse action following that investigation, the Board summarized what the employer would have had to show, by clear and convincing evidence, to establish the affirmative defense:

[Employer] was required to demonstrate through factors extrinsic to ... [complainant’s] protected activity that the discipline to which ... [he] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured.

DeFrancesco v. Union Railroad Co., No. 13-057, ALJ No. 2009-FRS-009, slip op. at 13-14 (ARB Sep. 30, 2015).^{10, 11}

Applying the rationale of *Benjamin* and *DeFrancesco* to the facts of this case, in order to establish the affirmative defense Respondent has to demonstrate by clear and convincing evidence that: (1) it terminated Complainants solely for non-retaliatory and legitimate reasons, and (2) it followed a clear, consistently applied, company policy when it terminated Complainants. Respondent has met this burden.

Respondent established that the investigation in this matter began because Respondent was genuinely concerned with employee safety, not to find evidence to punish Complainants. Mr. Harris testified that when he receives a report of an unsafe condition at Avon Yard, he physically goes out and inspects the site and if there is a problem, they get it fixed. (Tr. at 175.) He also testified that the purpose of an injury investigation is “[m]ainly to figure out what happened and keep it from happening again” and denied that injury investigations involved disciplining employees. (Tr. at 177). Mr. Harris stated that in response to Mr. Yoder’s complaint that the area where he allegedly fell was unsafe, they investigated the area. (Tr. at 191-92).

Mr. Conner testified that he made the decision to charge both Complainants with rule violations, and also made the determination to terminate them. (Tr. at 279-80). He stated that his decision to charge the Complainants was based on “their account of what occurred that Saturday,” both verbally and in writing, and Respondent’s investigation, including reviewing the video and the re-enactment. (Tr. at 282). Mr. Conner stated, “[w]hen you took all of those facts that we obtained, the facts didn’t match the story that they told. So yes, that’s when we made the decision to charge.” (Tr. at 282).

As far as the basis for the decision to terminate Complainants, Mr. Conner stated that the he considered all this evidence, and that the video was “compelling.” The following colloquy from the cross-examination of Mr. Conner demonstrates the impact the video had on Mr. Conner’s decision to terminate Complainants:

Q. ... And then moving on to the basis for the termination, after review of the on-property company investigation, it really just came back to the video evidence, correct?

¹⁰ Based on the Board’s analysis in *DeFrancesco*, slip op. at 6-7, if Complainants had engaged in protected activity, they necessarily would have satisfied the contributing factor element because their “protected activity ... [would have been] ‘a factor in’ ... a decision to investigate ... [Mr. Yoder’s] injury for the purpose of deciding whether to bring disciplinary charges.” *Id.*, slip op. at 7.

¹¹ The Board in *DeFrancesco* also listed five factors specific to the context of an investigation into an injury report that should be considered in determining whether an adverse action was based on “reasons extrinsic to the protected conduct.” *Id.* at 11-12. Those factors, however, are clearly tailored to a fact pattern where a *bona fide* injury report was made, a work place injury clearly occurred, and the question is simply whether an employer retaliated against an employee for making a *bona fide* injury report. Here, of course, the fact pattern is significantly different – the question is whether the employer took adverse action not for making an injury report, but rather for dishonesty in making that report.

A. That was one of the elements, but again, we really took a look at it realistically, if you will, their verbal statements, their written statements, the evidence that was presented in the on-site, on-property hearing, the reenactment, watching the video as it based on their statements to us when the car cleared that's when they began to walk across the tracks. All of those things, took them into account, and yes, made the decision that Mr. Howard and Mr. Yoder's account of this incident was not accurate; that, in my opinion, that they had lied about how it occurred.

Q. Okay. Well, without the video, it would be a little tough to go to termination, correct?

A. Yes, as it would with -- you know, we want to get all the facts that is [sic] at our disposal and because, you know, we're talking a termination and, so, yes, we're going to gather everything we can before I make that decision, yes, sir.

Q. And without the video, it would be a little tough to bring it to termination, correct?

A. Yes. Without reviewing that, in this particular incident, yes, the video was pretty compelling in my mind.

(Tr. at 283). Mr. Conner then testified that Mr. Howard was charged with dishonesty for corroborating Mr. Yoder's false injury report and Mr. Yoder was charged with dishonesty as well. (Tr. at 283-85). He testified that Mr. Yoder's having made an injury report had no role in his conclusion that Mr. Yoder and Mr. Howard had not been truthful. (Tr. at 253).

Mr. Conner was asked if he agreed that the video was unclear. (Tr. at 285). He responded:

I would agree that there are -- there is a time that you cannot see Mr. Howard and Mr. Yoder as they are standing while the cars are moving in front of them. Once that car clears -- and that was really the basis for me. They said the time line [was] that when that car cleared, that's when they started to cross the tracks, and that's when there account that he fell. So there is a time period where it is unclear or you can't -- they're not visible in the video. But once the car clears and they get across the tracks, at that point, they are visible.

(Tr. at 285). Given my review of that same video and the conclusions I reached after reviewing it, I find Mr. Conner's testimony concerning the video and how it affected his decision-making in this matter extremely credible.

Mr. Conner testified that he chose to dismiss Complainants, rather than give them lesser forms of discipline, because dishonesty is a very serious matter. (Tr. at 296). He stated that he has dismissed other employees for dishonesty. (Tr. at 256-62). Specifically, he testified that he had charged and dismissed four employees for dishonesty (Tr. at 256-260) and had charged two other employees with dishonesty, both of whom subsequently resigned. (Tr. at 260-62). He also testified that a dishonesty violation (a violation of Rule GR-2) is typically charged as a major offense. (Tr. at 248).

Mr. Conner also testified that, of the fourteen workplace injuries that were reported within his division in 2013, no other employees who reported an injury were charged with any rule violations for the incident relating to their report. (Tr. at 263). Three of the employees who made those 2013 reports were no longer working for Respondent as of the date of Mr. Conner's testimony on direct: one had retired, one was charged for an unrelated major rule violation seven or eight months later and was then dismissed, and the third had his seniority forfeited and left Respondent (Mr. Conner had nothing to do with the forfeiture of seniority). (Tr. at 263-64). In 2014, 19 workplace injuries were reported within Mr. Conner's division – only one employee was charged with a rule violation, which was for a late report, and that employee received a five day suspension. (Tr. at 264). All of the 19 employees who reported workplace injuries in Mr. Conner's division in 2014 were still working for Respondent as of the date of Mr. Conner's testimony on direct. (Tr. at 264).

Accordingly, in the event that Complainants had engaged in protected activity, I would find that Respondent has established by clear and convincing evidence that: (1) it terminated Complainants solely for non-retaliatory and legitimate reasons; and (2) it followed a clear, consistently applied, company policy when it terminated Complainants. Mr. Conner's testimony clearly and convincingly establishes that he decided to terminate Complainants solely for their dishonesty, not for any other reason such as making an injury report or corroborating an injury report made by another employee. Mr. Conner's testimony also establishes that he carefully considered all the available evidence, including the video, in determining that "Mr. Howard and Mr. Yoder's account of this incident was not accurate." Moreover, Mr. Conner's testimony clearly and convincingly establishes that in terminating Complainants for dishonesty, he was following a clear, consistently applied company policy prohibiting dishonesty. In sum, had Complainants engaged in protected activity, I would find that Respondent has, by clear and convincing evidence, established the affirmative defense.

CONCLUSION

I find that neither Complainant engaged in protected activity. It is undisputed that Mr. Howard did not report a work-related personal injury on April 14, 2013, or at any other time, and thus he did not engage in protected activity. Furthermore, although Mr. Yoder did report a work-related personal injury, he did not make that report in good faith and thus also did not engage in protected activity. Therefore, while Respondent took adverse actions against Complainants, it did not violate the Act in doing so.

In the alternative, if it is subsequently determined that Complainants had engaged in protected activity, I would find that Respondent has established by clear and convincing evidence that: (1) it terminated Complainants solely for non-retaliatory and legitimate reasons; and (2) followed a clear, consistently applied, company policy when it terminated Complainants. I would thus find that Respondent has established the affirmative defense.

ORDER

For the foregoing reasons, the complaints in these consolidated matters are **DISMISSED**.
SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.

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).