



Issue Date: 13 August 2015

In the Matter of:

WAYNE LAIDLER,
Complainant,

Case No.: 2014-FRS-00099

v.

GRAND TRUNK WESTERN RAILROAD CO.,
Respondent.

Appearances: Mr. Robert B. Thompson, Attorney
Mr. Robert E. Harrington, III, Attorney
For the Complainant

Mr. Andrew J. Rolfes, Attorney
For the Respondent

Before: Christine L. Kirby
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRSA” or “Act”), Title 49 United States Code Section 20109, as amended,¹ and implemented by 29 C.F.R. § 1982. In general, Section 20109 provides for employee protection from employer discrimination because an employee has engaged in a protected activity pertaining to railroad safety or security, has requested medical or first aid treatment, or has followed orders or a treatment plan of a treating physician.

Section 20109(b)(1) of the Act, and 29 C.F.R. § 1982.102(b)(2), prohibit a railroad carrier, or an officer or employee of a railroad carrier *inter alia* from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: 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

¹Pub. L. 103-272, §(e), July 5, 1994, 108 Stat. 867, and amended Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct 16, 2008, 122 Stat. 4892.

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.

Procedural Background

On March 7, 2013, Complainant, Mr. Laidler, filed a complaint of alleged illegal discrimination by Respondent, Grand Trunk Western Railroad (“GTW”), alleging that Respondent terminated his employment in reprisal for refusing to perform an assigned task, i.e., perform a roll-by inspection of an oncoming train from the ground, due to hazardous conditions. On May 7, 2014, after an investigation, the Regional Administrator, Occupational Safety and Health Administration (“OSHA”), United States Department of Labor (“DOL”), issued an *Order* finding that Respondent had violated the FRSA and awarding benefits to Complainant. On May 20, 2014, Respondent objected to the Secretary of Labor’s Findings and Order and requested a hearing before an Administrative Law Judge. On June 5, 2014, I issued a *Notice of Hearing* scheduling the hearing in Chicago, Illinois on November 26, 2014. On September 19, 2014, I granted the parties’ request for a continuance of the hearing and rescheduled the hearing for March 3, 2014. On December 3, 2014, I issued an *Order* approving the parties’ *Joint Stipulation for a Protective Order*. On January 9, 2015, I issued a *Decision and Order Granting In Part and Denying In Part Respondent’s Motion to Compel Production of Documents*. On February 11, 2015, I issued a *Notice of Hearing*, rescheduling the hearing for March 4, 2015, in Detroit, Michigan. On March 4-5, 2015, I conducted a formal hearing in this matter.

At the hearing, I admitted the following exhibits into evidence: Administrative Law Judge Exhibits (“ALJX”) 1-5; Complainant's Exhibits (“CX”) 1-14, 16-17(c),² and 18; Respondent’s Exhibits (“RX”) 1-40; and Joint Exhibits (“JX”) 1-5. At the hearing, I granted Complainant permission to file the report and deposition transcript of vocational expert, Dr. Robert Ancell, post-hearing. (TR. 290). Complainant filed this exhibit on May 12, 2015, and I have designated it as CX 19. On June 9, 2015, I granted Respondent's request for an extension of time to file its closing brief. Complainant and Respondent filed closing briefs on June 29, 2015.

Complainant’s Statement of the Case

Complainant asserts that his employment with Respondent was wrongfully terminated because he did not dismount his locomotive and perform a “roll-by inspection” of a passing train from the ground due to unsafe conditions. Specifically, Complainant asserts that his lead locomotive was in the middle of Schwartz Creek Bridge, and therefore he could not safely comply with GTW Rule 523, which states, in part, that when duties and terrain permit, at least two members of a standing train must inspect passing trains on the ground on both sides of the track. Complainant asserts that he did not receive the required prior notice that another train would be approaching until it appeared in the dark, thick fog, approaching at track speed. He therefore did not have time to ensure his train was in position to safely conduct a roll-by inspection from the ground or to notify Respondent of the situation before the other train was

² CX 15 was withdrawn at the hearing. Transcript (“TR.”) at 9.

upon him. Complainant asserts that he performed the roll-by inspection from the safety of the cab of his locomotive.

Respondent's Statement of the Case

Respondent asserts that Complainant is lying and that the head of his locomotive was not at or near Schwartz Creek Bridge, but was rather in an area near the Bristol Road overpass where Complainant could have safely performed a roll-by inspection from the ground. Respondent asserts that Complainant's refusal to perform the roll-by inspection was not made in good faith and constituted a dereliction of duty for which he was properly terminated. Respondent further asserts that there was no need for Complainant to perform a roll-by inspection from an alternative location, and that Complainant is also lying when he states that he performed a roll-by inspection from the cab of his locomotive. Respondent further asserts that the locomotive engineer, Mr. Freeman, is also lying to help his union "brother".

Issues

1. Whether Complainant's refusal to comply with GTW Rule 523, by conducting a roll-by inspection from the ground, constituted protected activity under the FRSA;
2. If Complainant engaged in protected activity and suffered an adverse personnel action,³ whether the protected activity was a contributing factor in the adverse personnel action;⁴
3. Whether Respondent would have taken the same adverse action in the absence of the protected activity.⁵
4. Damages.

Stipulations

1. Complainant is an "employee" within the meaning of and subject to the provisions of the FRSA;
2. Respondent is a "railroad carrier" within the meaning of and subject to the provisions of the FRSA;

³ Respondent does not dispute that Complainant suffered an adverse personnel action, i.e., termination of employment.

⁴ Respondent does not dispute that Complainant's employment was terminated due to his failure to perform a roll-by inspection from the ground. Rather, Respondent's position is that Complainant's activity, i.e., his failure to dismount the train and perform a roll-by inspection, was not a protected activity, but rather a dereliction of duty because the area was perfectly safe for Complainant to perform a roll-by inspection from the ground. Nor does Respondent dispute that it knew about Complainant's failure to perform a roll by inspection from the ground. Respondent does not dispute that it knew about Complainant's failure to perform a roll by inspection, but rather disputes that this was protected activity.

⁵ Respondent does not assert that it would have taken the same adverse action absent Complainant's failure to perform a roll-by inspection under Rule 523. Respondent does not assert that it had any other reason to terminate Complainant's employment besides his failure to perform a required roll by inspection. Respondent asserts however, that Complainant did not engage in protected activity.

3. Complainant was employed by Respondent from December 6, 2006, until his discharge on February 26, 2013;

4. Complainant filed a timely complaint with OSHA alleging that his discharge was in violation of the FRSA. Respondent filed a timely objection to the findings of OSHA and requested a hearing before an Administrative Law Judge;

5. If called to testify, Jacob Hommerding would testify consistently with his testimony at the investigation conducted on February 1, 2013, the transcript of which has been marked as JX 1. (JX 5).

6. At the hearing, the parties stipulated that if Roger Shuff were called to testify, he would testify that he is an employee of the law firm of Complainant's counsel. He was present taking measurements at a site inspection at Flint Michigan's yard on January 13, 2015. He used a Lufkin MW28 measuring wheel, and started taking measurements at approximately 12:45 PM. The distance measured from the point of the switch to where Mr. Laidler was standing in CX 10(a) was 160 feet. The distance measured from the switch to the beginning of Schwartz Creek was 864 feet. (TR. 265).

SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE⁶

Sworn Testimony

Claude T. Freeman, Jr., Locomotive Engineer

[Direct Examination, TR. 29] He has been employed by Respondent for approximately 13 years and has been a locomotive engineer since 2011. Prior to that, he worked as a conductor. He works out of the Port Huron terminal. He was working on the evening of December 14 and early morning of December 15, 2012. He was working on train number 399. The conductor was Wayne Laidler (Complainant). He had worked with Complainant many times throughout his career. He found Complainant to be a safe and good employee.

The job on the evening of December 14, 2012, involved stopping at Flint to pick up cars to add to the train. The conductor decides where the train is to be cut-off, i.e., where to uncouple the engines and/or cars from the train in order to pick up additional cars. He does not recall whether that evening they uncoupled from the engine or held on to some cars. After they uncouple, cut off, pull-up, and get the switch at Bristol, the conductor lines the switch. The conductor is on the point and they talk by radio, backing up into the yard to make the pickup.

He does not recall how many cars they picked up that night. When they pick up cars, they get a new "Wheel" which is paperwork describing the "Consist" of the train, i.e. the makeup of the train. After receiving the Wheel, they perform an air test on the train, talk to the dispatcher, give them the new markup and tell them they are ready to go. The train dispatcher gets the signal

⁶ The summary of testimony and evidence is not intended to be a verbatim recitation of the evidence, but rather just to highlight key points and/or the general nature of the evidence.

to leave the thoroughfare. When they pick up cars, they go down the lead, pick up the cars, and pull back out to the thoroughfare. They then couple the cars back together and add the new cars to the existing train. They [generally] pull out onto the thoroughfare, the conductor drops off by the switch, and they line the switch back toward the thoroughfare to pick up the remainder of the train. The conductor either is on the point or walks to the joint, depending on the conductor. The cars are coupled back together at a joint. The conductor handles that.

On that particular night, Laidler handled the coupling. He communicated with Laidler by radio. They made the joint and then they stretched it. When you couple trains together, some conductors couple the air hoses and some do not. Each conductor does things differently when they make the joint. There is a rule that requires stretching. They stretch all the joints to make sure they are not going to come apart. The conductor then stretches the whole train. Some conductors do the stretching differently than others. He does not remember exactly how Laidler stretched the train that night. He knows that it was at least 100 to 200 feet because they were stopped right by the bridge. He does not know the exact footage. The conductor decides how far to stretch the train. You can also stretch the train after connecting the air hoses. He was located in the head locomotive and Laidler was located at the coupling.

Stretching occurs every time they pick cars up and put a train back together. The conductor determines how far to stretch the train. He stretches the train out and moves the full train forward. Some conductors stretch so that the whole train is together. He can tell if the whole train is moving by the tail end device. He does not recall exactly how things were done that night. He remembers, however, that they stopped right by the bridge. The weather conditions that night were foggy. The fog was very thick. There is a bridge over the top of the river just West of Bristol Road. He is making a circle and placing his initials on the photograph where the head of the train was located (CX-2-C). They were on the thoroughfare with the main track to the right. When he stopped stretching the train, Laidler came to the head locomotive. He entered through the back door. They can walk from one locomotive to the other, and Laidler came through the back door. He entered through the back door because he could not access the front steps of the head locomotive due to the ground conditions of where they had stopped the train. Normally, when Laidler entered the cab, he would have the new paperwork and they would look it over before talking to anybody or leaving the yard.

Freeman was performing an air test on the train. Any time they cut off from the main train and then couple train cars back together, he has to make sure the airlines are properly connected with the proper amount of air pressure to the tail of the train. It is a test to determine that the air brakes are working. They do this after the train is stretched. As he was doing this and Laidler entered the car, an oncoming train came by. They did not receive any radio warning of the oncoming train. They did not hear a whistle because there is no crossing close enough to hear one. The closest crossing was approximately 2 miles away. They did not hear anything, but noticed the oncoming train. Because it was foggy, the train was probably less than 500 feet away going 45 miles an hour when they noticed it.

Rule 523 requires at least two members of the crew to be positioned on the ground for a roll-by inspection if the terrain permits. They did not perform such an inspection because there was nowhere on the ground to stand because the terrain drops off and is sloped. There is no

railing on the bridge. In order to perform the roll-by, you have to be in front of the locomotive. There is a sign on the bridge that says no trespassing, keep off. In order to perform a roll-by, you would need about 30 to 40 feet between you and the moving train. It is not appropriate or safe to stand in between the two tracks to perform a roll-by. It would be crazy to even be standing in between the main line and the thoroughfare. There is not enough room to perform a roll-by between the tracks.

After Laidler came into the head locomotive and handed him the paperwork, the approaching train popped out of nowhere, in the fog. Given that and the terrible terrain, they did not get down on the ground to do the roll-by. They watched the train go by from the cab of the locomotive. Both he and Laidler observed the train go by. When you are in the locomotive cab, you can see if there are any sticking brakes, anything dragging, or anything sparking on the passing train. They were about 17 feet in the air above the ground as the train went by. They did not notice anything indicating a safety problem on the passing train that night. The passing train did not contact them either before or after passing them. They did not know the train was coming. If they had seen anything unsafe, they would have reported it to the passing train. They did not report anything to the passing train that night. If they had seen any problems, they would have had a duty to report it to the passing train.

After the train passed, they got permission from the dispatcher to depart. Looking at CX 5, he has initialed where it would be possible to do a roll-by inspection from the ground. Beyond that circle, it would not be safe to perform a roll-by. Even at the point where he circled, there would be no room to escape if there were a problem, and the terrain does not provide 30 feet of clearance. He does not believe that even if the terrain had permitted them to do a roll-by, that they would have had enough time to get down on the ground to perform it, because due to the fog, the train was on top of them when they saw it.

There was nothing eventful the rest of the trip. They went to Battle Creek and delivered the train. He does not recall what day, but the trainmaster, Jacob Hommerding, told them that they had failed an efficiency test (ET) because they did not perform the roll-by inspection. He told Mr. Hommerding that it was not safe to do a roll-by in that particular spot and that it was foggy.

He heard there was an investigation and Laidler was pulled out of service, pending investigation. He did not receive any notice of an investigation. He did not receive any form of discipline. He was told by the trainmaster that he was going to get a letter of caution, but he never received it. He wrote a statement for the investigation. His statement is contained in JX 2 at page 79. Management never spoke to him about his statement. At some point, he had a conversation with Peter Bistis, the Terminal Superintendent at Port Huron, after Laidler was dismissed from service. Bistis told Freeman that he was to contact the company lawyer and tell him that they should have conducted a roll-by inspection on the night in question. He told Bistis that he would not say that because it was unsafe. Freeman also told the OSHA investigator that Bistis told him what he was supposed to say and was trying to intimidate him. Freeman stuck to his guns that the conditions were unsafe and that people could get killed. He believes that the location posed a risk of serious bodily injury and possibly death. There was no escape there and nowhere to run if the train derailed, if something was hanging off or flew off the train. There was

no way to get away from the tracks in that location. They could have fallen off the bridge into the river.

When conductors talk about distances, every conductor uses a different distance measurement. Every conductor uses a different type of car counts. Everybody uses different car lengths. The cars can vary from 50 footers to 200 footers. The conductor is guessing how far it is to where they are going to couple the train back on. Some people have long counts and some have short counts. They do not discuss that in job briefings beforehand. On the radio, the conductor will tell him how far to come back to the joint or the train. He thinks that Laidler was an accurate car counter. He was not like some people who give him 200-foot cars. Some people give short counts, some give long counts, and some are right on the money.

[Cross Examination, TR. 67] He had worked that train assignment many times before the evening of December 14, 2012. That night, they came into Flint with 103 cars and picked up 9 cars. They had two locomotives. The length of the cars was approximately 8,600 feet. Without the nine cars, the length was close to about 7,800 feet. The nine cars picked up were approximately 810 feet. The length of the train was about a mile and a half. The weight of the train was 8,481 tons. Without the 9 cars, the train weighed approximately 8,000 tons. He does not know how they determine the length of the train.

They would make the cut at least the length of the 2 locomotives which is approximately 146 feet. Where the cut is made depends on the conductor. The switch is east of the bridge. There is another switch called the Mason-Dixon switch that takes you either north or south. A lot of times you do not even have to handle the Mason-Dixon switch because it is already lined for you. If the switch is not lined up then you would have to handle it. However, you do not have to cut off across from it. It depends on the conductor. The conductor tells you where to stop. The conductor is on the ground when he tells you to stop. If the switch is properly lined, it is not necessary to stop and line the switch.

RX 29 accurately reflects the process of knuckles coming together to couple and then being stretched. The nine cars that they picked up were already set together for them when they came into the yard. All they had to do was couple those together with the locomotive, stretch the joint, and then connect the air hoses and pull back out onto the thoroughfare. After pulling out onto the thoroughfare with the 9 new cars, they then connected with the 103 cars that had been left on the thoroughfare. They had to then make sure the new cars were properly coupled to the other cars. When you shove back all these cars, there is slack in the drawbars and they are bunched up. So when you couple together, the drawbars come in. The cars have a cushion unit, so they move in and out. The train can move farther than that just stretching the joint. The drawbar will move in and out of the car. He does not know the maximum amount that it will move, but they stick out at least a couple of feet from the end of the cushion where they go in and out. They move at least a couple of feet and that must be considered for each car that is attached. It is necessary to stretch the joints to make sure the coupler holds. If the joint uncouples, the air hoses would come apart and cause the train to go into emergency and the brakes to apply. You would then have to recharge the brakes which could cause undesirable delay. RX 31 accurately shows two cars coupling together and stretching a joint. The air hoses

have to be connected to test the brakes on the train. You cannot test the brakes until the brake system is charged with air.

Performing a roll-by is an important safety function. When they were stopped on the thoroughfare, they were on a different radio channel than that of the passing train. In his written statement, when he wrote that they were at Bristol Road, he meant that they were by the bridge. They were further west on the bridge. In his written statement he did not specify that the head end of the locomotive was on the bridge. However the head end of the locomotive was approximately 20 feet forward of where he was sitting in the locomotive. The area that he circled in the photograph is where they were stopped. In his written statement he did not say whether they did an inspection from inside the cab. He stated that they did not perform the roll-by [on the ground] because of the conditions. They could perform an inspection by looking out the window of the train. He could see the whole train pass by. As the train passed by, both he and Laidler looked at the train to check it for defects. Laidler stood next to him and was looking at the train go by. They did not report that they did a roll-by from inside the locomotive, because they did not see any defects. If they had seen any defects, they would have reported immediately. They are not required to tell the yardmaster about a roll-by. It is not a rule.

That night they were parked with the headlights off. The fog was terrible. When the approaching train came by, they did not have time to get down to a roll-by inspection. Regardless of the ground conditions, they would not have had time to get down to do a roll-by. It was foggy and the approaching train popped out of the fog. The approaching train was coming by at approximately 45 miles an hour. The cars they pulled out of the Flint yard that night were 93 to 94 footers. The car length used by conductors depends on the conductor. His practice is to try to be accurate.

He was not disciplined for not doing a roll-by inspection that night. He told Mr. Hommerding that it was not safe to do the roll-by inspection. The rule states "if terrain permits."

Pete Bistis was a superintendent at the time he had a conversation with him. The conversation occurred after Laidler was discharged. He told Bistis that he was not going to say what Bistis wanted him to say. He was not disciplined for that.

[Redirect Examination, TR 111] Every conductor does everything differently. They are in charge of the train. Some conductors stretch the train after the air is in it and some do not. It just depends on the conductor. If you couple the air at a coupling in order to stretch the train, you can stretch even the cars that were left on the thoroughfare, if the air pressure is high enough. The pressure does not have to be up to 75 in order to stretch the train. A train can be stretched when the air pressure is up to 60. He has had conductors who have done that.

He has had the experience of a train separating not at the cutoff point, but at another location. That has happened to him. It is possible that if only the first nine cars had been stretched, and then they tried moving the train, that it could have separated all the way in the back. If that happened, the train would have gone into emergency and they would have had to start all over again. Then they would have had to stretch the whole train again. Somebody could have pulled an operating lever and uncoupled the train. He cannot control his standing train when

they are in the yard and he cannot see it. It is smart to stretch the train out to ensure that it is all together and then you can leave.

He saw a video this past year about roll-by inspections. The video did not explain what is meant by “when terrain and duties permit”. He is entitled to make decisions for his own safety. He has never seen anything that explains what he is supposed to do when it is impossible to get on the ground and the terrain does not permit it. He has not received any training on this. The only time he saw the documents from the United Transportation Union (JX 2, pages 73-78) was at his deposition.

[Recross Examination, TR. 116] Snow on the ground would not prevent a crew from doing a roll-by inspection. However it would hinder an accurate inspection because the snow would blow up blocking their view. It would not be safe to do a roll-by inspection in the fog because it would be difficult to see. However, he would be able to see signs of fire, smell something, and hear squealing. He had no knowledge of the documents contained at JX 2, pages 73-78.

Wayne G. Laidler, Complainant

[Direct Examination, TR. 120] He began employment with Respondent on December 6, 2006, at the Port Huron yard as a conductor. His six-month training period involved classroom training, watching videos, and hands-on training with certified conductors. He began to work on his own in approximately May 2007. He liked his job as a conductor for Respondent and would like to return to it. A conductor is responsible for all movements of the train. When he became a conductor, he mostly worked on the road. Road trains out of Port Huron generally went to Battle Creek or Toledo. He would go to Battle Creek 3-4 times a week. He was experienced in picking up railcars at the Flint Yard. He is required to be familiar with operating rules, hazmat rules, and safety rules. There are hundreds of rules. He carries them with him and is tested on them.

Operating Rule 523 says that when duties and terrain permit, both crew members are required to dismount the train and find a safe position to inspect an oncoming train. He never had any training or saw a manual explaining what the phrase “when terrain and duties permit” means. He has never seen anything telling him what to do if he is unable to perform a Rule 523 inspection from the ground. To perform a roll-by from the ground, you are looking for level ground where you can keep your footing and have a place to escape if necessary. He likes to be about 40 to 50 feet away from the passing train.

When directing an engineer, he will direct the engineer from his radio by car counts. When he gives car counts, he is referring to 50 footers. He gives short car counts. On the evening of December 14, 2012, and early morning of December 15, 2012, he was the conductor on train 399. He had worked that job before. The train departs Port Huron to Battle Creek, with usually a pickup in the Flint yard. His engineer was Ted Freeman, with whom he had worked before. He and Freeman are colleagues, but do not socialize outside of work. The weather conditions that night were foggy. He does not remember exactly how large the train was when he left Port Huron, but it was approximately 100 cars. At the Flint Yard, he had to stop the train and step off

the engine to make his cut so he could pull the engines into the yard to pick up the 9 cars. That night he entered by the Flint thoroughfare track.

He received instructions to go into the yard to pick up the cars. He dismounted his train and had Freeman cut away the cars and then made sure his cars were in the clear. He dismounted before the Bristol Road switch. He was standing on the ground and communicating with Freeman by radio. When you make the cut, you want to make sure you are on straight track. There is a general area where they cut cars and they know that they are in the clear. He turned the angle cock on the second engine and then cut away from the cars and had his engineer pull forward over the switch. He then went back and tied the hand brakes down to secure the cars. To cut away the cars, he had to pull a lever which pulls the pin out of the knuckle so the cars can be separated. He then told the engineer to pull the engine in a westerly direction. He walked back and tied the hand brakes down on the cars that were sitting there. When you cut away from the engine, the cars that have been left go into emergency and the brakes apply. He put the hand brakes on to make sure the cars did not roll away. He applied three or four hand brakes. He then went and lined the Bristol Road switch so his engineer could bring the engines into the yard and pick up the nine cars. CX 10A indicates where he cut off his cars on the night in question. When you cut off cars, you want to do it on straight track to couple the joints together. If you are on a curve, there is a risk of the joints not coupling together.

Normally it takes approximately 45 minutes to pick up cars. He has to obtain paperwork consisting of a new "Consist" and "Wheel." On the night in question, after coupling the 9 cars to the rest of the train, he had the engineer stretch the train. He had him stretch the whole train. This is the way he is comfortable doing it because he then knows his entire train is together. He has had pins pulled on him before and trains have come apart after he has made it to the head end. He does not know exactly how far forward the train was pulled. It had to be at least 150 feet to stretch a train that size. After stretching the train, he told his engineer that he was in the clear and he proceeded to walk to the head end. When he got close to the head end, he realized that the head was on the bridge. Therefore he stepped into the second engine because it was back further away from the bridge. He stepped into the second engine to walk through the cat walk to the head engine. When he entered the locomotive, he took off his gear and started reviewing the paperwork. He believes Freeman was doing an air test. He looked up and noticed a train coming at them. He had not heard anything. He had not received any radio communication warning of the approaching train. He had not received any communication from the yardmaster either. He did not hear a whistle.

He was aware of the Rule 523 obligation to perform a roll-by inspection from the ground. He did not do so that night because it was too dangerous to dismount the train on the bridge. He had been at this location in the daytime before and knew there was no railing on the bridge. When he walked to the head and got on the second unit, he thought the head end was in the middle of the bridge. When he was in the locomotive, he saw that he was in the middle of the bridge. He did not believe there was a safe location to perform a roll-by inspection. He believed that getting off at that location presented a risk of serious bodily injury. Because he could not do a roll-by inspection from the ground, he observed the train going by from inside the cab. He did not see any defects. He did not report the roll-by results because he did not see any defects.

When he arrived at Battle Creek, Jacob Hommerding approached him and asked why he had not performed the roll-by inspection. He told Hommerding that it was an unsafe spot to do a roll-by and that this fact is well known. There was no further discussion. No other management officials talked to him about the roll-by. Approximately a week later, he got a notice in the mail about an investigation. He called Hommerding and asked why he had received an investigation notice. Hommerding told him that he was ordered to do this by his superior. The investigation was held on February 1, 2013. He took the photographs at JX 2, pages 68-72. He produced the hard prints at the investigation. The photographs depict the area around Schwartz Creek. At the investigation the union letters located at JX 2, pages 73-78 were present. He had never read them prior to the investigation. He is not on the e-mail list for the Michigan State Legislative Board of the United Transportation Union. He knows that the area around Schwartz Creek had previously been complained about as an unsafe area to do roll-by inspections. He knows this because he had spoken to his union representative numerous times and has heard other guys discuss it in the lunchroom. He has never seen any document, operating rule, bulletin or anything else telling him what to do when you cannot perform a Rule 523 roll-by inspection from the ground.

He was called at home by the Port Huron trainmaster and told he was dismissed, prior to receiving a notice in the mail. The trainmaster read him the dismissal letter. He was in shock and called his wife immediately. He was upset and called his union reps. He has not sought any medical care for being upset. After being dismissed, he lost his health insurance. He did not look for work for the first 4 to 5 months because he thought his union would be able to get his employment back. Eventually, he started looking for work. He looked at Craigslist, newspaper ads, and online. He did not see any jobs that would pay well enough to take him away from his home responsibilities. He took on more responsibilities at home and his wife took on more hours at work. His wife was also in school, and they believed it was important for her to finish her Master's program. He eventually went to work for Madden's Lounge. He had worked there before. He works as a bartender and short order cook. He is paid minimum wage and tips. He started working there around March or April 2014. He earns approximately \$1,000.00 a month. He mostly works on weekends so he can be home with his son during the week.

He has also made efforts to check out his employability at other railroads. He did this after his deposition. He applied at CSX Railroad and the Huron and Eastern Railroad that runs out of Durand. On the railroad application, it asked why he left his last job. He had to identify that he had been discharged by Respondent. He had to state that he had been dismissed for a safety violation. He heard nothing back from the railroads about employment. He spoke to a woman at the Huron and Eastern Railroad. She said to contact them after the lawsuit was over. He did not believe he would be able to get a railroad job while this case was pending. He wants to return to work at the railroad. CX 16 reflects his earnings for 2010. In 2011, his earnings were decreased because he was off for approximately 7 months. He had to complete a program called Operation Red Block because he tested positive for a banned substance. In 2012, he was off for a period of time while he was being treated for medical issues. In 2013, he earned \$20,196.81 in just 2 months, from January until the date he was fired.

[Cross Examination, TR. 172] At the investigation, he did not say anything about having performed the inspection from inside the cab of the locomotive. In his testimony at the investigation, when he stated that he did not perform a roll-by, he meant that he did not perform

a roll-by from the ground. He did not state that he performed the inspection from the cab, because it was not a proper Rule 523 roll-by inspection. He had never seen the correspondence of the union which was introduced at the hearing, including the sentence that states that if a safe location could not be ascertained by the crew, an inspection from inside the cab would suffice. He does not believe an inspection from the cab is a proper Rule 523 roll-by inspection although you could do a reasonable roll-by inspection from inside the cab. At the investigation, when he said it was unsafe to do the roll-by, he meant "from the ground" even though he did not specifically say that. He did not specifically say that he performed the inspection from inside the cab. He believes he was investigated and fired for not doing a roll-by inspection from the ground. He was fired for not performing a roll-by under Rule 523 which states that you are supposed to do the roll-by from the ground.

He does not believe that doing a roll-by inspection from the platform would be a reasonable alternative because he would not think it safe to stand on a platform and watch a train go by him at 45 miles an hour, as the train would only be 3 feet from him. If the legislative director said that this was appropriate, he must have been advising people to do this in a yard where there was slow movement. Nobody would want to stand on a platform and watch a train go by them at 45 miles an hour. He never saw a union notice posted on a bulletin board stating that a roll-by inspection could be performed from a platform.

On the night of December 14 and early morning of December 15, 2012, he had a working radio. The cars they were picking up that night were already together on a track inside the yard. Probably the yard crew stretched the couplings when they made the train. He could have used the radio to contact the yardmaster or crew of the passing train to let them know they were not going to do a roll-by because of unsafe conditions. He did not contact either the yardmaster or crew of the passing train. If Mr. Hommerding had not approached him and asked about the roll-by, he was not going to tell anybody because he did not think he needed to tell them.

If it is a clear day, you could see all the way to the signal at West Flint, approximately 2 miles away. From the time he noticed the approaching train until it got to him took approximately 45 seconds. It was a big train and took a couple minutes to pass by. If he had been in a safe location, he could have gotten down to inspect at least part of the train going by. He would have done so if he felt safe. The presence of fog in the terrain that he was in, would make it unsafe to do a roll-by inspection. However, the mere presence of fog would not necessarily prevent someone from doing a roll-by depending on the terrain. He did not have time to put on his personal protective equipment because the train was approaching. If the conditions had been suitable, he could have gotten off the train and at least done a portion of the roll-by inspection [from the ground]. If safety and terrain had permitted, he would have done so.

He was trained to make the cut at the Flint Yard in the same general location every time. He believes that he would make the cut on the thoroughfare approximately 5 or 6 car lengths east of the switch. He uses 50-foot car lengths. The spot where he trained to make his cut on the thoroughfare is parallel to the Mason-Dixon switch. It is not adjacent to it. When you come in off the thoroughfare, you can see if the switch is set properly. If it is not set properly, you have to go over and throw it. If he were going in with just the engines, he would try to get as close as possible to the clearance point to make the cut. He usually makes his cut in the same general

vicinity, within 20 or 30 feet. He believes the cars that he was taking out of the yard that night were 90 footers. The first car was 68 feet long and the rest were 90 footers. When he gave directions to Freeman over the radio in terms of car lengths, he was referring to 50 footers even though he had 90 foot cars. He always refers to his car counts as short cars which are 50 footers.

When you make the cut on the thoroughfare, the remaining cars in the train go into emergency. The result is that the air comes out of the brake system, causing the brakes to be fully applied. He also applied three to four hand brakes. He tested the hand brakes. After coupling the cars that he brought out from the yard to the first car that he left on the standing train, he had to stretch the train. You have to stretch all the joints to make sure your train is together. In order to move the train, you have to stretch every coupling. It would have been possible to only stretch the coupling between the 9th and 10th car, but he stretched the whole train to make sure it was together and to feel comfortable that his train was together. You can tell that the train is together because if it were not together it would go into emergency and you would know right away. It is possible that if you connect the air hoses to the entire train before stretching the coupling that you have made, and open the angle cock and the air starts going into the brake system, and then you stretch that coupling and it comes apart, both sections of the train could go into emergency. Then you would have to recharge the brakes on the locomotives and those nine cars and do it again. That would take time. However, it would take even longer if the train came apart in the back and you had to walk all the way to the rear end of the train. He is concerned with both being efficient and working safely.

He does not recall how many cars went past him when Freeman stretched the joint. It could have been a couple hundred feet. The nine cars that he brought out of the yard that night had cushion drawbars. The drawbars have some play in them, but he does not know how much. They are long drawbars. At the deposition, he did not state that he had Freeman stretch the train 100 to 200 feet, because he was not asked about it. He did not mention stretching because it is regular procedure and part of normal train movement. You cannot move the train while the engineer is doing the air test.

He never saw the list located at JX 2, page 78 prior to the investigation. The area where his train was stopped had been talked about by union reps and other union members. The conductors take it upon themselves to take the safest course. The union reps always said to take the safest route.

Prior to his dismissal, he had worked as a conductor for a little over six years. Prior to that, he worked as a car salesman for two years and a service advisor for over four years at a car dealer. He had also previously held an assistant manager position at Madden's. Several months after his discharge, he started looking for jobs in the newspaper and on line. He was looking for a railroad job with comparable pay. He did not look for a railroad job until after his deposition. He did look for a job that would provide comparable pay in the newspaper and online. He did this about ten times apiece. He did not apply for some bartending and auto industry jobs that he was qualified for because they were not convenient. The job at Madden's works well with his wife and her schedule. He applied for a job at CSX railroad. He did not call anybody about his application. He has asked friends about jobs at other railroads. He inquired with friends who used to work out of Flint, but they shut the Flint yard down, so now they work out of Toledo,

which is too far. He has inquired of his Union reps if they could get his employment back at Respondent railroad. He filed a grievance. He has prepared a resume.

He applied for a job with CSX online. He got Huron Eastern's phone number online and called them about a job. He has also looked on Craigslist for jobs, but not on Monster or Careerbuilder. He is not claiming financial hardship caused by emotional distress. He had previously been diagnosed with anxiety and depression in 2012. He was off work for several months due to that. In 2011, he was out of work for 6 months after testing positive for cocaine. In 2013, he earned \$20,198. That amount included a payout for unused vacation and personal time.

[Redirect Examination, TR. 228] At the investigation, Mr. Hommerding was called the charging officer. He was charged at the investigation with violating Rule 523. His understanding is that he was dismissed for not performing a roll-by inspection from the ground in a dangerous situation, reported to his immediate supervisor. At the investigation, no one asked about putting his train together when he came out of the yard. He was not asked about anything other than where his locomotive was. Nobody asked him what happened inside the locomotive at the time the other train passed it. The entire investigation focused on why he was not on the ground. He does not believe there was a reasonable alternative, on the ground, from which he could perform a roll-by inspection that night. At the investigation, he stated that he generally cut his cars off in the same spot. That spot is indicated in the photograph located at CX 10(a). At his deposition, when asked about car distances, he stated that he uses 50-foot cars. He does not believe any union representative has the ability to suspend or change Respondent's operating rules. Everyone has their own interpretation of the rules. The union cannot change an operating rule. The CSX website where he made an application did not give any instructions about whether you could call them about the application.

[Recross Examination, TR. 232] The location in CX 10(a) is not parallel to the Mason-Dixon switch. He would agree that rule 523 is not written in absolute terms because an engineer may or may not be able to stop at a location where it is possible for the other employee to get across the tracks to do a roll-by inspection. The fact that something is not specifically written into the rule does not preclude you from doing it.

[Redirect Examination, TR. 235] There was no safe spot on either side of where the train stopped on the Schwartz Creek Bridge from which to safely perform a roll-by inspection. In the darkness, he had no idea where the head end of the locomotive ended up until he walked there.

William T. Miller, Conductor

[Direct Examination, TR. 237] He is a conductor for Respondent. He has worked for Respondent since 2001. He is a member of the SMART or old UTU union. He is the legislative rep for Local 72 stationed out of Battle Creek. He is also the local chairman for Local 72 and the secretary of the Michigan Legislative Board, and recently became the vice-general chairman.

He has been a legislative rep since 2003. He deals on the local level with safety, F.R.A. regulations with the CN through the union. A local chairman deals with discipline and investigations when an employee gets in trouble. He has been the elected local chairman since

about 2010 and has been the vice local chairman and local chairman since around 2004 or 2005. The Michigan Legislative Board handles all railroads in the State of Michigan. The head of the Michigan Legislative Board is Jerry Gibson. He is the secretary of the board. There are three people on the board. As the vice general chairperson he works under the general chairman for the Grand Trunk Western (GTW) United Transportation Union (UTU). The general chairman handles the discipline and appeal process after the local chairman has done his job with regard to the investigation. He also negotiates contracts with the carrier.

In his role with the union, he has been in a position to field safety complaints. The membership comes to him and he tries to handle it on a local level or it may get escalated to Jerry Gibson and go to the Michigan Legislative Board. Mr. Gibson would contact the general manager of the territory or the assistant superintendent. This would be a GTW official.

GTW Operating Rule 523 states that if weather and terrain permit, two members of the crew are supposed to be on the ground to do a roll by. He has dealt with safety complaints about that particular rule. He created the document at RX 28 in 2010 or 2011. It lists places where it is unsafe to walk and do roll by inspections. The area around Schwartz Creek at Flint is listed on RX 28 as the "West Flint ditches on both sides". He used that term and did not give it a specific milepost, because the whole area is unsafe. He made this list because the management at CN and GTW has taken the position that there is no unsafe spot from which to do a roll by inspection. He created this document and sent it to Jerry Gibson as well as the local managers of the areas that contain these locations. He also sent it to the assistant supervisors and division train masters. RX 27 contains e-mail correspondence in which the supervisor of the railroad, Mr. Colasimone, was informed of the unsafe spots to do roll-bys. Mr. Gibson, as the Michigan Legislative Board Director, does not have the ability to change GTW operating rules. Nor does the union have the ability to change operating rules.

An operating bulletin would be used to change or amend a rule. Sometimes railroads issue bulletins to change an operating rule. He has never seen a bulletin changing Rule 523. Nothing happened after the email exchange at RX 27 informing Mr Colasimone of the problem locations contained on the list. RX 26 is a letter from Mr. Gibson to UTU members telling them that if it is unsafe to do an inspection from the ground, an inspection could take place from a platform of the locomotive. This letter does not change Rule 523 in any way. If this letter were hanging on a bulletin board, it would not change the rule. No bulletin was issued changing the operating rule.

He is familiar with the concept of stretching a train. After joints are coupled together, you stretch them to make sure it is a good joint. He hooks up the air after testing the joint. He then opens the angle cock and lets the air flow and takes the hand brakes off. After releasing the brakes, some engineers stretch the train again for numerous reasons. Sometimes angle cocks are closed so you do not have air all the way to the tail end of the train. So, often engineers will want them to pull the cars just to see if the marker moves. He has had pins pulled out of his train, separating the cars 50-100 cars back. In the stretching process, he moves his train 50-100 feet.

There is a new tentative contract for UTU employees with CN which would provide an 18.6% pay increase, retroactive to 2010.

[Cross Examination] The video at RX 29 shows knuckles coming together. In the video, the coupling is stretched. In that video, that stretching would be sufficient because it is just an engine and a car. RX 31 accurately shows two cars coupling. Pulling forward a couple feet was sufficient to stretch that particular joint. It appears the conductor was trying to connect the air hoses after stretching the joint. He was taught to stretch the joint and then connect the air hoses. If you connect the air hoses prior to stretching the joint and the air hoses come apart, the rest of the train will go into emergency. If the train goes into emergency then you would have to get the air pumped back through the train and try again. The railroad does not like to waste time. Some cars have cushioned draw bars. He does not know how much cushion or play they have. The purpose of the roll-by is to check the oncoming train for defects.

He does not see anything inaccurate in RX 26. As the secretary of the board, he receives copies of everything that Mr. Gibson sends out. He would have e-mailed the document to the members in his local and posted it in Battle Creek. He does not see anything inaccurate in RX 27.

He is familiar with the rule regarding roll-bys. The rule provides some flexibility on how to do the roll-by if an employee cannot get on the other side of the tracks. However, it does not say what the employee is supposed to do. The rule does not say that they could do a roll-by from the platform of a locomotive. It only says that when duties and terrain permit, at least two crew members of a standing train, or other employees along the right-of-way, must inspect passing trains on the ground on both sides of the tracks. The rule does not explain what employees should do if duties and terrain do not permit this. He thinks that a union official and carrier official could agree to allow certain practices such as doing inspections from a platform.

[Redirect Examination] After the letter at RX 26 was sent out, nobody was doing roll-by inspections from platforms. The rule never changed. The video he was shown showed the stretching of a joint. However, when you stretch a train, you are making sure you have the whole train. It is possible to stretch the joint and just check that particular joint. Then you could attach the air hose. It would then be possible to have the train go into emergency when the whole train was stretched. The train could go into emergency not at the point of the joint, but it could go into emergency 95 cars down the line. It would take time to then walk all the way down the train. That is part of the reason why engineers sometimes stretch the train.

In his career at GTW, GTW has never said that some terrain does not permit you to do a roll-by from the ground. He has always been told by GTW that there is no unsafe location to do a roll-by. So, you basically have to do a roll-by everywhere, from the ground.

Luann Castellana, Vocational Rehabilitation Counselor

[Direct Examination (by Respondent)] She is a certified rehabilitation counselor. She is familiar with the labor market in Michigan. She was asked to look at the ability for Complainant to pursue employment and what was reasonable in terms of his looking for a job and obtaining employment. She prepared a written report, contained at RX 40. She did not personally meet with Complainant. She reviewed his deposition and job application. His job application listed his

prior job experience which was also discussed as part of his deposition. She also looked at the *Dictionary of Occupational Titles, Selected Characteristics of Occupations, and Occupational Outlook Handbook*.

Complainant had prior experience working for a dealership. He was an auto service advisor or writer for several years. He also sold automobiles with the same dealership. He had extensive skills in sales with that job as well as customer service and troubleshooting in evaluating mechanical issues that needed repairs. He also worked as an assistant manager for Madden's Lounge and Grille. He did bartending, cooking, ordering supplies, and things like that. He had some other work that she did not classify because it was significantly beyond 15 years.

There are services available in the local community that a person can utilize to help them find a job. In Complainant's deposition, he mentioned that he looked on Craigslist and checked the Flint Journal newspaper about 10 times. He took a part-time job back at Madden Bar and Grille as a short order cook, which is semiskilled work. She believes he is earning minimum wage. Since taking the job at Madden's Lounge, she believes Complainant has continued to look for jobs in the newspaper and on Craigslist, but has not applied for any jobs.

She believes Complainant would definitely have skills that would lend themselves to not only the jobs that he has done in the past, but jobs related to work he has previously done. He could find a job as a service advisor or writer or customer service-related occupation. He could do retail sales in a variety of settings. He could go back to working as a conductor or other related occupation in the railroad industry.

In her experience, the fact that someone has been fired is not an insurmountable obstacle for them to obtain employment with another employer. It would depend on why they were fired. Being terminated from a job does not automatically preclude someone from finding employment, but it could pose a problem. It does not appear that Complainant took advantage of all the resources available to help someone look for a job.

She does not believe Complainant made a reasonable effort to find suitable employment after he was discharged, because she believes he is underemployed and doing a job that is semi-skilled and part-time. She looked at job websites and saw jobs listed with the railroad. There were auto writers and various sales representative jobs, as well as hospitality and restaurant industry type jobs. She listed some of these in her report. She thinks similar jobs would have been available since Complainant's discharge in February 2013. She thinks the railroad industry is going through a hiring process with more employees being hired. She thinks Complainant could return to an occupation similar to what he had in the past. It would take 3-6 months or longer depending on the geographical area, but in Michigan 3-6 months would have been reasonable. She believes he could earn pay comparable to what he was making at the time he left the railroad. She believes he could easily make between \$26 and \$36 per hour.

[Cross Examination] She has never interviewed Complainant. She has never conducted any IQ or vocational testing of Complainant. There are a number of ways of helping people look at their potential and assess their skills, but often she looks at the work history as an actual gauge of what skills a person has acquired. She did not administer any tests to Complainant. You would

want to combine a lot of difference strategies when looking for work. Blind resume sending is not as effective as going to friends, family, neighbors, and prior employers.

Job termination is not necessarily an obstacle that a person cannot overcome in finding another job. There are different reasons why people lose jobs or get terminated from jobs. She agrees that an employer would consider their safety rules important. Depending on whether someone was fired for a major or minor safety violation could hinder their ability to get a job in that same industry in the future. It depends on the nature of the violation and how well an individual is prepared to discuss why they left their past job or were asked to leave.

Complainant worked in the railroad industry for approximately 7 years prior to his termination from Canadian National, so that industry would be the one where he had the most recent experience. Often, she would have the person look at the feasibility of going back to the same or a similar employer. She did not speak with anyone at the Canadian National Labor Relations Department as to how many employees from other railroads they have hired in the last 5 years. She has no knowledge of how many employees Canadian National has hired in the last 5 years from other railroads where the employee had been terminated from their prior position.

She would assist them in figuring out a way to communicate why they were fired. You do not always have to disclose every little thing about why you left a job. You need to be prepared to answer the question and it does not have to be so devastating that a person can never get a job again. She is unaware that Complainant applied for a job at CSX as a conductor. She would not be surprised that they would ask the question why he left his prior railroad employment. He would have to discuss why he was terminated from his prior railroad employment. If he were competing with another prior railroad employee who had not been terminated from his position, she believes Complainant would have a bit of an obstacle, but it would not necessarily rule him out of the total picture. There is some value in his 6-7 years' experience with the railroad. His termination, however, would be an obstacle. She believes Complainant could earn \$26-36 per hour, even without potential railroad jobs.

Phillip B. Tassin, Jr., General Manager, CN Railroad

[Direct Examination (by Complainant), TR. 296] He is the general manager of CN Railroad of the Michigan division. He has been in the position since April 2013. He also worked in the Michigan division from 2004 to 2006. He then went to Chicago. In September 2010 he returned to the Michigan division. Since returning to the Michigan zone in September 2010, his titles have been superintendent, general superintendent, and general manager. The only individual with higher authority than him in the Michigan zone is Derrick Colasimone.

CN and the GTW division of CN have written rules. Complainant was employed by the GTW Railroad. CN is the parent company. There are hundreds of rules and all are important. Operating Rule 523 is important. He does not have authority to modify rules, but he can help to interpret them. He can send out superintendent bulletins that interpret rules. Employees are required to be aware of bulletins. He saw the letters at JX 73-76 in the transcript for Complainant's investigation. Prior to that, he was aware of the content of conversations he had with Jerry Gibson. Jerry Gibson was the UTU legislative rep for Michigan. They discussed Rule

523 and what to do when terrain does not permit a roll-by. Gibson wanted guidance from management as to how to interpret facts. Employees were required to bring concerns about interpretation to his attention.

He never published any document in any way shape or form that explained to employees what they are supposed to do when faced with an unsafe roll-by location. The rule is written. He does not publish bulletins in regards to rules. The rules are written as they are written. Mr. Gibson wanted guidance as to what to do about unsafe locations on the ground. Mr. Gibson does not have authority to modify rules. He does not believe Mr. Gibson has authority to require employees to see his letters. It is not his job to publish bulletins modifying rules. He makes sure, however, that the rules are known to employees. His managers help employees interpret rules that are unclear. The managers do not instruct employees on rules. They enforce rules. He does not know whether anyone under his supervision ever informed employees what to do when they could not perform a train inspection from the ground under rule 523. The rule is not specific about what you are to do if you are unable to perform an on the ground roll-by inspection.

Employees are to do what they believe is safe. That is what he tells employees. He empowers them. He had never met Complainant before. Rule 523 says that when duties and terrain permit, roll-by inspections must be performed from the ground. He recalls that Mr. Hommerding testified that he asked Complainant why he did not do a roll by, and Complainant said it was because the ground conditions were unsafe. He does not have any knowledge of other railroads' rules. The investigation of Complainant was scheduled by GTW to develop all the facts. The conducting officer was Jim Golombeski.

It was his job to review the transcript and determine whether Complainant was guilty of not performing a roll-by inspection per Rule 523. It was his decision alone. He also decided that Complainant would be dismissed based on his personal work record, because he violated Operating Rule 523. He received the transcript and exhibits of the investigation at 3:04 PM on February 13, 2013. He received them by e-mail. In making his decision, he relied on the transcript, exhibits, his personal experience, and information he knew of the case prior to the investigation. He was not a witness at the investigation. He relied on his 17 years of railroad experience. He was not present on December 15 in the early morning hours outside of Flint. He has never been a switchman in Flint. Nor has he ever been a conductor or switchman in the Michigan zone.

Nothing states that he is to rely exclusively on what is in the transcript for his facts and information. He cannot "unknow" what he knows as far as experience and he cannot "unknow" things that he was told prior to the investigation. He relied on information and facts that were not contained in the investigation transcript. He does not believe he is required to only rely on information that is in the transcript and attached exhibits in making his decision. At his deposition, he stated that when he made the decision that is reflected in Exhibit 1, the discipline letter, he did not recall relying on any information other than what was contained in Exhibit 2, which was the transcript of the information, and the exhibits, which are part of Exhibit 2.

In the investigation transcript, Mr. Golombeski told Complainant that he had the right to be present during the entire investigation. However, Complainant was not present when Tassin

spoke to the trainmaster who saw Complainant not perform a roll by. He spoke to him, Mr. Hommerding, prior to the investigation. He asked Hommerding where the engine was located. He relied on this information, that was not in the transcript, in making his decision. Complainant and his representative were not present during this conversation. The purpose of the investigation was to develop all the facts. He does not believe that anything says that all of the facts are supposed to be in front of Complainant at the investigation. Hommerding testified at the investigation as a company witness. His role was to present the company's position and tell what happened.

In the transcript, at the end of the investigation, Mr. Golombeski said that the investigation was closed at 11:29 on February 1, 2013. However, Tassin relied on information that was not in the transcript. He relied on a Google map of the Flint yard. He looked at this map after reading the investigation transcript. Complainant was not present. He also relied on a conversation that he had with another employee. He cannot recall if it was prior to or after the investigation. He asked the employee where the normal location was to cut-off cars. He wanted to be certain of his decision. He did not think that relying on information that was not presented at the investigation was unfair. He was trying to determine if the locomotive could have been on the bridge. If it were on the bridge, he would not have disciplined Complainant. If the engine were even close to the bridge and in an unsafe location, he also would not have disciplined Complainant. The person whom he asked about the normal location to cut-off cars was not a witness at the investigation. Nor was that information entered into the investigation transcript.

The things that he relied upon in making his decision that were not presented in the investigation transcript included: a conversation with Mr. Hommerding, a Google map of the Flint yard, and a discussion with at least one other employee. He was told that an employee who made a cut with nine cars, when he coupled back up, would have his engines located right above the viaduct. So, then he asked where the cut would have been. He thinks he might have had this conversation prior to the investigation. However, when he read the investigation transcript, there was no discussion about where the cut was made. No facts were developed at the investigation about where the cut was made. He does not recall any testimony about the moves of the train after they coupled back with the nine cars. He does not recall any discussion in the transcript about where the cut-off point was for Complainant.

Conductors typically follow a certain pattern. He knows from hearing Complainant's testimony [at this hearing] that Complainant cut his cars off 5 or 6 car lengths clear of the switch. However, he did not know that at the time he made the decision to discipline Complainant.

When deciding how to discipline Complainant, he considered Complainant's past work record. In assessing Complainant's credibility, he considered that he had previously tested positive for cocaine. This information was not contained in the transcript.

He believes that Mr. Freeman was lying when he said it was unsafe to perform a roll by at that location. He did not believe his testimony in the transcript was truthful. He had never met Mr. Freeman before. Nor had he ever talked to Mr. Freeman about the incident. He did not believe Freeman's testimony based on the testimony of the trainmaster (Hommerding) as well as the evidence he looked at that would prove where the locomotive was located. He assessed

Complainant's credibility based on something that was not in the transcript. He does not believe he was only required to rely on information in the transcript and records that were admitted at the investigation.

He sent Complainant the discipline letter at JX 3. In the letter, he stated that the record contains credible information and substantial evidence proving that Complainant violated certain rules. So, he fired Complainant based on credible evidence in the record. There is no evidence in the record as to where the cars were cut-off. There is no evidence in the record about stretching the train. There is no evidence in the record about the moves that were made that resulted in the train ending up at the bridge. There is testimony in the transcript of the location of the train from Mr. Hommerding. Mr. Hommerding stated that there was suitable ground to get down on the ground and do a roll-by inspection.

At the investigation, Mr. Hommerding was asked to identify in a photograph (CX 2) exactly where the engine was located (JX 1-45). Hommerding said that the engine would have been further toward the bottom portion of the photograph (CX 2). Tassin concluded that this meant the engine was "outside" of the photograph. He interpreted the word "further" as meaning "beyond". Looking at the photograph (CX 2), he does not see a safe place within the photograph where a roll by inspection could have been performed. If he had concluded that the locomotive was somewhere within the photograph, he would not have disciplined Complainant. Other than referencing the photograph, Mr. Hommerding did not state specifically where the locomotive was located.

Determining where the locomotive was located was a key factor in determining whether Complainant was guilty or not. Complainant and Mr. Freeman said it was either on the bridge or right by the bridge. Mr. Hommerding did not give a specific location. He said it was not on the bridge. He does not recall if Mr. Hommerding indicated that he did not even know there was a bridge there until this incident.

Complainant's train would have been over a mile long. If it were at the bridge, his train would have been a mile to the east or even further back assuming it was not on the bridge.

When Mr. Hommerding prepared the notice of charge, he said the incident occurred at milepost 263.8. There was a typo in the location. West Flint is at 263.8. It is a signal 2 miles away from this location. The charge notice says from about milepost 263.8. That is about 1.7 miles away from 265.5. On page 52 of the transcript, Hommerding indicated that the engine was within a few car lengths of the bridge included on the photograph. He does not recall if Hommerding stated what size car lengths he was referring to.

Tassin uses 65 foot car lengths when he gives measurements. That is what he grew up with as a conductor, 65 foot cars. Everybody has a different interpretation of what a car length is.

The discipline or work history that was an exhibit to the investigation, is admitted only to determine the level of discipline. It is not to be used to determine whether Complainant is guilty or not guilty.

Looking at CX 5, he sees some safe locations at the spot circled and beyond where it would be safe to do a roll-by. He does not know how long it would take for Complainant to put on his coat, hat, gloves, and vest to go out and perform a roll-by. It depends on what he was putting on.

Mr. Freeman had an equal responsibility to perform a Rule 523 roll-by inspection from the ground just as Complainant did. It is true that Freeman received no discipline. He was supposed to receive a letter of caution. Tassin has never seen it. GTW does not have a written discipline policy. Nothing is published for either employees or managers.

He received the transcript and exhibits of the investigation at 3:04 PM. He does not recall how long it took him to read through everything. It took him a minute to access Google. He did not send an e-mail to Steve Napierkowski 34 minutes later. On his home computer, it showed an hour and 34 min, but when he printed it, it showed only 34 minutes. Napierkowski is a manager of labor relations who has responsibility for the unionized employees over Michigan. Either 34 minutes or one hour and 34 minutes after receiving the transcript, he asked Napierkowski if he could support a dismissal of Complainant. At that point, he had made a decision that Complainant was guilty and felt that dismissal was warranted.

He took into account how much time Complainant had to get down from the engine to do a roll-by. However, he believes that Complainant had much more time than he said he did. All three witnesses: Complainant, Freeman, and Hommerding said it was foggy that night. Complainant would be permitted to review his Consist after picking up cars in Flint. He would not have to keep a constant lookout out the front window while reviewing his Consist.

[Cross Examination, TR. 357] He does not believe that Rule 523 required modification. Mr. Gibson does not have the authority to modify GTW or CN operating rules or federal statutes. The collective bargaining agreement governing disciplinary proceedings states that, "Employees will not be assessed discipline until after a fair and impartial investigation." It does not state what sources he may consider when determining what discipline to impose or whether someone has committed an offense. He is not aware of anything limiting what he is allowed to consider in making a decision.

He has seen employees cut off cars across from the Mason-Dixon switch. The investigation transcript did not discuss movements of the train or stretching of the train. He believes that when Mr. Hommerding testified that the engine was within a few car lengths of the bridge included in the photograph (Exhibit 10, JX 2-63), he was referring to the viaduct. He does not recall anything in the transcript about Complainant taking off his coat, vest, gloves, or personal protective equipment. Mr. Napierkowski's office is located in a different time zone. He is an hour behind Michigan time. The transcript contains nothing regarding Complainant reading his Consist.

[Redirect Examination] Exhibit 10 (JX 2-63) shows Schwartz Creek in the distance, but it is not clearly visible.

[Direct examination (by Respondent) TR. 402] He is concerned about safety and holds “safety summits” with unionized employees, monthly. He talks about situations they will encounter, and empowers them to make good, smart, safe decisions. If an employee brings a safety concern to his attention, he addresses it immediately. Many safety issues can be detected by a Rule 523 roll-by inspection. The rule requires the employee to provide notice to the passing train whether they see a defect or not.

Rule 523 states that the approaching train must notify the first train when they pass the approach to the siding (a track off the main line where trains meet), to allow crew members to be in position for the inspection. If an employee thinks it is unsafe to get on the ground to do an inspection, he can inspect from the platform of the locomotive. He would expect a conscientious employee, doing such an inspection, to notify someone that they were doing the inspection from the platform.

He made the decision to discharge Complainant. It was his sole decision in his role as the superintendent. He did not believe that Complainant complied with Rule 523. He did not believe Complainant when he said that the head end of his locomotive was positioned in the middle of the bridge over Schwartz Creek. He did not believe Complainant because Mr. Hommerding said that the locomotive was not on the bridge. He believed Mr. Hommerding because he is a good manager and employee and a religious person who he thinks is honest. He did not think that Mr. Hommerding had anything to gain from saying this versus Complainant who had everything to gain by lying.

He tried to figure out where employees typically would make the cut at the Flint Yard. He has seen some employees make the cut at the Flint Yard by the Mason-Dixon switch. He pulled up a map of the Flint Yard on Google maps. He then tried to figure out the length of the cars that Complainant had and figure out where they would be on the map. Based on this, he determined that the end of the locomotive was just at the very edge of the west end of the viaduct (JX 2-63). He used a 92 foot car when making his measurements. He concluded that the head of Complainant’s train would have been in a safe location to get down and do a roll-by inspection.

From the Bristol Road overpass looking west, there are about 2 miles of visibility. Mr. Hommerding testified that he was 1,000 feet away when he noticed Complainant’s train with its light off. He believes that even in thick fog you could see the glow of a light from quite a distance. He thinks that Complainant would have seen the light coming from about 4,000 feet away. He also believes that Complainant would have been able to hear the whistle for the crossing even though it is 2 miles away from where he was stopped.

JX 3 contains the letter notifying Complainant of his dismissal for a violation of Rule 523 and Rule 100, which essentially says that employees must follow the rules.

At the investigation, Complainant did not discuss having stretched the train for 100 feet or more. It would not have been necessary to stretch the coupling that far. He thinks it is ridiculous that Complainant would have stretched the train, because he only had to stretch the coupling between the 9th and 10th car. He does not believe that anyone stretches the entire train and thinks this is ridiculous.

Cars have a cushion drawbar to prevent the end train forces from damaging the contents inside the car. He thinks the maximum amount of slack the nine cars that Complainant brought out of the yard would have had would have been 270 inches.

He dismissed Complainant because he did not perform a roll-by, previously had a 30-day suspension for operating a train without the proper TGBO paperwork, and previously tested positive for cocaine and was in a diversion program. He saw the positive drug test as a violation of trust. He did not find Complainant credible based on this past problem and because he had a lot to gain by lying.

He had known Mr. Hommerding for about a year and spoke to him on a daily basis. Mr. Freeman was given a letter of caution. This is not considered a disciplinary action. This was his decision and he thought it was right based on Freeman's work history.

[Cross Examination, TR. 435] His interaction with Mr. Hommerding was primarily since he became a trainmaster. Hommerding had been a trainmaster for approximately one month as of the date of the incident. Therefore, he had not interacted with him for a year as stated previously. He does not recall when Hommerding became a trainmaster. He does not know if Complainant was under the influence of cocaine while at work. It is possible.

When he used the Google map to determine where Complainant's train was located, he did not use any testimony in the transcript to determine where the cutoff point was. He did not use Complainant's testimony. He agrees with Mr. Miller, Hart and Freeman when they say that every conductor cuts off trains in a different place. He did not check the video feed for Complainant's locomotive to determine where the front end of the locomotive was located. Nor did he check the events' recorder to find out how much the train was stretched. He did not see any reason to check these things. The event recorder would have told right down to the foot how much the locomotive had moved. He does not know if the locomotive had a video camera, and did not check to find out if it had one. He does not know if the locomotive had a GPS system.

Neither he nor GTW ever sent anything in writing out to the employees stating that an inspection could be performed from the platform of the train. Complainant did not perform a roll-by. He never disciplined Freeman. He thought this was the right decision. He believes that Freeman was trying to help out his brother (Complainant). This conclusion is based on his personal opinion. He does not know whether Freeman goes to church or is a religious person. He does not believe the locomotive was in an area that was unsafe to perform a roll-by. He does not believe that the locomotive was in the area that Complainant and Freeman said it was in. He thinks Freeman was trying to gain the respect of his union brothers for helping out one of his pals. He does not know whether there is anyone, using this analysis, who could testify who does not have something to gain. The facts just did not add up to him.

He thinks that somebody could have seen the approaching train at 3,000-4,000 feet away. If Complainant saw the train when it was 4,000 feet away, and if it were traveling at 40 miles per hour, he would accept that it would have traveled approximately 3,500 feet in a minute.

Freeman is a certified locomotive engineer certified by the CN Railroad. Certification is required by the federal government. Freeman said that on many occasions he has been part of crews that stretch the entire train. Mr. Miller said he does not do this personally but knows people who stretch the entire train. Complainant said he stretched the entire train. Nobody asked at the investigation about whether the train was stretched or not.

[Redirect Examination, TR. 447] At the investigation, Mr. Hommerding testified that he had worked as a trainmaster since November 21, 2011. If the locomotive had been equipped with a video camera, the data would have been available less than a week. Event recorders are only good for 48 hours. Some are good for 28-30 days. He was unaware that there was an issue about stretching the train.

[Recross Examination, TR. 450] From the very beginning, there was an issue as to where the locomotive was located and whether it was located in an unsafe area to perform a roll-by inspection. A video and events' recorder could have helped to disclose the location. A GPS could also have helped.

[Redirect Examination, TR. 451] Not all locomotives are equipped with Wi-Tronix (GPS). He does not know what percentage of the locomotive fleet was so equipped. Only 5% of the fleet had video cameras.

Christopher Hart, Conductor

[Direct Examination, TR. 370] He has been employed by CN or GTW as a conductor for over 10 years. Prior to that, he worked as a conductor for about a year with CSX. He is the local chairman of the union for the Port Huron UTU or SMART. Complainant is a member of the local. He represented Complainant at his investigation.

As a conductor, he has sometimes worked assignments taking trains from Port Huron to Battle Creek. Sometimes he has stopped at the Flint Yard to pick-up or set-off cars. The photograph at JX 4 looks like the Flint Yard. When he comes into the Flint Yard on the thoroughfare, there is not a specific location where he cuts off his cars. The location varies every time. Sometimes he will make the cut adjacent to the Mason-Dixon switch. Other times, he pulls up closer to the clearance switch. At the investigation, he stated that when he makes his cut, he probably does it differently than everybody else. He said that he stops at the Mason-Dixon switch. That way if the switch is bad, he can stop and pull it forward. What he meant was that he stops at the switch, if it is bad. The location where he stops varies every time. If the switch were not properly aligned, he would have to throw the switch. He was not taught to make the cut at the Mason-Dixon switch. Nobody has ever showed that to him.

When you couple cars together, you have to stretch the coupling. The video (RX 29) shows knuckles or couplers coming together, followed by a small stretch of the joint. Sometimes you can use the motion of the car to stretch a joint, but you are still supposed to ask for a stretch. To confirm, you are supposed to stretch the cars.

The second video accurately shows the process of coupling cars together and then the joint being stretched. It appeared that after stretching the joint, the conductor then connected the air hoses. Typically, once you stretch the cars, you get permission from the engineer to go in between the cars and connect the air hoses. If you connect the air hoses and don't have a good coupling and then stretch the cars, the air hoses will disconnect. This causes the rest of the train to go into emergency and the brakes to fully apply. It would then be necessary to get air back up into the locomotive and the cars in order to move the train.

When he uses car lengths to give radio signals to the engineer, he uses long car lengths. Everybody gives car lengths differently. He just chooses to use long cars. It is important that the engineer understand what type of car lengths are being used.

When you do a roll-by inspection, you look for many things including dragging, smoking, brakes applied, hand brakes applied, etc. It is an important safety rule and you are looking for potentially serious mechanical defects. When you have finished with a roll-by, you are required to let the crew of the passing train know that you have done a roll-by. You also look to make sure that the passing train's marker is flashing and notify the crew that they have a complete train.

The photograph at RX 3 is the location near the Bristol Bridge. The track on the left is the thoroughfare and the one on the right is the main line. He thinks the area around the signal would be a safe location to do a roll-by inspection. The photograph at RX 5 shows the location near the Bristol Road overpass. He would consider the area on the right-hand side of the thoroughfare to be a safe location to conduct a roll-by inspection.

Mr. Gibson is the state legislative director for the union in the State of Michigan. He does not recall receiving Mr. Gibson's memo (RX 26) in January of 2011. He was not aware of it until later on. He does not believe he saw this memo before Complainant's investigation. The memo says that if it is unsafe to do a roll-by inspection from the ground, one can be done from the platform of a locomotive. He has never seen anybody do a roll-by from the platform. He does not know if he disagrees with Mr. Gibson stating that a roll-by can be performed from a platform. He previously said there was nothing in the letter that he did not agree with or think is not correct. He previously said that he received a copy of the letter from Mr. Gibson in January 2011. RX 27 contains an e-mail stating that if it is unsafe to perform a roll-by from the ground, an employee can do one from the cab of the locomotive. He agrees that you would be able to hear and see things going by from the locomotive cab. He does not recall if Complainant ever said he had done a roll-by inspection from inside the locomotive, while preparing for the investigation. Complainant was charged with not getting down on the ground to do a roll-by.

The Company sometimes holds safety summits where safety issues are discussed. They discuss how employees have been injured and advise people how to avoid such situations. There is also a safety committee in Port Huron.

[Cross Examination, TR. 394] Every conductor has a different method of cutting-off cars when they come into the Flint Yard. Sometimes he cuts-off at the clearance point. When it comes to stretching, everybody does it differently. Some people stretch the whole train. This is not

unusual. Every conductor does it differently. He has never seen anyone perform a roll-by inspection from the platform of the locomotive.

It is his understanding that at an investigation and hearing, the railroad is supposed to present all the evidence against the union member. At the beginning of every investigation, they tell you that all the evidence is going to be developed. At the end of the investigation, they close the investigation. Whoever makes the discipline decision is supposed to decide based on what happened at the investigation hearing.

At the investigation hearing, the focus was on why Complainant and Mr. Freeman did not comply with Rule 523. Rule 523 requires employees to do a roll-by and get down on the ground when duties and terrain permit.

[Redirect Examination, TR. 398] At the investigation, there was no testimony that Complainant or Freeman stretched the train for hundreds of feet. If terrain does not permit the employees to be on both sides of the track, they could both do the inspection from one side of the tracks, if terrain permits. The rule also states that the engineer, if possible, should stop the train at a location that allows an employee to perform the inspection from the opposite side of the track. The rule seems to contemplate that there might be a situation where the engineer cannot stop at a location where an employee can get across the track. The rule does not specify what is to be done in this situation. Depending on the conditions, the employee can exercise some discretion in complying with the rules.

[Recross Examination, 399] The employee is to use his discretion to determine where it is safe on the ground.

Peter Bistis, Former Manager

[Stipulated Testimony, TR. 453] He is a former manager for GTW. He still works for Wisconsin Central and has a current connection with Respondent, CN. He spoke to Ted Freeman and told him that he needed to call the company's lawyer in connection with Complainant's complaint. He did not direct Freeman as to what to say to the company's lawyer.

Mr. Terwillager, OSHA Investigator

[Stipulated Testimony, TR. 453] He conducted an OSHA investigation of Complainant's complaint. Mr. Freeman called him and reported that Mr. Bistis had instructed him as to what to say to the company's lawyer.

Lance Osmond, Assistant Superintendent

[Direct Examination, TR. 455] He has been employed by GTW for a little over 17 years and is currently the assistant superintendent at Battle Creek. He has been in this position for 2 years and 4 months. He has worked in several different railroad positions and locations. One of his duties is to perform efficiency tests.

JX 4 accurately depicts the western end of the Flint Yard. A siding is a track that is built for the purpose of meeting and passing trains. Crews working on the thoroughfare operate on different radio channels than crews on the mainline. If a crew is on the main and pulls into a siding, they would remain on the same channel as a train passing on the mainline. If a train were pulled into a siding to wait for a train to pass on the mainline, it would be typical that the passing train would pass at track speed.

He is familiar with Rule 523. If terrain does not permit an employee to get on the ground to perform a roll-by, they could do it from the front or nose of the locomotive. He has never heard of an employee doing a roll-by from the cab of a locomotive. It would be safer to be outside where you could smell or hear a problem. If an employee reported that they did a roll-by from inside the cab, he would talk to them and find out the facts of why they did not get on the ground. He was not involved in the decision to discipline Complainant. Complainant did not say anything at the deposition about performing a roll-by from inside the cab.

Complainant testified that the head end of his locomotive was in the middle of the bridge over Schwartz Creek. He is familiar with that location and it has no railings on the bridge. There is no safe place to stand directly on the bridge. If the engine were in the middle of the bridge, it would be possible to do a roll-by from the platform. It would be safe to do a roll-by from the ground near the Bristol Road overpass.

RX 11 shows the Consist of the train that Complainant was working that night. In February 2015, Osmond built a train with cars and locomotives the same length as the one Complainant took out of the Flint Yard on December 15, 2012. The train he built for the reenactment was 2 feet longer than Complainant's train. RX 19 is the Consist of the train he built for the reenactment. After building this train, he had the crew pull two locomotives and 9 cars onto the thoroughfare and stop the lead locomotive in the middle of the Schwartz Creek Bridge. (RX 20). When the head of the locomotive was in the middle of the bridge, the tail end was - - of that switch [sic]. After he had the head end of the train parked in the middle of the bridge, he instructed the crew to shove back 4 car lengths and stop on top of the switch. He was using 93 foot cars. When the tail end of the train was moved 4 car lengths past the switch, the head end was just west of the Bristol Road overpass (RX 22, 23). RX 24 shows where the locomotive stopped after shoving back 4 car lengths. It was a safe area to do a roll-by inspection from the ground. He then had the crew shove back one more car length. When he did that, the head end of the lead locomotive was underneath the Bristol Road overpass bridge. RX 25 is the rear car of the reenactment train. It is adjacent to the Mason-Dixon switch that takes you to the north or south yard.

When performing the reenactment, he did not couple to any standing cars. Nor did he show any stretching of the joint. He was not aware of the joint stretching until after the reenactment was done.

He is familiar with the process of stretching a coupling. Operating rule 603 says that when coupling to equipment, before moving it, you are to stretch the slack. You have to ensure that there is a positive coupling to avoid having the train come apart and putting the train into emergency. The rule does not mean that you have to stretch every coupling on the entire train. It

is not necessary to stretch the entire train. There would be no reason to think the portion of the train you left out there would not be together. If there is an equipment malfunction, it is possible that couplings could come apart after they have been tested, but this would be abnormal. RX 30 shows what happens when the pin is up and pulled away and the knuckle opens up. If it is not a positive coupling, this is what happens. The train goes into emergency and the air hoses separate.

He is not aware of any written rules or procedures that address when an entire train should be stretched. He can only speak from the way he was trained and his experience. The way he was taught and usually sees it done, is that when a coupling is made, the engineer stretches to ensure a positive coupling and then makes the air hose, pumps the train up there, and releases the handbrakes. In his experience, the only time an entire train would be stretched would be after doing a Class-3 air test. You would never stretch your entire train when making a coupling. The crew did a roll-by during the reenactment when the engine was sitting in the middle of the bridge. This is not shown on the video.

[Cross Examination, TR 486] He did not mention the roll-by at his deposition which was conducted the day after the reenactment. He sat in on the depositions of Freeman, Miller, and Hart. He thinks they said that everybody stretches a train differently and some people stretch trains more than others. He does not know how Complainant stretches a train.

You are supposed to cut-off cars either at the clearance point or back of the adjacent tracks, so you are clear. He was taught to stand on the ties of the adjacent track and put his hand out to measure his location. He does not know if this is in the operating rules. He does not recall seeing any ties painted, indicating a clearance point. There is no spray-painted mark for the clearance point on the Flint thoroughfare. He has never seen a spray-painted mark of a clearance point on any track, in his career. If there is no mark indicated, you can take a position at the end of the tie and close to the rear rail of the adjacent track and raise your arms to shoulder height to the end of the car that is to be left. You can also visually see and know a clearance point. He did a reenactment in which he pushed the train only to the clearance points, but that is not in the video. He does not recall what size car lengths Complainant said he used for distance estimates. At the Flint Yard, a 90-foot car is referred to as a car length.

They did the reenactment from the switch rather than the clearance point. They did the reenactment 5 or 6 car lengths back from the switch. He agrees that everybody makes their cut differently, but they are all taught the same way because there is a proven method of success. When he says he used 4-5 car lengths, he counted using 93-foot car lengths from the switch. He never did a reenactment from the clearance point. It was from the switch. He did not take a picture of where the clearance point was. Nobody stood out there and measured it. In the reenactment, he did not attach to a block of cars and then stretch to see how far it would actually stretch. Track speed is 45-50 miles an hour. He does not recall ever seeing a bulletin issued by Respondent explaining that it is okay under Rule 523 to perform a roll-by inspection from the platform of a locomotive.

The reenactment was performed during the daytime.

[Redirect Examination, TR. 501] Complainant was asked if the train car is longer than an engine, and he said it depends on the car. Some are 90 feet and some are 50 feet long. Complainant testified that car lengths are 50 feet when asked by his attorney. He determines a clearance point by standing at the end of the ties and holding up his arm.

[Recross Examination, TR. 503] At the deposition, Complainant stated that he uses 50 foot car lengths.

[Redirect Examination, TR. 505] At the deposition, Claimant stated that the cars he brought out of the Flint yard that night were 90-foot boxcars.

Documentary Evidence⁷

JX 1, Investigation Transcript

On February 1, 2013, Respondent conducted an investigation of Complainant's actions on the night of December 14 and morning of December 15, 2012. The interrogating officer was James Golombeski, Manager for Respondent. Complainant provided testimony. Jacob Hommerding also provided testimony as a company witness.

At the start of the investigation, Golombeski informed Complainant that the purpose of the formal investigation was to develop facts and determine his responsibility, if any, and determine whether he violated any company rules, regulations, and/or policies in connection with allegedly failing to perform a roll-by inspection at approximately 0350 hours, December 15, 2012, while awaiting departure from about milepost 263.8, Flint subdivision. Golombeski informed Complainant that he would be given a full opportunity to cross-examine any person giving testimony and full opportunity to present testimony and evidence. Golombeski later informed Complainant that he had the right to be present during the entire investigation, that he or his representative could question any person who might testify against him, and that he could present witnesses on his own behalf.

Under interrogation by Golombeski, Jacob Hommerding testified in relevant part as follows. He has been employed by GTW for approximately three years. At the time of the incident under investigation, he was the trainmaster for Battle Creek Michigan. He had worked in that position since November 21, 2011. He had previously worked as a conductor and engineer.

On the night in question, he was performing a territorial check ride and observed the train crew not perform a passing train inspection at approximately milepost 263.8, Flint Division, as required by Rule 523. Upon returning to Battle Creek he inquired from the crew (Laidler and Freeman) as to why they had not performed the required inspection. With unsafe walking conditions being cited, Freeman stated that one side of the train could have been inspected. Laidler told him that due to unsafe walking conditions near the bridge, a roll-by could not have been conducted as required. Exhibit 10 (JX 2-63) shows the area where Complainant's engine

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

was stationed when he passed it. There are two tracks and a signal on the left-hand side identified as milepost 265.5.

The engineer is also required to do a roll-by inspection. The engineer was not on the ground doing a roll-by. He was in the engineer's seat. The engineer is not under charges because he was already disciplined. When he passed Complainant's train, he saw a second person in the cab of the locomotive and assumes there were two members on the crew. He saw two people in the cab of the locomotive and nobody on the ground.

He does not know whether Complainant was told that he would be meeting another train while aboard that engine at Flint. He does not know if Complainant was told by the dispatcher that a train would be arriving. However, he thinks that Complainant had a clear range of vision down the track. That night there was fog throughout the duration of the trip increasing as the train proceeded east. He believes that, because he was able to see Complainant's locomotive cab, Complainant would have seen his approaching train and had enough time to perform a roll-by inspection. He was approximately 1,000 feet away when he noticed Complainant's train.

Mr. Hommerding responded as follows, in relevant part, under cross-examination. He was doing a territory ride check. The purpose of it was to better understand the terrain in which the operating employees were required to traverse. He had had limited exposure to this terrain. He was not personally familiar with the ground condition or characteristics of the area in question in which the roll-by was to be performed.

He did not inform Complainant that his train was approaching, because he had no knowledge that Complainant's train was going to be on the track. Under Rule 523, the approaching train is supposed to inform the standing train crew when they pass the approach to the siding to allow crew members to be in position for inspection. The crew of Complainant's train would only know that his (Hommerding's) train was approaching by visual observation. He had no previous knowledge that there would be a train meeting ahead. The crew only informed him that unsafe walking conditions prevented a roll-by inspection from the ground. He agrees it would be the safe course of action if there was no ability to stand safely on the ground, to not get off the locomotive to do a roll-by inspection. However, the crew concluded that one side of the train probably could have been roll-by inspected.

The original charging notice said the alleged failure to perform a roll-by inspection occurred at milepost 263.8 at the Flint subdivision. Another charging notice said the incident occurred at milepost 265.5, almost 2 miles away. The Complainant's engine was located within a few car lengths of the bridge. The engineer, Freeman, was given a letter of caution in connection with the incident.

Mr. Hommerding responded, in relevant part, as follows to questions by Complainant. If the head end of Complainant's locomotive were in the middle of the bridge, he would not expect Complainant to get down and do a roll-by. If it was not in the middle of the bridge, he would have expected Complainant to do a roll-by inspection.

Complainant responded to questions by Golombeski in relevant part as follows. Weather conditions during the early hours around 3:50 on December 15, 2012, were very foggy and affected his visibility. He saw the train approaching when it was about 500 feet away. He assumed the train was moving at a high rate of speed. He did not have enough time to detrain and get down on the ground to perform a roll-by inspection. His engine was sitting directly in the middle of the bridge. It was not possible to get down and inspect the passing train.

Complainant responded to questions by Hart in relevant part as follows. After picking up the cars in Flint, he walked to the head end of the train. Because the head engine was on the bridge, he entered the second engine and walked through the engine to the front of the train. He walked through the catwalk. Even if the conditions were not foggy, he still could not have gotten off the engine to do a roll-by inspection, because the engine was in the middle of the bridge.

Complainant responded to questions by Golombeski in relevant part as follows. He did not tell Hommerding that he could have performed a roll by inspection from at least one side.

Mr. Hommerding responded, in relevant part to further questions by Golombeski as follows. He believes the engine was located east of the bridge in Exhibit 18. He thinks the engine would be toward the bottom of the photograph in Exhibit 16, where 3 to 4 feet of space would be available on the side of the sill step of the locomotive. Freeman said at least one side of the train could have been inspected. Hommerding was not aware that there was a bridge located on the Flint subdivision at approximately mileage 263.8 or anywhere in between, prior to this incident.

Complainant responded to additional questions by Golombeski as follows. He told Hommerding the reason he did not get down and do the roll-by was because it was unsafe territory. He estimates that his train was 4 to 5 car lengths past the signal and it was directly in the middle of the bridge. He picked up nine 90-foot cars at Flint with his engines light. The head of the engine was directly in the middle of the bridge.

JX 2, Investigation Exhibits

The exhibit contains a number of documents introduced at Respondent's investigation of Complainant. GTW Operating Rule 523. Inspecting Passing Trains states that when duties and terrain permit, at least two crew members of a standing train and other employees along the right-of-way, must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding, to allow crew members to be in position for inspection. It states that the engineer of the standing train must, if possible, stop the train at a location that allows an employee to perform the inspection from the opposite side of the track. The engineer must perform the inspection on the same side as the standing train. The rule lists several conditions that are to be inspected for. It says to report the results of the inspection to a crew member of the passing train.

JX 3, Dismissal Letter

On February 26, 2013, Philip Tassin sent a letter by certified mail to Complainant stating that he had reviewed the transcript of the formal investigation held on February 1, 2013, to develop the facts and to determine Complainant's responsibility, if any, and whether he violated any company rules, regulations, and/or policies in connection with allegedly failing to perform a roll by inspection at approximately 0350 hours, December 15, 2012, while awaiting departure from about milepost 263.8, Flint Subdivision. Mr. Tassin states that the record contains credible testimony and substantial evidence proving that Complainant violated Rules 100 and 523. The letter informs Complainant that he is dismissed from service.

JX 4, Google Map's Satellite View

This exhibit contains a Google Map showing the west end of the Flint Yard to Schwartz Creek.

CX 1, Secretary's Findings

This exhibit contains the Secretary, U.S. Department of Labor's findings following an investigation of Complainant's claim by the Occupational Safety and Health Administration.⁸

CX 2, Photos

Photo Exhibit 16 from the hearing conducted by Respondent on February 1, 2013.

CX 3/RX 2, Photo

Photo Exhibit 10 from the hearing conducted by Respondent on February 1, 2013.

CX 4/RX 3, Photo

Photo Exhibit 11 from the hearing conducted by Respondent on February 1, 2013.

CX 5/RX 4, Photo

Photo Exhibit 12 from the hearing conducted by Respondent on February 1, 2013.

CX 6, Report, Unsafe Inspection Locations

Exhibit 21 from the hearing conducted by Respondent on February 1, 2013. The document entitled, *Reported Unsafe Crew Inspection Locations*, identifies the "West Flint ditches on both sides" as being unsafe locations.

⁸ The proceeding before me is a *de novo* hearing. I informed the parties at the hearing that the previous findings have no effect or bearing on my decision in this matter, and this document will be considered only as a matter of procedural history. (TR. 7).

CX 7, CN Railroad's Operating Rules

This exhibit contains Respondent's Operating Rules. As stated in JX 3, above, Complainant was dismissed from employment for allegedly violating Rules 100 and 523.

Rule 100, *Rules Regulations, and Instructions* requires employees to be familiar with and obey all rules, regulations and instructions. They must attend required classes with current rulebook, regulations and instructions. They must attend required classes with current rulebook, timetables and instructions, and must pass the required examinations. Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. Employees must ask their supervisor for an explanation of any rule, regulation, or instruction of which they are unsure.

Rule 523, *Inspecting Passing Trains* states that when duties and terrain permit, at least two crew members of a standing train and other employees along the right-of-way, must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding, to allow crew members to be in position for inspection.

The engineer of the standing train must: if possible, stop the train at a location that allows an employee to perform the inspection from the opposite side of the track; and perform the inspection on the same side as the standing train.

Crew members of the standing train are to look for several hazardous conditions as listed in the rule and report the results of the inspection to a crew member of the passing train.

CX 8, CN Railroad's Air Brake and Train Handling Rules

This exhibit contains rules governing air brake and train handling procedures.

CX 9/RX 9, Train Consist

This document shows the makeup of Complainant's train on December 15, 2012, at 1:32 AM.

CX 10, Photos

This exhibit contains 4 photographs taken during a site inspection by Complainant.

CX 11, Memo

On February 12, 2015, Roger Schuff, investigator for Complainant's attorneys, wrote a memo stating that on January 13, 2015, he took measurements at the Flint Michigan CN yard using a Lufkin MW-38 Measuring Wheel. The distance measured from the point of the switch to where Complainant was standing at the clearance point was 160 feet. The distance measured from the switch to the beginning of Schwartz Creek was 864 feet.

CX 12 A, CSX Train Inspection Rule

This document contains rules governing Observation of Trains for CSX Railroad. It states *inter alia* that when there are two or more inspecting employees, one employee should be stationed on each side of the passing train, if possible. Engineers may inspect the passing train from the locomotive cab. When inspecting the passing train from the ground, do not stand closer than 30 feet from the passing train or between the rails of adjacent tracks.

CX 12 B, NS Train Inspection Rule

This document contains rules governing train inspections by Norfolk Southern Railroad. It states *inter alia* that inspection of a passing train on both sides is required when two or more employees can safely position themselves in advance. During train meets, crew members must inspect passing trains from either inside the locomotive cab or from a safe ground location. When performing the inspection from the ground, employees must dismount the locomotive on the field side away from the adjacent track, if possible. Crew members are not required to cross tracks to inspect a passing train.

CX 13, E-Mail Correspondence

This document shows that at 3:04 PM on February 8, 2013, Lance Osmond, Assistant Superintendent at Battle Creek, Michigan, sent an e-mail to Phillip Tassin, Jacob Hommerding, and James Golombeski containing the transcript of proceedings and exhibits from Respondent's investigation of Complainant.

On February 8, 2013, at 3:38 PM,⁹ Phillip Tassin sent an e-mail to Steve Napierkowski asking him if he could support a dismissal of Complainant.

On February 8, 2013, at 6:28 PM,¹⁰ Napierkowski replied to Tassin that he thought an arbitrator would find it excessive. He stated that it probably would have benefited us to call the engineer in as a witness in order to substantiate the trainmaster's testimony...especially in regards to the trainmaster saying that the engineer told him one side of the train could have been safely rolled by.

CX 14, Responses to Interrogatories

On August 7, 2014, Respondent provided answers to Complainant's interrogatories.

CX 15, Stipulation to Testimony

This exhibit was withdrawn at the formal hearing.

⁹ Respondent asserts that this e-mail was sent at 4:38 PM, per testimony of Mr. Tassin.

¹⁰ Respondent asserts that this e-mail was sent at 7:28 PM per testimony of Mr. Tassin.

CX 16, Earnings Records

This exhibit contains Complainant's W2, Wage and Tax statements for 2010-2013.

CX 17, Photos

This exhibit contains still photos from GTW DVD of a train at Schwartz Creek Bridge.

CX 18, Deposition of Jerry Gibson

On February 27, 2015, Jerry Gibson provided the following deposition testimony, in relevant part. He is currently the state legislative director for the State of Michigan for Smart Transportation Division or what was formerly known as United Transportation Union ("UTU"). He handles membership safety and legislative issues. He is also co-chairman of freight for the national safety team working with the FRA and NTSB on all major accidents across the UTU. He is currently employed by CSX. He is a safety liaison between management and labor.

He is familiar with GTW Rule 523 that requires employees to do inspections on passing trains. The inspecting crew is to report the results of the inspection to a crew member of a passing train. If they see a problem, they need to communicate it to the crew of the passing train so that the crew can stop the train and address it.

In late 2010, he was involved in discussions with GTW management officials regarding the safety of employees doing roll-by inspections. RX 27 was an e-mail he sent to Derrick Colasimone, who was the assistant general manager for Canadian National ("CN"), at the time. The Michigan zone for CN is Grant Trunk Western ("GTW"). In the e-mail, he refers to a discussion he had with Mr. Miller, the former CN general manager, in which they agreed that if employees could not find a safe space to conduct a roll-by inspection from the ground, they could elect to complete such an inspection from the cab of the locomotive. In this correspondence with Mr. Colasimone, he asked that a bulletin be issued so the crew would understand that it was acceptable to do an inspection from the cab if the ground was unsafe. To his knowledge, no such bulletin was ever issued. He believes that doing a roll-by inspection from the cab of the locomotive would be a reasonable alternative to doing it from the ground, if the employee feels the conditions on the ground are unsafe.

He sent an e-mail to employees, discussing what had transpired, but he does not have authority to tell employees of CN to do anything. RX 26 is a January 30, 2011, letter to all Michigan UTA members. He wrote the letter to inform employees of safety issues and let them know how they are being handled. However, he does not have everybody's e-mail, even though the letter says that it is addressed to all Michigan UTA members. He does not know if this letter was posted anywhere.

In the letter, he advised members to take the safest course of action and use their best judgment if they encounter an unsafe situation. He advised members to report dangerous situations to management. When he referred to an understanding with Mr. Ross and Mr. Tassin, he was referring to his original letter, in which it was stated that if conditions were unsafe,

employees could do an inspection from the cab of the locomotive. In the letter, he also stated that if it is unsafe to do an inspection from the ground, an inspection could take place from the platform of the locomotive. Depending on the circumstances, there are times when inspecting from the platform would be appropriate. However, it depends on the terrain, weather conditions, sight availability, speeds, curves, etc. There are times when because of speeds and leaning and listening, if you are at a curve or other locations, being inside the cab of the locomotive is much safer because it offers you protection against something sticking outside of a boxcar or some type of other equipment.

RX 28 is a list of reported unsafe crew inspection locations that they were presenting to Mr. Colasimone. He believes the list was sent as an attachment to an e-mail to Mr. Colasimone. The issue of employee safety while doing roll-by inspections is not a new issue. He is aware of other employees, besides Laidler, who have been disciplined for not doing a roll-by inspection. CSX has a similar rule to GTW's, but it states that employees have to be at least 30 feet away from the train they are inspecting. It also states that engineers may inspect passing trains from the locomotive cab. Norfolk Southern's rule provides that crew members are not required to cross tracks to inspect the passing train.

He believes an effective train inspection can occur from the cab of the locomotive. He is not aware of any employees who have been hired by any railroad while they were involved in a lawsuit against their former railroad.

CX 19, Report and Deposition of Dr. Robert Ancell

On March 19, 2015, Dr. Robert B. Ancell, Rehabilitation Consultant, issued a Vocational Rehabilitation Evaluation concerning Complainant. He stated that he interviewed Laidler, a 45-year-old male, in his office. Laidler reported that he was fired from his job in February 2013. He had been employed as a conductor for the CN railroad. He had worked for the CN railroad for about 7 years, starting as a brakeman.

Since his termination, he has looked for work and applied at CSX and Bay City Huron Eastern Railroad. He secured a position with a former employer at Madden Lounge and Grill. He is currently working 27 hours per week and is paid \$6.50 per hour, plus tips, which translates to approximately \$9.00 per hour.

Laidler is not taking any medication. Laidler indicated he had previous medical issues and in 2012 was off of work for approximately 6 months due to depression. He treated with a psychologist and was able to return to work without restrictions. He is a high school graduate. After graduating from high school, he worked for a veterinarian, training horses and worked at an Arabian horse farm, earning minimum wage. From 1999 to 2005, he worked for a Pontiac dealership as a salesperson and service advisor. He was paid about \$39,000 per year. He then went to work for Madden's Lounge as a bartender and ultimately became an assistant manager where he earned about \$25,000 and managed approximately 12 people. In 2006, through networking, he was able to secure a position at CN Railroad. In 2010, he earned \$84,000. In 2011, he earned \$46,000. He was off for discipline reasons for part of that time. In 2012, he missed about 6 months of work. He earned \$36,000. His depression was related in part to his

work. His current activities of daily living are to work 27 hours a week. He has continued to search Craigslist and network for jobs.

Dr. Ancell also reviewed Laidler's records including a February 19, 2015, report by Luanne Castellana. He opined that there were several problems with Castellana's report. He noted *inter alia* that Ms. Castellana does not hold any professional licenses in the field of counseling or other professional areas in the State of Michigan. He noted that Castellana did not conduct an interview of Laidler before authoring her report. Her report does not indicate, as required by the code of professional conduct, that her conclusions are limited by virtue of the fact that she never evaluated this individual. Castellana indicated that she did a transferable skills assessment, but does not indicate the basis of it, other than identifying some very generic terms that she believes are attributable to its functionality. He noted that Castellana had provided a number of options in the railroad industry, even though Complainant had been terminated for a safety violation, which is public knowledge on some of the websites for the railroads.

Dr. Ancell noted that some of the jobs Castellana identified did not even exist in Michigan. He noted that she identified conductor jobs which were located over two hours from Complainant's home. She also cited a number of other jobs without giving information as to where they were located, the pay, etc. These included a job as a truck service advisor in Battle Creek, which is four hours from Complainant's home, and another job as a truck service advisor which is three hours from his home. He opined that Castellana's conclusion that Complainant could earn from \$11.89 per hour to \$43 per hour was unrealistic and that she did not consider that the jobs she identified would require a bachelor's or associate's degree, which Complainant does not have. He also stated that Complainant did not have the skill sets required for many positions Castellana identified in the food service industry.

With regard to jobs that Castellana identified in the railroad industry, he found Castellana's suggestion that Complainant could be a welder helper with the Union Pacific to be totally without merit as Complainant has never performed any such functions. He noted that Castellana claimed to have found conductor jobs in the Detroit, Jackson, and Dearborn areas, but that she conceded that because Complainant had been terminated for a safety violation, the probability of his being able to attain a railroad job would be extremely limited, if nonexistent.

Dr. Ancell conducted a Labor Market Survey for job opportunities through Rail Service and found only a mechanic's job in Midland and an operator helper's job in Midland. He also did a labor market survey through the Association of American Railroads, which was another database cited by Castellana. There were no job leads in the State of Michigan at all.

Dr. Ancell stated that Castellana cited jobs that she had found in the sales and service arena. He noted that it is a four-hour drive between Complainant's home to the truck service advisor job in Battle Creek. Furthermore, Complainant has never been a parts and service advisor for motorcycles, which is a job Castellana found with BMW. It is over 3 hours to Monroe from where he lives for the "Truck Service Advisor" job at the Travel Centuries.

Dr. Ancell stated that he conducted an independent job search of railroads. He found one position available as a conductor with Norfolk Southern Railroad in Jackson, Michigan, which is

approximately 4 hours from Complainant's home. The Pacific Coast Railroad had no jobs available. A job search for auto service advisor revealed 2 positions, neither of which involved vehicles that Complainant had previous experience with.

Dr. Ancell disagreed with Castellana's conclusion that Complainant had a residual earnings capacity of \$26-\$36 per hour. After conducting research, he concluded that the more realistic range is \$12.50 to \$15 per hour.

Dr. Ancell provided deposition testimony on April 27, 2015. He testified in relevant part as follows. He is a vocational rehabilitation counselor and case manager in private practice in Southfield Michigan. He has two professional licenses in Michigan. One is as a licensed professional counselor and the other is as a licensed master's level social worker, and he has certifications in rehabilitation counseling, case management, and general counseling. He was asked to evaluate Complainant and determine what would be the reasonable expectation for his employment and earning capacity. He also reviewed the report of Ms. Castellana.

Dr. Ancell reiterated the contents of his written report, as described above. He expressed concern that Castellana did not interview Complainant and that she relied on a very outdated 1991-1993 Dictionary of Occupational Titles (DOT). Castellana presented some DOT codes that were last updated in 1977. He took issue with Castellana's transferable skill analysis because Castellana did not explain what she relied on and how it relates to her conclusions. It therefore could not be validated. Castellana described jobs that were unrealistic in terms of Complainant's earning potential. She also identified jobs which were several hours from Complainant's home and were therefore not realistic. Dr. Ancell explained that he found Castellana's earnings potential range to be unrealistic because Complainant would have to start in an entry level position and therefore would not earn the top salary. He did not disagree that Complainant could earn \$11.89 per hour, but he did not believe \$43 and \$96 per hour was realistic. He opined that Complainant would not get a job in the railroad given his termination and the reasons for it. Safety is a major issue in the railroad and auto industry.

Dr. Ancell opined that Complainant's dismissal for a safety violation is a "negative valence" or a negative issue that relates to his higher ability in the same industry or similar industries where safety is a major issue. It is like having a black cloud over your head. When comparing Complainant to other people who want employment, it is not something that bodes well for employment. The probability of successful placement with that on his record is very low, if nonexistent.

Dr. Ancell also took issue with Castellana's suggestion that Complainant could be a transportation manager. He stated that because Complainant does not have a bachelor's degree and that kind of experience or education, it is not a realistic position. He stated that while Complainant does have some experience working in a bar, his experience does not rise to the level of a food service manager or someone at that high of a level. Dr. Ancell stated that in order to ascribe that someone is able to do something, they have to have already been able to perform it or they should be in training to do it. Complainant has not done any of these kinds of jobs that Castellana suggested he would be capable of to earn these very high levels of earnings. Complainant has only demonstrated experience being an assistant manager at a relatively small

operation. Complainant does not have the experience to then jump to become a manager of a big restaurant or place where you are running a large operation and making big money.

Dr. Ancell opined that Castellana had overestimated Complainant's real abilities to work and his earning potential. He conducted his own research. Based on his research, he believes that Complainant could more realistically earn between \$25,000 and \$30,000 a year or between \$12.50 and \$15.00 per hour. This figure is based on jobs that are in existence and are a fair representation of his present earning capacity. He disagrees with Castellana because she looked at higher skill levels, which Complainant has not demonstrated, and she made assumptions that he could get a job in the railroad industry, which he disagrees with. Castellana also assumed that Complainant could be a food service manager, which he has never been, and she used the highest amount of dollars to ascribe to those occupations when we know in reality that when someone has been terminated from a job, they start at entry level. They do not start at the highest earning capacity for the job. So he respectfully disagrees with her methodology for looking at the numbers.

Complainant has no physical or emotional limitations on his ability to find work. Some of the jobs identified by Ms. Castellana were approximately an hour and 48minutes or an hour and a half from Complainant's home rather than 2 to 4 hours from his home, based on Google maps, but he does not know how long it would take with traffic or what time of day Google was referring to. He does not know the locations of the jobs Complainant applied for. He does not know how many times Complainant applied for each job. He did not personally speak to anyone at any of the railroads in determining that Complainant would have a hard time being hired by a railroad. He knows that Complainant was terminated for a safety issue but does not know the details. In his experience, someone with a negative valence would have a limited chance of finding comparable work in the same industry. There is no such thing as a 100% obstacle, but it is a very negative valence and not something that bodes toward being number one on the list. Six years of experience as a conductor would be a positive factor as compared to someone who has no prior experience. He does not know what rule Complainant was charged with violating. In an interview, Complainant could try to explain what happened, but it is speculative to know whether he could explain it away.

He would not describe Complainant's job search efforts as minimal, but the job search Complainant documented would not be the type of search he would recommend. Complainant has been successful in finding work, which is positive. However, Complainant has not done what he would describe to be a full-blown job search. Complainant mentioned that he is networking, which is the most effective way of finding work. Complainant did not state what kinds of jobs he has looked for on Craigslist. He does not know when Complainant interfaced with the Michigan Talent Bank, a State of Michigan employment service. He did a transferable skills analysis as it relates to Complainant's work on the railroad and as a first-line supervisor. Complainant does have transferable skills and he thinks he could find a higher paying job than he has now. His assessment as to the hourly rate excludes railroad jobs and is based on the federal data for the area in which Complainant lives for the types of jobs that he ascribes to him. He assumes that Complainant would have been able to find the type of jobs he describes, if they were open. So, he was not dealing with placement ability as much as with earning capacity.

He searched for railroad positions on March 18, 2015. Being a service advisor on one brand of car does not necessarily mean that you are qualified for the nuances of some other type of car, but you could be trained to do that. He is not suggesting that Complainant could not be trained to work with other vehicles. To suggest, however, that you can earn a significant amount of money without starting brand-new as an entry level employee, is the main question. He is not suggesting that Complainant could not work with other cars, but he would have to be trained. If he were competing with someone who had experience with those vehicles, they would have a step up from Complainant.

When he was determining how long it would take Complainant to find a job, he disagreed with Castellana's conclusion that he should have been able to get a job within 3 to 6 months of dismissal. He looked at the percentages reported by the federal government as to what we really expect and what the experience has been as to how long it takes for people to get jobs. The statistics say that 31% of the population is still unemployed after 27 weeks, which is greater than 6 months. More than two thirds of people find a job in less than 27 weeks. When he stated that Complainant has an earning capacity of \$25,000-\$30,000 he was making an assumption that there was work available in the market place that would accommodate that. Whether or not Complainant could get the job is based on all kinds of other issues. With a diligent job search, there is a reasonable probability he could find such work as described in his report. If Complainant had done everything he wanted him to do, based on his actual skill set, he would qualify for something from \$12.50 an hour to \$15 an hour.

He has not had good experience in placing people back in the same industries who have had safety violations like this, even though they are capable of performing the duties of the job. It is a negative valence in terms of employment. He does not know the specifics of why Complainant was terminated, but what he means is that being terminated from a position is a negative valence to the next employer you are applying. He has found this to be a major problem. It is a negative issue in terms of future employability when you were terminated by your past employer for any kind of reason, some less, some more. When you get into drugs, safety, fighting, or major issues that cause termination, it is extremely difficult to place people back into similar types of employment.

RX 1, Operating Rule 523

See CX 7, above.

RX 5, 6, Photographs

Photographs of tracks in vicinity of Bristol Road looking east.

RX 7, Photograph

Photograph of tracks in vicinity of Bristol Road looking west.

RX 8, Photograph

Photograph of tracks in vicinity of Dye road looking east.

RX 10, Map

Google Map satellite view of west end of Flint Yard to Schwartz Creek showing distance from bridge to switch on thoroughfare.

RX 11, Map

Google Map satellite view of west end of Flint Yard to Schwartz Creek showing distance from Bristol Road overpass to point parallel to "North-South" switch.

RX 12, Work Record

Personal Work Record for Complainant, also contained in JX 2-80.

RX 13, Waiver of Investigation

December 12, 2011, waiver of investigation for charge of operating a train without proper TGBO authority. Complainant accepted responsibility and a 30 day suspension from service.

RX 14, Notice of Investigation

On June 9, 2011, Complainant received notice of an investigation for allegedly testing positive for a prohibited substance.

RX 15, Redblock Option Form

On June 21, 2011, Complainant elected to contact the carrier's manager and indicate willingness to enroll in and participate in an approved rehabilitation program.

RX 16, Abeyance Notice

On June 24, 2011, Complainant was informed that the investigation scheduled for June 28, 2011, would be held in abeyance.

RX 17, Agreement

On December 9, 2011, Complainant agreed to undergo toxicological testing.

RX 18, Work Record

Personal work record for Freeman indicates a December 20, 2012, letter of caution for failure to perform a roll-by inspection on December 15, 2012. The record does not indicate whether Freeman ever received the letter.

RX 19, Consist of Reenactment Train

The exhibit contains a Consist of a reenactment train on February 9, 2015.

RX 20, Video

The exhibit contains a video of the reenactment conducted by Respondent on February 9, 2015.

RX 21-25, Photographs

These exhibits contain photographs of various views from the reenactment conducted by Respondent on February 9, 2015.

RX 26, January 30, 2011, Letter

See CX 18, above. On January 30, 2011, Jerry Gibson wrote a letter to all Michigan UTU members informing them of safety issues and letting them know how they were being handled. In the letter, he stated *inter alia* that if an unsafe location is deemed as a reason for not being on the ground for an inspection, the inspection can take place from the platform of the locomotive and said location should then be reported to the appropriate CN officer for proper handling and the employee who made the safe decision should not face discipline for doing so. He also stated that safety is never to be compromised and all locations must be identified that are considered unsafe.

RX 27, November 20, 2010, E-mail

See CX 18, above. On November 20, 2010, Jerry Gibson sent an e-mail to Derek Colasimone referring to a discussion he had with Mr. Miller, the former CN general manager, in which they agreed that if employees could not find a safe space to conduct a roll-by inspection from the ground, they could elect to complete such an inspection from the cab of the locomotive.

RX 28, List Of Reported Unsafe Crew Inspection Locations

See CX 18, above. This exhibit contains a list of reported unsafe crew inspection locations that Jerry Gibson testified were reported to Mr. Colasimone.

RX 29, Video

This video shows a coupling of knuckles.

RX 30, Video

This video shows air hoses separating.

RX 31, Video

This video shows coupling of freight cars.

RX 32, Operating Rule 603

CN Operating Rule 603. Coupling/Uncoupling Precautions. When coupling to equipment, verify it is properly secured and can be coupled to safely. Before moving the equipment: 1) stretch the slack to ensure all couplings are made, and 2) check cars for hand brakes that are applied. Do not cut off or leave equipment in curves and turnouts where couplers may bypass when re-coupling. When coupling to equipment in any other than straight track, use caution, stopping if necessary, to ensure couplers are properly aligned.

RX 33, Medical Status Reports

These reports indicate that from April to August 2012, Complainant was unable to work due to symptoms of depression, anxiety, worry, rumination, and insomnia.

RX 34, Medical Status Reports

These reports indicate that in April, October, and November 2012, Complainant suffered from severe obstructive sleep apnea and had excessive daytime sleepiness.

RX 35, Medical Status Report

This report indicates that in September 2012, Complainant was diagnosed with chest pain and unable to work.

RX 36, Form 1040

For the tax year 2013, Complainant had an adjusted gross income of \$76,348.

RX 37, Form 1040

For the tax year 2012, Complainant had an adjusted gross income of \$73,455.

RX 38, Form 1040

For the tax year 2011, Complainant had an adjusted gross income of \$71,018.

RX 39, Curriculum Vitae, Luann Castellana

This document outlines Luann Castellana's qualifications as a vocational rehabilitation counselor.

RX 40, Report of Luann Castellana

Vocational rehabilitation counselor, Luann Castellana, conducted a vocational assessment of Complainant on February 19, 2015. The reports and opinions were based on a review of Complainant's deposition testimony of August 20, 2014, Complainant's CN job application dated October 5, 2006, the Dictionary of Occupational Titles and other sources enumerated in her report.

Castellana noted that Complainant graduated from high school in 1987. He has training as a brakeman and conductor from Grand Trunk Railroad. He also has experience operating a forklift and backhoe with front loader and has a chauffeur's driver's license.

From August 1999-2005, he was employed by Joseph Pontiac dealership in Fenton, Michigan. He was earning \$35,000 annually. He started working as a salesperson for two years and then was promoted to service advisor earning \$39,000 annually. He worked as a service advisor from March 2001 to September 2005, when he was laid off due to discontinuation of the Pontiac Brand. He then worked for Madden's Lounge and Grill from March 2001-December 2006 as an assistant manager, bartender, cook, etc. earning \$25,000 a year.

From December 2006 to February 2013, Complainant worked for Grand Trunk Railroad as a brakeman and conductor, ultimately earning \$36.00 per hour. Since his discharge, Complainant has returned to work with Madden's as a part-time short order cook, earning \$7.50 per hour.

Castellana opined that Complainant possesses several transferable skills and has the potential to pursue similar occupations within the same or similar work fields and industries. She opined that Complainant made minimal attempts to look for other employment before returning to his bar job as a short order cook. His current job as a short order cook is significantly below his skill level and potential. According to his deposition, he reviewed the classified and want ads in the Flint Journal and looked online through Craig's Lists approximately 10 times. This is far less job seeking activity than what most serious jobseekers pursued. She stated that there are many more resources available when looking for full-time employment.

Castellana opined that Complainant has several types of opportunities to pursue work based on his experience and skills within various work fields. She opined that within the railroad industry, he could pursue positions as a conductor, brakeman, trainmaster, yardmaster, train dispatcher, etc.. Castellana stated that there are a large number of railroad job openings and listed some possible jobs. She opined that Complainant also has the capacity to pursue a position in sales and customer service, and she listed a number of possible positions. She also stated that Complainant has skills acquired in the restaurant/hospitality field that would allow for reentry into similar jobs at the managerial level and listed a number of possible positions.

Castellana opined that Complainant is currently working significantly below his earning and skill level potential and that he has put forth little effort towards his job search. She stated that based on the current labor market and job openings, Complainant should be earning at least \$26-\$36 per hour.

ANALYSIS AND CONCLUSIONS

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

Applicable Law

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

Section 20109(b)(1) of the Act, and 29 C.F.R. § 1982.102(b)(2), relevant to the current claim, prohibit a railroad carrier, or an officer or employee of a railroad carrier *inter alia* from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: 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 individual 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 to authorize the use of the hazardous equipment, track, or structures unless the condition were corrected immediately, or the equipment, track, or structures were repaired properly or replaced.

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

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

AIR 21, and thus the FRSA, require a complainant to prove by a preponderance of the evidence that: 1) he engaged in a protected activity; 2) he was subjected to an adverse personnel action; and 3) his protected activity was a contributing cause of the unfavorable personnel action.¹¹ A complainant’s failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint.¹²

Title 49 U.S.C. § 42121(b) of AIR 21 and 20 C.F.R. § 1982.109(b) also provide that even if the complainant satisfies his burden of proof on all three elements, relief may not be granted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

Credibility/Protected Activity

In order to determine whether Complainant’s activities on December 14-15, 2012, were “protected activity” under the Act, I must first make findings of fact as to what exactly Complainant did or did not do. There is a factual dispute in this case as to what Complainant did with his train after picking up nine cars at the Flint yard and, specifically, where he stopped his head engine. Complainant asserts that he stopped his head engine on the Schwartz Creek Bridge, a location where it would have been hazardous to dismount the train and perform a roll-by inspection from the ground. Respondent asserts that Complainant stopped his head engine near the Bristol Road overpass where it would have been perfectly safe to dismount the train and perform a roll-by inspection from the ground.

A decision in this case therefore depends significantly on the credibility of the witnesses with regard to the location of the head engine of Complainant’s locomotive and other circumstances surrounding his failure to dismount the train and perform a roll-by inspection under Rule 523. There are only three people who provided testimony¹³ who were in a position on the night in question to potentially see where the head end of the locomotive was located: Complainant, Freeman, and Hommerding.

In his testimony, Tassin, stated that if, in fact, Complainant’s engine were stopped on Schwartz Bridge or close to the bridge, or somewhere within Exhibit 16 (JX2-70, CX 2, CX 2A), he would not have disciplined Complainant, because the engine would have been in an unsafe location to perform a roll-by inspection from the ground. There was also deposition testimony

¹¹*Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004).

¹²*Robinson v. Northwest Airlines, Inc.* ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

¹³ The record does not indicate whether there was anyone else on Hommerding’s train who was in a position to see where the head engine of Complainant’s train was located.

by Gibson indicating that the union had been in discussions with GTW management officials regarding the safety of employees doing roll-by inspections. The West Flint ditches on both sides were identified as being unsafe roll-by locations. (CX 6). Miller testified that “West Flint” encompassed the area by the Schwartz Creek Bridge in Flint where Complainant asserted his head engine was located. I therefore find that if Complainant’s engine were located on or near Schwartz Creek Bridge, it would have been in an unsafe location for Complainant to dismount the train and perform a roll-by inspection from the ground.

Location of Head Engine Based on Testimony

Complainant testified consistently at the February 1, 2013, investigation and in the formal hearing before me, that his head engine was located in the middle of the Schwartz Creek Bridge. Freeman was not called to testify at the investigation, but provided a written statement (JX 2-79) stating that they did not do a roll-by inspection because of the terrain and fog conditions with both sides of the main track dropping off by a bridge and nowhere to stand or escape if something were to happen. At the formal hearing he testified that the engine was stopped “right by the bridge” and they were located where the terrain drops off and is sloped, with no railing on the bridge. Hommerding testified at the investigation, but was not called at the formal hearing, and stated that Complainant’s engine was located within a few car lengths of the bridge and that it was located toward the bottom of the photograph in Exhibit 16 (JX 2-70, CX 2, CX 2A).

All three key witnesses confirmed that the train passing occurred at approximately 3:50 A.M. on the morning of December 15, 2012, and that it was therefore dark and was also very foggy. Hommerding testified that there was fog throughout the duration of the trip, increasing as the train proceeded east. All three key witnesses also confirmed that they were not expecting to encounter a train passing. Complainant and Freeman testified that they received no prior notice that another train would be passing and were surprised when Hommerding's train suddenly appeared out of the fog. Hommerding confirmed in testimony that he was unaware that his train would be passing Complainant’s train and therefore did not provide Complainant with the prior notice, required under Rule 523, that they would be passing his train, to allow Complainant and his crew to get into position for a roll-by inspection.

The testimony of Complainant, Freeman, and Hommerding establish that Complainant and Freeman were sitting in a locomotive that was stopped on the tracks, while Hommerding was in a train that was traveling at track speed, i.e. approximately 45-50 miles an hour. Complainant and Freeman testified that they had worked this route numerous times and were very familiar with the terrain. Hommerding testified that he was conducting a territory ride check on the night in question. He had limited exposure to the terrain and was therefore performing the territory ride check to better understand the terrain that operating employees traverse. He further testified that he was not personally familiar with the ground conditions or characteristics of the area in which the roll-by inspection was to be performed. Hommerding testified that he, in fact, was not even aware that there was a bridge located on the Flint subdivision at approximately mileage 263.8 or anywhere in between, prior to this incident.

At the hearing, I had the opportunity to observe the demeanor of Complainant and Freeman. I found their testimony to be consistent, straightforward and complete, without any equivocation, avoidance, or vagueness. I found both witnesses to be credible.

I did not have the opportunity to observe the demeanor of Hommerding. However, I find the content of his testimony with regard to the exact location of the head engine to be less credible than that of Complainant and Freeman for several reasons. First, Complainant and Freeman were stopped on the tracks, while Hommerding was in a train moving at track speed in dark fog. Second, Hommerding was unfamiliar with the territory and was not even aware that a bridge was present in the area until he became aware of this sometime after the incident in question. I therefore find it implausible that he could state, with specificity, where Complainant's head engine was stopped, especially with regard to its relation to the bridge which he did not even know was there. I find this especially hard to believe, given that Hommerding was not only on a train moving at track speed, but the conditions were also dark and very foggy. Third, because Hommerding was not expecting to encounter another train on the tracks, he therefore would not have been on the alert to note the exact location of the head engine. Fourth, I found Hommerding's testimony to be internally inconsistent. Hommerding testified that Freeman stated that one side of the train probably could have been roll-by inspected. However, he did not elaborate upon the content and context of that conversation. Elsewhere in his testimony, he stated that "They stated that due to unsafe walking conditions near the bridge that a roll-by could not have been conducted as required." As there were only two crew members on Complainant's train, Hommerding had to be referring to both Complainant and Freeman as the "they" making this statement. Freeman has consistently maintained that it was unsafe to dismount the train and perform a roll-by inspection. Therefore, absent further information as to the exact content and context of the alleged conversation, I do not find it credible that Freeman stated unequivocally that a roll-by inspection could have been performed from one side.

Tassin, whose job was to determine whether Complainant should be disciplined, testified that he did not have any prior contact with Complainant and thus did not know him personally. He testified that in assessing Complainant's credibility, he considered that Complainant had previously tested positive for cocaine, which he viewed as a breach of trust. He further testified that he believed Complainant was lying because he had a lot to gain by lying. Given this type of analysis, it does not appear that there was anything that Complainant could have said or done that would have made him credible to Tassin.

Tassin also testified that, although he had never met Freeman before or spoken to him about the incident, he believed Freeman was lying to try to gain the respect of his union brothers for helping out one of his pals. Tassin did not explain, and the record provides no support for, his conclusion that Freeman was lying to gain the respect of union brothers or help out a pal. Tassin testified that he drew this conclusion about Freeman based solely on his personal opinion. The record contains no evidence of animosity between the union and management officials, but rather shows that they were working together to jointly address safety issues concerning roll-by inspections. Furthermore, in Complainant's testimony he testified that he did not socialize with Freeman outside of work and therefore did not have a personal relationship with him.

Tassin further testified that he found Hommerding more credible than Complainant and Freeman because he is “religious.” Even if one were to assume *arguendo* that being “religious” equates to being “honest,” the record does not contain any evidence regarding the degree to which Complainant and Freeman are “religious” and therefore, in Tassin’s view, “honest.” Tassin specifically testified that he did not know whether Freeman goes to church or is a religious person. Regardless of the answer to the issue of Complainant and Freeman’s degree of being “religious,” I find that this is not a reliable method of assessing honesty and credibility. Furthermore, even assuming that Hommerding were truthful in his testimony, I find that the content of his testimony is not necessarily in conflict with that of Complainant and Freeman. Hommerding testified that he thought Complainant’s engine was within a few cars of the bridge (that he did not even know was there on the night in question) and within the photograph located at JX 2-70). Tassin testified that if Complainant’s head engine were within this Exhibit 16, he would not have disciplined Complainant. Tassin explained that he reached the conclusion that when Hommerding testified that Complainant’s engine was “further toward the bottom” of this photograph, what he really meant was that the engine was “outside” or “beyond” the photograph, and therefore in a location where it would have been safe to dismount the train and perform a roll-by inspection from the ground. Tassin also testified that when Hommerding said the engine was “near the bridge” what he really meant was that the train was “near the viaduct.” Tassin provided no credible explanation for interpreting Hommerding’s testimony in this manner. Rather, in his testimony, Tassin confirmed that Hommerding did not state specifically where Complainant’s locomotive was located. I find Tassin’s credibility analysis to be flawed and incomplete. He made assumptions that appear to have been supported by nothing more than his personal feelings and are not supported by a preponderance of the evidence of record.

I find based on a preponderance of the credible eyewitness testimony, that Complainant’s head engine was located at the Schwartz Creek Bridge and therefore in an unsafe location to perform a roll-by inspection from the ground. However, I will discuss the other relevant factors that were presented at the hearing that relate to the location of the head engine, that I also considered in reaching this conclusion.

Stretching of the Train

In testimony, Complainant explained that the reason the head engine of his train was located at Schwartz Creek Bridge and not near the Bristol Road overpass was because, after picking up nine cars at the Flint yard, he stretched his whole train which extended the engine to the Schwartz Creek Bridge.

Respondent’s position is that Complainant is lying about stretching his whole train because it was only necessary to stretch the joint between the ninth and tenth cars to ensure that the coupling was properly joined. Respondent asserts that if Complainant had only stretched this coupling/joint, there is no way his head engine could have been at Schwartz Creek Bridge and it would have been in a location where it would have been safe to dismount the train and perform a roll-by inspection from the ground.

There was testimony by several witnesses regarding train stretching. Freeman testified that each conductor stretches a train differently after making a joint. He testified that, in his

experience, some conductors stretch all the joints on the entire train to make sure they are not going to come apart. He testified that on the night in question, they stretched the whole train 100-200 feet.

Complainant testified that on the night in question, he stretched his entire train after picking up the cars at the Flint yard. He stated that, although it would have been possible to only stretch the coupling between the 9th and 10th cars, he stretched the whole train to make sure it was together and to feel comfortable that he had his whole train together. From prior experience, he has had experience with his train coming apart several cars back from where a coupling was made, which then causes the train to go into emergency. He explained that, at the investigation, the focus was on where his locomotive was located and no one questioned him about the process of putting his train together or stretching it. Therefore, this explanation did not come out at the investigation. The entire focus at the investigation, from his perspective, was on why he was not on the ground.

Miller, another conductor, testified that after joints are coupled together, you stretch them to make sure there is a good joint. He said that engineers stretch their train for numerous reasons. He testified that he has experienced angle cocking before, i.e., somebody closes an angle cock so you do not have air all the way to the tail end of the train. Consequently, often engineers will want to pull the train forward to ensure the marker moves and the train is all together. He testified that he has previously had pins pulled out of his train, causing it to come apart 50 to 100 cars back from the engine. He explained that sometimes a train can go into emergency when it separates 95 cars down the line, causing delay. That is why engineers sometimes stretch the whole train. He stated that in the stretching process, he moves his train 50-100 feet.

Tassin testified that it is unnecessary to stretch a whole train after picking up cars and that is only necessary to stretch the coupling connecting the new cars. He stated that it was "ridiculous" to believe that Complainant would have stretched the whole train because he only had to stretch the coupling between the 9th and 10th car. He testified that he does not believe anyone stretches an entire train.

Hart, another conductor, testified that some people stretch the whole train and that this is not unusual. He stated that every conductor stretches a train differently.

Osmond testified that Operating Rule 603 states that when coupling to equipment, before moving it, you are to stretch the slack and you have to ensure there is a positive coupling to avoid having the train come apart. He stated that it is not necessary to stretch the entire train, and although it is possible for couplings to come apart after they have been tested, this would be abnormal. He testified that he is not aware of any rules or procedures that address when an entire train should be stretched. In his experience, the only time an entire train would be stretched is after a Class-3 air test.

RX 32 contains CN Operating Rule 603, Coupling/Uncoupling Precautions. It states that when coupling to equipment, verify it is properly secured and can be coupled to safely. Before moving the equipment: 1) stretch the slack to ensure all couplings are made, and 2) check cars

for hand brakes that are applied. Do not cut off or leave equipment in curves and turnouts where couplers may bypass when re-coupling. When coupling to equipment in any other than straight track, use caution, stopping if necessary, to ensure couplers are properly aligned.

After reviewing all of the evidence of record pertaining to train stretching, I find that the record contains no evidence indicating that Respondent provided its employees with written or verbal guidance or procedures informing them of when they should or should not stretch an entire train. What is apparent from the preponderance of evidence presented is that every conductor has his own method of stretching a train. Some conductors stretch just one joint, while others stretch multiple joints or the entire train. There is no standard methodology that conductors are required to follow. While Respondent is correct in asserting that it was not absolutely necessary for Complainant to have stretched his entire train on the night in question and he could have merely stretched one joint, no authority was presented that establishes that Complainant's asserted action was incorrect or a violation of rules or procedures. Rather, it would appear that Complainant was being extra cautious in insuring that every coupling on his train was properly connected.

The testimony of Complainant, Freeman, Osmond and Miller corroborated that occasionally trains do come apart in places other than where a new coupling has been made. Stretching the entire train ensures that it is properly connected. Although Tassin and Osmond apparently frown on this approach to train stretching, it does not appear that Complainant's actions were so out of the norm as to make his actions implausible or "ridiculous" as asserted by Tassin. Accordingly, I find that Complainant's testimony, as corroborated by Freeman, that he stretched his entire train on the night in question, and further corroborated by other disinterested witnesses who stated that stretching an entire train is something that is not unusual, is credible. I specifically find that Complainant stretched his entire train, bringing the head engine to the Schwartz Creek Bridge.

Respondent's Reenactment and Use of Google Map

In February 2015, shortly before the March 4, 2015, hearing, Respondent constructed a train of similar size¹⁴ to that of Complainant's train on the night of December 14, 2012, in an attempt to establish where the head engine of the locomotive would have been located after picking up nine cars at the Flint yard. Respondent asserts that, based on this reenactment, there is no way the head engine of Complainant's locomotive could have been on or near the Schwartz Creek Bridge and instead would have been near the Bristol Road overpass where Complainant could have safely dismounted the train and performed a roll-by inspection from the ground. Osmond testified that while performing the reenactment, he was unaware of Complainant's assertion that he had stretched his entire train. He therefore could not have accounted for Complainant's alleged train stretching during the reenactment.

Osmond also testified that, in performing the reenactment, he made assumptions about where Complainant "cut-off" the cars that were left on the thoroughfare. I find these assumptions to be problematic. There was much testimony concerning where Complainant said he cut-off his cars versus where Respondent believed he cut-off his cars. As with the car

¹⁴ Osmond testified that the reenactment train was two feet longer than Complainant's train.

stretching discussion above, I find that there was no specific written rule or guidance as to where conductors/engineers were specifically to cut-off their cars at the Flint Yard and that it was dependent on the practice of the particular conductor. Only two individuals, Complainant and Freeman were in a position to know exactly where the cars were cut-off on the night in question, and even Freeman's vantage point would have been less ideal than Complainant's because he was seated in the locomotive and not on the ground.

Freeman testified that they would generally make the cut at least the length of the two locomotives which is approximately 146 feet, but it all depends on the conductor. He stated that at the Flint yard, it is not necessary to make the cut across from the Mason-Dixon switch and often the switch does not have to be handled because it is already properly aligned.

Complainant testified that there is a general area where he cuts-off cars at the Flint yard to be assured that they are in the clear, but he does not always cut-off in the same location.¹⁵ He testified that on the night in question, he cut his cars off on the straight track near the clearance point to the Bristol road switch, not at the Mason-Dixon switch as asserted by Respondent. Hart testified that he frequently cut off cars near the clearance point, and not across from the Mason-Dixon switch. Osmond testified that you were supposed to cut off cars either at the clearance point or back of the adjacent tracts, so you were clear. He testified that there are no ties or marks painted at the Flint yard indicating a specific clearance point. If no marks are indicated, you can take a position at the end of the tie and close to the rear rail of the adjacent track and raise your arms to shoulder height to the end of the car that is to be left. Osmond testified that when he performed the reenactment, he pushed the train only to the clearance points, but that is not reflected in the video. He later testified that they, in fact, performed the reenactment from the switch rather than the clearance point. He agreed that different conductors make their cut differently.

Tassin testified that he spoke to an unidentified employee, perhaps sometime prior to or after Complainant's investigation, in an attempt to determine where Complainant might have cut-off his cars at the Flint yard. Based on the location given by this other employee, Tassin determined where Complainant's engines would have been located. This "other employee" did not testify at either the investigation or the hearing. Tassin testified that typically conductors follow a certain pattern in cutting-off cars. However, at the time he made the decision to discipline Complainant, he did not know where Complainant had cut-off his cars and he did not recall any information contained in the investigation transcript as to where Complainant cut-off his cars. However, based on what this unnamed employee told him, Tassin concluded that, based on the cut-off point identified by this employee, Complainant's head engine could not have been located at the Schwartz Creek Bridge. Tassin also testified that he did not consider whether Complainant had stretched the train in determining where Complainant's head engine would have ended up in relation to either the claimed or assumed cut-off point.

After reviewing all of the evidence, I find that the cut-off point that Respondent used in the "reenactment" was based on assumptions and not supported by specific evidence of record. However, regardless of the exact cut-off point, because the reenactment did not account for

¹⁵ In its brief, Respondent argued that Complainant testified that he *always* made his cut parallel to the Mason-Dixon switch. (R. Br. at 4). I find that this is a misstatement of Complainant's testimony.

stretching of the train, it could not under any circumstances have resulted in the head engine reaching the Schwartz Creek Bridge. I therefore find that the reenactment was based on assumptions and not particularly accurate or helpful.

Similarly, Tassin testified that after receiving the investigation transcript and exhibits, he found a “Google map” online and based on his viewing of this map, independently determined that Complainant’s head engine could not have been at the Schwartz Creek Bridge. As with the February 2015 reenactment, Tassin did not account for stretching of the train when viewing this map. Nor did he provide any authority to support that the methodology he used for measuring the length of Complainant’s train on the map was accurate. He also made an assumption as to the point where Complainant cut-off his cars based on his conversation with an unnamed employee who was not part of the investigation and did not provide testimony at either the investigation or formal hearing. Based on this assumption, and looking at the Google map, Tassin determined that Complainant’s engine could not have been at Schwartz Creek Bridge. (R. Br. at 16). I do not find this method of determining the location of Complainant’s head engine to be either particularly scientific or accurate, and I give it little weight.

Analysis of Complainant’s Activity Under the Act

Having determined that Complainant’s head engine was located at the Schwartz Creek Bridge, and thus was in a location where it was hazardous to dismount the train, I must now determine whether Complainant’s refusal to perform a Rule 523 roll-by inspection from the ground was protected activity under the Act. In order to do this, I must examine the specific terms of the Act.

Section 20109(b)(1) of the Act, and 29 C.F.R. § 1982.102(b)(2), relevant to the current claim, prohibit a railroad carrier, or an officer or employee of a railroad carrier *inter alia* from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: 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 individual 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 to authorize the use of the hazardous equipment, track, or structures unless the condition was corrected immediately, or the equipment, track, or structures were repaired properly or replaced.

Good Faith

The first issue I must address is whether Complainant’s refusal to dismount the train and perform a roll-by inspection was made in good faith. As discussed above, I have found based on all the evidence of record, that Complainant’s head engine was located at the Schwartz Creek Bridge and therefore it was in an area where it was hazardous to dismount the train. Complainant, through his experience of riding this route on several occasions, was familiar with

the hazardous nature of the area, and it was identified by the union as being a dangerous area. Therefore I find that his refusal to dismount the train and perform a roll-by inspection from the ground was made in good faith.

Reasonable Alternative

In this case, there was much discussion as to whether Complainant could have properly performed a roll-by inspection from either the cab or platform of his locomotive. There was some testimony and documentary evidence suggesting that, under some circumstances, a roll-by inspection could perhaps be performed from such an alternate location.

Gibson had written a memo in January 2011 for union members indicating that an inspection could take place from the train platform in some circumstances. (RX 26). However, it was clear from the testimony of Miller and Tassin that the union had absolutely no authority to change or write operating rules for Respondent. Therefore, even if Complainant had seen this memo,¹⁶ it would have had no authoritative effect. In his testimony, Tassin stated that employees could alternatively perform a roll-by inspection from the platform of a locomotive. (TR. 413). Osmond also testified that performing a roll-by inspection from the platform could be an alternative to an on-ground inspection in some circumstances. However, Rule 523 was silent as to alternate locations from which employees were to perform roll-by inspections if they deemed the terrain unsafe to perform such an inspection from the ground. Furthermore, the evidence established that no bulletin or written guidance was ever published or issued to employees by Respondent outlining reasonable alternatives from which employees could conduct roll-by inspections. Tassin testified that while he could issue superintendent bulletins interpreting rules for employees, he had not done so with respect to Rule 523. He testified that he had never published any document in any way shape or form that explained to employees what they were to do when faced with an unsafe roll-by location. Nor were employees ever provided with training on reasonable alternatives. I therefore find that Complainant was not provided with a reasonable alternative, sanctioned by and explained by Respondent, to performing a roll-by inspection from the ground.¹⁷

Imminent Danger

The next issue is whether a reasonable individual in the circumstances then confronting Complainant would conclude that the hazardous condition presented an imminent danger of death or serious injury. In this case, even Tassin conceded that if Complainant's head engine were on the Schwartz Creek Bridge, as he claimed, then he would not have disciplined

¹⁶ Complainant claimed that he had not been aware of this memo. Respondent provided no direct evidence that Complainant ever saw the memo prior to the investigation.

¹⁷ Complainant contends that he performed a roll-by inspection from inside the cab of his locomotive. Respondent counters, however, that Complainant should have performed a roll-by inspection from the ground, and that because Complainant, in its view, was in a safe location to dismount his train, no alternative inspection was permitted (even assuming *arguendo* that it had published such guidance for employees – which it had not). Therefore, whether it might have been permissible, under some circumstances, to perform a roll-by inspection from an alternate location is irrelevant in this claim, because Complainant was disciplined for failing to dismount his train and perform the inspection from the ground in accordance with Rule 523.

Complainant due to valid safety concerns. In fact, he testified that if the engine were even close to the bridge, he would not have disciplined Complainant. The union had also identified this as a hazardous area from which to perform roll-by inspections. (CX 6). I therefore find that a reasonable individual in the circumstances then confronting Complainant would have concluded that the hazardous condition of being located at the Schwartz Creek Bridge presented an imminent danger of death or serious injury.

Time to Eliminate Danger/Notify Railroad Carrier

The next question is whether the urgency of the situation allowed sufficient time to eliminate the danger without refusal to perform the work. In this case, testimony by all three relevant witnesses, including Respondent's witness, Hommerding, confirmed that none of them were expecting to encounter a train passing on the evening in question. Hommerding testified at the investigation that he did not know he would be passing another train until he was approximately 1,000 feet from Complainant's train. He testified that he, therefore, did not give the required Rule 523 warning to Complainant and his crew to provide them with sufficient time to dismount and get in position for a Rule 523 on-ground inspection.

Complainant testified that he was reviewing paperwork in the cab, when he looked up and noticed a train approaching at track speed. Within approximately 45 seconds, the train was upon them. He had not heard a train whistle or received any radio communication warning of an approaching train. At the investigation, Complainant testified that he saw the approaching train when it was approximately 500 feet away and moving at a high rate of speed. Freeman testified that the train was probably less than 500 feet away going approximately 45 miles an hour when they noticed it approaching.

Surprisingly, Tassin, who was not present that night and who testified that he had never even worked as a conductor or switchman in the Michigan zone, disagreed with all of the eyewitnesses, including Respondent's own witness, Hommerding. Tassin testified that he believed Complainant would have seen Hommerding's approaching train when it was 4,000 feet away. I find that Tassin's conclusion was based on mere personal opinion and speculation and not supported by any of the relevant objective evidence of record. Accordingly, I find that Complainant had no warning of an approaching train and did not notice it until it was at most 500 to 1,000 feet away, approaching at track speed. Tassin testified that a train traveling at 40 miles an hour would travel approximately 3,500 feet in one minute. Based on this, I conclude that a train would travel 1,750 feet in 30 seconds, 875 feet in 15 seconds, and 437 feet in 8 seconds. Clearly, if the train was noticed at 500-1,000 feet, as I have found, Claimant would not have had sufficient time to eliminate the danger without refusal to perform the work.

For these reasons, I also find that it was not possible for Complainant to notify Respondent of the existence of the hazardous condition and his intention not to perform the work unless the condition was corrected immediately.

Conclusion, Protected Activity

Based upon my analysis above, I find that Complainant's refusal to dismount his train and perform a roll-by inspection on December 14/15, 2012, constituted protected activity under the Act.

Adverse Personnel Action/Contributing Factor

There is no issue in this case that Complainant suffered an adverse personnel action and that his protected activity was a contributing factor in the adverse personnel action. Tassin confirmed in testimony that he dismissed Complainant from employment because he did not dismount his train and perform a Rule 523 roll-by inspection from the ground. He testified that he drafted the dismissal letter located at JX 3 dated February 26, 2013. In the letter, Tassin stated that the record contains credible testimony and substantial evidence proving that Complainant violated Rules 100¹⁸ and 523. Clearly, Complainant's protected activity was a contributing factor to the adverse personnel action.

Affirmative Defense

As previously discussed, under 49 U.S.C. § 42121(b) of AIR 21 and 20 C.F.R. § 1982.109(b), even if the complainant establishes that an activity protected under the Act was a contributing factor in an adverse personnel action, relief may not be granted if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

I have determined that Complainant's protected activity was a contributing factor to the adverse personnel action, i.e., his dismissal from employment by Respondent. Considering the content of the dismissal letter drafted by Tassin, as well as Tassin's testimony that he would not have disciplined Complainant if he had believed that his head engine was at or near Schwartz Creek Bridge, I find that Respondent is unable to establish that it would have dismissed Complainant in the absence of his protected activity.

Remedies

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-00003, 4, PDF at 8 (ARB Sept. 29, 2011) (noting that complainant may seek

¹⁸ Rule 100 merely stated that employees were to follow the operating rules.

damages for mental hardship under the Act). Punitive damages up to \$250,000 are also authorized. § 20109(e)(3).

Abatement

I order Respondent to purge any documents referencing Complainant's termination from his personnel file. Respondent is also ordered to refrain from any and all other violations of the whistleblower statutes.

Reinstatement

Reinstatement is considered to be the default, or presumptive, remedy under the Act. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990 ERA 30 (ARB Feb. 9, 2001). In the event reinstatement is not a viable remedy, then front pay may be warranted. *Id.*, ARB No. 98-166 at 8.

Complainant has expressed a desire to have his employment reinstated with full seniority rights. I find no evidence in the record that would prevent Complainant from returning to his former position with Respondent. Accordingly, I find that Complainant should be reinstated with the same seniority status he would have had, but for his termination.

Back Pay

I find that Complainant is entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). The purpose of back pay is to make a prevailing complainant whole by restoring the earnings he would have received but for the impermissible discrimination. *Blackburn v. Metric Constructors, Inc.*, 86 ERA 4 (Sec'y Oct. 30, 1991). Such an award should include associated losses such as interest, overtime, and increases in wages. *See Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002 ERA 30 (ARB Sept. 29, 2006); *Pillow v. Bechtel Constr. Inc.*, 87 ERA 35, slip op. at 14, (Sec'y July 19, 1993). In computing back pay, unrealistic accuracy is not required. *Johnson v. Bechtel Constr. Co.*, 95 ERA 11, slip op. at 2 (Sec'y Sept. 11, 1995). Any uncertainty should be resolved in favor of the complainant. *See Tipton*, ARB No. 04-147 at 9.

A respondent's liability ends when the employee's employment would have ended for reasons independent of any violation found. *Artrip v. EBASCO Ser., Inc.*, 89 ERA 23, slip op. at 4 (ARB Sept. 27, 1996). If not based on a permanent disability, workers' compensation benefit payments covering lost wages may be deducted from a back pay award. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004 AIR 11 (ARB May 26, 2010).

Evidence that a complainant failed to mitigate his damages will reduce the amount of back pay. *West v. Systems Applications International*, 94 CAA 15 (Sec'y Apr. 19, 1995). At the same time, the respondent bears the burden of establishing a mitigation failure by showing that substantially equivalent positions were available and the complainant failed to use reasonable diligence in seeking such positions. *Timmons v. Franklin Electric Corp.*, 1997 SWD 2 (ARB Dec. 1, 1998).

In order to make a complainant whole, prejudgment interest on back pay is awarded based on the interest rate for the underpayment of federal taxes, set out in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly. *Doyle v. Hydro Nuclear Servc.*, ARB Nos. 99-041, 99-042, and 00-12, ALJ No. 1989 ERA 22, slip op at 18-19 (ARB May 17, 2000).

Respondent argues that in determining an amount of back pay, I should consider that Complainant failed to mitigate his damages by failing to seek employment in a timely manner and then taking a job that was below his earning potential. Respondent asserts that, if he were diligent, Complainant could have found a job earning between \$26.00 and \$36.00 per hour within 3 to 6 months following his dismissal, based on the vocational report of Castellana. Respondent asserts, therefore, that in the event I award back pay, it should be reduced based on Complainant's failure to mitigate damages.

Complainant argues that he appropriately mitigated damages to the greatest extent possible. According to Complainant's vocational expert, Ancell, Complainant could have found a job earning \$12.50 to \$15.00 per hour. In determining how long it should have taken Complainant to find such a job, he disagreed with Castellana's conclusion that it would take 3 to 6 months. Based on the percentages reported by the federal government, he stated that two thirds of the people find a job in less than 27 weeks and one third of the population are still unemployed after 27 weeks. Ancell opined that Complainant's job search efforts were minimal and he did not do the type of search that Ancell would have recommended.

After reviewing the reports of both vocational experts, I give the report of Ancell more weight than that of Castellana for several reasons. First, unlike Ancell, Castellana does not hold any professional licenses in the field of counseling or other professional vocational areas in the State of Michigan. Second, Unlike Ancell, Castellana did not conduct an interview of Complainant before authoring her report, and she did not indicate the basis for her transferable skills assessment. Third, Castellana unrealistically discounted the fact that Complainant was fired from a job in the railroad industry for a serious safety violation as being a significant hindrance to his ability to find new work in the railroad industry. Fourth, many of the jobs that Castellana identified either did not exist in Michigan or were so far from Complainant's home that they would not be realistic options, even if he could be hired for them. I find that Castellana also identified jobs for which Complainant does not have the necessary skills or educational qualifications. Fifth, Castellana relied on an outdated 1991-1993 Dictionary of Occupational Titles. Sixth, Castellana did not account for the fact that Complainant would be starting in an entry level position rather than immediately earning top salary.

I find that Ancell's estimates of Complainant's earning potential were more realistic and based on jobs that are in existence. I find that Castellana made assumptions that were not supported by Complainant's circumstances, e.g., she assumed that he could easily get another job in the railroad industry as a conductor and that he could be a food service manager, a position for which he has insufficient experience or training.

Based on my review of the vocational reports, I find that Complainant did not conduct as thorough a job search as he could have, and that he thus did not mitigate damages to the greatest

extent possible. I find that within 6 months of his dismissal, Complainant could have found a full-time job earning between \$12.50 and \$15.00 per hour, if he had been more diligent in his job search.

Complainant's employment with Respondent was terminated on February 26, 2013. He began working for his current employer, Madden's Lounge, in March 2014, where he has been working part-time and earning approximately \$1,000.00 per month. His last full year of railroad employment was 2010 when he earned \$86,158.91. (TR. 169, CX 16). In 2011, Complainant did not work a complete calendar year due to being off work for testing positive for a banned substance. (TR. 169). In 2012, Complainant was off work for a medical condition. (TR. 169-170). His union guarantee is \$1,602.00 per week if medically qualified and not suspended from work. Therefore Complainant could have earned at a minimum \$83,304.00 while working at the railroad. Miller testified that a new labor wage agreement was recently passed between union membership and Respondent. It has been ratified and is retroactive to 2012 and calls for an 18.6% pay increase for all employees. I thus find that any lost wages by Complainant should be increased by 18.6%.

Complainant asserts that he is entitled to back wages in an amount of between \$186,660.72 and \$216,160.72, as of the date he filed his closing brief. To reach this figure, Complainant approximates that he has lost gross wages in the amount of \$231,160.72. I agree with Complainant's assertion that a calendar day rate is required because of the unique nature of railroad employment in which workers earn different amounts from week to week depending upon the jobs they hold via seniority. I agree with Complainant's methodology of computing this amount as set forth in his closing brief.

I find however that the amount of lost gross wages should be offset by the amount that Complainant has earned while working at Madden's Lounge (approximately \$1000 per month since March 2014). Based on Ancell's report, I also find that as of the six-month unemployment anniversary date, August 26, 2013, Complainant should have been earning approximately \$13.75 per hour for 40 hours per week (Ancell's median range).¹⁹ Thus, from September 2013 on, Complainant should have been earning approximately \$2,200.00 per month. I find that his lost gross wages should thus be offset by \$2,200.00 per month from September 2013 to March 2014. Starting with his employment at Madden's in March 2014, his earnings of \$1,000.00 per month should be factored into the offset computation.

Compensatory Damages

Complainant seeks \$45,000.00 for compensatory damages to compensate him for the distress associated with losing his job. An employer who violates the FRS employee protection provision may also be held liable for compensatory damages associated with mental and emotional distress. To receive compensatory damages, a complainant must demonstrate both: 1) objective manifestation of distress, such as sleeplessness, anxiety, embarrassment, and depression, and b) a causal connection between a violation of the Act and the distress. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993 SWD 001, slip op. at 17 (ARB July 30, 1999).

¹⁹ In his brief, Complainant incorrectly computed the median as \$12.50 per hour.

A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. An award is “warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996).

Complainant did not submit any corroborating evidence of medical or psychological treatment to support an award for emotional harm or mental anguish. A complainant’s credible testimony alone, however, is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). Here the Complainant testified that he is not claiming financial hardship caused by emotional distress. He stated that he had previously been diagnosed with anxiety and depression in 2012, unrelated to this claim. He testified that when he received the call about his dismissal, he was upset and called his union representatives. He testified that he has not sought any medical care for being upset.

After a complete review of the record I find that the evidence of emotional harm, or mental anguish or upset, is insufficient to support an award of compensatory damages. While clearly being found guilty of dishonesty and dereliction of duty and losing one’s job under disgrace would cause emotional distress, Complainant simply did not present evidence with the specificity required to justify an award. There was, for example, no evidence of sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown. Furthermore, there was no evidence of physical manifestations such as ulcers, gastrointestinal disorders, headaches, or panic attacks. Without such evidence, there is inadequate evidence of specific discernible injury to the Complainant’s emotional state.

Punitive Damages

Complainant seeks \$100,000 in punitive damages. Punitive damages are granted to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant’s reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent’s actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving “reckless or callous disregard for the [complainant’s] rights, as well as intentional violations of federal law” *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

Complainant argues that he is entitled to punitive damages because Respondent completely disregarded its requirements for an impartial investigative hearing process. He argues that he was singled out for retaliatory conduct because nothing was done to his co-worker who acted identically to him. Complainant argues that the deciding official, Tassin, ignored the objective evidence and made his decision based on personal desire to target him, and then later

attempted to justify his decision with supplemental information. Complainant asserts that this is exactly the type of conduct that the act was designed to prevent.

I find these arguments in favor of an award of punitive damages compelling. It is clear to me from the record that Respondent ignored the objective evidence of record, i.e., the testimony of its own key witness, Hommerding, who stated that he did not know that he would be passing Complainant's train until he was approximately 1000 feet from it. He also testified that he was unfamiliar with the terrain and was unaware that there was even a bridge in the area. He testified that he was on a train moving at track speed in the dark and thick fog. Although it is true that Hommerding reported that he saw Complainant's crew in the cab of their locomotives and not on the ground, he could not state with specificity where Complainant's head engine was located and testified that it was within the photograph located in Exhibit 16. Without a reasoned explanation, Tassin concluded that what Hommerding meant was that Complainant's head engine was nowhere within Exhibit 16, but instead was located near the Bristol Road overpass where it would have been perfectly safe to get down on the ground and perform a roll-by inspection. Tassin, also contrary to all of the eyewitnesses, including Hommerding, concluded without reasonable explanation that Complainant should have seen the approaching train when it was 4,000 feet away. Furthermore, the testimony established that Respondent never even bothered to check if Complainant's train was equipped with a GPS system, video camera, or event recorder which would have provided relevant and indisputable information as to the location of Complainant's engine and how far the train had traveled. Although Respondent conducted a flawed reenactment, it did not bother to do so until well after the decision had been made to dismiss Complainant. In fact, no reenactment was conducted until shortly prior to the formal hearing, in an attempt to justify Respondent's dismissal determination, after the fact.

It is most disturbing that Respondent's investigative proceeding appears to have been a sham. Although at the investigation, the investigative officer, Golombeski, specifically told Complainant that he would be given a full opportunity to cross-examine any person giving testimony, to be present during the entire investigation, and to question any person who might provide testimony against him, that was not, in fact, the case. Rather, it was clear from Tassin's testimony that Complainant was not informed of all the witnesses against him, not told of the content of what they said, not given an opportunity to cross-examine them, and not told of additional exhibits such as the Google map and theories that would be used against him. Tassin testified that he conducted his own investigation by talking to undisclosed witnesses and relying on information and facts that were not contained in the investigation transcript. Yet, surprisingly, at his deposition, Tassin testified that he did not recall relying on any information other than what was contained in the investigation transcript and its exhibits. I find this deposition testimony was not credible and that Tassin did, in fact, know he had relied on other information. Complainant was not given the opportunity to either question these undisclosed theories and persons or to explain why they might have been flawed. For example, had he known that Respondent believed that his head engine was only located at the Bristol Road overpass, he could have explained that the reason it reached the Swartz Creek Bridge was due to his stretching the train. However because all of the evidence was not presented to him, such information never came out at the hearing.

Tassin testified that he determined where Complainant's head engine was located based on a conversation with an employee who was never even revealed to Complainant and whose statements were never revealed so that they could either be understood or questioned. He also made the determination based on his viewing of a Google map and independently determining where Claimant's engine would be. Although in the dismissal letter, Tassin stated that the dismissal was based on the record and transcript of the formal investigation, in fact, it was based on witnesses and information that were never presented at the formal investigation and whose existence were never revealed to Complainant.

While Tassin is correct in stating that Respondent could set its own procedures for conducting investigations, I find it shocking that Respondent would have told Complainant that he was entitled to a full due process investigation in which he would be informed of all the evidence against him and allowed to respond, while, in reality, Respondent had a secret procedure in which Respondent based its decision on information that was never revealed or allowed to be disputed. Tassin is correct that, if Respondent had desired, it could have informed employees that management would consider additional information from other sources in determining guilt and discipline. However, Respondent did not do this. Respondent instead told employees that they would receive due process, when in reality Respondent did not provide it.

Furthermore, I find that Complainant was singled out for disciplinary action. Freeman testified that he never received any discipline whatsoever although he also had a requirement to perform a roll-by inspection. Also, Hommerding and his crew were never disciplined for violating Rule 523's requirement to notify Complainant that they would be passing his train, in order to allow Complainant and his crew to be in position for a roll-by inspection, if the terrain had so permitted. Nor does it appear that management was too concerned about why Hommerding and Complainant were both unaware that there would be a train passing that night. The train passing should not have been a surprise to the two train crews, and the fact that it was a surprise should be a safety concern to the railroad.

Although I do not conclude that there was sufficient information to conclusively find that Respondent's Terminal Superintendent, Bistis, told Freeman that he was to contact the company lawyer and tell him that they should have conducted a roll-by inspection on the night in question, I do find it disturbing that Freeman, at a minimum, had the perception that he was being told to lie. Such perceptions, if discussed with fellow employees, could serve to discourage other employees from reporting future hazardous conditions and taking steps to avoid them.

Overall, I find that the conduct by the Respondent is sufficiently egregious to warrant an award of punitive damages. I find that an award of punitive damages is appropriate to deter future misconduct.

I have surveyed the award of punitive damages in other FRSA cases, ranging from \$25,000 to the full \$250,000, but it would be disingenuous to suggest that one case is like another. Each case presents its own unique circumstances. Although the facts of this case are disturbing, they are not the worst example of retaliation. It was my impression that Tassin believed that Complainant was lying. However, what he did not recognize was that he ignored the objective evidence of record and based his belief on personal prejudice and assumptions that

simply could not be verified. He also seemed to believe that he could consider any information that he desired without informing Complainant, despite the fact that Respondent had an investigative procedure in place by which it was to provide procedural fairness to employees. It appeared to me that Tassin failed to perceive the retaliatory nature of his conduct. It was also my impression from Tassin's testimony that the Respondent railroad does have a genuine interest in safety. However, Respondent has failed to set forth any guidance as to what Employees are to do when duties and terrain do not permit a roll-by inspection from the ground.

While these are mitigating factors, they do not excuse the manner in which the Complainant was treated as a result of his protected behavior. Nor do they in any way justify the more egregious aspects of this case. The Respondent's actions in this case create a work environment in which employees may put themselves in danger out of fear of losing their livelihoods, creating an issue of safety and striking at the heart of the FRSA's protections. Therefore, I find an award of \$100,000, still less than half the allowable amount, is appropriate in this case.

Attorney Fees And Costs

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have thirty (30) days from receipt of the application within which to file any opposition thereto.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall insure that Complainant is reinstated to his position as a conductor, receiving the same pay, terms and privileges of employment that he would have received had he not been terminated.
2. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of December 14-15, 2012, as well as his discriminatory termination.
3. Respondent will pay Complainant back pay, with both pre- and post-judgment interest. The exact amount will be computed based on my guidance outlined

above.

4. The Respondent will pay the Complainant \$100,000 in punitive damages.

5. Counsel for the Complainant shall have thirty (30) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have thirty (30) days from receipt of the fee application within which to file any opposition thereto.

SO ORDERED.

CHRISTINE L. KIRBY
Administrative Law Judge

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

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

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

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

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

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

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

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

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

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).