



Issue Date: 18 February 2015

CASE No: 2014-FRS-00022

In the Matter of:

DAVID C. LEE, III,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Order Granting Summary Decision

Union Pacific Railroad Company (Union Pacific) moved for judgment without a trial (summary judgment). The Complainant, David Lee, opposes the motion and wants a trial. The dispute arises under the employee protection or “whistleblower” provisions of the Federal Rail Safety Act (FRSA),¹ as amended by the 9/11 Commission Act of 2007.² The FRSA prohibits a railroad carrier from discriminating against an employee for engaging in protected activity.³

Union Pacific’s motion is granted, and the matter is dismissed.

I. Background

Mr. Lee, who began to work for Union Pacific in June 1998,⁴ was terminated on August 4, 2013, after causing a derailment and a second safety-related incident after he returned to work. The first was on October 9, 2012, the second on July 8, 2013.⁵

¹ 49 U.S.C. §§ 20109.

² Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-452 (Oct. 6, 2008).

³ 49 U.S.C §§ 20109.

⁴ R. Ex.-1 at 6.

⁵ R. Ex.-4.

A. October 9, 2012 Derailment Incident and Safety Complaint

Mr. Lee was working on October 9, 2012 as a conductor in Arizona, near the Tucson Electrical Plant.⁶ His crew included Jason Alegria, a brakeman, and Robert Darling, an engineer.⁷ The crew was to assemble an outbound coal train and to place two railcars on Track 706, while the rest of the train was built on Track 707.⁸ Upon arrival, Mr. Lee, Mr. Alegria, and Mr. Darling walked through their assigned task and identified the tracks on which to place the railcars.⁹

Mr. Lee was in charge of putting the second of the two railcars on Track 706.¹⁰ During alignment of the railcar, Mr. Lee failed to observe whether the switch was aligned so the railcar would move onto Track 706.¹¹ The switch was aligned incorrectly to Track 705.¹² When the crew began to shove the railcar onto Track 706, the railcar could not move in the direction they were shoving because it was aligned with the wrong track.¹³ A derailment and approximately \$300,000 in damage¹⁴ to the railcars and track resulted.¹⁵

The on-duty manager of terminal operations, Craig Webster, arrived to investigate the incident and interview Mr. Lee, Mr. Alegria, and Mr. Darling.¹⁶ Mr. Lee told Mr. Webster that he believed the lack of light and signal markers, as well as a radio malfunction, had contributed to the derailment, and that he had serious safety concerns about the working conditions out on the tracks.¹⁷ After speaking with Mr. Webster, Mr. Lee also contacted the Occupational Safety and Health Administration (OSHA) to report safety failures during the derailment.¹⁸

Union Pacific convened a formal investigation hearing on November 26, 2012, to determine whether Mr. Lee failed to visually confirm that all switches were properly aligned, whether he failed to instruct Mr. Darling to change engine direction, and whether he failed to perform a proper briefing before switching the alignment of the

⁶ R. Ex.-1 at 192.

⁷ R. Ex.-1 at 68.

⁸ R. Ex.-1 at 69.

⁹ R. Ex.-1 at 176–77.

¹⁰ R. Ex.-1 at 194.

¹¹ R. Ex.-D at 33.

¹² *Id.*

¹³ R. Ex.-1 at 40.

¹⁴ Mr. Hardisty Aff. at 2.

¹⁵ R. Ex. 1 at 11.

¹⁶ R. Ex. 1 at 68–69.

¹⁷ R. Ex.-D at 47–48.

¹⁸ C. Ex. 22 at 4.

railcars.¹⁹ During the hearing, Mr. Lee declined an offer to enter into a discipline deferral program Union Pacific offers. Deferring discipline requires the employee to accept responsibility for the violation of railroad rules and attend safety training in lieu of discipline.²⁰ Once declined, if an employee is found accountable in the current investigation, he becomes ineligible for discipline deferral for the next seven years.²¹

After reading the transcript of the formal hearing and examining the exhibits, Superintendent Lance Hardisty found that Mr. Lee was responsible for the derailment because he aligned the switch to the wrong track.²² Pursuant to Union Pacific's Policy and Procedures for Ensuring Rule Compliance, Mr. Lee received a Level 4C discipline; he was suspended without pay for 60 days.²³

Mr. Alegria and Mr. Darling were also charged with violation of rules in the derailment, but Mr. Hardisty found their actions were dependent upon confirmation from Mr. Lee that he had lined up the switches with the correct track, and that the train was ready to move.²⁴ As a result, the charges against Mr. Alegria and Mr. Darling were dropped.²⁵

B. A July 8, 2013 Stoplight Incident Leads to Termination

Mr. Lee was reinstated and resumed work on February 5, 2013 as a conductor for Union Pacific.²⁶ About four months later, on July 8, 2013, Mr. Lee was working again in Tucson, Arizona,²⁷ this time with Juan Najera, an engineer.²⁸ Mr. Lee and Mr. Najera relieved another crew on train IHOLA-06 and proceeded to move the train.²⁹ Mr. Lee was to communicate with the dispatcher in the yard, to obtain permission to pass each control point.³⁰

The dispatcher had technical difficulties and informed Mr. Lee that he was not sure of the train's location.³¹ Mr. Lee confirmed that he and Mr. Najera were at control point 987 and that he had the control

¹⁹ R. Ex.-1 at 10–11.

²⁰ R. Ex.-1 at 18.

²¹ R. Ex.-1 at 18–19.

²² R. Ex.-2.

²³ *Id.*

²⁴ Mr. Hardisty Aff. at 3.

²⁵ *Id.*

²⁶ R. Ex.-2.

²⁷ R. Ex.-3 at 151–52.

²⁸ R. Ex.-3 at 153.

²⁹ R. Ex.-3 at 153–54.

³⁰ R. Ex.-3 at 164.

³¹ R. Ex.-3 at 72.

point in view.³² The dispatcher gave permission to pass control point 987.³³ But the train wasn't at control point 987.³⁴ It was at control point 985.³⁵ When Mr. Lee and Mr. Najera realized their mistake they stopped the train, but not before it entered an area of mainline track without authorization,³⁶ creating a dangerous situation, fortunately no actual damage.

Union Pacific conducted another formal investigation hearing, this one on July 26, 2013, to determine whether Mr. Lee failed to have a proper job briefing after receiving permission from the dispatcher to pass control point 987, whether he failed to comply with the restricted speed, and whether he passed through control point 985 without permission.³⁷

Mr. Hardisty found, on August 5, 2013, that Mr. Lee was responsible for all charges.³⁸ Mr. Lee again received a Level 4C discipline. Due to his recent Level 4C discipline, he was terminated.³⁹

Mr. Najera was also charged with violations regarding the stoplight incident.⁴⁰ Mr. Najera accepted deferred discipline before the formal investigation hearing, however, no the charges against him were dropped.⁴¹

Union Pacific was notified shortly after the suspension (on January 5, 2013), that Mr. Lee had filed a complaint with OSHA alleging retaliatory employment discrimination.⁴² In August of 2013, Mr. Lee amended the complaint to include his termination. Mr. Lee learned on September 13, 2013, that OSHA's investigation found no reasonable cause to believe that Union Pacific disciplined or terminated him in retaliation for reporting safety concerns about the derailment.⁴³

II. Legal Standards

A. Standard for Summary Decision

The standard for summary decision is indistinguishable from the standard set out in Rule 56 of the Federal Rules of Civil

³² R. Ex.-3 at 72.

³³ R. Ex.-3 at 72–73.

³⁴ R. Ex.-3 at 44.

³⁵ *Id.*

³⁶ R. Ex.-3 at 41.

³⁷ R. Ex.-3 at 4.

³⁸ R. Ex.-4 at 1–2.

³⁹ *Id.*

⁴⁰ R. Ex.-3 at 193.

⁴¹ R. Ex.-4 at 194.

⁴² C. Ex.-14 at 2–3.

⁴³ *Id.*

Procedure.⁴⁴ Summary decision is proper if the pleadings, affidavits, material obtained by discovery, or other materials show there is no genuine issue of material fact.⁴⁵ A genuine issue of material fact “is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.”⁴⁶

Union Pacific bears the procedural burden to prove that Mr. Lee cannot establish the essential elements of his case.⁴⁷ Once Union Pacific does, Mr. Lee must show a genuine issue of material fact for trial.⁴⁸ Mr. Lee may not rest upon allegations or denials, he must produce affirmative evidence to support the essential elements of his claim.⁴⁹

On summary decision, all evidence and inferences are viewed in a light most favorable to the non-moving party.⁵⁰ When the non-movant fails to establish an essential element of his claim, however, there is no issue of genuine fact; the movant is entitled to summary decision.⁵¹

B. Federal Rail Safety

To prevail at trial in a retaliation claim under the FRSA, a complainant must show by a preponderance of the evidence that:

1. He engaged in protected activity,
2. His employer knew of the protected activity,
3. He suffered an adverse personnel action, and
4. His protected activity was a factor that contributed to the decision to take adverse personnel action such as suspension or termination.⁵²

Once these elements are established, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same adverse personnel action regardless of the protected

⁴⁴ *Mara v. Sempra Energy Trading, LLC.*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011).

⁴⁵ 29 C.F.R. §§ 18.40(d); *Mara v. Sempra Energy Trading, LLC.*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011).

⁴⁶ *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986)).

⁴⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

⁴⁸ *Id.*

⁴⁹ 29 C.F.R. §§ 18.40(c).

⁵⁰ *Mara v. Sempra Energy Trading, LLC.*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011).

⁵¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

⁵² 49 U.S.C. §§ 42121(b)(2)(B)(iii).

activity.⁵³ To meet its heightened burden the employer must show, “the truth of its factual contentions are highly probable.”⁵⁴

III. Discussion

A. Mr. Lee Failed to Establish His Prima Facie Case

1. Protected Activity

The parties dispute whether Mr. Lee’s report to Mr. Webster on October 9, 2012 constituted protected activity.⁵⁵ Protected activity includes any report of safety concerns by an employee to a person with the ability to investigate the misconduct, a person with supervisory authority at the railroad carrier, or a government agency.⁵⁶

“Whistleblower” statutes are construed broadly to ensure employees are protected, to further the federal goals of enhancing railway safety.⁵⁷ Informal complaints to an employer or administrative agency can lead to discrimination remediable through a retaliation claim.⁵⁸

Mr. Lee reported safety concerns directly to the railway after the derailment on October 9, 2012.⁵⁹ When Mr. Lee reported safety concerns to Mr. Webster during his interview,⁶⁰ he was reporting a safety concern to a person with the authority to investigate.⁶¹ Mr. Webster had more than authority to investigate the circumstances surrounding the derailment, he did that investigation.⁶²

The safety concerns stated to Mr. Webster on the night of October 9, 2012 qualify as an activity the FRSA protects.

⁵³ 49 U.S.C. §§ 42121(b)(2)(B)(iv).

⁵⁴ *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

⁵⁵ Mr. Hardisty Aff. 3–4.

⁵⁶ 49 U.S.C. § 20109(a).

⁵⁷ *Cusack v. Trans-Global Solutions, Inc.*, 222 F. Supp. 2d 834, 842 (S.D. Tex. 2002)(citing *Haley v. Retsinas*, 138 F. 3d 1245, 1250 (8th Cir. 1998)).

⁵⁸ *Cusack v. Trans-Global Solutions, Inc.*, 222 F. Supp. 2d 834, 842 (S.D. Tex. 2002)(citing *Abramson v. William Paterson College*, 260 F.3d 265, 289 (3rd Cir. 2001) (Title VII); *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701-02 (3rd Cir. 1995) (Age Discrimination in Employment Act); *Truex v. Hearst Communications, Inc.*, 96 F.Supp.2d 652, 665-66 (S.D.Tex. 2000) (Fair Labor Standards Act)).

⁵⁹ R. Ex. 1 at 68–69.

⁶⁰ R. Ex.-D at 47–48.

⁶¹ 49 U.S.C. §§ 20109(a).

⁶² R. Ex. 1 at 68–69.

2. Knowledge

It is not enough that Union Pacific had general knowledge of Mr. Lee's protected activity.⁶³ Mr. Lee must establish that Mr. Hardisty, the decision maker, was aware of his protected activity before he imposed the discipline.⁶⁴

Union Pacific cannot contend the record lacks proof that Mr. Hardisty knew of the Complainant's protected activity. It is undisputed that Mr. Hardisty read the transcript of the formal investigation convened on November 26, 2012.⁶⁵ Mr. Lee's statements to Mr. Webster about safety concerns are right there.⁶⁶ It is of no consequence that Mr. Webster did not personally inform Mr. Hardisty of what Mr. Lee said.⁶⁷ Because Mr. Hardisty was aware that Mr. Webster was a manager with the authority to investigate, Mr. Hardisty knew Mr. Lee had made a protected disclosure before he suspended, and before he terminated Mr. Lee.⁶⁸

3. Adverse Personnel Action

Both the December 5, 2012 suspension for 60 days without pay⁶⁹ and the August 5, 2013 termination⁷⁰ are adverse employment actions.

4. Contributing Factor

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."⁷¹ The complainant such as Mr. Lee need only establish by a preponderance of the evidence that reporting safety concerns, in combination with other factors, played some role in the decision to

⁶³ *Lonnie Smith v. Union Pacific*, No. 2012-FRS-39, 66 (Apr. 22, 2013). See *Gary v. Chautauqua Airlines*, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028 (ARB, Jan. 30, 2004).

⁶⁴ *Lonnie Smith v. Union Pacific*, No. 2012-FRS-39, 66 (Apr. 22, 2013). See *Gary v. Chautauqua Airlines*, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028 (ARB, Jan. 30, 2004).

⁶⁵ Mr. Hardisty Aff. 6.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ R. Ex.-2.

⁷⁰ R. Ex.-4.

⁷¹ *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15 (ARB Mar. 29, 2013); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013).

suspend or terminate him.⁷² Mr. Lee's proof meets this undemanding standard.⁷³

Circumstantial evidence in the form of close temporal proximity between the disclosure and the discipline can be enough to support an inference of contribution.⁷⁴ Other ways to link the protected disclosure to the discipline could include things not present here: any shifting explanations Union Pacific may have offered for the suspension and termination; some inconsistent application of its disciplinary policies to Mr. Lee; proof of antagonism or hostility toward Mr. Lee's safety report; proof that Union Pacific's stated explanation of the reason for the discipline was false; or a change in Union Pacific's attitude towards Mr. Lee safety report might serve as proof that his report contributed to his suspension and termination.⁷⁵

Union Pacific contends Mr. Lee's termination was too remote in time from his protected activity to infer causation. Union Pacific goes further, claiming the lengthy time period between the two events is affirmative evidence that the protected activity and Mr. Lee's termination were not connected. Union Pacific also claims that Mr. Lee has not produced evidence of any disparate treatment.

Mr. Lee argues that both his suspension and termination should be considered one continuous adverse action. He claims there was never a gap between the two actions, because he was still on probation from the derailment when he was terminated. Additionally, Mr. Lee argues that he received disparate treatment when he was denied a fair and impartial investigation regarding the stoplight incident and further claims he was the victim of inconsistent application of Union Pacific's discipline policy. None of these arguments have record support.

a. Temporal Proximity

Causation can be inferred from timing itself when adverse personnel action quickly follows protected activity.⁷⁶ Despite that,

⁷² *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15 (ARB Mar. 29, 2013); *Lonnie Smith v. Union Pacific*, No. 2012-FRS-39, 66 (Apr. 22, 2013).

⁷³ *Rudolph v. National Railroad Passenger Corp. (AMTRAK)*, ARB No. 11-037, ALJ No. 2009-FRS-15 (ARB Mar. 29, 2013).

⁷⁴ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065-66 (9th Cir. 2002).

⁷⁵ *DeFRancesco v. Union RR Co.*, ARB No. 10-114, ALJ No.2009-FRS-0 (ARB Feb. 29, 2012); *Kuduk v. BNSF Ry. Co.*, 980 F. Supp. 2d 1092, 1101 (D. Minn. 2013) *aff'd*, 768 F.3d 786 (8th Cir. 2014); *Keyser v. Sacramento City Unified School District*, 265 F.3d 741 (9th Cir.2001); *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003); *Ray v. Union Pac. RR. Co.*, 971 F. Supp. 2d 869, 885 (S.D. Iowa 2013).

⁷⁶ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065-66 (9th Cir. 2002).

“timing alone will not show causation in all cases; rather, in order to support an inference of retaliatory motive, the termination must have occurred fairly soon after the employee’s protected expression.”⁷⁷

Mr. Lee was suspended approximately two month after he shared safety concerns with Mr. Webster on the night of the derailment.⁷⁸ There are mixed rulings on the subject, but at least one court of appeals has found in another retaliation case under the FRSA, “a plaintiff cannot establish a prima facie case of retaliation based on temporal proximity alone when the termination occurred two months after the alleged protected conduct.”⁷⁹

Only Mr. Lee’s suspension occurred within two months of the protected activity.⁸⁰ He was terminated ten months after he reported safety concerns to Mr. Webster.⁸¹ Considering courts have held that as little as two months is too long to find causation based solely on temporal proximity, a separation of ten months won’t support causation.

I disagree with Mr. Lee’s assertion that his suspension and termination were one continuous adverse action. In other retaliation cases under the FRSA, courts have considered multiple instances of discipline as separate events.⁸² In *Kuduk*, the court found that although termination for a second rule violation was close in time to protected activity, the two events were completely unrelated.⁸³ As in this case, the protected activity shared no “nexus” with the second rule violation.⁸⁴ Treating each discipline as a separate incident, the court found that intervening rule violations are enough to sever the causal

⁷⁷ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065–66 (9th Cir. 2002)(citing *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009–10 (7th Cir.2000)); see also *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003); *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398–99 (7th Cir.1999) (four months too long); *Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir.1998) (eight months), cert. denied, 528 U.S. 988, 120 S.Ct. 450, 145 L.Ed.2d 367 (1999); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir.1998) (five months); *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir.1997) (four months).

⁷⁸ R. Ex.-2.

⁷⁹ *Kuduk v. BNSF Ry. Co.*, 980 F.Supp.2d 1092, 1101 (D. Minn. 2013) aff’d, 768 F.3d 786 (8th Cir. 2014)(citing *Kipp v. Mo. Hwy & Transp. Comm’n*, 280 F.3d 893, 897 (8th Cir. 2002)(finding an interval of two months between plaintiff’s complaint and her termination insufficient to support a causal link)).

⁸⁰ R. Ex.-2.

⁸¹ R. Ex.-4 at 1–2.

⁸² *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014).

⁸³ *Id.*

⁸⁴ *Id.*

relationship between the protected activity and the plaintiff's termination.⁸⁵

Temporal proximity won't enough to support the inference that Mr. Lee's protected activity contributed to his termination. Mr. Lee correctly states in his Sureply to the motion that a lack of temporal proximity isn't fatal to a whistleblower claim. Temporal proximity is but one way to establish a causal connection between an employee's protected activity and an employer's adverse action.⁸⁶ I examine next Mr. Lee's alternative attempts establish a link between his protected activity and his termination.

b. Disparate Treatment and Inconsistent Application of Union Pacific Policy

Mr. Lee argues that circumstantial evidence supports his retaliation claim because he received disparate treatment and because Union Pacific applied its policies inconsistently against him. He alleges a number of problems with how Union Pacific treated him, including that:

1. Union Pacific failed to hold a fair and impartial investigation regarding both the derailment and the stoplight incident,
2. a witness in the stoplight incident hearing was not fully "rested" and should not have been allowed to attend the hearing,
3. another party also should have been held responsible for the derailment,
4. the hearing officer was confrontational and disparaging during the formal investigation of the derailment,
5. Mr. Lee did not accept differed discipline for the derailment because the plan offered was longer than plans offered to others,
6. no other employees were disciplined for the stoplight incident, and
7. Mr. Lee was not offered a discipline diversion plan for the stoplight incident.

⁸⁵ *Id.*

⁸⁶ *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065–66 (9th Cir. 2002).

Neither Union Pacific nor Mr. Lee has offered a standard for gauging what constitutes a fair and impartial formal investigation hearing by a railroad. Mr. Lee claims that he was denied witnesses, and that other procedures were violated. Yet he was allowed a union representative⁸⁷ and the opportunity to cross examine witnesses. It is unclear what specific procedures, if any, he contends were violated.⁸⁸ Mr. Lee cites to the closing statements his union representative made as evidence that his hearings were not fair or impartial; but pure argument is not evidence. The assertion by Mr. Lee's union representative the hearing wasn't impartial does not constitute a fact. Mr. Lee offered no facts to support that allegation.⁸⁹ Consequently, Mr. Lee has not presented any evidence to support the argument that he suffered disparate treatment by being denied fair and impartial hearings.

Mr. Lee likewise contends that a witness in the stoplight incident investigation hearing, Michael McClintic, should not have been allowed to attend.⁹⁰ Mr. McClintic was the Signal Department's Electronic Technician Inspector at Union Pacific who was called to the scene of the stoplight incident.⁹¹ Mr. Lee asserts Mr. McClintic should have been barred from attendance because he was not "rested"⁹² until after the hearing began⁹³ and that his presence demonstrates disparate treatment. I accept Mr. Lee's factual contention that Mr. McClintic was not "rested" until four hours after the investigation hearing began⁹⁴ and indulge the argument that he should not have been allowed to attend per the requirements of the Rail Safety Improvement Act.⁹⁵ Mr. McClintic's presence does not demonstrate disparate treatment. Mr. Lee has not shown Mr. McClintic's presence unfavorably affected the outcome of the investigation hearing or that Mr. McClintic's absence would have helped his case.

Mr. Lee also contends that the brakeman who worked on his crew during the earlier derailment should have also been held responsible, and the fact he was the only member of the crew punished demonstrates disparate treatment. Mr. Lee claims that had the

⁸⁷ R. Ex.-1 at 6-7.

⁸⁸ R. Ex.-1 at 113.

⁸⁹ C. Ex.-17.

⁹⁰ C. Ex.-1 at 2.

⁹¹ R. Ex.-3 at 126.

⁹² Mandatory rest from work required of all employees by the Rail Safety Improvement Act.

⁹³ R. Ex.-1 at 11.

⁹⁴ C. Ex.-1 at 2-3.

⁹⁵ R. Ex.-1 at 11.

brakeman stretched the train, the train would not have derailed.⁹⁶ Mr. Lee admits in his deposition, however, that, “the brakeman is supposed to be double assurance.”⁹⁷ The brakeman was not there to prevent a mistake, only to double check that Mr. Lee had not made a mistake.⁹⁸ This does not negate Mr. Lee’s responsibility for his own error. He acknowledges in his deposition that he thought he was sending the railcar to the right place but, “that later turned out to be a mistake.”⁹⁹ Not holding the brakeman responsible for the derailment does not demonstrate disparate treatment.

Mr. Lee offered a late exhibit consisting of nine decisions of Public Law Boards,¹⁰⁰ a type of arbitration forum that can be brought into being by agreement of the parties, with final and binding authority to adjudicate grievances under collective bargaining agreements subject to the Railway Labor Act of 1926, as amended. The Boards have the authority to overturn discipline railroads, such as Union Pacific, imposed on employees, which the Union has grieved. Union Pacific was a party to all nine, opposing the United Transportation Union.

None of the decisions of the Public Law Boards show what Mr. Lee contends, that the brakeman was in charge of the move, and should have been held responsible, not Mr. Lee.

Further, Mr. Lee asserts that the formal investigation officer for the derailment hearing was confrontational and disparaging. There is no affirmative proof that the hearing officer behaved improperly. Nor was any concern about the hearing officer’s behavior brought up during the hearing itself.

Mr. Lee also asserts that he did not accept deferred discipline for the derailment because the plan offered was longer than plans offered to others. Nothing Mr. Lee has offered in evidence shows he has personal knowledge that more advantageous deferred discipline plans were offered to other employees. No evidence submitted shows that the deferred discipline plan offered to Mr. Lee was improper in any way. Neither party submitted a copy of the plan offered to him, nor does any proof in the transcript of the railroad hearing point to a disparity in the length of the plan offered to Mr. Lee when compared to plans offered to other employees facing discipline.

Mr. Lee argues he suffered disparate treatment when he was the only employee disciplined for the stoplight incident. He overlooks that

⁹⁶ Complainant’s Depo. 41.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The Boards were authorized by Public Law 89-456.

the engineer in that case was charged with rule violations. He chose to accept a deferred discipline plan.¹⁰¹ The engineer was held accountable and took responsibility for his role in the stoplight incident.¹⁰²

Finally, Mr. Lee contends he received disparate treatment when he was not offered a deferred discipline plan for the stoplight incident. There are two reasons that Mr. Lee was ineligible for deferred discipline. First, during the derailment hearing Mr. Lee refused deferred discipline after being expressly informed, as the transcript shows, that if he was held responsible, he would not be eligible for deferred discipline during the next seven years.¹⁰³ Second, under Union Pacific's discipline policy, when Mr. Lee received a Level 4C violation for the derailment, he became ineligible for deferred discipline for the stoplight incident.¹⁰⁴

Mr. Lee has failed to set forth a *prima facie* case for retaliation under the FRSA.

B. Mr. Lee Would Have Been Terminated Regardless of His Protected Activity

Had Mr. Lee established his *prima facie* case, Union Pacific has shown, by clear and convincing evidence, that it would have made the same decision to terminate Mr. Lee.¹⁰⁵ The termination arose from an intervening event, his second Level 4C violation. Termination is consistent with the Union Pacific discipline policy.¹⁰⁶

Mr. Lee had been found guilty of a Level 4C infraction for his role in the derailment.¹⁰⁷ Mr. Lee also admits it was a mistake to not visually confirm which track he was sending the railcar to on the night of the derailment.¹⁰⁸ It is also undisputed that Mr. Lee passed a control point he did not have permission to pass during the stoplight incident. This serious safety violation was a second Level 4C violation.¹⁰⁹

Union Pacific's discipline policy states that, if an employee commits a second Level 4/4C violations within twenty-four months of the first infraction, the discipline will be assessed as a Level 5 violation. Level 5 requires termination.¹¹⁰ Neither party disputes this is the Union Pacific policy. Mr. Lee committed two Level 4C violations

¹⁰¹ R. Ex.-3 at 193–94.

¹⁰² R. Ex.-3 at 194.

¹⁰³ R. Ex.-1 at 18–19.

¹⁰⁴ R. Ex.-5.

¹⁰⁵ 49 U.S.C. §§ 42121(b)(2)(B)(iv).

¹⁰⁶ R. Ex.-5.

¹⁰⁷ R. Ex.-2.

¹⁰⁸ Complainant's Depo. 41.

¹⁰⁹ C. Ex.-14 at 2–3.

¹¹⁰ R. Ex.-5.

within ten months.¹¹¹ Union Pacific treated him in a manner similar to others with two Level C violations. No evidence is offered that Union Pacific treated other employees with two Level 4C violations less harshly or applied its discipline policy inconsistently in this case.

IV. Conclusion

Respondent's Motion for Summary Decision is hereby **GRANTED** and this claim is **DISMISSED**.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar

¹¹¹ R. Ex.-4.

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

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

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

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

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