



Issue Date: 30 June 2016

Case No.: 2014-FRS-00045

In the Matter of:

LARRY R. MEADOWS,
Complainant,

v.

BNSF RAILWAY CO.,
Respondent.

APPEARANCES: C. Marshall Friedman, Esq.
Kenneth E. Rudd, Esq.
Attorneys for the Complainant

Mary Taylor Gallagher, Esq.
Jennifer L. Willingham, Esq.
Attorneys for the Respondent

BEFORE: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises from a complaint filed under the employee protection provision of the Federal Railroad Safety Act, U.S. Code, Title 49, §20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (FRSA) and implementing regulations at 29 C.F.R. 1982. The claim was referred to the Office of Administrative Law Judges (OALJ) for formal hearing upon appeal by the Complainant of the January 10, 2014, Occupational Safety and Health Administration (OSHA) determination dismissing the complaint.

A two-day hearing was held before the undersigned presiding Judge in Newport News, Virginia, beginning March 31, 2015. The decision in this matter is based upon the Parties' arguments and motions and all documentary evidence admitted into evidence. The documentary evidence admitted at the hearing includes ALJX¹ 1-11, CX 1-8,² and RX 2-7.^{3,4}

¹ The following notations apply in this Decision and Order: ALJX- Administrative Law Judge Exhibit, CX- Complainant's Exhibit, RX- Respondent's Exhibit, TR- Transcript.

STIPULATIONS OF FACT

The parties made the following stipulations of fact and this presiding Judge accepted as fact in this case (TR 6-8):

1. At all times relevant to this proceeding, the Respondent was a railroad carrier engaged in interstate commerce within the meaning of the FRSA, as amended.
2. The Complainant was hired by Respondent on March 20, 2006, as a Maintenance Mechanic Apprentice in Memphis, Tennessee.
3. The Complainant became a “Carman – Freight” in Memphis, Tennessee, on November, 20, 2006.
4. While employed by the Respondent, the Complainant was an employee of Respondent within the meaning of the FRSA, as amended, and the FRSA implementing regulations.
5. On August 19, 2011, the Complainant was performing assigned duties in Memphis-Birmingham HUB #2 when he suffered a work-related injury to his low back, which was subsequently medically treated, and he was released back to full duty by the treating physician following a medical examination on November 7, 2011.
6. On August 21, 2011, the Complainant filed an “Employee Personal Injury/ Occupational Illness Report” to report the August 19, 2011, work-related injury.
7. On November 27, 2012, the Complainant filed a retaliation complaint under the FRSA with the Department of Labor, OSHA involving Respondent.
8. On February 13, 2013, an investigation of “misconduct, horseplay, indifference to safety of yourself and others, [and] conduct which contributed to a hostile work environment while working as a Carman in Memphis, TN, terminal – MSR S-1.2.9, S-28.6” by the Complainant on January 4, 2013, was conducted.
9. As a result of the February 13, 2013, investigation, the Complainant was “dismissed” from his employment with the Respondent on March 4, 2013.
10. The Complainant appealed the March 4, 2013, termination of employment under the appropriate Collective Bargaining Unit Agreement then in effect.
11. On May 22, 2013, the Complainant filed an amended retaliation complaint under the FRSA with the Department of Labor OSHA to include the March 4, 2013, termination of employment involving Complainant and Respondent.
12. The appeal of the Complainant’s termination of employment under the terms of the collective bargaining agreement is still pending as of March 31, 2015.
13. The Complainant’s average weekly wage on employment termination on March 4, 2013, was \$1,094.80.

ISSUES

The following issues remain to be adjudicated in this case (TR 10-14):

² The Respondent objected to the admission of CX 2 on the grounds that this presiding Judge had already ruled that the discipline contained in the exhibit was time-barred as an adverse action in this case. CX 2 was admitted over the Respondent’s objection because while results of the investigation do not constitute an adverse employment action in this case, it may still be relevant to the facts of the instant case, particularly in issues 4 and 5.

³ No RX1 was submitted.

⁴ The Claimant objected to the admission of RX 5 on hearsay grounds, but the objection was later withdrawn.

1. Did the Complainant engage in an activity protected under the FRSA as alleged in the complaint and the amended complaint to wit (a) filed an August 21, 2011, report of work injury on August 19, 2011, (b) made an August 21, 2011, report of hazardous safety or security conditions, (c) reporting to three supervisors in October 2012 of a hazardous safety condition created by supervisors following and verifying work that is being done on in-bound train inspections on section shift, (d) refusing to complete second shift work on October 20, 2012, due to hazardous safety conditions,⁵ and (e) filing a November 27, 2012, complaint of retaliation with OSHA under the FRSA.
2. If yes to any of the allegations of protected activity above, did the Respondent have knowledge of the protected activity as alleged in the complaint and the amended complaint?
3. After the alleged protected activity under the FRSA, did the complainant suffer an adverse employment action as alleged in the complaint and amended complaint when (a) threatened on October 23, 2012, by general foreman R. Jaramillo with AWOL, abandoning duties, and insubordination for leaving second shift work on October 20, 2012, and/or (b) his employment was terminated on March 4, 2013?⁶
4. If yes, was the protected activity a “contributing factor” to the decision that caused the alleged adverse employment action?
5. If the Complainant has established his *prima facie* case, did the Respondent establish by clear and convincing evidence that the basis for the alleged adverse employment actions was unrelated to the protected activity?
6. Is the Complainant entitled to appropriate relief under the FRSA, such as reinstatement, back pay, front pay, restoration of employment benefits and seniority, interest, attorney fees, and legal costs?

DECISIONAL FRAMEWORK

Section 20109(b)(1) of the FRSA and 29 C.F.R. § 1982.102(b)(2), prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: (a) reported a work-related personal injury; (b) reported in good faith a hazardous safety or security condition; (c) 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 would then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or

⁵ This presiding Judge noted at the hearing that the Regulations require that the refusal be made in good faith with no reasonable alternative to refusal was made available to the Complainant; that the reasonable person in the circumstances confronting the Complainant on October 20, 2012, would conclude both that the hazardous conditions presented an immediate danger of death or serious bodily harm, and the urgency of the situation did not allow sufficient time to eliminate the danger without such refusal; and the Complainant, where possible has notified the Respondent of the existence of the hazardous condition and the intention of not performing further work unless the condition is corrected immediately

⁶ This presiding Judge noted at the hearing that the six other alleged adverse employment actions were time-barred. The ones that were time-barred were a) assessed reprimand on permanent record for the rules violations b) held accountable for “laying off for personal business” on August 20, 2011, c) bumped off job and general foreman R. Jaramillo attempted coercion to work former job during five-day bump period provided under the collective bargaining agreement, d) reprimanded for absenteeism for leaving early due to bad weather, e) counted as AWOL on November 7, 2011 by immediate supervisor B. Ables, and f) denied vacation day on March 5, 2012, for emergency dental visit. This presiding Judge noted that while these allegations will not be considered as adverse employment actions because they are time-barred, that does not mean that those areas cannot be explored for purposes of course of conduct and credibility. (TR at 10).

serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures are repaired properly or replaced; (d) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions listed in (c) herein, or € filed a complaint under the FRSA.

The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. §42121. *See* §20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof as outlined in the AIR 21. *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, 2015 WL 1876029 (ARB Mar. 20, 2015) *reissue* (Apr. 21, 2015); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). The burden shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence that: (1) the complainant engaged in protected activity; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Powers*, slip op. at 9, n. 2; *Araujo*, 708 F.3d at 157; *see also Consolidated Rail Corp. v. U.S. Dept. of Labor*, 567 Fed. App’x 334, 337 (6th Cir. 2014); *Murphy v. Norfolk Southern Ry. Co.*, No. 1:13-CV0863, 2015 WL 91422 (S.D. Ohio Mar. 3, 2015). A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a “contributing factor” in the adverse action alleged in the complaint. 29 U.S.C. §1982.109(a). “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.’” *Powers*, slip op. at 9.

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity.]” 49 U.S.C. §§42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. §1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. §42121(b)(2)(B)(iv). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probably or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, slip op. at 6 (ARB Jan. 31, 2011) (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

PARTIES’ POSITIONS

Complainant’s Position (TR 265 -271, 276-278)

The Complainant argues that January 4, 2013, is a critical date in this case because it was the date the Complainant was pulled out of service and stopped receiving pay, which is an adverse action despite not being “completely terminated” on that date. (TR 265). The Complainant argues the date is also important because of the testimony of Mr. Cargill and Mr. Mahoney that neither one was involved in the decision to pull the Complainant out of service because their involvement in the Complainant’s case did not begin until much later.

The Complainant argues that the court can then infer by exclusion that only Mr. Jaramillo remains to have made the decision to pull the Complainant out of service. The Complainant also argues that the date was also important because it was about the time that the investigation by Mr. Jaramillo “started to kind of morph into something different.” (TR 266). The Complainant notes that the investigation began with an anonymous phone call regarding fireworks but that at about January 3 or 4 of 2013 the investigation “takes a transformation into inquiring about whether or not some horns were stolen.” (TR 266). The Complainant argued that this change signaled that the Respondent was treating the Complainant’s case as a theft case, “they were looking for a horn that they could prove was stolen for the purposes of terminating [the Complainant].” (TR at 266). The Complainant notes the investigation also looked into a hot sauce prank and for uploading a video to YouTube that shows “nothing more than a prank being shown on the video that doesn’t damage [the Respondent’s] reputation in any way since it wasn’t even known it was [Respondent] where the videotape was taken.” (TR 267).

The Complainant notes the associated disciplinary letters were sent out “weeks before they ever talked to Mr. Maggitt,” who made the initial anonymous phone call. (TR 267).

So, you have a very strange set of...circumstances in this investigation, but if you go back then and look at the latter part of 2012, it’s our position that the evidence shows really what was going on here. At that time, [the Complainant] and Mr. Lanier were doing their job in the train yard and they were bad ordering cars and these cars were being bad ordered, their testimony was because it was a safety issue...They don’t like these bad orders to build up. They kind of clog up the railway and it causes them some consternation about getting your freight moved...It got to the point where the two supervisors who worked directly under [Mr. Jaramillo], that being Mr. Loveall and Mr. Ables were directed to go out and follow these two men around every night.

(TR 268). The Complainant argues that this was not a check on the Complainant because Mr. Lanier testified that he had never seen anything like that in his 19-year career. The Complainant argues that therefore, it can be inferred that this was being done to discourage the employees from bad ordering cars. The Complainant argues this inference is supported by his own testimony that Mr. Ables told him “well you know how to stop this, quit bad ordering cars.” (TR 269). The Complainant argues that bad ordering cars and bringing safety issues to the attention of the railroad in the fall and winter of 2012 is protected activity that occurred approximately two months before termination.

The Complainant argues that he also engaged in protected activity when he submitted his on-duty accident report and on-duty injury report. The Complainant notes that the time he was off work for the work-related injury was counted against him as absenteeism, which “became part of the formal reprimand that he was given by the railroad back in 2012.” (TR 269).

The Complainant argues that there were other issues amounting to protected activity but that bad ordering cars seemed to drive the Respondent’s decision to begin “bird-dogging” the Complainant and to discipline him. The Complainant argues that he was adversely affected and that under the “relaxed” standard of these cases, there is also a causal connection that can be inferred between the Complainant’s protected activity and Mr. Jaramillo’s decision to pull the

Complainant out of service. The Complainant also argues the inference of causal connection can be made because he has shown that there were no other issues, such as complaints about the Complainant's work or personality issues, between himself and Mr. Jaramillo. The Complainant argues that being pulled out of service also started the series of events ultimately resulting in his termination and subsequently being out of work for two years.

The Complainant notes that he does not dispute that Mr. Mahoney and Mr. Cargill had "absolutely no role whatsoever in...the decision to initially pull the Complainant out of service on January 4th." (TR 277). The Complainant notes that he was out of service for two months before they made a decision. The Complainant argues that "rather than showing that it's clear and convincing evidence that the decision would have been the same anyway...it's clear and convincing evidence that they had no role in making that decision. It was Mr. Jaramillo's decision." (TR 277).

The Complainant also argues that, though Employer's counsel argues the transcript of the investigation hearing indicate Mr. Maggitt said the Complainant threw the firecrackers, the transcript actually indicates that Mr. Maggitt assumed it was the Complainant who threw the firecrackers. The Complainant argues that this was all after the Respondent had begun "bird-dogging" the Complainant and "turning up the heat on him for the bad order that he was turning in. (TR at 278). The Complainant argues that Mr. Jaramillo "didn't come in here and say that didn't happen. He simply tried to justify it." (TR 278). The Complainant argues that the 19-month gap identified by the Respondent did not exist because protected activity occurred within two months of termination, "and in fact, the railroad had responded adversely to the protected activity by sending two foremen to birddog him every day." (TR 278).

Respondent's Position (TR 271-276)

The Respondent argues that the issue in this case is not related to the Complainant reporting a personal injury in August of 2011. Rather, the Respondent argues the issue is whether it can "fire an employee who repeatedly threw lit firecrackers at co-workers on [Respondent] property because he couldn't resist, an employee who created a work environment so hostile that his own union brother, [Mr. Maggitt], called the [Respondent] safety hotline to turn him in." (TR 272). The Respondent argues that the Complainant did not believe the safety rules applied to him and that if an injury report nineteen months before termination prevents the Respondent from firing such an employee, other employees' safety suffers. The Respondent noted as examples of the Complainant's disregard for safety rules the fireworks and air horn incidents.

The Respondent argues that the Complainant has not made a *prima facie* case because he has not shown that his protected activity was a contributing factor in the Respondent's decision to terminate the Complainant's employment. The Respondent also argues that clear and convincing evidence shows that the Respondent, particularly Mr. Mahoney and Mr. Cargill would have made the same dismissal recommendation even in the absence of any protected activity. The Respondent argues that the testimony of Mr. Mahoney and Mr. Cargill shows that neither knew that the Complainant had reported any safety concerns, that his supervisors were checking his bad orders, or that the Complainant had "walked off the job" in October of 2012. (TR 273). The Respondent also argued that neither knew that the Complainant filed an OSHA complaint in

November of 2012. The Respondent argues that this leaves only the protected activity of the August 19, 2011, report of injury, which was nineteen months before the Complainant was disciplined. The Respondent argues that Mr. Jaramillo conducted a thorough investigation, including interviewing the Complainant last. The Respondent also argues that it was undisputed that Mr. Cargill and Mr. Mahoney did not consider the Complainant's report of personal injury.

The Respondent argues that it would have dismissed the Complainant absent his alleged personal injury report 19 months earlier. The Respondent notes that Mr. Cargill and Mr. Mahoney both testified that they relied on the investigation transcript, and testimony and written statements of co-workers. The Respondent argues that Mr. Cargill and Mr. Mahoney specifically relied on Mr. Maggitt's testimony, which was consistent with his written statement that he personally saw the Complainant throw a firecracker at a co-worker. The Respondent notes the Complainant admitted in his testimony that he violated Respondent Safety Rule on horseplay and that he blasted an air horn at co-workers, which constitutes a violation of the Respondent's safety rules prohibiting horseplay. The Respondent argues that the Complainant also violates the mechanical rule on conduct by contributing to hostile work environment and by his indifference to the safety of himself and others. The Respondent argues that the violation is a stand-alone dismissible offense. The Respondent argues that Mr. Cargill and Mr. Mahoney based the decision to terminate the Complainant on this stand-alone dismissible violation. The Respondent notes that neither knew of any protected activity by the Complainant, except the personal injury report 19 months prior, "but that both testified they complied and their testimony was undisputed that they complied with [the Respondent's] code of conduct and its anti-retaliation policy in recommending and approving [the Complainant] be dismissed from service for his inexcusable and harassing conduct." (TR 276).

SUMMARY OF RELEVANT EVIDENCE

Testimonial Evidence

Complainant's Hearing Testimony (TR 24-89, 262-263)

The Complainant testified to his background and history with the Respondent. He testified that he was hired in 2006 as a rail car inspector in the Mechanical Department through an apprenticeship program. He testified that he was trained in conducting inspections in the rail yard and completing mechanical repairs.

The Complainant testified that his duties in inbound inspections differed from outbound inspections. He testified that inbound inspections are the terminating inspection of a train when it comes into the yard, the engine is cut off, and the cars are inspected for defects. He testified these inspections are conducted for safety purposes. The Complainant testified that outbound inspections involve testing hoses and brakes and inspecting the train and rail cars for "something that may have been missed or something that could have happened in between the time of that rail car getting in the yard and the time it's leaving again." (TR 27). The Complainant testified that the outbound inspections are also important to the safety of the freight cars. The Complainant testified that if defects are found during the inbound inspection, and the cars are properly repaired, the issues should not exist any longer on the outbound inspection.

The Complainant testified that he had no issues with his co-workers or supervisors while working in the yard until August of 2011, when he was injured. The Complainant testified that Mr. Jaramillo began working there in 2010, and that he had no problems with Mr. Jaramillo until his injury. The Complainant testified that he was injured when he was working on an outbound train at night. He testified that the shift he was working was short-handed and that it was the highest volume of traffic he had ever seen. The Complainant testified that he was injured when he bent over to buckle an air hose when he heard a pop and a sharp pain in his back.

The Complainant testified that he was working on a poorly-maintained section of track and that they had complained for months about working short-handed and the poor maintenance of the track. The Complainant testified that he complained about working short-handed and about the condition of the yard because he thought they were unsafe. He testified that the complaints were made to the foreman verbally and also in writing in the sign-in sheets in the space designated for remarks. The Complainant testified that coworkers also complained. The Complainant testified that he believed the injury and the conditions contributed to his August of 2011 injury because he felt "there could have been preventative measures." (TR at 30).

The Complainant testified that he completed an accident report when he returned to work two days after the injury. He testified that he reported his injury to Mr. Ables and that Mr. Ables responded "Man, I don't need this on me right now." (TR at 31). The Complainant testified that he told Mr. Ables he was not sure about the nature of his injury or whether he could "sleep it off" as Mr. Ables suggested. (TR at 31). The Complainant testified that this conversation happened on August 19 and that he did go home as Mr. Ables suggested. The Complainant testified that when he woke up the next day "I knew something was wrong and that's when I called and reported the injury by telephone and I went to the emergency room and the emergency room doctor did follow-ups." (TR at 31). The Complainant testified that he was given pain medication, muscle relaxers, and referral to a physician. The Complainant testified that the next day he spoke with Mr. Jaramillo, who told him to "drive 65 miles to work while medicated to fill out an accident report which is what this is [referring to CX 1] that I filled out on the 21st and that's when this was actually filled out." (TR at 32).

The Complainant testified that he told Mr. Jaramillo of his condition and that he was not comfortable driving but that Mr. Jaramillo "pretty much insisted. He said, 'You have to come fill this out.'" (TR at 32). The Complainant testified that he later saw his absentee record during an investigation. The Complainant testified that his employee transcript both noted that his first day off for medical leave was August 20 and that he was "being held accountable for laying off for personal business on August 20, 2011." (TR at 33). The Complainant testified that when he brought this to Mr. Jaramillo's attention, his response was that he did not have the documentation.

The Complainant testified that he was on approved medical leave until returning to work on November 7, 2011, when he was released back to work by Dr. Lovelle, a neurosurgeon. The Complainant testified that the day he was released to work by the doctor, he faxed the release form to Mr. Jaramillo from the doctor's office. The Complainant testified that the doctor's office was about an hour from his home and that his home was about 65 miles from work. The

Complainant testified that when he left the doctor's office, he got a call from Mr. Jaramillo asking if he would be in that day. The Complainant testified that he explained that he could not make it in because of where he was and that he felt he could not make it home to get ready and then in to work. He testified that he told Mr. Jaramillo he would be in the following day. The Complainant testified that a few minutes after this he was called by Mr. Ables telling him that Mr. Jaramillo instructed Mr. Ables to count the Complainant as absent without leave. The Complainant testified he was not sure whether he was actually counted as absent without leave for that day. The Complainant testified that from that time to January 4, 2013, he did not have any extended absences or leaves of absence.

The Complainant testified that in July of 2012, he was working in a train yard conducting inbound train inspections. He testified that at this time he mostly worked with Mr. Lanier due to the way their schedules overlapped and that if he was not working with Mr. Lanier, he usually worked with Mr. Boykin. The Complainant testified that his front line supervisors at the time were Mr. Loveall and Mr. Ables. The Complainant testified that at about this time, his supervisors started following him and his partner around while they were performing their inspections. The Complainant described the "following around" as:

Sometimes literally they'd just be right behind us while we were doing our inspections and sometimes when I would be at one end of the train, my partner at the other end, they would be a track over going back and forth keeping check on us, following us around, just bouncing around. Other times, I've seen them just watch us from like two tracks over sit there. We'd pull up, they'd pull up...if we had to fill out a bad order card on a defect we found, they were, I don't know if they were required to or what, but they were having to sign all our defect cards and like I said, I don't know why, but it just happened consistently and to the point of a distraction. It felt like an unnecessary distraction by myself and [Mr.] Lanier.

(TR at 40). The Complainant testified that this happened every day on his shift. He testified that there were usually six car inspectors on duty, but that to his knowledge the supervisors were not following any of the other carmen around. The Complainant testified that he was followed "every time we had a train, they would go out on that train with us...if they were available." (TR at 41). The Complainant testified that he had been a journeyman carman for three and a half years at that point.

The Complainant testified that Mr. Loveall and Mr. Ables claimed they were verifying the bad orders that he and his partner identified, "I guess to make sure we're not bad order bogus stuff." (TR at 42). The Complainant testified that bad order cards are a record of the defect that was found on the car that would get it sent to the repair track. The Complainant testified that cars with bad order cards were supposed to be sent to the repair track but that he had seen Mr. Ables pull cards off cars more than once. He testified that he also heard Mr. Ables direct that their radio notifications of bad orders to the lead person to enter into the computer be disregarded and not entered into the computer system. The Complainant testified that a car that does not get entered into the system "just moves on" and does not get the inspection it needs and does not get repaired. The Complainant testified that he would consider this a safety issue both to railroad employees and the public.

The Complainant testified that the FRA can hold the person inspecting the train personally responsible for “any willful violation, for turning a blind eye or anything like that.” (TR at 44). The Complainant testified that he was not willing to let the FRA hold him personally accountable for negligence or any willful violation.

The Complainant testified that when he was being followed by his supervisors, Mr. Ables got physically close. “We had totally felt like we were being harassed and it was an unnecessary distraction that we didn’t need and we felt like it was unsafe.” (TR at 46). The Complainant testified to an incident in which Mr. Ables came to verify a defect the Complainant had identified and stepped on the Complainant’s toes causing him to fall down in the rocks. “I told them, I expressed my concern again to him that I felt like this was ridiculous. It’s unsafe, it’s an unnecessary distraction and I didn’t feel safe working like that.” (TR at 46). The Complainant testified that he had no personal issues with Mr. Ables aside from the treatment at work and that he had known Mr. Ables for years.

The Complainant testified that he had told Mr. Ables that he felt unsafe and that he was being harassed by being followed. When asked about Mr. Ables’ response, the Complainant testified, “I pretty much gave up on it after – one time, he said, ‘Well, you know how to make it stop...’ And I said, ‘What do you mean’ and he said, ‘Stop bad ordering cars and we’ll stop following you.’” (TR at 47). The Complainant testified that he also addressed the issue with Mr. Loveall, who responded that he was just doing what he was told.

The Complainant testified that the situation with Mr. Ables came to a head in October of 2012 when he empowered himself. The Complainant testified that “empowerment” is “when you look at a situation, feel it’s unsafe, you feel it could do you harm or anyone else harm... you don’t force yourself to do it...empower yourself to stand back, reassess the situation, assess the risks, like any approach to anything as far as anything you can empower yourself to avoid unsafe conditions.” (TR at 47). The Complainant testified that empowerment is covered in the Respondent rule book, and that he thought he was exercising empowerment by removing himself from a dangerous situation. The Complainant testified that the dangerous situation he identified was “the way that they were distracting us possibly. We couldn’t do our job safely with them harassing...following us around, distracting us and I didn’t feel comfortable with it anymore.” (TR at 48).

The Complainant testified that he then removed himself from a train one evening. He testified that he “bad ordered” a car on a train when Mr. Ables radioed to ask where the car was because he had not yet caught up to the Complainant to follow him around. The Complainant testified that he then radioed his partner that night, Mr. Boykin, told him that he had locked up the end of the track he had been working on and said “I can’t work like this. I don’t feel comfortable working like this. I don’t feel safe.” (TR at 49). He testified that he also told Mr. Boykin that he was going in and that at that point Mr. Ables radioed for another person to come fill the Complainant’s position. The Complainant testified that he then went to the locker room or the lunchroom.

The Complainant testified he had not empowered himself to remove himself from an unsafe condition before. He testified that shortly after he removed himself from the yard he was

approached by Mr. Ables who asked him why he had done so. The Complainant testified he responded. "I told you over and over I don't feel safe like this. We've asked that you stop, wait till we're off the train, just something for you to go out there and inspect or verify." (TR at 50). The Complainant testified that Mr. Ables then asked for a written statement, which he did not feel comfortable giving a written statement without union representation. He testified that Mr. Ables responded, "Well, [Mr. Jaramillo] is not going to like this." (TR at 50).

The Complainant testified that he heard from Mr. Jaramillo two days after the incident when he reported back to work as scheduled. The Complainant testified that before he started working he was told to report to Mr. Jaramillo's office, where he went with the local union chairman. The Complainant testified that Mr. Jaramillo and Mr. Ables were in the office and that Mr. Jaramillo told him that he was "getting a big break." (TR at 51). The Complainant testified that Mr. Jaramillo told him he could be written up for insubordination, AWOL, and abandoning his duties, "just pretty much threatened me telling me I'm getting a big break for doing something I thought we had the right to do being there was a policy about it." (TR at 51). The Complainant testified that this was in October of 2012.

The Complainant testified that he filed the first OSHA complaint in November of 2012 through counsel. He testified that he was then investigated in 2013 over several issues. He testified that he found out in January of 2013 that someone made a hotline call claiming that he and another co-worker threw fireworks at them. The Complainant testified that he was called into Mr. Jaramillo's office on January 3, 2013, with a union representative and two special agents also present. He testified that Mr. Jaramillo then began questioning him about stealing a pair of air horns from the diesel shop, during which time the special agents were close to him in what he thought was an attempt to intimidate him. He testified that the meeting took approximately three hours and that he was also asked about the use of fireworks and that Mr. Jaramillo also had two statements that the Complainant had stolen air horns from the diesel shop. The Complainant testified that he got the air horns from his brother and that they were not train air horns.

The Complainant testified about a hot sauce incident he was questioned about. He testified that he and two other coworkers were in the lunchroom where he had left some hot sauces that he brought in where everyone was welcome to try them. He testified that one coworker tried a really hot one, and "he had quite a reaction from it and I was basically pulling a prank on him. He grabbed the hot sauce off the table, he put it on his plate, he dipped his chicken he was eating...but somehow it got turned around that I did this somehow." (TR at 57).

The Complainant testified that the agents wanted to see the air horns, which were installed on his truck at home. He testified that he told the agents he could not drive his truck to work because it was having mechanical problems. He testified that the agents offered to come to his house to look at them but that he said they would have to get a warrant. The Complainant testified that he asked Mr. Jaramillo if this was a criminal investigation and that Mr. Jaramillo responded, "Possibly." (TR at 59). The Complainant testified that he then offered to get the air horns from his truck and to bring them to work but that he reiterated that the agents were not welcome on his property. He testified that he brought the air horns in and that they were satisfied that they were not Respondent property.

The Complainant testified that after he showed them the horns he was then served with a notice of investigation and a notice that he was being withheld from duty pending the investigation. He testified that his gate pass was disabled and he had to be escorted off the property. The Complainant testified he had only returned to the property for the investigation.

The Complainant testified that he was not offered any deferral or alternative handling in association with the hearing in 2013. The Complainant testified that the notices of investigation were signed by Mr. Jaramillo, and that as far as he knew, Mr. Jaramillo made the decision to offer deferral or alternative handling.

The Complainant testified that he had not had any social issues with Mr. Jaramillo or any of the other foremen outside of work. He testified that the issues he had regarding reporting his concerns with freight cars and the foremen following him were all safety-related.

The Complainant testified that he knew of at least four other employees who also received investigation notices relating to the same incidents for which he was investigated, but that he believed there were more. The Complainant testified that the individuals he knew were investigated were not removed from service relating to the investigation and that he was the only one who was terminated.

The Complainant testified that he lost income as a result of his termination and had not had any steady employment from January 4, 2013, to the time of the hearing. He testified that he did do some work for his father, who is a farmer. The Complainant testified that his father paid him hourly wages like any other employee. He testified that he made \$10.00 per hour and guessed that he made between \$5,000.00 and \$7,000.00 over the time he worked for his father.

The Complainant testified that he was looking for other work, but that it was a small town, and that he wanted to go back to work. The Complainant testified that he set up a profile in an online hiring pool. He testified that he had an interview approximately 45 minutes from his house with a contractor for a railroad, but that the contractor said “he couldn’t really afford me, I don’t think at the time from what I needed to make it worth it driving that far back and forth to work.” (TR at 68). The Complainant testified that he also looked online for other jobs as far as Memphis, but that he could not find anything that would pay enough to make a living. The Complainant described the state as “down and out.” (TR at 68).

The Complainant testified that he believed that the complaints he made played a role in being brought up on disciplinary charges in January of 2013 because he wants to be the best at any job he does and because

when it comes to FRA, they can hold you personally responsible for it...I’ve got a job to do whether he [Mr. Jaramillo] likes it or not...I’m the one that’s going to be held accountable for my performance, quality of my work and I’m not going to be a yes man and just turn a blind eye to something that’s going to come back on me and that’s one aspect of it.

(TR at 69). The Complainant testified that he also had a responsibility to the workers, members of the public, and anyone else who comes in contact with the train who might be injured by an

improperly inspected rail car, which he was proud of and meticulous about. The Complainant testified that before the end of 2012, no one had told him he was not doing his job correctly. The Complainant testified that, in fact, Mr. Loveall told him “you’re one of the best inspectors I’ve seen,” which he was proud of.

The Complainant testified that he lost wages as a result of being terminated in January of 2013. He testified to his average annual pay, medical benefits, retirement benefits, and other losses he alleged were suffered as a result of his termination.

On cross examination, the Complainant testified that he was called to an investigation in February of 2013 for which he read the investigation notice and understood the charges. He testified that he was charged with violating the Respondent’s rule concerning conduct and was investigated for the use of fireworks and an air horn on the Respondent’s property. The Complainant testified that he blew the air horn intentionally to startle a coworker, Mr. Jones, to get “a fun reaction” out of him. (TR at 75). The Complainant testified that he also blew an air horn to startle a contractor who was on the Respondent’s property, but that he was directed by a supervisor to do so. The Complainant testified that he posted a video on YouTube of Mr. Jones “leaping out of a chair because firecrackers went off underneath his chair.” (TR at 75). The Complainant testified that the video was titled “Best Firecracker Prank Ever.” (TR at 75). The Complainant agreed that setting off firecrackers in a rail yard is not safe, “It could be used improperly. Yes, it’s unsafe.” (TR at 75). The Complainant agreed that it could be a safety hazard to set off firecrackers in the Respondent’s locker room.

The Complainant testified that he was represented by the union at the investigation hearing and that he heard Mr. Maggitt testify that he called the Respondent’s safety hotline because he believed the Complainant threw firecrackers at him. He also testified that Mr. Maggitt testified at the investigation hearing that he saw the Complainant throwing firecrackers at Mr. Houston. The Complainant testified that he testified at the investigation hearing that he did not recall the incidents involving Mr. Maggitt and denied that he threw firecrackers at Mr. Jones, Mr. Maggitt, or Mr. Houston. The Complainant testified that he would not say these employees were lying that the incidents happened, but that “it had nothing to do with me. I didn’t throw anything at anybody.” (TR at 79). The Complainant testified that if Mr. Maggitt said that he saw the Complainant throw firecrackers he was lying, “he hasn’t seen me throw anything. I haven’t thrown anything at anyone.” (TR at 79).

The Complainant testified that he had seen his dismissal notice, and that the Respondent dismissed him because they believed he had violated the mechanical safety rule against horseplay and the mechanical safety rule dealing with conduct. Upon review of his testimony at the investigation hearing, the Complainant testified that he did not believe he was in violation of the rule against horseplay but that others might believe it was horseplay. The Complainant affirmed his earlier testimony that he was concerned with children in neighborhoods and workers falling off ladders and other safety issues, but testified that when he intentionally blew the air horn at Mr. Jones, he “didn’t really see any harm in it as far as any harm that could happen to him. I didn’t think of anything at the time.” (TR at 81). When asked whether he was concerned with Mr. Jones’ safety when the fireworks exploded under his chair, the Complainant testified that his only involvement in the incident was to create an account and post the video to

YouTube, at the request of Mr. Jones.

The Complainant testified that he had spent his entire career with the Respondent in Memphis but that he had never worked as a front line supervisor or foreman or as a carman at any other location. The Complainant testified that he had no knowledge of how the Respondent instructs first line supervisors to verify bad order tags and that he had never attended any of the supervisor meetings that Mr. Jaramillo had when he talked with his first line supervisors.

The Complainant reiterated his earlier testimony that he had never had any issue with Mr. Jaramillo until he reported an injury in August of 2011. The Complainant testified that he had never met Mr. Mahoney, had never reported any safety concerns to him, and had never informed him that he filed an OSHA complaint. The Complainant testified that he did not know Mr. Cargill from Labor Relations, had never worked with or been supervised by him, and never reported any safety concerns to him.

The Complainant testified that since he was dismissed he had had only one interview for a job. He testified that jobs in Ripley are “few and far between.” (TR at 85). When asked whether he looked for jobs in the larger cities, the Complainant testified that he looked online but he had not found anything that paid enough to be worth the drive and the cost of commuting. The Complainant testified that prior to working for the Respondent, he worked for his father on the farm, to which he has returned, “some.” (TR at 86). The Complainant testified that he was not receiving unemployment benefits and had no insurance through the union. He testified that he was receiving help from family to get by including living with family. The Complainant testified that he had lived with family before “at some points.” (TR at 86). The Complainant testified that he had received some benefits from the Railroad Retirement Board in the past, but that he could not recall the amount. He testified that he could not recall precisely but estimated that the benefits ran for about a year at approximately \$300.00 per week.

The Complainant testified that he was not sure if the other employees who were investigated for horseplay were investigated as a result of the safety hotline call.

On re-direct examination, the Complainant testified that Mr. Maggitt did not tell him, nor did he hear from anyone else, that Mr. Maggitt had complaints about the air horn. The Complainant testified that he was unaware of any complaints by Mr. Maggitt relating to hot sauce or firecrackers going off when Mr. Jones was in the locker room. He testified that he did not know if anyone made a complaint about the theft of the air horns. The Complainant testified that Mr. Jaramillo did not indicate why those issues came up in the investigation.

The Complainant was recalled and provided additional testimony under redirect examination. The Complainant testified that an outshop inspection is an “inspection of a rail car that has recently left a repair shop...to ensure and verify the quality of work done inside of a repair shop.” (TR 262). He testified that his inbound inspections are not related to outshopping or outshop inspections.

Hearing Testimony of Mr. R. Bower (TR at 91-115)

Mr. Bower testified that he was the full-time officer who went to Memphis to assist the local

chairman in conducting the investigation into alleged horseplay. He testified that he travels all over the country conducting investigations as part of his duties as a union officer. Mr. Bower reviewed the various union offices he has held in connection with the Respondent. He testified that he is familiar with the applicable collective bargaining agreement, the Respondent's disciplinary process, and the safety rules.

Mr. Bower testified that the Respondent has a progressive discipline policy. He testified that under such a policy, an employee's record with the Respondent is considered when assessing discipline. Mr. Bower testified that if an employee under investigation has no prior discipline he is normally treated as a "new offender" but that "sometimes it can be a disagreement between [the Respondent] and the union what's considered a standard violation and what's considered a serious violation of the rules." (TR at 95). Mr. Bower testified that a serious violation would be a violation contained in Appendix A of the policy and that Appendix B contains "stand alone dismissible violations. In other words, the company will dismiss you up for that violation the first time it occurs." (TR at 95). He testified that the Respondent officers interpret the rule.

Mr. Bower testified that if an employee has previous discipline in his record, it would depend on the nature of the violation in question. "An example would be if it's an attendance issue, there's a three or four step process before an employee would be disciplined, whether it's what they call a serious rule violation, a vehicle accident, that type of thing. Under their PPA policy, two times will usually get an employee dismissed." (TR at 96). Mr. Bower also reviewed the disciplinary process for absenteeism testifying that the first violation results in a reprimand, the second in a 10-day record suspension, the third in a 30-day record suspension, and the fourth may result in dismissal.

Mr. Bower testified that an employee who has a serious violation is not precluded from going through either alternative handling or getting a waiver. He testified that an employee can request alternative handling "for a safety rule violation, like a seat belt issue, something like that and alternative handling will not result in discipline on an employee's record. It usually results in like a schooling training...a shift briefing and discuss the rule and how to comply with the rule, that sort of thing." (TR at 98). Mr. Bower testified that a waiver is a contractual right under the agreement wherein an employee can waive his right to attend an investigation, admit the rule violation, and accept the discipline. Mr. Bower testified that the Complainant was not offered alternative handling or a waiver. Mr. Bower testified that the local chairman or he would discuss the possibility of alternative handling or a waiver with the employee. He testified that they would then have discussions with the general car foreman or the first line of lower management, and would then go to the superintendent of field operations. "If we still feel like it merits going further, we would then go to the CMO, chief mechanical officer." (TR at 100). He testified that three officials are generally involved in the decision for an employee to have alternative handling: the general foreman, field superintendent, and field operations or chief of mechanical, but "as far as who makes those decisions, I can't answer that. I don't know who's making the decision on any given day or any given situation, but it's those three people." (TR at 102).

Mr. Bower testified that the general foremen in his experience have input into whether an employee goes to an investigation testifying, "that's the person that feeds the information to the superintendent to make the decision on whether an employee is going to be charged with an

alleged rule violation.” (TR at 102).

Mr. Bower testified that of the other employees who were involved in the incidents for which the Complainant was being investigated, Mr. Boykin and Mr. Shipp received discipline and that Mr. McBride was charged but not disciplined. He testified that he could not recall any other discipline being assessed. He testified that only the Complainant was terminated and only the Complainant was given “real time off.” (TR at 105).

Mr. Bower testified that in his capacity as a labor official, he is familiar with the costs associated with the health insurance the Respondent purchases for its employees. He testified that the monthly cost of hospitalization for carmen as of January of 2015 was \$1,284.82 per month. He testified that carmen are also provided through the collective bargaining agreement on-duty coverage, national dental plan, national vision plan, national early retirement major medical plan, and Aetna supplemental sickness benefits, as depicted in CX 7.

On cross examination, Mr. Bower testified that he represented the Complainant in his investigation hearing in February of 2013. When asked whether he was aware that the Complainant was precluded from eligibility for alternative handling because of the rules he was charged with violating, Mr. Bower answered, “According to what some managers say, that may be their opinion.” (TR at 111).

Mr. Bower testified that Appendix B to the disciplinary policy lists stand-alone dismissible offenses including “conscious or reckless indifference to the safety of themselves or others.” (TR at 112). When asked whether he understood that the Complainant was terminated for “misconduct, horseplay, indifference to the safety of himself and others, and conduct which contributed to a hostile work environment,” Mr. Bower responded that “I understand that’s what the company believes.” (TR at 112). He testified that he was present at the investigation hearing and that he heard the testimony of the witnesses, including Mr. Maggitt. Mr. Bower testified that the determination that the Complainant’s dismissal was currently being appealed under the collective bargaining agreement, but that to his knowledge no appeal of the decision not to offer the Complainant alternative handling was made. Mr. Bower testified that if the Complainant had accepted a waiver he would have had to admit to the charge in the investigation notice and accept the discipline under the PPA policy for the rule violations.

Hearing Testimony of Mr. K. Lanier (TR at 116-127)

Mr. Lanier testified that he was currently working for the Respondent and had done so for nineteen years, all of which was in the Memphis area. Mr. Lanier testified that in this time he had worked on the repair track and in the train yard, and had performed inbound and outbound inspections of trains. He testified that he undergoes annual certification for his job as a car inspector. He testified this certification is designed to help him detect and rate freight car defects. Mr. Lanier testified that he has field manuals from “the AAR”⁷ (TR at 118) and the FRA that he has reviewed in his work.

Mr. Lanier testified that in 2012 he was working as a car inspector in the train yard, as was the Complainant. Mr. Lanier testified that he and the Complainant worked as partners three to four

⁷ “AAR” is not otherwise defined; however it is reasonable to assume it refers to the Association of American Railroads.

times per week “at least.” (TR at 119). Mr. Lanier testified that at that time he had at least twelve years of experience as a car inspector. Mr. Lanier testified that at this time the supervisors began to follow the Complainant and him when they worked together to verify their work. Mr. Lanier clarified that following meant they would “physically get on the ATV and follow us while we were working and look at the bad order cards that we presented to the shop.” (TR at 120). Mr. Lanier testified that to his knowledge no other carmen on the third shift were followed around like he and the Complainant were. He testified that, “this went on for at least during the summer of 2012.” (TR at 120). Mr. Lanier testified that Mr. Loveall mostly followed them but that Mr. Ables also followed them.

Mr. Lanier testified that he discussed being followed with Mr. Loveall and that Mr. Loveall “told me that he was just doing what he was told and what he was told to do.” (TR at 121). Mr. Lanier testified that Mr. Loveall never explicitly stated who instructed him to follow them but that Mr. Jaramillo would have been above Mr. Loveall in the chain of command as the general car foreman. Mr. Lanier testified that as the general car foreman, Mr. Jaramillo would also have Mr. Ables reporting to him. Mr. Lanier testified that he did not see Mr. Loveall or Mr. Ables remove bad order cards from cars. He testified that “they just told us that there were too many bad orders going to the shop and our bad orders weren’t bad when they get there, but when they call it up, they never found anything wrong to my knowledge with what we were doing.” (TR at 122). Mr. Lanier testified that it was “pretty peculiar” to have supervisors follow him around on a shift and that, “As long as I’ve been in the railroad, I’ve never been physically followed every night ever by anybody.” (TR at 122). Mr. Lanier testified that he had also reported a personal injury at one time.

Mr. Lanier testified that he was present for the interview of the Complainant by Mr. Ables with two Respondent resource protection officers present. He testified that this interview occurred in January of 2013 and that he was present in his capacity as a union officer and the Complainant’s union representative. Mr. Lanier testified that in this meeting, which was in Mr. Ables’ office, the Complainant was questioned about train horns and was accused of being a thief. He testified that the officers threatened to arrest him. Mr. Lanier testified that he “never in [his] whole career seen anybody threatened like that” at the Respondent. (TR at 124). Mr. Lanier testified that the meeting seemed “over the top.” (TR at 124). He testified that the officers were physically imposing and that he and the Complainant moved their chairs so “they wouldn’t be standing over the top of us the whole time.” (TR at 125).

Mr. Lanier testified that since the Complainant was terminated, he had never been followed again. He testified that Mr. Jaramillo had not told him why he was followed.

In response to questions from this presiding Judge, Mr. Lanier testified that the presence of the two supervisors following and checking the bad order cards in 2012 did not put him in fear of death or immediate bodily harm, nor did he feel that he needed to leave the area because of threats of serious injury.

On re-direct in light of this presiding Judge’s questions, Mr. Lanier testified that the presence of the supervisors following them was a distraction, and that “it’s always a distraction when you think somebody is looking over your shoulder.” (TR at 126). Mr. Lanier testified that being

followed concerned him; specifically he was concerned that “ever move I was making was being watched and I ought to be watching out for my own safety out there instead of watching the supervisors.” (TR at 127). When asked if distractions create a safety issue in a train yard at night, Mr. Lanier testified in the affirmative. When asked if it was a concern for that reason, Mr. Lanier testified, “Well, yes. I mean, you lose your attention out there one second, you can get run over.” (TR at 127).

Hearing Testimony of Mr. R. Jaramillo (TR 129-192)

Mr. Jaramillo testified to his background with the Respondent starting with his work as a carman in 2002, working up to car foreman. He testified that when he was a carman, he conducted inspections of freight trains. He testified that when he was a carman, he had supervisors verify when he would bad order a car. He testified that they would "come behind us and verify our bad orders both on the inbound and the outbound side to verify that they were federal defects." (TR 132). Mr. Jaramillo testified that when supervisors found bad orders that were not federal defects the supervisors would provide additional training on federal defects. He testified that there is a difference between FRA defects and AAR defects and that "AAR is a little bit more lenient." (TR 133). He testified that in the train yard the focus was on FRA defects, "however, when it gets to the rip track, it's standard that we address all AAR defects." (TR 133). Mr. Jaramillo testified that as a car foreman or a front line supervisor he would verify bad order tags. He testified that there was no difference in how one would verify a bad order in Memphis than from the yard where he worked in Kansas City.

Mr. Jaramillo testified that if a car were bad ordered it could take "some time" to set the car out. He testified regarding outbound setouts that "trains are usually on average about a mile long so depending on where it's at in the train, you can't just pick a car up and set it to the other track. You actually got to drag the whole train out...and then back it into the certain track that you want it to be set out at. Even at that point, it's still not done because that car actually has to go back into a bad order track." (TR 135-136). Mr. Jaramillo testified that on inbound setouts, a car that is "bad ordered" is humped to the correct track. He testified that this causes extra switching for the crews and that additional switching results in additional risk to the crews. He testified that a car that is incorrectly bad ordered can also cause delayed freight, affecting the customer. "So, in hindsight, that car might have spent an extra day or two in the terminal trying to get to the rip track and then back to an outbound train." (TR 137).

Mr. Jaramillo testified that it was not unusual for car foremen or front line supervisors to follow behind carmen and check bad order tags, and that had happened to him when he was a carman himself in Barstow. He testified that he had done that as a car foreman or front line supervisor in Kansas City. He testified that when he was mechanical foreman he had a larger territory so he did not routinely check bad orders on the rip track but that when he was in the yard he would and would also monitor work plans and production of the rip track to look at the quality of work that was being done.

Mr. Jaramillo testified that he was a "general foreman 2" during his time in Memphis where he oversaw approximately 120-150 employees. He testified that he had carmen, electricians, machinists, etc., working for him, of which approximately 50-70 were carmen. He testified that

he identified several areas of concern he wanted to address in Memphis such as compliance with safety rules. He testified that he spot-checked the supervisors when he arrived in Memphis. Mr. Jaramillo testified that he also communicated his expectations to his supervisors in staff meetings. He testified that he instructed the supervisors to "verify all outbound setouts and we'd go down and verify that our inspectors on the inbound side were actually tagging FRA defects." (TR 141). He testified that some supervisors thought the change was positive and some did not like it. He testified that this instruction required them to spend more time in the yard.

Mr. Jaramillo testified that the Respondent's safety program includes annual safety certification training that all employees receive. He testified that in the instant case he was notified that a call had been made to the Respondent's safety hotline by email from his boss at the time, Mr. Collier. "He indicated that there was a hotline call and that I needed to investigate it to get with Resource Protection and HR and see how we needed to proceed and to report back to him with my findings within a week and that's what I did." (TR 142). Mr. Jaramillo testified that he read the hotline call that indicated there was an anonymous caller who reported that the Complainant and Mr. McBride threw fireworks at an individual in a locker room. Mr. Jaramillo testified that the caller indicated this was unsafe, was a form of harassment, and that he wanted it to be addressed.

Mr. Jaramillo testified that Resource Protection is the Respondent's police department and that they were involved in the incident because "the hotline call came in as a workplace violence type complaint. So, any type of workplace violence complaint gets investigated with Resource Protection." (TR 143). He testified that the investigation started with interviewing all of second and third shifts because he could not get additional information from the anonymous caller and those were the shifts of the individuals identified by the caller. He testified that he also believed it would be best to interview all of second and third shifts because the caller indicated the incident took place around the time of the shift turnover.

Mr. Jaramillo testified that he obtained written statements from everyone he interviewed. He testified that among the people he interviewed was a carman named Mr. Jones. He testified that when he spoke with Mr. Jones, he came to believe that Mr. Jones was the one who made the hotline call because Mr. Jones began talking about an incident in the locker room in which fireworks were thrown at him. Mr. Jaramillo testified that Mr. Jones indicated that "he was sitting in the locker room along with three other of his peers and they were having a discussion when [the Complainant] threw some fireworks behind his chair that he was sitting in and he lit them off which scared him." (TR 145).

Mr. Jaramillo testified that Mr. Jones told him that the incident was recorded and had been posted to YouTube, and that he had personally verified that such a video had been posted to YouTube. Mr. Jaramillo testified that he watched the video. He testified that Mr. Jones did not indicate why the video had been posted. "He at the time he was more concerned about his safety. He felt he was being harassed. He felt he was being targeted because this wasn't the only event that occurred to Mr. Jones." (TR 146). Mr. Jaramillo testified that Mr. Jones also described an incident with a horn in which the Complainant "had another employee lured Mr. Jones out into a parking lot and as he was lured out into the parking lot, [the Complainant] was sitting in his personal vehicle on [Respondent] property and honked the horn which ended up being something similar to a train horn which was very loud and startled him again." (TR 147).

Mr. Jaramillo testified that Mr. Jones texted him a phone recording of this incident. He testified that Mr. Jones intimated that the Complainant had “orchestrated” the air horn incident. (TR 148).

Referring to the video of the fireworks incident that he viewed on YouTube, Mr. Jaramillo testified that he saw Mr. Jones seated in a wheeled chair “leaning back, having a discussion with somebody that was recording him. If I recall right, I believe seeing one of the knees of the individual that was recording. To me, it appeared that the individual was trying to not be noticed that he was recording...” (TR 148). He testified that he saw the firecrackers go off,

I actually saw something from the left side of the screen come out from behind some lockers that landed right behind Mr. Jones and then you could hear them actually popping off. You could see them sparking off in the actual building...in a building setting going off and startling Mr. Jones.

(TR 148). He testified that it is not acceptable to set off fireworks in the locker room on Respondent’s property. Mr. Jaramillo testified that when he interviewed Mr. Jones, he did not expect to discover other incidents of harassing misconduct and pranks.

Mr. Jaramillo testified that he also interviewed Mr. Shipp because Mr. Jones had indicated that Mr. Shipp had been present for the fireworks incident. Mr. Jaramillo testified that he learned from Mr. Shipp that he was the individual who recorded the incident and that the Complainant had thrown the fireworks.

Mr. Jaramillo testified that he then interviewed Mr. Maggitt. He testified that during these interviews he had assumed that it was Mr. Jones who called because he had so much personal knowledge of the incidents, however, when Mr. Maggitt came in to be interviewed he identified himself as the caller. Mr. Jaramillo testified that he was shocked. He testified that Mr. Maggitt explained that

it was actually him that had gotten fireworks thrown at him on a separate occasion in the locker room and he indicated...that it was Mr. McBride and [the Complainant], but when I was having a discussion with him, he indicated that he had saw Mr. McBride at the end of the lockers as the fireworks were being thrown over the locker and he also indicated that there were only three people in the locker room which was Mr. Maggitt himself, [the Complainant] and Mr. McBride. So, when I asked him if he knew who actually threw the fireworks, he indicated that it was [the Complainant].

(TR 150). He testified that Mr. Maggitt told him the fireworks went off close to his face because he had been tying his shoe at the time, which Mr. Maggitt thought was “very serious and unsafe.” (TR 151). He testified that Mr. Maggitt said this was when he had decided he had had enough and to call the hotline, but that Mr. Maggitt also indicated that it had not been the first time that the Complainant had thrown a firework at a peer near an ATV. Mr. Jaramillo clarified that Mr. Maggitt told him about two different firecracker incidents. Mr. Jaramillo testified that Mr. Maggitt was upset and “He basically had enough. He was tired of the pranks and he felt he was being singled out and harassed.” (TR 151).

Mr. Jaramillo testified that he interviewed all of the second and third shift carmen, “just to be fair

and just to ensure that I got a clear picture of what was really going on and ensured that anybody and everybody that could have possibly seen anything related to the hotline call that I got their side of the story.” (TR 151). He testified that he discovered other kinds of horseplay going on in the yard as well, including employees involved in a footrace stating that “two employees were actually involved with the actual running on property which is a violation of our rules and then we also had an employee that recorded it which helped contribute to the foot race.” (TR 152).

Mr. Jaramillo testified that the employees involved in the footrace were also investigated, but he thought there was a difference between the footrace and the fireworks incident. He testified that the difference was that the fireworks and the air horn incidents were “more of a conduct type incident where employees were intentionally being startled without their knowledge. Employees were being harassed and they had no knowledge of it until it actually happened and that in itself fell under the conduct rule.” (TR 152).

Mr. Jaramillo testified that he learned about the source of the air horns during the course of the interviews. He testified that another co-worker had stated in an interview that the Complainant had stated he got the air horns from someone in the diesel shop. Mr. Jaramillo testified he was concerned about this because “that was potentially something new added to this investigation of a possible theft.” (TR 153). He testified that when he interviewed the Complainant, he asked about where the Complainant got the air horns. Mr. Jaramillo testified that the Complainant first said that he got the horn from his brother and that he initially refused to allow the Respondent to see the horns but later brought in “a horn that he said was mounted to his truck and allowed us to look at it.” (TR 153). Mr. Jaramillo testified that he was not able to confirm where the horn came from, “I looked at it. I didn’t find any distinguishable marks that indicated that it happened to be [Respondent] property so it was given back to him.” (TR 154).

Mr. Jaramillo testified that when he interviewed the Complainant a union representative and someone from Resource Protection were present, though “there was somebody from Resource Protection for everybody” because the incident was initially reported as a workplace violence-type violation. (TR 154). Mr. Jaramillo testified that before he interviewed the Complainant, he was concerned that there might also have been an incident of theft of Respondent property.

Mr. Jaramillo reiterated his earlier testimony that Resource Protection was involved because of the workplace violence nature of the report. He also testified that his supervisor, Mr. Collier, the Human Resources representative at the time, Mr. Anderson, and he were all involved in the decision to bring in Resource Protection.

Mr. Jaramillo testified that when he concluded his investigation he reported his findings to Mr. Collier, the field supervisor at the time, who oversaw the Springfield Division and part of the Nebraska Division. He testified that Mr. Collier made the decision whether to charge the Complainant with any rule violations. He testified that Mr. Collier tasked him with getting statements, beginning the investigation, and specifically to report back within a week. Mr. Jaramillo testified that the investigation took longer than that due to employee rest days, but that he kept Mr. Collier informed. Mr. Jaramillo testified that he provided Mr. Collier copies of the statements he obtained and a copy of the YouTube video. Mr. Jaramillo testified that after that his involvement in the process “died down” and his next involvement was when he testified as a

witness at the investigational hearing overseen by Mr. Mahoney.

Mr. Jaramillo testified that he did not make the decision to recommend dismissal for the Complainant. He testified that he recalled meeting with the Complainant in October of 2012 to discuss the Complainant's attempt to use the empowerment rule. Mr. Jaramillo testified that before that meeting, the Complainant had not raised any safety concerns with him related to front line supervisors verifying his bad orders. Mr. Jaramillo testified that Mr. Ables, the Complainant's supervisor that evening, reported that the Complainant did not give a specific reason for his safety concern "he just felt unsafe and he had to remove himself from work." (TR 158). Mr. Jaramillo testified that he encouraged the supervisor to try to figure out the specific issue so that he could address it "and at no time did [the Complainant] actually indicate what the actual safety issue was during that evening." (TR 159).

Mr. Jaramillo testified that the empowerment rule is

a tool that employees are able to use when they find themselves in an unsafe manner when maybe the task has changed or there's uncertainty. They can actually remove themselves from the workplace or from the work task, but they're also entitled to actually be part of the corrective action of how we can make it safe and that's done with our front line supervisors. So, it's not just removing yourself and say, "fix it."

(TR 159). Mr. Jaramillo testified that they still have to get job done with the safety concern being addressed, but that in the Complainant's case the attitude was "There's a problem. I'm not going to tell you what the problem is." (TR 159). Mr. Jaramillo testified that exercising the rule does not permit the employee to leave work.

Mr. Jaramillo testified that Mr. Anderson, a Human Resources representative, was present for the October of 2012 meeting with the Complainant, as was Mr. Mothershed, the local chairman at the time. He testified that the meeting began with trying to figure out what the safety concern was and how it might be addressed. He testified that the Complainant indicated he felt unsafe being followed to verify FRA defects. Mr. Jaramillo testified that the Complainant suggested it would be best if the supervisors could stay back while he was working. He testified that the Complainant also requested to see the company policy requiring that bad orders be verified, which Mr. Jaramillo testified could be found in the "Best Way Initiative." (TR 160). Mr. Jaramillo testified that he provided the Complainant a copy of the document and highlighted the portion explaining that "outshops were to be performed in the train yard." (TR 161). He testified he explained that the inspections were not going to be going away but that supervisors would stay out of sight while performing the outshops inspections.

Mr. Jaramillo testified that at the time he was concerned that cars were being bad ordered that were not FRA defects. He testified that in some instances a supervisor verified bad orders to find that they were not FRA defects but AAR defects. He testified that supervisors on all shifts were supposed to be verifying defects.

Mr. Jaramillo testified that they also discussed the proper use of the empowerment rule with the Complainant and that the way the Complainant removed himself from service and "abandoned his job" was not correct and could otherwise have resulted in "repercussions." (TR 162). Mr. Jaramillo testified that "in light of his safety concern of how he felt, I took into consideration that

we used it as a coaching type session and basically ensured that [the Complainant] understood the expectations going forward.” (TR 162). Mr. Jaramillo explained that the expectations were that the supervisors would “kind of stay back” but would continue doing their jobs. (TR 162).

Mr. Jaramillo testified that he was not aware that the Complainant made a complaint to OSHA in November of 2012. He testified that after the October of 2012 meeting, he instructed the supervisors to give the carmen more space. Mr. Jaramillo testified that he did not instruct supervisors to stop verifying bad orders after the Complainant was dismissed and that it was his expectation that they could continue verifying bad orders.

Mr. Jaramillo testified that he is currently a manager of mechanical service excellence, and that his duties include writing policies and procedures, determining when procedures are not being followed, and possibly revise policies to address issues. He testified that he is familiar with the Respondent’s code of conduct, which supervisors certify in annually and which addressed retaliation.

Referring to RX 3 at 1, Mr. Jaramillo testified that the code of conduct requires that employees who find something unsafe or illegal to report it. Referring to RX 3 at 2, he testified that the anti-retaliation policy prohibits retaliation against anyone “who might report a safety concern or any type of breaking of the law.” (TR 166). He testified that he did not retaliate against the Complainant for reporting a personal injury and that he was not aware that the Complainant had filed a complaint with OSHA in November of 2012. Mr. Jaramillo testified that he felt he complied with the Respondent’s code of conduct in his investigation of the Complainant.

On cross examination, Mr. Jaramillo testified that he left his job in Memphis in 2013 after a period of transition and started in Chicago in July. He testified that he made the decision to take the new job after being offered a “developmental move,” which is “just an opportunity for me to actually go and be in a different position to expand my knowledge from a railroad perspective.” (TR 169). He testified that he no longer supervises employees, and that he made the decision to move to Chicago on his own, not at the suggestion of any of his superiors.

Mr. Jaramillo testified that Mr. Collier, his supervisor when he was in Memphis, did not instruct him to have Mr. Ables or Mr. Loveall follow the Complainant. He testified that his instructions regarding outshops were “right in line with the Best Way policy which was to go outshop trains in the yard” and were not directed at a specific employee. (TR 171). When asked if he knew why it might be that other testimony in this hearing indicated that other employees were not followed, Mr. Jaramillo replied, “I can’t speak to that.” (TR 172).

Mr. Jaramillo testified that he did not speak with Mr. Ables or Mr. Loveall about how much time they spent following the Complainant and Mr. Lanier. He testified that he did not have a direct conversation with Mr. Ables about outshopping; “when I talked about outshops, it was specially the outlines of the roles and responsibilities.” (TR 172). He testified that after the October 2012 meeting, he instructed the inspectors to “go down the train a little bit further based off of [the Complainant’s] suggestion and to give them a little bit of space, but the instructions were still put out there that they would continue to do outshops.” (TR 173). He testified that he did not have a conversation about how frequently the Complainant was being followed by the supervisors.

Mr. Jaramillo testified that Mr. Collier informed him about the hotline call by email, and that he believed the date of the email was January 2nd. He testified that he took a written statement from Mr. Maggitt. When asked if he knew why it took “over three weeks, almost four weeks” for Mr. Collier to contact him about the call that came off the hotline, he testified that he did not know.

Mr. Jaramillo testified that he took statements from the men on second and third shifts, which was approximately ten to twelve men. He testified that there were some statements that were not included in the investigation because they not relevant to the Complainant. He testified that he did not show the Complainant or his union representative the statements that were not exhibits to the investigation hearing. He testified that he turned the statements over to human resources, but that he believed Mr. Collier received all of the documents related to the whole investigation. Mr. Jaramillo testified that he did not know what Mr. Collier did with the documents.

Mr. Jaramillo testified that the decision to investigate the hot sauce incident was made by himself, Mr. Collier, and Mr. Anderson. He testified that he provided daily updates on the hotline call investigation to Mr. Collier and that Mr. Collier advised that because the complaint was of a workplace violence nature, Resource Protection should be involved. Mr. Jaramillo testified that some of the verbal statements were retracted by those who were interviewed when Resource Protection was involved and the employees began to get in trouble themselves for their involvement in some of the incidents. He testified that some of the written statements were also retracted at the investigation hearing. He testified that he did not speak with the employees about retracting their statements. Mr. Jaramillo testified that he was aware of an email in which Mr. Jones indicated he felt he had been coerced into giving a statement.

Mr. Jaramillo reaffirmed his earlier testimony that it was unacceptable to throw firecrackers at another employee while on company property and denied having done so himself. He testified that specifically he did not throw firecrackers at another supervisor at a company picnic.

Mr. Jaramillo testified that he did not have any personal issues with the Complainant before January 3, 2013. He testified that he thought the Complainant did his job, but “there were some concerns. He had some attendance issues.” (TR 183). Mr. Jaramillo testified that he did not know if he made Mr. Collier aware of the Complainant’s attendance issues, but that Mr. Collier was new at the time the attendance issues arose and that Mr. Grubs, who was transitioning out of the position of field superintendent, was aware of the issues.

Mr. Jaramillo testified that when an employee under his supervision has an attendance issue, his superiors are informed through an automated attendance system that “gets sent as a report to general foreman and the field superintendent and it’s reviewed by the field superintendent and the general foreman.” (TR 185). He testified that discipline that is assessed goes into the employee’s transcript, and that it becomes known to anyone who has access to the transcript. Mr. Jaramillo testified that he was not sure who has access to the employee transcript, but that it would be accessed through the company website.

Mr. Jaramillo testified that he recalled the Complainant turning in a personal injury report in

August of 2011. He testified that the Complainant was off work for a period of time following the accident. He testified that hypothetically, if a person went to the emergency room for medical treatment of work injuries, that employee would not be held accountable for the time out of work. When asked whether receiving treatment for an on-the-job injury should under all circumstances be an excused absence, Mr. Jaramillo answered, "I would say so." (TR 189). Mr. Jaramillo testified that he did not recall if the Complainant received a formal reprimand in part because of an unexcused absence related to seeking medical attention on August 20, 2011, following an on-the-job injury.

On redirect, Mr. Jaramillo testified that the statements that he obtained that were related to the allegations of the Complainant's rule violations were attached to the investigation transcript. He testified that there was only one investigation into the hotline call. Mr. Jaramillo testified that if an employee is flagged for attendance issues, that is done through a computer automated system, which he does not control.

On re-cross, Mr. Jaramillo testified that in the one investigation into the hotline call, which included multiple employees, there were no other employees terminated or assessed actual time off.

Hearing Testimony of Mr. J. Mahoney (TR 200-244)

Mr. Mahoney testified that he had worked for the Respondent for 19 years having started as a machinist. He testified that in that position he inspected, repaired, manufactured wheel sets for freight cars. Mr. Mahoney testified that he was promoted to car foreman in 2001, which he testified would be the same as a front line supervisor similar to Mr. Ables and Mr. Loveall. Mr. Mahoney testified that his job duties as a front line supervisor included ensuring that trains get inspected in a timely manner and verifications of bad orders called in by carmen.

Mr. Mahoney testified that the bad ordering of cars that only have AR defects, and not FRA defects, affects operations –

We work in a time constrained environment where it's very important that we're meeting the safety criteria set forth by the FRA, but we don't want to be overzealous in our inspections and inspect to AR standards which could cause a large delay and I think it's been explained in past testimony what the difference is and what the delay can be.

(TR 201). Mr. Mahoney testified that AR defects would be caught during routine inspections on a schedule. He testified that carmen are looking for defects according to the FRA's "very defined set of criteria" of what constitutes a safety defect. (TR 202).

Mr. Mahoney testified that as a front line supervisor he is governed by Respondent rules and responsibilities including verifying bad orders. He testified that for a front line supervisor, "it is a requirement that on a daily basis you --- it's what we call an outshop of train inspections which include going behind the inspectors, verifying that the work they did is accurate and that the cars they bad ordered are federal defects, FRA defects in the yard." (TR 203).

Mr. Mahoney testified that he was then promoted to “manager of quality for mechanical zone 4,” which is the Chicago division, and later to the general foreman in the car department of Lincoln, Nebraska. (TR 203). Mr. Mahoney testified that as general mechanical foreman his duties included being responsible for the entire operation in Lincoln, which consisted of 150 carmen, several machinists, and electricians in Lincoln, as well as outlying locations. He testified that in this position he communicated his expectations and the applicable rules and responsibilities to his front line supervisors. He testified that these included supervising carmen, verifying outshopping trains, and verifying bad orders. Mr. Mahoney testified that he is currently the manager of mechanical training at the Technical Training Center in Kansas where he oversees the training programs for all of the mechanical crafts.

Mr. Mahoney testified that he conducted the Respondent’s investigation hearing in February of 2013. He testified that he had never worked with or supervised the Complainant or known him before the hearing. Mr. Mahoney testified that he did not know the Complainant had filed a complaint with OSHA in November of 2012. He testified that he was the hearing officer for all of the scheduled disciplinary hearings in the division. Mr. Mahoney testified that he did not participate in the investigation into the safety hotline call nor did he have any knowledge of the investigation itself or the results of the investigation prior to arriving in Memphis to conduct the hearing.

Mr. Mahoney testified that to prepare for the hearing he reviewed witness statements that were provided. He testified that his job as hearing officer is to ensure the hearing is held pursuant to the collective bargaining agreement. He testified that the Complainant was present for the whole hearing and was represented by a union official, Mr. Bower.

Mr. Mahoney testified that the hearing and his review of the witness statements indicated that the Complainant was involved in a pattern of harassing and inappropriate behavior on Respondent property. He testified that he learned from Mr. Maggitt’s testimony that he was so upset about the firecracker incident in the locker room that he called the safety hotline. Mr. Mahoney testified that Mr. Maggitt also described another firecracker incident in which he witnessed the Complainant throwing firecrackers at a co-worker. Mr. Mahoney testified that during the hearing the Complainant admitted to using an air horn to startle people and to posting the firecracker video to YouTube.

Mr. Mahoney testified that the air horn incident involved a carman named Mr. Jones and that he had the opportunity to view cellphone video of the air horn incident during the investigation hearing. Mr. Mahoney testified that the video, in conjunction with the investigation hearing testimony indicated that the horn was “no ordinary car horn. This was a high-powered air horn similar to what you’d see on a semi-truck or a train and as it’s activated next to someone standing close to it, it has the potential to harm them.” (TR 210).

Mr. Mahoney testified that he saw the YouTube video uploaded by the Complainant during the investigation hearing. He testified that the video showed Mr. Jones and a co-worker sitting side by side. The co-worker was making an attempt to record what appeared to be secretly - - - the phone was hidden at knee level kind of hidden out of sight and as [Mr. Jones] and he were discussing something, firecrackers were thrown at [Mr. Jones’] feet and exploded. It kind of

frightened him and got a big laugh out of his co-worker (TR 210). Mr. Mahoney testified that Mr. Jones testified at the investigation hearing that the Complainant threw the firecracker under his chair.

Mr. Mahoney testified that the testimony and written statements exhibited at the investigation hearing indicated that the Complainant had been involved in several incidents. He testified that Mr. Loveall and Mr. Ables did not testify at the investigation hearing and did not submit any statements that he considered in making his recommendation. Mr. Mahoney testified that his recommendation was “based solely on the transcript, the review of the transcript that was returned as well as the exhibits which included the signed, handwritten statements of all of the witnesses as well as the videos that were submitted.” (TR 211).

Mr. Mahoney testified that he made a recommendation that dismissal of the Complainant was appropriate discipline. He testified that he recommended dismissal because “there appeared to be a pattern of inappropriate behavior that was indifferent to the safety of his co-workers.” (TR 212). When asked whether the Complainant ever accepted responsibility or acknowledged his actions during the course of the hearing, Mr. Mahoney testified that “I don’t think [the Complainant] ever understood the seriousness of the charges brought against him.” (TR 212).

When asked to describe what happened relating to reports that some witnesses tried to retract their statements at the hearing, Mr. Mahoney testified that during the hearing all of the witnesses who were called had provided written statements. “When I questioned them in the hearing, they had a little trouble remembering exactly what they had written. When... I presented them with their handwritten statements...they all agreed that the statement that they had provided was truthful.” (TR 213). Mr. Mahoney testified that Mr. Maggitt’s testimony was also consistent with his written statement.

Referring to the Respondent’s code of conduct and anti-retaliation policy at RX 3 at 2, Mr. Mahoney testified that the policy means that “no one that works for [the Respondent] should be in fear of being retaliated against for reporting anything, whether it’s safety related, inappropriate behavior, rules violations, etc.” (TR 214). Mr. Mahoney testified that he did not consider the Complainant’s report of personal injury in August of 2011 when he made his recommendation for dismissal. He testified that he also did not consider the Complainant’s attendance issues in making his recommendation for dismissal because he only considered the hearing and the evidence presented.

Mr. Mahoney testified that according to the Respondent’s discipline structure, a violation of the conduct policy is a stand-alone dismissible offense. “After reviewing the evidence provided in the hearing, [the Complainant] was in violation of the conduct policy on at least two occurrences, if not more.” (TR 215). He testified that he believed the Complainant was indifferent to the safety of himself and others and that the Complainant’s standing in the PEPA (Policy for Employee Performance Accountability) did not have any bearing on his decision to recommend dismissal.

On cross examination Mr. Mahoney testified that he did not know the exact date he first became aware that he was going to be the hearing officer in the investigation hearing concerning the

Complainant, but that he was sure it was about the same time the Complainant found out. Mr. Mahoney testified that the first investigation hearing notice was dated January 8, 2013. He testified that though his name appears on the notice, the letter is sent by an automated program and that he receives it in the mail. The Complainant testified that he believed Mr. Jaramillo started the process.

Mr. Mahoney testified that he first learned there was an anonymous employee call on January 2, 2013, in the course of the investigative hearing. When asked about Mr. Jaramillo's earlier testimony that Mr. Maggitt's call came in on December 7, 2012, Mr. Mahoney testified that he was not aware of any other anonymous calls. Mr. Mahoney testified that the investigation occurred in February of 2013. He testified that the initial investigation notice was issued on January 8th and that an amended notice was issued on January 14, which added allegations concerning fireworks. When asked why the fireworks were not included in the initial notice, Mr. Mahoney testified that he did not know. He further testified that he had no knowledge of what was being charged other than what was written in the investigation notice because he receives the notices at the same time as the principal. When asked whether he considered that Mr. Maggitt's statement was issued eight days after the amended Notice of Investigation charging the Complainant with the fireworks incident, Mr. Mahoney testified that "it wasn't the only event involving fireworks." (TR 230).

Referring to Mr. Maggitt's statement at the investigation hearing, Mr. Mahoney testified that whether the statement contained the work "firecracker" was a matter of semantics "You say fire popper, I say firecracker. Some people say fireworks." (TR 230). Mr. Mahoney testified that the statement mentions fireworks were "popping" and that he "had to turn his head while they were popping to keep them from popping in his eyes." (TR 231). Mr. Mahoney testified that the statement did not contain a reference to anything being lit. He testified that he did not ask Mr. Maggitt to identify precisely the fireworks or that they had been lit, "but the YouTube video clearly showed lit firecrackers being exploded in the locker room." (TR 231). When asked whether Mr. Bower testified in the investigation hearing that he had not seen who threw the fireworks, Mr. Mahoney testified that Mr. Bower had assumed by process of elimination of who was in the locker room at the time that the Complainant threw the fireworks.

Mr. Mahoney testified that he referred to Appendix B of the PEPA policy. He testified that he did not refer to Appendix B of the PEPA policy in the dismissal letter at RX 2, and that he did not refer to stand alone violations in the letter. Mr. Mahoney testified that as noted in the letter, he reviewed the Complainant's personnel file as an exhibit to the investigation transcript. He testified that the Complainant's employee transcript included as Exhibit 23 to the investigation transcript, contains two discipline events- "a formal reprimand and a record suspension for excessive absenteeism." (TR 235). Mr. Mahoney reviewed the dates of the various disciplinary actions and testified that he was not aware of any other portion of the Complainant's personnel file than what was contained in the investigation transcript. Referring again to the dismissal letter, Mr. Mahoney testified that the letter does not contain the word "conscious" or reference "conscious and reckless indifference." (TR 236).

On re-direct examination, Mr. Mahoney reiterated his testimony that he reviewed the transcript, exhibits, and statements presented during the investigation hearing as the basis for his

recommendation to dismiss the Complainant. He testified that this included the Complainant's employee transcript that was made an exhibit to the investigation hearing. Mr. Mahoney testified that the purpose of reviewing the Complainant's employee transcript is to "ensure that he was current with his mechanical safety rules qualification." (TR 241). Mr. Mahoney testified that he checked for this because the Complainant was charged with violating mechanical safety rules, which Mr. Mahoney ultimately determined the Complainant did violate. Mr. Mahoney testified that he also determined the Complainant was indifferent to the safety of himself and others and that he contributed to a hostile work environment. Having reviewed the transcript, Mr. Mahoney testified that in the investigation hearing Mr. Maggitt indicated that the Complainant lit fireworks on Respondent property.

Mr. Mahoney testified that in recommending dismissal, he complied with the Respondent's code of conduct and its anti-retaliation policy.

Hearing Testimony of Derek Cargill (TR 245-260)

On direct examination Mr. Cargill testified that he was the Director of Employee Performance in the Labor Relations Department and had worked for the Respondent since April of 2011. He testified that Labor Relations is not involved in the investigation of alleged rule violations or reports of injury. He testified that his duties include overseeing the discipline process for scheduled employees so it is his responsibility to oversee the PEPA policy. He testified that the PEPA policy is the policy that dictates "how scheduled employees are disciplined for different types of rule violations." (TR 247). Mr. Cargill testified that he oversees that process and assists supervisors in the field who have a question about the administration of the policy.

Mr. Cargill testified that the PEPA policy is a progressive discipline policy, which means that there are three types of violations under the policy. He testified that the first type is "standard violations which would be the most less severe violations in terms of discipline." (TR 247). He then testified the next step up is "Level S or serious violations and the next step above that would be standalone dismissible violations." (TR 247). Mr. Cargill testified that if an employee has five standard violations in a 12-month period, the employee can be dismissed. He testified that an employee can be dismissed for "two active Level S or serious violations...but for stand-alone violations, the employee could stand for a dismissal...regardless of whether or not his discipline record is clean." (TR 248). Mr. Cargill testified that Appendix B of the PEPA policy addresses stand-alone dismissible violations and lists eleven violations, but indicates the list is not exhaustive.

Mr. Cargill testified that, pursuant to the collective bargaining agreement, before an employee is disciplined there must be a discipline investigation. He testified that a transcript is produced after the investigation takes place "and if the supervisors in the field look at the case as a potential dismissible violation and they recommend dismissal for the case, then they will send the transcript to me for review and then I will review it and make a recommendation." (TR 250). Mr. Cargill testified that the conducting officer, such as Mr. Mahoney, would make the recommendation about discipline.

Mr. Cargill testified that in the instant case he received a report, recommendation, and

investigation transcript from Mr. Mahoney. He testified that prior to making his own recommendation of dismissal for the Complainant, he reviewed the investigation transcript, the attendant exhibits, and the Complainant's disciplinary history found in his employee transcript. He testified that the Complainant's disciplinary history did not play a role in his determination that the Complainant should be dismissed because the case involved stand-alone dismissible violations. "Since this was a stand-alone violation, his discipline record was irrelevant." (TR 251).

Mr. Cargill testified that he reviewed the YouTube video of the firecracker incident that was posted by the Complainant as well as the cell phone video of an air horn incident involving Mr. Jones. Mr. Cargill testified that in the YouTube video he saw Mr. Jones seated in the locker room conversing with a coworker "and then at one point, you can hear loud fireworks going off. Mr. Jones is obviously startled and jumps out of his chair." (TR 252). Mr. Cargill testified that the video shows the firecrackers exploding. He testified that in the cell phone video of the air horn incident involving Mr. Jones, "you can see Mr. Jones walking past a vehicle and then at one point, a very loud train horn goes off and again it's obvious that Mr. Jones is startled." (TR 252).

Mr. Cargill testified that based on his review of the investigation transcript, including the videos he described, he determined the Complainant violated safety rules; specifically he determined the Complainant violated mechanical safety rule 28.6 relating to conduct and rule 1.2.9 prohibiting horseplay, practical jokes, and harassment. Mr. Cargill testified he determined the Complainant contributed to a hostile work environment and that his harassing conduct was indifferent to the safety of himself and others. Mr. Cargill testified that these violations are stand-alone dismissible violations.

Mr. Cargill testified that under Appendix B of the PEPA policy, Subpart 6, "conscious or reckless indifference to the safety of themselves, others, or the public is a stand-alone dismissible event. It also lists malicious rule violations as a stand-alone dismissible event." (TR 253). Mr. Cargill testified that he was not instructed to make a recommendation for dismissal. He testified that he was not aware that the Complainant reported any alleged safety violations or removed himself from service in October of 2012. He testified that he was not aware the Complainant made a complaint with OSHA in November of 2012. He testified that he did not consider the Complainant's personal injury report in making his recommendation for dismissal because he was unaware the Complainant made such a report.

Mr. Cargill testified that he was familiar with the Respondent's anti-retaliation policy in the code of conduct. He testified that he believed the policy means that retaliation of any kind is prohibited and "if you become aware of any retaliation, that you should immediately report it to your supervisor." (TR 255). Mr. Cargill testified that all employees are required to complete training annually on the code of conduct.

Mr. Cargill testified that he did not recall whether he consulted with Mr. Jaramillo before recommending and approving dismissal. He testified that after an employee is dismissed, that would be noted in the employee's transcript.

On cross examination Mr. Cargill testified that his recommendation for dismissal would have

been made before an actual dismissal letter was issued. He testified that he would have received the transcript from Mr. Mahoney via email in late February or early March. Mr. Cargill testified that he had no involvement in initially pulling the Complainant from service and that he did not know who made that decision. Mr. Cargill testified that he could not recall having any input into the dismissal letter sent to the Complainant by Mr. Mahoney, other than recommending the Complainant's dismissal to Mr. Mahoney. Mr. Cargill reiterated his earlier testimony that he reviewed all of the transcript documents in making his decision.

Documentary Evidence

Employee Personal Injury/ Occupational Illness Report (CX 1)

The form indicates the Complainant injured his back while working on August 19, 2011, and reported the injury on August 21, 2011. The form indicates the Complainant's supervisor was Mr. Ables.

Notice of Investigation May 25, 2012 (CX 2)

The letter, addressed to the Complainant, indicates that an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged excessive absenteeism on 5/13/2012" would be held on May 31, 2012. The letter indicated the Respondent first knew of the incident on May 17, 2012, and that the Complainant was not eligible for alternative handling. The letter directs the Complainant to contact Mr. Jaramillo with any questions, but is signed by another general foreman.

Notice of Dismissal May 4, 2013 (CX 3, RX 2)

The letter, addressed to the Complainant, indicates that the Complainant was being dismissed effective immediately as a result of an investigation held on February 13, 2013. The letter states the Complainant was dismissed "for misconduct, horseplay, indifference to safety of yourself and others, and conduct which contributed to a hostile work environment while working as a carman...from early 1st quarter of 2012 to January 8, 2013." (CX 3 at 1). The letter states that it was determined the Complainant was in violation of "MSR S-1.2.9 Horseplay and MSR S-28.6 Conduct." (CX 3 at 1). The letter states that consideration was given to the Complainant's personnel record and that the discipline assessed was in accordance with the Respondent's Policy for Employee Performance and Accountability (PEPA). The letter contains the signature of Mr. Mahoney.

Employee Transcript (CX 4)

The exhibit, dated January 9, 2013, contains the employment history, discipline record, personal injury record, leave history, and training record of the Complainant. The exhibit indicates the Complainant was hired by the Respondent on March 20, 2006. It indicates the Complainant was formally reprimanded on June 27, 2012 for excessive absenteeism on May 13, 2012, and received a record suspension for excessive absenteeism on October 2, 2012. The exhibit indicates the Complainant injured his back on August 19, 2011, while on duty.

Employee Transcript (CX 5)

The exhibit, dated May 28, 2013, contains the employment history, discipline record, personal injury record, leave history, and training record of the Complainant. The exhibit indicates the Complainant was hired by the Respondent on March 20, 2006, and Dismissed for Cause on March 4, 2013. It indicates, in addition to the discipline history described in CX 4, that the Complainant was dismissed on March 4, 2013, for “misconduct, horseplay, indifference to safety of yourself & others, & conduct which contributed to a hostile work environment while working as a carman in Memphis, TN Terminal – MSR S-1.2.9, S-28.6.” The incident date is listed as January 4, 2013. The transcript contains the same personal injury record as described in CX 4.

Investigation Hearing Exhibits (CX 8)

- “Exhibit 1” This exhibit is the affidavit of Mr. Mahoney.⁸ The affidavit is generally consistent with Mr. Mahoney’s hearing testimony.⁹ Mr. Mahoney testified that the anonymous caller to the safety hotline “expressed concern for his safety and the safety of his coworkers due to his coworkers engaging in a continuous series of pranks...” (CX 8 at 2). Mr. Mahoney testified the Complainant was initially charged by written notice on January 8, 2013, relating to “misconduct, horseplay, and contributing to a hostile work environment” but that the Respondent issued an amended notice on January 14, 2013, to include charges related to the use of fireworks and an air horn, with a second amended notice issued February 13, 2013, relating to scheduling of the investigation hearing. Mr. Mahoney testified that the investigation hearing revealed the Complainant had been involved in “at least five (5) on-duty incidents” of misconduct including throwing fireworks at Mr. Maggitt in the locker room, throwing fireworks at Mr. Maggitt and Mr. Houston while they were working near a railroad track, throwing fireworks at Mr. Jones in the locker room, at least two incidents of attempting to startle coworkers with an air horn including a specific incident involving Mr. Jones and a specific incident involving an outside contractor. Mr. Mahoney testified that MSR S-28.6 states that employees must not be careless of safety or negligent, and that any act of hostility, misconduct, or willful disregard affecting the interest of the company is cause for dismissal. He also testified that MSR S-1.2.9 states that employees must conduct themselves in a way supporting a safe environment “free of horseplay, practical jokes, and harassment.” (CX 8 at 4).
- Exhibit E¹⁰ The exhibit to the affidavit indicates the Mechanical Safety Rule S-28.6, entitled “Conduct,” states that employees must not be “careless of the safety of themselves or others, negligent,” or several other characteristics. (CX 8 at 7). The rule goes on to state that “any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal...” (CX 8 at 7).
- Exhibit F The exhibit to the affidavit indicates the Mechanical Safety Rule S-1.2.9, entitled “Horseplay,” directs employees to “conduct yourself in a way that supports a safe work environment – free of horseplay, practical jokes, and harassment.” (CX 8 at 9).
- Exhibit G¹¹ The exhibit to the affidavit indicates the Respondent’s Policy for Employee Performance Accountability (PEPA) supports the company’s vision of becoming “injury and accident free by encouraging all employees to demonstrate safe work behaviors and ensure a safe work environment.” (CX 8 at 11). The exhibit describes the categories of discipline under the PEPA

⁸ This affidavit was accepted into evidence as sworn testimony during the hearing. (TR 224).

⁹ Only those portions that clarify, elaborate on, or are inconsistent with the hearing testimony are summarized here.

¹⁰ Only certain exhibits referenced in the affidavit are included in CX 8.

¹¹ This exhibit is also submitted as RX 6.

policy, which are standard, serious, and stand-alone dismissible. The exhibit indicates the first serious violation will result in a 30-day record suspension and a review period of 36 months while a second serious violation within the review period might result in dismissal. The exhibit indicates that serious violations include, but are not limited to, violations of any work procedure designed to protect employees, violations of operating rules for which FRA decertification is also mandated, late reporting of an injury, EEO policy violations, and unauthorized absences. The exhibit indicates that stand-alone dismissible violations include theft of Respondent property, violence in the workplace, conscious or reckless indifference to the safety of themselves or others, malicious rule violation, aggravated EEO policy infractions, or a rule violation that could result in serious injury to another employee. Both the list of serious and stand-alone dismissible violations are noted to be non-exhaustive.

2011 Code of Conduct Reporting Violations (RX 3)

The exhibit appears to be an excerpt from the Respondent Code of Conduct. The exhibit indicates that employees are required to report violations of the law, the Code of Conduct, and any Respondent policy. The exhibit indicates employees can make reports to any Respondent supervisor, other company officers, and to the Respondent hotline. The exhibit indicates calls to the hotline can be made anonymously. The exhibit also contains a page entitled “No Retaliation,” which indicates that retaliation for good faith reporting of violations is prohibited and that acts of retaliation could lead to disciplinary action up to and including dismissal.

Equal Employment Opportunity Policy (RX 4)

The exhibit indicates that the Respondent’s policy is to provide equal employment to all employees and that no person is to be discriminated against due to “race, color, religion, national origin, sex, age, marital status, genetic information, veteran status, disability, sexual orientation, pregnancy, or any status protected by law.” (RX 4 at 1). The policy further prohibits “retaliation against any employee for exercising rights protected by this policy, including the right to make a complaint and the right to participate or assist in an investigation of a complaint of discrimination.” (RX 4 at 1).

Investigation Transcript (RX 5)¹²

The exhibit indicates the purpose of the investigation was to “determine [the Complainant’s] responsibility, if any, in connection with the alleged misconduct, horseplay and contributing to a hostile work environment in relation to the use of fireworks on Respondent property and startling people with an air horn.” (RX 5 at 1). The exhibit indicates the date of the incident was January 4, 2013, that the date of the investigation hearing was February 13, 2013, and that the conducting officer was Mr. Mahoney.

The transcript contains several exhibits, summarized below, that were read into the record. The transcript contains the unsworn testimony of several witnesses including Mr. Jaramillo and the Complainant. The statements of the witnesses who also testified at the live hearing before this presiding Judge were consistent with their sworn testimony except for any clarifications, additions, or differences summarized below.

¹² There are two DVDs attached to this exhibit, marked as RX 5 (a) “Firecracker Video” and RX 5(b) “Horn Incident Video.” These videos will not be considered and are attached to the record for appeal purposes.

Testimony of Mr. Jaramillo (RX 5 at 21-78)

Mr. Jaramillo described his investigation interview with Mr. Jones and indicated that Mr. Jones named the other employees involved in the fireworks, air horn, hot sauce, and other incidents of “horseplay.” (RX 5 at 23-24). Mr. Jaramillo read into the record the written statements that were given to him by employees he interviewed in connection with the hotline call that are attached to the transcript as exhibits and are summarized below. He explained why he submitted many of the statements into evidence. Mr. Jaramillo submitted two statements from Mr. Jones into evidence. He explained that he entered the second statement, attached as Exhibit 5 to the transcript, into evidence “based off of the practical jokes. I asked for this statement based off of... a separate investigation of a foot race.” (RX 5 at 32). Mr. Jaramillo stated that he thought it was important to include in the instant investigation because of “the part where he says how he put certain people on notice that he wasn’t going to take...to be part of practical jokes anymore and whatnot.” (RX 5 at 32).

Mr. Jaramillo stated that he submitted the Complainant’s statement into the record, as Exhibit 6 to the transcript, because the Complainant stated “I did not make anyone light fireworks, I didn’t encourage anyone to blow a horn...basically the evidence supporting the fireworks incident and the horn incident.” (RX 5 at 34). Mr. Jaramillo stated that he submitted the e-mail from Mr. Jones, Exhibit 7 to the transcript, was related to a separate investigation but “I thought the relevance...of submitting this was for one, due to he talks about certain incidents that have occurred to him...There’s some ongoing issues with Mr. Jones...with the fireworks, with the horn... and then... whatever else he might disclose.” (RX 5 at 38-39). Mr. Jaramillo stated that he submitted the last statement from Mr. Jones, attached as Exhibit 8 to the transcript, because the statement related to Mr. Jones being a victim of multiple pranks, described various horseplay incidents that “centered around him”, and referred to the actions as a form of harassment, discrimination, and defamation of character.

Mr. Jaramillo read Mr. Boykin’s statement into the record as Exhibit 9. Mr. Jaramillo explained that he learned from his interview of Mr. Boykin that regarding the hot sauce incident, the people who ate the hot sauce poured the hot sauce themselves. Mr. Jaramillo also stated that Mr. Boykin mentioned in his interview that the horn from the air horn incident came from the Respondent’s diesel shop.

Mr. Jaramillo stated he then interviewed Mr. Cohen, who said he had seen fireworks used at work in an incident about a year prior that involved the Complainant and several other employees. Mr. Jaramillo indicated that he also learned from Mr. Cohen that the Complainant lit the fireworks in the incident that was later posted to YouTube and that Mr. Cohen had been present for the air horn incident and had himself been subject to the use of the air horn by the Complainant. He stated that Mr. Cohen provided three statements, each of which Mr. Jaramillo submitted as exhibits and read into the record as Exhibits 10-12.

Mr. Jaramillo stated that he interviewed Mr. Shipp next, and that they first discussed the fireworks incident. He stated that Mr. Shipp first described an incident in the rip track locker room sometime between late 2011 and the spring of 2012 in which the Complainant played a trick on Mr. Jones. He stated that Mr. Shipp told him that he recorded the incident because he

knew the Complainant was going to light the fireworks and he wanted to see Mr. Jones' reaction. He read Mr. Shipp's statement, submitted as Exhibit 13, into the record. He explained that he and Mr. Shipp drew a diagram of how the fireworks incident unfolded, which was entered into the record as Exhibit 14.

Mr. Jaramillo stated that he next interviewed the Complainant and that they began by discussing the fireworks incident, the video which the Complainant admitted posting online. He stated that the Complainant indicated he had stepped out of the locker room to spit out some tobacco at one point and that he was standing by the door. Mr. Jaramillo stated that the Complainant reported Mr. Jones assumed the Complainant had thrown the fireworks and threatened to "get him back." (RX 5 at 54). Mr. Jaramillo stated that the Complainant reported having taken the video down after having received a phone call that it was "causing a bunch of ruckus and we were investigating it." (RX 5 at 54). Mr. Jaramillo stated that the Complainant denied lighting the fireworks, but agreed that Mr. Jones and Mr. Shipp could not have done so and stated he did not see Mr. Cohen light the fireworks. Mr. Jaramillo stated that the Complainant reported Mr. Jones was not picked on and that Mr. Jones played jokes over the radio.

Mr. Jaramillo stated the Complainant indicated the air horn was given to him by his brother and that he had shown people the video of the incident on his phone. Mr. Jaramillo stated the Complainant was sorry if Mr. Jones had felt harassed but that it was a "harmless prank." (RX 5 at 56). He stated the Complainant also discussed the air horn incident involving a contractor on Respondent property. Mr. Jaramillo stated that the Complainant described the incident and said he just "couldn't resist" startling the contractor, though he reported apologizing to the contractor. (RX 5 at 57). Mr. Jaramillo submitted three statements from the Complainant as Exhibits 15-17 and read them into the record. He also submitted a "voluntary statement" from the Complainant that was entered as Exhibit 18.

Mr. Jaramillo stated that he also interviewed Mr. Houston and that they discussed the air horn incident. He stated that Mr. Houston reported he was the person the Complainant got to "lure" Mr. Jones out to the parking lot before the air horn incident. (RX 5 at 63). Mr. Jaramillo stated that at first Mr. Houston denied his involvement. Mr. Jaramillo entered Mr. Houston's statement as Exhibit 19 and read it into the record. Mr. Jaramillo stated that he also interviewed Mr. Maggitt, who provided a statement that was submitted as Exhibit 20 and read into the record. He stated that he learned additional information from Mr. Maggitt that he had not learned from others that he characterized as "alarming." (RX 5 at 65).

Mr. Jaramillo stated that the activities he uncovered in these statements indicated three rule violations had occurred including S-1.2.9 the rule against horseplay, S-28.4 "Carrying Out Rules and Reporting Violations," and S-28.6 the rule governing conduct and prohibiting negligence. Mr. Jaramillo testified that the last rule was violated in several ways

bringing fireworks on property for one, um, and lighting them off, um could potentially cause harm, not only to the individuals that they were directed at, uh, but also to the employee...who had lit them off. Um, fireworks can, uh, cause harm, and they're unwarranted on [Respondent] property. Um, being discourteous based off of, uh, statements of feeling harassed by Mr. Jones, um and, pranking individuals... not only Mr. Maggitt on two separate occasions, um, but Mr. Jones also on two separate occasions, our...guest or Contractor, um,

um, and that in itself would, would be discourteous to employees by playing these practical jokes. Um, any act of hostility or misconduct, uh based off of...the allegations against [the Complainant], um it is creating a hostile work environment...and it's a willful disregard and negligence, uh, affecting the interest of the company and all the employees. (RX 5 at 70).

Mr. Jaramillo stated that though the incidents he uncovered went back into 2012, they were not reported to him or his managers in the past and that his firsthand knowledge of the activity was January 4, 2013.

Testimony of Mr. Flynn (RX 5 at 78-101)

Mr. Flynn stated that he had been a special agent for the Respondent for approximately four years and that his duties include investigating any criminal activity against the railroad. He stated that he was familiar with the investigation into the report of fireworks being thrown at an employee. Mr. Flynn stated that he was part of the investigation and that the investigation found that there were several incidents of unacceptable behavior. "We definitely proved that fireworks were thrown down there at the car shop." (RX 5 at 80). He stated that the results of the investigation were turned over to Mr. Jaramillo for handling. Mr. Flynn read into the record statements by himself and one other special agent that were part of the Respondent Police Incident Report, which was submitted as Exhibits 24.

Mr. Flynn stated that the investigation did not substantiate any criminal misconduct but that the incidents did violate company rules 28.4 and 28.6. He stated that "we found them both to be...careless, negligent, uh, and especially the line here where it says any act of hostility, misconduct, willful disregard, or negligence affecting the interest of the company or its employees is cause for dismissal." (RX 5 at 99). Mr. Flynn stated that the Complainant violated rules S-28.6 and S-1.2.9. When asked how the Complainant violated these rules, Mr. Flynn responded that based on the investigation,

it's evident then from a collective effort down there that there was horseplay going on down there, from the fireworks incident to the train horn incident...the chicken incident could be somewhat questionable, but none of these in any way had any interest, uh, in furthering the goals of [the Respondent]...they were obviously deliberately, uh, directed towards a particular employee, uh, just for the sole purpose of amusement. (RX 5 at 99).

When asked whether the Complainant lit fireworks on company property, Mr. Flynn replied, "I cannot prove that. We do believe that to be the case." (RX 5 at 100). When asked whether the fireworks used on property were used to harass the Complainant's coworkers, Mr. Flynn replied, "Yes, that is evident from the video." (RX 5 at 100). Mr. Flynn stated that he never interviewed the Complainant. He stated that in the incidents described, the Complainant was not supporting a safe work environment free of horseplay, practical jokes, and harassment because it was evident from the statements that the Complainant was an integral part of the incidents, if not the main instigator.

Testimony of Mr. Jones (RX 5 at 102-112)

Mr. Jones stated he was a carman for the Respondent and that his primary duties in that position were to inspect cars and identify defects. He testified that he did not see who lit the firecrackers, but because they were lit behind him, he knew who did not light them. Mr. Jones stated that he did not believe the Complainant was a threat or that he meant to hurt anybody. He stated the Complainant violated the horseplay rule but that he did not know if the Complainant lit fireworks on the Respondent's property because he did not see the Complainant do so. When asked whether the incidents he described in his statements submitted by Mr. Jaramillo constituted a work environment free of horseplay, practical jokes and intimidation, Mr. Jones responded implying that his statements might have been influenced by coaching. Mr. Jones reiterated that the firecrackers were a practical joke, "But I mean, if you shut down pranks at the railroad, people having pranks, you're going to shut down the whole railroad." (RX 5 at 106).

Mr. Jones stated that during the fireworks incident, there were four people in the locker room: himself, Mr. Cohen, Mr. Shipp, and the Complainant. He stated that he knew Mr. Shipp recorded the incident, but did not necessarily know that during the incident. He stated that he could not see Mr. Cohen or the Complainant during the incident. When asked, Mr. Jones reiterated his earlier statement that the Complainant was not in compliance with the rules on horseplay, but also reiterated that he did not feel threatened or harassed by the fireworks or air horn incidents. However, Mr. Jones stated that during his interview with Mr. Jaramillo "he made me feel as though I was harassed, coached me to say that I was harassed. But he, [the Complainant], I mean...hasn't harassed me." (RX 5 at 109). When asked whether he felt coached to write the subsequent e-mail statements he provided that also mentioned harassment, Mr. Jones stated that he felt more harassed by Mr. Jaramillo and reiterated that the Complainant was not a threat and that his actions were just pranks.

Testimony of Mr. Shipp (RX 5 at 112-122)

Mr. Shipp stated that he had been a carman with the Respondent for four and a half years and that his primary duties were to inspect outbound trains. Mr. Shipp stated that he was in the locker room when the fireworks incident occurred along with Mr. Jones, Mr. Cohen, and the Complainant. Mr. Shipp stated that he was recording his conversation with Mr. Jones because he thought the content of the conversation was funny and indicated the conversation was related to a local election in which Mr. Jones was a candidate. Mr. Shipp stated that the Complainant had walked away to smoke and that during this conversation, fireworks went off behind Mr. Jones.

Mr. Shipp stated that his written statement submitted by Mr. Jaramillo was inaccurate because he was rushed into completing it. When asked what part of the statement was untrue, Mr. Shipp stated that he could not recall everything that happened because he was "rushed" and "intimidated" to give a statement. (RX 5 at 117). When asked whether the Complainant was in compliance with the safety rules, Mr. Shipp stated that since he did not know if the Complainant had done anything wrong, he could not say if he was in compliance with the rules.

Testimony of Mr. Cohen (RX 5 at 122-129)

Mr. Cohen stated that he had been a carman with the Respondent for about six years. He reviewed three written statements he provided regarding two incidents of use of an air horn in the

rip track and in the parking lot and an incident involving fireworks in the locker room. He stated that both incidents of the Complainant using the air horn the person at whom it was directed laughed it off, including himself. Mr. Cohen stated that he, the Complainant, Mr. Jones, and Mr. Shipp were present for the fireworks incident and that Mr. Shipp was recording a conversation among Mr. Shipp, Mr. Jones, and Mr. Cohen when fireworks went off behind Mr. Jones. Mr. Cohen stated that after the fireworks stopped popping, Mr. Jones was laughing. Mr. Cohen stated that though his written statement did not mention any other people than those four, there were others in the locker room at the time, though he could not recall them.

Mr. Cohen stated that he did not believe the air horn incidents he described indicated the Complainant violated any of the safety rules, including the rule concerning horseplay because he did not consider blowing the airhorn to be horseplay. Mr. Cohen stated that “Every day people blow their horns in the track.” (RX 5 at 126). Mr. Cohen also stated that he did not believe the Complainant’s uploading of video of the fireworks incident put the Respondent in a negative light. He also stated that the incidents he described, including the fireworks incident and two separate horn incidents, were free of horseplay, practical jokes, and harassment.

Testimony of Mr. Boykin (RX 5 at 129-138)

Mr. Boykin stated that he had been a carman with the Respondent for approximately a year and that his primary duties included inspecting inbound and outbound trains. Mr. Boykin stated that he only knew about the air horn incident that he recorded with his phone. He stated that he and the Complainant planned to startle Mr. Jones and for him to record it. Mr. Boykin confirmed he gave a written statement to Mr. Jaramillo but stated that he was “threatened” before he gave the statement. Mr. Boykin stated that he was told that if he failed to disclose what he knew, “they’d get me for insubordination, falsifying documents, and withholding information. And he told me more than likely, I’d be fired.” (RX 5 at 131). However, he also stated that the statement he provided was accurate.

Mr. Boykin stated that he did not believe that the Complainant meant to harm anyone with his pranks and that Mr. Jones thought they were funny and requested the video so he could show others. Mr. Boykin stated that he believed the Complainant may have violated the horseplay rule with the practical jokes but reiterated that he did not believe the Complainant meant any harm. Mr. Boykin stated that the Complainant was not careless of the safety of himself or others during these incidents and that he did not know if the Complainant lit the fireworks. Mr. Boykin stated that during these incidents the workplace was free of harassment but “maybe not of horseplay and practical jokes.” (RX 5 at 136).

Testimony of Mr. Houston (RX 5 at 138-144)

Mr. Houston stated that he had worked in the car department for the Respondent for about a year, and that his primary duty in that position was to inspect cars. He stated that he did not know about the fireworks incident but that he was familiar with the air horn incident involving Mr. Jones. Mr. Houston stated that he was not involved in the incident except that the Complainant or Mr. Boykin, he could not recall which one, asked him to send Mr. Jones outside. Mr. Houston stated that he did not initially relay that message but that he and Mr. Jones struck up a

conversation about a bike that Mr. Jones was riding. Mr. Houston stated that he and Mr. Jones went out to the parking lot together to look at the bike when they heard a loud horn. He stated that he did not know where the horn was coming from and that he was startled too. Mr. Houston stated that they saw Mr. Boykin and the Complainant by the Complainant's truck. Mr. Houston stated that he and Mr. Jones then continued on to look at the bike. He stated that he did not see Mr. Boykin recording the incident. Mr. Houston stated that he was not present for the fireworks incident but that Mr. Jones showed him a video of the incident.

When asked whether the Complainant violated the rule against horseplay or the rule governing conduct, Mr. Houston stated that he did not feel the rules applied to the Complainant because he did not see the Complainant do anything. He stated that after he heard the horn go off, he thought it came from a locomotive but that he did not look into it any further.

Testimony of Mr. Lanier (RX 5 at 144-146)

Mr. Lanier stated that he had been a carman for the Respondent for seventeen years and that he was the train yard inspector on the second shift. He stated he was not present for the fireworks incident and only knew about it from the video. Mr. Lanier stated generally the same for the airhorn and hot sauce incidents also; that he did not witness the events but knew about them.

Testimony of Mr. Maggitt (RX 5 at 146-155)

Mr. Maggitt stated that he had been a carman for the Respondent for about a year and that his primary duty in this position is working the train yard in the Car Department. He described an incident in December of the previous year in which fireworks went off near him while he was in the locker room. Mr. Maggitt stated that he called the hotline the following day. He stated that eventually rumors emerged about who made the hotline call so he told Mr. Jaramillo that it had been he who made the call and provided a statement, which was attached as Exhibit 20 and read into the record. Mr. Maggitt stated that based on the statement he provided, he did not believe that the Complainant was trying to hurt anyone intentionally.

Mr. Maggitt stated that the Complainant violated the rules regarding conduct and horseplay bringing fireworks on the property and "throwing them...towards my way because it could have caught me." (RX 5 at 152). He stated that the Complainant's use of fireworks was to harass or frighten coworkers and that the Complainant was careless of the safety of himself or others during these incidents. Mr. Maggitt stated that during the incidents described in his written statement the Complainant was not supporting a safe work environment.

In response to questions from Mr. Bower, the Complainant's union representative, Mr. Maggitt clarified what he wrote in his statement by explaining that he did not see the Complainant throw the fireworks. He also stated that at the time of the incident, only he, Mr. McBride, and the Complainant were in the locker room.

Testimony of the Complainant (RX 5 at 155-164)

The Complainant pled innocent to the charges contained in the notice of investigation. He stated that he believed he complied with the safety rules regarding conduct and horseplay. He stated

that at the time of the fireworks incident involving Mr. Jones, he had been in the locker room but stepped outside to spit out some tobacco and when he returned he heard fireworks going off. He stated that he did not know until after the fireworks went off that Mr. Shipp had recorded the incident and that he asked for Mr. Shipp to send him the video, which he did. The Complainant testified that he then sent the video to Mr. Jones and was later able to upload the video to YouTube.

The Complainant stated that his intent in getting Mr. Jones to come outside for the air horn incident was not to cause him harm but to “get a reaction out of him” and that it was a “harmless joke.” (RX 5 at 159). The Complainant stated that his intent in using the air horn to startle the contractor was also “just a joke.” (RX 5 at 159). He stated that he and the contractor had laughed about it afterward and that he had apologized but that he “couldn’t resist.” (RX 5 at 160). The Complainant testified that he did not use the air horn on anyone else while on Respondent property.

The Complainant stated that during the fireworks incident with Mr. Jones he only saw Mr. Cohen, Mr. Jones, and Mr. Shipp in the locker room but that there could have been others in the room. When asked whether his intent in dropping fireworks behind Mr. Jones’ chair was to harm him, the Complainant answered, “No, I did no such thing.” (RX 5 at 161). He stated that he did not recall the two other fireworks incidents described by Mr. Maggitt in his statements.

The Complainant stated that he believed he complied with the rule regarding conduct, and stated that he believed at his discretion he was in compliance with the rule regarding horseplay but that “people could take that as horseplay.” (RX 5 163).

Exhibit 1 (RX 5 at 170-176)

This exhibit includes the Notices of Investigation and postponements related to the disciplinary investigation.

Exhibit 2 (RX 5 at 184)

The exhibit is a handwritten statement dated 1/3/2013 signed by Mr. Jones. The statement was consistent with Mr. Jones’ description of the fireworks incident in the locker room. Mr. Jones wrote that he was the victim of a joke. Mr. Jones specifically wrote that he never saw who lit the fireworks, but that he was told it was the Complainant. Mr. Jones stated that he did not take offense at the joke but that he did not think fireworks inside a confined area was permissible. “The incident could of affected someone’s hearing...I don’t think all meant any harm but should be advised on the severity and safety of the incident.” (RX 5 at 185).

Mr. Jones’ statement also described the horn incident that took place in late October to mid-November. He wrote that he was asked to go outside by Mr. Houston where the Complainant blew his horn, “which was extremely loud.” (RX 5 at 186). He stated that the horn was loud enough to cause vibrations in the ground. He stated that again, he did not report this incident because he did not want to get anyone in trouble, but that he did warn the Complainant about the

danger of the horn. “I feel these guys doesn’t mean any harm, but are not aware of the damages that could occur.” (RX 5 at 186-187).

Exhibit 3 (RX 5 at 188)¹³

The exhibit appears to be a screen shot of a YouTube video titled “Best firecracker prank...EVER!!!.” The exhibit shows that the video was posted by a username with the Complainant’s first initial and last name.

Exhibit 5 (RX 5 189)

The exhibit is an email from Mr. Jones to Mr. Jaramillo dated January 9, 2013. The email first describes a footrace in which Mr. Jones and Mr. Lanier took part. However, Mr. Jones stated that the incident was not a “race” and that he and Mr. Lanier were moving at a “fast walk.” (RX 5 at 189). Mr. Jones wrote that he did not believe the race was “horseplay” because “neither guy wouldn’t attempt to do something unsafe.” (RX 5 at 189). The email indicates that Mr. Jones warned some co-workers that he would not be a part of the practical jokes any longer, but that he did want to create a fun atmosphere at work.

Exhibit 6 (RX 5 at 190)

The exhibit is an email from Mr. Jones to Mr. Jaramillo dated January 10, 2013. The email indicates that Mr. Jones was concerned about an investigation into his own actions and stated that he felt “used” as he was made out to be a victim of the jokes. He stated his disappointment at having been involved due to the inappropriate actions of others.

Exhibit 7 (RX 5 at 191)

The exhibit is an email from Mr. Jones to Mr. Mahoney dated January 11, 2013. The email references an investigation scheduled for January 23, 2013, involving himself, Mr. Lanier, and Mr. Cohen. The email addressed an incident that Mr. Jones asserted did not constitute a race and emphasized his commitment to safety. Mr. Jones wrote about his disappointment with the investigation process for various reasons, including involving him for what he considered unrelated issues.

Exhibit 8 (RX 5 at 193)

The exhibit is an email from Mr. Jones to Mr. Lancaster, Mr. Mabry, Mr. Anderson, and Mr. Grubbs. The email again expresses Mr. Jones’ disappointment with the investigation process, particularly the investigation into his own actions, which he considered to be unrelated to the investigation into the Complainant. Mr. Jones expressed his concern about the effect of the investigation on his reputation and more than once expressed that he was disappointed that he had to elevate the issue.

Exhibit 9 (RX 5 at 195)

¹³ This screen shot is also submitted as RX 7.

The exhibit is a handwritten statement dated January 6, 2013, and signed by Mr. Boykin. The exhibit describes the fireworks, hot sauce, air horn, and footrace incidents. Mr. Boykin also wrote as a note that he was told the horn was given to the Complainant by someone in the diesel shop.

Exhibits 10-12 (RX 5 at 199)

The exhibits are handwritten statements signed by Mr. Cohen and dated January 6, 2013. The exhibits describe two air horn incidents and the fireworks incident involving Mr. Jones. Mr. Cohen wrote in Exhibit 11 that he did not have a problem with the Complainant “[getting] his attention by using the air horn.” In each exhibit, Mr. Cohen indicated the involved parties laughed off each incident.

Exhibit 13 (RX 5 at 202)

The exhibit is a handwritten statement signed by Mr. Shipp dated January 6, 2013. The exhibit describes the fireworks incident and describes it as a “prank.” (RX 5 at 202).

Exhibit 14 (RX at 203)

The exhibit is a hand-drawn rough diagram of what appears to be the position of the parties involved in the fireworks incident with Mr. Jones.

Exhibits 15&17 (RX at 204)

The exhibits are handwritten statements signed by the Complainant and dated January 7, 2013. The statement at Exhibit 15 describes the air horn incident involving Mr. Jones. The Complainant wrote that he asked another employee to “lure” Mr. Jones outside where the Complainant blew the air horn and Mr. Boykin “happened” to record the event on his cell phone. The Complainant stated that the parties involved all laughed about it.

In the statement at Exhibit 17, the Complainant described the fireworks incident in “early 2012.” He wrote that after spitting out some tobacco, he saw Mr. Shipp, Mr. Cohen, and Mr. Jones were sitting and heard fireworks go off. The Complainant wrote that he later saw that Mr. Shipp had a video of the incident on his phone, which he sent to the Complainant. The Complainant wrote that Mr. Jones suggested he post the video to YouTube and laughed about the whole situation. The Complainant wrote that Mr. Jones “seemed to be very proud” of the video posted to YouTube.

Exhibit 18 (RX 5 at 206)

The exhibit is a form entitled “[Respondent] Railway Police Voluntary Statement” that was completed by hand and signed by the Complainant on January 8, 2013. The statement provided by the Complainant is consistent with the description provided by the Complainant at Exhibit 17.

Exhibit 19 (RX 5 at 207)

The exhibit is a handwritten statement dated January 7, 2013, and signed by Mr. Houston. The statement describes the air horn, footrace, firework, and hot sauce incidents. The exhibit indicates Mr. Houston was not present for the footrace and fireworks incidents but that he saw the cell phone videos of the incidents. Mr. Houston wrote that Mr. Jones told him that he did not like the hot sauce incident.

Exhibit 20 (RX 5 at 208)

The exhibit is a handwritten statement dated January 22, 2013, and signed by Mr. Maggitt. Mr. Maggitt described seeing video of the fireworks incident involving Mr. Jones. He also described witnessing the Complainant throw a “firepopper” toward Mr. Houston in the rip track. Mr. Maggitt also described an incident in which he, Mr. McBride, and the Complainant were in the locker room and a pack of firepoppers was thrown over the lockers. Mr. Maggitt’s statement indicated that he saw Mr. McBride at that time and that only himself, Mr. McBride, and the Complainant were in the locker room at the time. Mr. Maggitt wrote that on December 7, 2012, he called the Respondent Hotline to report the incident.

Exhibit 23 (RX 5 at 212)

This exhibit is the employee transcript of the Complainant which is also included in CX 4.

Exhibit 24 (RX 5 at 215-223)

The exhibit is an incident report by the Respondent Police completed by Mr. Flynn. The report indicates the “Mechanical General Foreman advised he had a hotline call regarding a possible rules violation/WPV and was requesting our assistance with it to determine if there was any criminal element involved.” The report indicates that Mr. Flynn was notified by Mr. Jaramillo that he had received notice of a hotline call from his supervisor, Mr. Collier. The hotline call related to an incident that occurred at the car shop and that they were requesting assistance from the Respondent Police. The report indicates the call was anonymous and that it alleged the Complainant and Mr. McBride set off firecrackers in the locker room. The report indicates Mr. Flynn or Mr. Connell attended interviews of several employees including Mr. Jones, Mr. Shipp, Mr. Boykin, Mr. Cohen, and the Complainant.

The exhibit indicates Mr. Flynn was present for the interview of Mr. Jones regarding the firecracker incident. Mr. Flynn noted that Mr. Jones was reluctant to speak about the incident “because he said he was a victim of the incident and was nervous that his coworkers would find out and retaliate against him.” (RX 5 at 220). Mr. Flynn’s summary of Mr. Jones’ description of the fireworks incident is generally consistent with Mr. Jones’ statements in the investigation hearing. However, Mr. Flynn’s summary indicates that Mr. Jones did not like the incident but laughed it off to avoid conflict with his coworkers. Mr. Flynn’s notes indicate Mr. Jones expressed the same wish to avoid conflict and get along with coworkers relating to the air horn

and hot sauce incidents in which he was the target.

Mr. Flynn's notes indicate he was also present for Mr. Jaramillo's interview with Mr. Cohen. He wrote that Mr. Cohen was evasive and argumentative in the interview. Mr. Flynn's summary of Mr. Cohen's interview is consistent with Mr. Cohen's statements in the investigation hearing. Mr. Flynn's notes indicate he was also present for Mr. Jaramillo's interview with Mr. Boykin. Mr. Flynn's summary of Mr. Boykin's interview is consistent with Mr. Boykin's statements in the investigation hearing. Mr. Flynn's notes indicate Mr. Boykin described incidents he had been present for including the hot sauce incident, the foot race, and the train horn incidents. Mr. Flynn's notes indicate that when asked by Mr. Jaramillo, Mr. Boykin reported that Mr. Jones was a frequent target of these pranks because "Mr. Boykin said Mr. Jones is an easy target and that he is very comical and dramatic in his reactions." (RX 5 at 221). The exhibit indicates that Mr. Connell was also present for the interview with Mr. Cohen. His notes also describe Mr. Cohen as "confrontational" and unwilling to answer questions. (RX 5 at 222). Mr. Connell's notes are otherwise generally consistent with Mr. Flynn's notes and with Mr. Cohen's statements in the investigation hearing.

The exhibit indicates Mr. Connell was the officer present for Mr. Jaramillo's interview with Mr. Shipp. Mr. Connell's notes indicate that Mr. Shipp admitted to filming the fireworks incident with Mr. Jones, but that he was reluctant to provide a written statement to Mr. Jaramillo. The notes summarize the conversation between Mr. Jaramillo and Mr. Shipp regarding the consequences of refusing to provide a statement and Mr. Shipp's insistence on obtaining union representation. Mr. Connell's notes indicate that Mr. Jaramillo asked Mr. Shipp not to discuss the matter with anyone else. He also noted that the fireworks video was removed from YouTube approximately fifteen minutes after Mr. Shipp left.

The exhibit indicates that Mr. Connell was the officer present for Mr. Jaramillo's January 7, 2013, interview with the Complainant. He indicated that in response to being asked if he knew why he was there, the Complainant answered regarding the fireworks incident and the air horn. Mr. Connell wrote that this answer caught his attention because the Complainant "should not have known about it yet." (RX 5 at 223). Mr. Connell's notes indicate that the Complainant admitted posting the video of the fireworks incident and admitted removing the video because he had "gotten a phone call that the video was causing some problems," but would not identify who had told him this. (RX 5 at 223). Mr. Connell's notes describe the conversation about the source of the air horn, which was consistent with the Complainant's statements in the investigation hearing and hearing before this presiding Judge. The notes indicate the Complainant said his brother bought the air horn and he bought the air horn from his brother. The notes indicate the Complainant became agitated when discussing whether Mr. Connell could go to the Complainant's house to see the horn before offering to bring the horn in for inspection.

Mr. Connell's notes indicate that the Complainant called him the following day to arrange to show him the air horn. Mr. Connell's notes indicated that he asked the Complainant for a statement, despite the Complainant having provided a statement to Mr. Jaramillo the previous day, because he needed the statement to be on the Respondent's statement form. The notes indicate that the Complainant apologized for becoming so upset the day before. Mr. Connell wrote that after he determined the horn did not belong to the Respondent, Mr. Jaramillo came

into the office and gave the Complainant an “investigation letter.” (RX 5 at 223). He indicated that the Complainant signed the letter and left the property.

DISCUSSION

The Complainant must make a *prima facie* showing of retaliation by demonstrating by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Consolidated Rail Corp. v. United States Dep't of Labor*, 567 Fed. Appx. 334, 337 (6th Cir. 2014); *Murphy v. Norfolk S. Ry. Co.*, 2015 U.S. Dist. LEXIS 25631, *11, 2015 WL 914922 (S.D. Ohio Mar. 3, 2015). At this stage, this presiding Judge may consider both the Complainant's and the Respondent's evidence that is relevant to the four elements of the Complainant's *prima facie* case. *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-00030 (ARB Mar. 20, 2015) (en banc); reissued with full dissent (ARB Apr. 21, 2015); vacated for member making ex parte communication (May 23, 2016)¹⁴. However, the Respondent's statutory defense is not relevant to the Complainant's *prima facie* case and is analyzed under a clear and convincing evidence standard if the Complainant successfully makes his *prima facie* case. Because proof of contributing factor does not require evidence of retaliatory motive on behalf of a respondent or its managers, evidence of a non-retaliatory motive does not rebut a complainant's evidence of contribution. *Id.* at 26-28. Rather such evidence is relevant to a respondent's statutory defense under a clear and convincing evidence standard. *Id.*

I. The Complainant has established by a preponderance of the evidence that he suffered only the adverse employment action of employment termination on March 4, 2013.

Section 20109(b)(1) of the FRSA and 29 C.F.R. §1982.102(b)(2), specifically prohibit a railroad carrier, or employee of a railroad carrier from suspending an employee for reporting a hazardous safety condition. Under the FRSA, a suspension constitutes an adverse action by an employer. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 5 (ARB Feb. 29, 2012). Discharge is identified in the FRSA as prohibited discrimination. 49 U.S.C. §20109.

Section 20109(d)(2)(A)(ii) of the FRSA and 29 C.F.R. § 1982.103(d), requires that a complaint of violations of the FRSA must be filed within 180 days of the alleged retaliation, i.e.: the adverse employment action. As stipulated by the Parties, the Complainant filed his initial complaint on November 27, 2012 and amended the complaint on May 22, 2013 to include retaliation in the form of employment termination on March 4, 2013. Accordingly, all alleged adverse employment actions that are attributed to the period prior to May 31, 2012, are time-barred from consideration as acts of retaliation under the FRSA.

The Parties have stipulated that the Complainant was “dismissed” from employment on March 4,

¹⁴ Issue addressed in *Powers* and *Fordham v. Mannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) concerning Employer evidence that may be considered in rebuttal during Complainant's case-in-chief seeking to establish protected activity contributed to retaliation is to be addressed in *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Jun. 17, 2016).

2013. The credible evidence of record establishes that the Claimant has not returned to work for Respondent since March 4, 2013. Accordingly, this presiding Judge finds that the Complainant suffered the adverse employment action of termination on March 4, 2013.

The only other alleged adverse employment action occurring on or after May 31, 2012, involves the allegation that the Complainant was threatened on October 23, 2012, by general foreman R. Jaramillo with AWOL, abandoning duties, and insubordination for leaving second shift work on October 20, 2012. The credible evidence of record established that in the July 2012 timeframe general foreman R. Jaramillo ordered his yard supervisors to check inbound railroad cars that were marked as “bad ordered” by carmen on their shift in order to ensure the defects were those under FRA standards and not AAR standards. The Complainant and his shift co-workers, K. Lanier and J. Boykin, performed work as carmen inspecting inbound rail cars and placing “bad ordered” paperwork (tags) on various rail cars during their shift work. Yard supervisors Lovall and Ables followed behind the Complainant and his assigned shift co-worker inspecting the “bad ordered” tags placed on rail cars. During one of the shifts K. Lanier was working with the Complainant, K. Lanier approached supervisor Lovall about following closely behind in an ATV checking the “bad ordered” tags he and Complainant had placed on rail cars. K. Lanier did not complain that the actions of the supervisors was distracting or a safety violation; but did inquire about the reason the supervisors were following and checking the “bad ordered” tags. The Complainant confronted supervisor Ables about following too closely behind him checking “bad ordered” tags and notified the supervisor that he considered the manner in which they were following so closely to be harassment and an unnecessary distraction which caused him to feel unsafe while working in the rail yard. The Complainant understood that the supervisors were verifying defects the Complainant had noted on the “bad ordered” tags. On October 20, 2012 the Complainant took it upon himself to leave the rail yard (self-empowerment) and go to the locker/lunch room during his shift assignment after he had placed a “bad ordered” tag on a rail car and supervisor Ables inquired over the radio asking where the tagged car was located so he could inspect the “bad ordered” tag. Supervisor Ables was not within eyesight of the Complainant at that time. On or about October 23, 2012, the Complainant met with foreman R. Jaramillo in the presence of a union representative and supervisor Ables. During the meeting the Complainant was advised by R. Jamarillo that the supervisors would no longer follow so closely to carmen during their inspections and the supervisor review of “bad ordered” tags. The Complainant testified to the meeting as one involving threats of disciplinary action that resolved into being given a “big break.” R. Jamarillo testified to the meeting as a coaching method to ensure the Complainant knew the expectations placed on him which resolved with the supervisors being directed to continue inspections of “bad ordered” tags but to stay back from the carmen. Where the credible evidence of record is in “equipoise”, that is evenly balanced, the party proponent with the burden of proof (persuasion) must loose. *Director, OWCP v. Greenwich Colliers*, 512 US 267, 281 (1994); *Schaffer v. Weast*, 546 US 49 (2005) Here the evidence is equipoised as to whether the Complainant was threatened during his meeting with R. Jaramillo. Accordingly, the Complainant fails to establish the alleged threat.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant failed to establish by a preponderance of the credible evidence that adverse employment action was taken against him on or about October 23, 2012, as a result of his complaint that supervisors were following too closely during rail car inspections or as a result of his leaving the rail yard (self-empowerment) on October 20, 2012.

II. The Complainant has established by a preponderance of evidence that he engaged in protected activity - on August 21, 2011 by reporting a work-related back injury that occurred on August 19, 2011 and following a prescribed medical treatment plan until released for work by the treating physician on November 7, 2011; between July 2012 and October 20, 2012 by reporting to supervisors Able and Lovall that the manner in which they were reviewing “bad order” tags was distracting and creating an unsafe work environment in the rail yard; and on November 27, 2012 by filing a retaliation complaint under the FRSA; but the Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity on or about October 20, 2012 by leaving the rail yard during his shift (i.e.: refusing to work) when confronted by a hazardous safety or security condition related to the performance of his duties.

Section 20109(a)(4) of the FRSA and 29 CFR §1982.102(b)(1)(iv), specifically prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminate against an employee for reporting a work-related injury of an employee in good faith. Section 20109(c)(2) of the FRSA and 29 CFR §1982.102(b)(3)(ii), prohibit a railroad carrier, or employee of a railroad carrier from disciplining an employee for following orders or a treatment plan of a treating physician.

Here the evidence of record established that the Complainant suffered a work-related back injury on August 19, 2011 and reported the injury to his railroad supervisors on August 21, 2011. The Complainant then remained out of work upon his treating physician’s orders until released on November 7, 2011. Such activity is protected activity under Section 20109(a)(4) of the FRSA and 29 CFR §1982.102(b)(1)(iv).

Section 20109(a)(3) of the FRSA and 29 CFR §1982.102(b)(1)(iii), specifically prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminate against an employee for filing a complaint under the FRSA in good faith.

Here the Parties stipulated that the Complainant filed a complaint under the FRSA with OSHA on November 27, 2012. Such activity is protected activity under Section 20109(a)(3) of the FRSA and 29 CFR §1982.102(b)(1)(iii).

Section 20109(b)(1)(A) of the FRSA and 29 C.F.R. §1982.102(b)(2)(i)(A), specifically prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee for reporting a hazardous safety condition. Such protected activity may include providing information regarding conduct that the employee *in good faith* believes constitutes a violation of railroad safety or constitutes a hazardous safety condition. 49 U.S.C.A. §20109(a)-(b). Thus, the FRSA does not protect knowingly false reports of safety violations. *See Walker v. Amer. Airlines*, ARB No. 05-028 AIR (Mar. 30, 2007) (unpub.). A *good faith* report requires both objective and subjective belief that the complaint relates to safety concerns. *See Hernandez v. Metro-North Commuter Railroad*, No. 1:13-cv-02077 (S.D.N.Y. Jan. 9, 2015) (2015 WL 110793; 2015 U.S. Dist. LEXIS

2457) (in which the court found that the FRSA requires a reasonable belief by the complainant both that the reported conduct was related to railroad safety or security and that an objectively reasonable person in the same factual circumstances as the complainant could believe the same.); *Jackson v. Union Pacific R.R. Co.*, ARB Case No. 13-042; ALJ Case No. 2012-FRS-00017 (Mar. 20, 2015)(in which the Board found that substantial evidence supported the ALJ's finding of protected activity when the record contained support for both the complainant's subjective good faith and other employees' reasonable belief that a complaint such as the complainant's constituted a safety concern.). A good faith belief of a violation of a federal law, rule, or regulation relating to railroad safety is required by 49 U.S.C. §20109 (a)(2). However, 49 U.S.C. §20109 (b)(1)(A) requires only a good faith report of a hazardous safety or security condition.

Here the credible evidence of record established by a preponderance of the evidence that the Complainant approached his supervisors Able and Lovall between July 2012 and October 20, 2012 and notified them that the manner in which they were conducting review of the "bad ordered" tags he placed on rail cars during his shift was distracting him and creating a hazardous condition adverse to his personal safety. The fact that the Complainant's co-worker K. Lanier also approached supervisor Lovall about the manner he was conducting review of the "bad ordered" tags and the actions of foreman R. Jamarillo in directing supervisors Able and Lovall to remain at a distance from carmen when conducting their review of "bad ordered" tags supports the contention that an objectively reasonable person would consider the reported actions by the supervisors to constitute a hazardous safety condition. After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has established by a preponderance of the evidence that this activity constitutes protected activity under Section 20109(b)(1)(A) of the FRSA and 29 C.F.R. §1982.102(b)(2)(i)(A).

Section 20109(b)(1)(B) of the FRSA and 29 C.F.R. §1982.102(b)(2)(i)(B), specifically prohibit a railroad carrier, or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee for refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if (1) the refusal is made in good faith and no alternative to the refusal is available to the employee; (2) a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous condition presents an imminent danger of death or serious injury and the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal to work; and (3) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.

The evidence establishes that the Complainant left the rail yard on October 20, 2012 when he became frustrated with supervisor Ables asking over the radio where the rail car was upon which the Complainant had placed a "bad ordered" tag. The Complainant testified that he notified his shift co-worker J. Boykin by radio that he had locked up his end of the track and was going in. He then went to the locker/lunch room where he subsequently spoke with supervisor Ables. The Complainant classified this as "empowerment." However, conditions that evening of supervisor Ables reviewing "bad ordered" tags was not as severe as the numerous earlier manner in which supervisors Ables and Lovall had reviewed the Complainant's and co-workers' "bad ordered"

tags. On October 20, 2012, supervisor Ables was not even in sight of the Complainant and had to use the radio to ask where the tagged rail car was located. The Complainant's shift co-worker, J. Boykin, did not leave the rail yard on October 20, 2012 for concerns over personal safety. Additionally, on prior occasions between July 2012 and October 20, 2012, when the supervisors were in close proximity to the Complainant and his co-workers, neither the Complainant nor his shift co-workers left the rail yard because of perceived imminent danger of death or serious bodily injury nor did their respective actions during that period demonstrate the belief that the conduct of the supervisors was so hazardous that it constituted an imminent danger of death or serious injury and the urgency of the prior events did not allow sufficient time to eliminate the danger without leaving the rail yard.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of evidence that his departure from his shift work on October 20, 2012 was protected activity under Section 20109(b)(1)(B) of the FRSA and 29 C.F.R. §1982.102(b)(2)(i)(B).

III. The Complainant has established by a preponderance of the evidence that the decision maker responsible for the Complainant's termination of employment knew of Complainant's protected activity by reporting a work-related injury on August 21, 2011 and by following the medical treatment plan of his treating physician between August 19, 2011 and November 7, 2011; but failed to establish by a preponderance of the evidence that the decision maker responsible for the Complainant's termination of employment knew of the Complainant's protected activity of filing a complaint under the FRSA on November 27, 2012, and of reporting a hazardous safety condition created by supervisors following carmen too closely behind carmen when inspecting bad ordered" tags on rail cars between July 2012 and October 2012.

"The concept of cat's paw liability in *Staub v. Proctor Hosp.*¹⁵ recognizes that knowledge of protected activity and actions by others occurring early in the decision-making chain can impermissibly influence the final decision maker. In cases in which motivation is not a required element of the complainant's *prima facie* case, such as the instant case, "the complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew, regardless of their motives." *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB Case No. 11-037; ALJ Case No. 2009-FRS-00015, slip op. at 18 (ARB Mar. 29, 2013).

CX 1 is a copy of a document from the Complainant's employee files indicating that on August 21, 2011 he reported a work-related injury incurred on August 19, 2011. The report was made to supervisor Ables. CX 4 is a copy of the Complainant's January 9, 2013 "Employee Transcript" which indicates the Complainant had an "on-duty injury" to his lower back on August 19, 2011 and lost 57 days of work in a leave status through November 7, 2011. This material was contained in the February 13, 2013 report of investigation issued by J. Mahoney and reviewed by D. Cargill, as Director of Employee Performance. Complainant's foreman, R. Jaramillo, also testified that he was aware of the on-duty injury report and period of time off-work for medical

¹⁵ 559 U.S. 1066 (2010).

treatment/recovery. J. Mahoney issued the March 4, 2013 dismissal letter (RX 2, CX 3). In few of the foregoing, this presiding Judge finds that the termination decision maker, General foreman J. Mahoney, had actual knowledge of the Complainant's protected activity related to reporting a work-related injury on August 21, 2011 and following the medical treatment plan of his treating physician between August 19, 2011 and November 7, 2011, when he made the decision to terminate the Complainant's employment.

Complainant's foreman R. Jaramillo testified at the hearing he did not know the Complainant had filed a complaint under the FRSA on November 2012. General mechanical foreman J. Mahoney¹⁶ testified at the hearing he did not know the Complainant prior to the disciplinary hearing in February 2013; that he had not worked with the Complainant; and that he did not know the Complainant had filed a complaint under the FRSA in November 2013. General foreman J. Mahoney conducted all disciplinary hearings in the Chicago division of the railroad. J. Mahoney personally made the determination to terminate the Complainant's employment upon completion of the disciplinary hearing and enacted the termination on March 4, 2013 by the dismissal letter he signed. D. Cargill, who reviewed the disciplinary hearing report in his capacity as Director of Employee Performance testified that he had no knowledge that the Complainant had filed a complaint under the FRSA in November 2012. In few of the foregoing, this presiding Judge finds that the Complainant failed to establish that the termination decision maker, General foreman J. Mahoney, had either actual or constructive knowledge of the Complainant's protected activity related to filing a complaint under the FRSA in November 2012, at the times he made and effectuated his decision to terminate the Complainant's employment.

As discussed earlier, R. Jaramillo was fully aware that the Complainant had confronted line supervisors Ables and Lovall about perceived hazardous safety conditions created by their following him and his co-worker in close proximity when the Complainant and his shift co-worker inspecting and placing "bad ordered" tags on rail cars between July 2012 and October 2012. He was aware of the events from not only his discussions with supervisors Ables and Lovall; but also his personal discussion with the Complainant on October 23, 2012. Neither supervisor Ables nor Lovall testified at the disciplinary hearing nor submitted statements to be considered by General foreman J. Mahoney. Further review of the exhibits both Parties submitted that involved the disciplinary hearing held by General foreman J. Mahoney reveals that the matters addressed throughout the disciplinary hearing were limited in scope and did not include or otherwise involve the Complainant's reporting his perceived hazardous safety conditions created by their following him and his co-worker in close proximity when the Complainant and his shift co-worker inspecting and placing "bad ordered" tags on rail cars between July 2012 and October 2012. In few of the foregoing, this presiding Judge finds that the Complainant failed to establish that the termination decision maker, General foreman J. Mahoney, had either actual or constructive knowledge of the Complainant's protected activity related to his reporting his perceived hazardous safety conditions created by their following him and his co-worker in close proximity when the Complainant and his shift co-worker inspecting

¹⁶ At the pertinent time involved, J. Mahoney was the general mechanical foreman of the car department for Respondent railroad out of Lincoln, Nebraska, for 150 carmen, several machinists and electricians in Nebraska and parts of Iowa, South Dakota, and Missouri. At the time of the formal hearing he was the Manager of mechanical training at the Respondent's technical training center in Overland Park, Kansas.

and placing “bad ordered” tags on rail cars between July 2012 and October 2012.

IV. The Complainant has failed to establish by a preponderance of the evidence that his protected activity contributed to the adverse employment action of employment termination on March 4, 2013.

A contributing factor is any factor that, “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-00052, slip op. at 5 (ARB Jan. 31, 2011); *Araujo*, 708 F.3d at 158; *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-00028 (ARB Jan. 30, 2008). This standard is less demanding than a requirement to show a “‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action.” *Araujo*, 708 F.3d at 158 (quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Therefore, a complainant need not show that protected activity was the determining or the most significant factor in the decision that resulted in the adverse action, “but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Powers* ARB No. 13-0134 at 11 (quoting *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (ARB May 31, 2013)) (internal quotations omitted). A complainant’s burden of proving contributory causation will be met upon a “minimal showing even if the employer also had a legitimate reason for the unfavorable employment action against the employee.” *Rudolph*, ARB CASE NO. 11-037 at 20.

The contributing factor element of the complainant’s *prima facie* case may be proven by “direct evidence or indirectly by circumstantial evidence.” *De Francesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-0009, slip op. at 6-7 (ARB Feb. 29, 2012). Circumstantial evidence may include “motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.” *Bobreski v. Givoo Consultants, Inc.*, ARB No. 13-001; ALJ No. 2008-ERA-003, slip op. at 17 (ARB Aug. 29, 2014). In proving this element, a complainant “need not provide evidence of motive or animus” by the employer. *Araujo*, 708 F.3d at 158 (internal quotations omitted). While temporal proximity between the protected activity and the adverse action, “*alone* may at times be sufficient to satisfy the contributing factor element, ...ARB precedent...has declined to find ‘contributing factor’ based on temporal proximity *alone* where relevant, objective evidence disproves that element of complainant’s case.” *Powers*, ARB No. 13-034 at 23 (footnotes omitted)(emphasis in the original). Temporal proximity of protected activity is not dispositive at the merit stage of the proceeding where the Complainant must establish each element of his case by a preponderance of the evidence and there is compelling evidence to the contrary. *Spelson v. United Express Systems*, ARB Case No. 09-063 at FN 3, ALJ No. 2008-STA-00039 (ARB Feb. 23, 2011) and cases cited therein.

In cases in which the administrative law judge determines that the protected activity is “closely intertwined with the adverse action taken, the respondent ‘bears the risk that the influence of legal and illegal motives cannot be separated.’” *Abdur-Rahman v. Dekalb Cnty.*, ARB No. 08-003, ALJ No. 2006-WPC-0002, slip op. at 12 (ARB May 18, 2010) In his concurrence in *Hutton*, Administrative Appeals Judge (AAJ) Corchado stated that a complainant’s protected activity and the adverse action are inextricably intertwined when “the basis for the adverse action

cannot be explained without discussing the protected activity.” *Hutton*, ARB No. 11-091 at 15 (Corchado, J. concurring). Furthermore, “the causal link is self-evident where ‘contributory factor’ is the burden of proof.” *Id.* at 15, n. 49.

As found herein, the Complainant has established by a preponderance of the evidence that he only engaged in the following protected activity under the FRSA –

- (a) on August 21, 2011, by reporting a work-related back injury that occurred on August 19, 2011;
- (b) following a prescribed medical treatment plan from August 19, 2011, until released for work by the treating physician on November 7, 2011;
- (c) between July 2012 and October 20, 2012 by reporting to supervisors Able and Lovall that the manner in which they were reviewing “bad order” tags was distracting and creating an unsafe work environment in the rail yard; and,
- (d) on November 27, 2012 by filing a retaliation complaint under the FRSA.

Also as found herein, the Complainant has established by a preponderance of the evidence only the adverse employment action of termination of employment on March 4, 2013.

Also as found herein, the Complainant has established by a preponderance of the evidence that the decision maker who terminated the Complainant’s employment on March 4, 2013, had actual knowledge, at the time he made and effectuated the termination decision, of the Complainant’s protected activity related to (a) reporting a work-related injury on August 21, 2011 and (b) following the medical treatment plan of his treating physician between August 19, 2011 and November 7, 2011. The Complainant failed to establish by a preponderance of the evidence that the decision maker had constructive or actual knowledge of the remaining protected activity of (a) reporting hazardous safety condition created by supervisors following carmen too closely between July 2012 and October 2012 or (b) filing a complaint under the FRSA in November 2012. Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that his protected activity of (a) reporting hazardous safety condition created by supervisors following carmen too closely between July 2012 and October 2012 and (b) filing a complaint under the FRSA in November 2012, contributed to the adverse employment action of termination of employment on March 4, 2013.

The protected activity of reporting a work-related injury on or August 21, 2011 and following physician directed treatment through November 11, 2011 were events that occurred more than 15 to 18 months prior to the adverse employment action on March 4, 2013. During that period the Complainant was gainfully employed in his usual position as a carman. While the report of the work injury and being off-duty was indicated on the Complainant’s “Employee Transcript”, the entry play no part in the disciplinary investigation nor decision to terminate his employment for violating safety regulations by throwing and discharging fireworks at co-workers and startling co-worker and contractor by sounding his truck’s loud horns. The testimony from J. Mahoney and D. Cargill is that they considered the Complainant’s “Employee Transcript” for his history of two events of absenteeism and related reprimand and subsequent suspension. Indeed, the Complainant’s work-related injury and follow-on medical treatment is not discussed by J. Mahoney in the disciplinary investigation or report. It was merely a routine business notation on

the “Employee Transcript” that appeared as a document in the disciplinary investigation. The Complainant has failed to establish that the entry was considered in any way by the termination decision maker, General foreman J. Mahoney. It would be mere speculation based on a 15 to 18 month time lapse between injury report and treatment to disciplinary hearing and termination based on the record of the disciplinary hearing that such a limited entry was considered or contributed in any part in the termination decision. After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that his protected activity of (a) reporting a work-related injury on August 21, 2011 and (b) following physician directed treatment through November 11, 2011, contributed to the adverse employment action of termination on March 4, 2013.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence the elements necessary for a *prima facie* case under the FRSA. Since the Complainant has failed to establish a *prima facie* case under the FRSA, he is not entitled to relief under the FRSA and there is no need to discuss the Respondent’s statutory defense in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation on the entire record, including all the evidence of record and the arguments of the parties, this presiding Judge finds that:

1. At all times relevant to this proceeding, the Respondent was a railroad carrier engaged in interstate commerce within the meaning of the FRSA, as amended.
2. The Complainant was hired by Respondent on March 20, 2006, as a Maintenance Mechanic Apprentice in Memphis, Tennessee.
3. The Complainant became a “Carman – Freight” in Memphis, Tennessee, on November, 20, 2006.
4. While employed by the Respondent, the Complainant was an employee of Respondent within the meaning of the FRSA, as amended, and the FRSA implementing regulations.
5. On August 19, 2011, the Complainant was performing assigned duties in Memphis-Birmingham HUB #2 when he suffered a work-related injury to his low back, which was subsequently medically treated, and he was released back to full duty by the treating physician following a medical examination on November 7, 2011.
6. On August 21, 2011, the Complainant filed an “Employee Personal Injury/ Occupational Illness Report” to report the August 19, 2011, work-related injury.
7. On November 27, 2012, the Complainant filed a retaliation complaint under the FRSA with the Department of Labor, OSHA involving Respondent.
8. On February 13, 2013, an investigation of “misconduct, horseplay, indifference to safety of yourself and others, [and] conduct which contributed to a hostile work environment while working as a Carman in Memphis, TN, terminal – MSR S-1.2.9, S-28.6” by the Complainant on January 4, 2013, as conducted.
9. As a result of the February 13, 2013, investigation, the Complainant was “dismissed” from his employment with the Respondent on March 4, 2013.
10. The Complainant appealed the March 4, 2013, termination of employment under the appropriate Collective Bargaining Unit Agreement then in effect.

11. On May 22, 2013, the Complainant filed an amended retaliation complaint under the FRSA with the Department of Labor OSHA to include the March 4, 2013, termination of employment involving Complainant and Respondent.
12. The appeal of the Complainant's termination of employment under the terms of the collective bargaining agreement is still pending as of March 31, 2015.
13. The Complainant's average weekly wage on employment termination on March 4, 2013, was \$1,094.80.
14. The Complainant established by a preponderance of the evidence that he suffered an adverse employment action of employment termination on March 4, 2013.
15. The Complainant failed to establish by a preponderance of the evidence that he suffered an adverse employment action on or about October 23, 2012 by being threatened by R. Jaramillo as alleged.
16. The Complainant failed to timely file a complaint involving alleged adverse actions occurring prior to May 31, 2012.
17. The Complainant established by a preponderance of the evidence that he engaged in protected activity, under §20109(a)(4) of the FRSA and 29 CFR §1982.102(b)(1)(iv), on August 21, 2011 by reporting a work-related back injury that occurred on August 19, 2011.
18. The Complainant established by a preponderance of the evidence that he engaged in protected activity, under §20109(c)(2) of the FRSA and 29 CFR §1982.102(b)(3)(ii), during the period from August 19, 2011 through November 7, 2011 by following the medical treatment plan of his treating physician.
19. The Complainant established by a preponderance of the evidence that he engaged in protected activity, under §20109(a)(3) of the FRSA and 29 CFR §1982.102(b)(1)(iii), by filing a complaint under the FRSA on November 27, 2012.
20. The Complainant established by a preponderance of the evidence that he engaged in protected activity, under §20109(b)(1)(A) of the FRSA and 29 CFR §1982.102(b)(2)(i)(A), between July 2012 and October 2012 by reporting his perceived hazardous safety condition created by supervisors following too closely behind carmen when inspecting "bad ordered" tags on rail cars.
21. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity, under §20109(b)(1)(B) of the FRSA and 29 CFR §1982.102(b)(2)(i)(B), by removing himself from the rail yard on October 20, 2012.
22. The Complainant has established by a preponderance of the evidence that the termination decision maker, General foreman J. Mahoney, had actual knowledge of the Complainant's protected activity related to reporting a work-related injury on August 21, 2011 and of following the medical treatment plan of his treating physician between August 19, 2011 and November 7, 2011, when he made the decision to terminate the Complainant's employment.
23. The Complainant failed to establish by a preponderance of the evidence that the termination decision maker, General foreman J. Mahoney, had either actual or constructive knowledge of the Complainant's protected activity related to filing a complaint under the FRSA in November 2012, at the times he made and effectuated his decision to terminate the Complainant's employment.
24. The Complainant failed to establish by a preponderance of the evidence that the termination decision maker, General foreman J. Mahoney, had either actual or

constructive knowledge of the Complainant's protected activity related to his reporting his perceived hazardous safety conditions created by their following him and his co-worker in close proximity when the Complainant and his shift co-worker inspecting and placing "bad ordered" tags on rail cars between July 2012 and October 2012.

25. The Complainant has failed to establish by a preponderance of the evidence that his protected activity contributed to the adverse employment action of employment termination on March 4, 2013.
26. The Complainant has failed to establish by a preponderance of the evidence the elements necessary for a *prima facie* case of retaliation under the FRSA.
27. The Complainant is not entitled to relief under the FRSA.

ORDER

IT IS HEREBY ORDERED that the complaint filed by the Complainant under the FRSA is **DENIED**.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/ard
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (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, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

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

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

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

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