

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 06 July 2015

CASE NO.: 2014-FRS-00076

In the Matter of:

CRAIG PEACHY,
Complainant,

v.

WISCONSIN CENTRAL, LTD.,
Respondent.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Richard L. Carlson, Esq., Hunegs, LeNeave & Kvas, Wayzata, MN, for the Complainant

Holly M. Robbins Esq., Neil S. Goldsmith, Esq., Littler Mendelson, PC, Minneapolis, MN, for the Respondent

DECISION AND ORDER DISMISSING COMPLAINT

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Craig Peachy (the “Complainant”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Wisconsin Central, LTD. (“Railroad” or the “Respondent”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007) and the implementing regulations at 29 C.F.R. § 1982 (2010).

The FRSA complaint filed with OSHA alleged Respondent issued a 10 day deferred suspension to Complainant on May 10, 2012, in retaliation for reporting a work-related injury. On March 4, 2014, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found that there was no violation of the FRSA and dismissed the

complaint. On March 26, 2014, Complainant objected to the Secretary's findings and requested a hearing before the Office of Administrative Law Judges ("OALJ").

A hearing was held before me in Milwaukee, Wisconsin, on February 5-6, 2015, at which time the parties were afforded the opportunity to present evidence and arguments. The parties' documentary evidence was admitted as Joint Exhibits ("JX") 1-48. Hr'g TR ("TR") 6.

The parties submitted post-hearing briefs ("Compl. Br." and "Resp. Br." respectively).

II. STIPULATIONS AND ISSUES PRESENTED

The parties offered the following stipulations:

1. On February 12, 2012, Complainant reported a work-related injury.
2. On May 10, 2012, Respondent sent Complainant a notice assessing a 10 day deferred suspension.
3. Complainant is not seeking back pay or front pay damages.
4. The Respondent has a policy requiring on the job injuries be reported.
5. The Respondent has an anti-retaliation policy with respect to injury reports.

TR 7-8.

The following issues are in dispute: (1) whether Complainant engaged in protected activity; (2) whether protected activity was a contributing factor in Respondent's assessing a 10 day deferred suspension; (3) whether Respondent has established it would have taken the same adverse employment action absent any protected activity; and (4) damages, if any.

III. PARTIES' POSITIONS

Complainant maintains he engaged in protected activity when he in good faith reported the injury sustained at work on February 12, 2012. Compl. Br. at 21-22. Complainant asserts the Railroad was aware of his protected activity in reporting his injury. Compl. Br. at 22-23. He suffered an adverse action when he was assessed a 10 day deferred suspension. Compl. Br. at 23-24. Complainant argues reporting his work injury was a contributing factor in the discipline imposed by the Railroad. Compl. Br. at 24-28. Complainant contends Respondent failed to establish by clear and convincing evidence that it would have taken the same unfavorable personnel action absent his protected activity. Compl. Br. at 30-34. In this regard, Complainant maintains that he and engineer Chupka were involved in the coupling action on February 12, 2012, but he was injured and disciplined and Chupka was not disciplined. Compl. Br. at 31. The difference between them was that Complainant suffered an injury and Chupka did not. *Id.* Complainant seeks compensatory damages for emotional distress, attorney fees and punitive damages. Compl. Br. at 28-30.

Respondent asserts Complainant did not engage in protected activity because his injury report was not made in good faith. Respondent contends Complainant was not truthful about the circumstances surrounding his injury and therefore, his report of injury was not in good faith. Resp. Br. at 47-48. The Railroad next argues Complainant's injury was not a contributing factor in the discipline assessed. Resp. Br. at 48-54. Rather, it maintains Complainant was disciplined for violation of safety rules. Additionally, Respondent argues the Department of Labor's Administrative Review Board's (ARB's), interpretation of the "contributing factor" element places an undue burden on employers. Resp. Br. at 54-59. Finally, the Railroad argues it established by clear and convincing evidence it would have taken the same adverse employment action absent Complainant's protected activity. Resp. Br. at 59-61. Therefore, Respondent maintains Complainant is not entitled to damages for emotional distress or to punitive damages. Resp. Br. at 61-66.

IV. SUMMARY OF EVIDENCE

A. Witness Testimony

1. Complainant Craig Peachy

Complainant is 59 years old and began working for Respondent in 1990 as a diesel mechanic. TR 15-17. After approximately six months, Complainant bid on a conductor position with Respondent's transportation department and was hired for that position. TR 18-19. He continued to work as a conductor until March 22, 2012. During his employment with the Railroad, Complainant has also held various union positions. He has held a legislative representative/safety officer position for his local for several years beginning in 1997. TR 20-21. On March 22, 2012, Complainant took a leave of absence from the Railroad to work full-time in an elected position with the Sheet Metal, Air, Rail and Transportation Union ("Union"). TR 19-20, 133. Should Complainant lose his re-election bid in 2016, he can return to his job as conductor with Respondent. TR 21-22.

On February 12, 2012, Complainant's shift began at 8:00 a.m. TR 25. That morning Complainant was the conductor, Mike Chupka was the engineer and Tanner Klapperich was the conductor trainee. TR 25-26. Complainant testified he was to instruct, train and oversee Klapperich, with respect to complying with rules and procedures for the assigned tasks. TR 26. As the conductor, Complainant was ultimately responsible for the crew. TR 95. The crew assignment that day was to "block swap" a 46 car train to another 46 car train that was in the yard and then take the train to Chicago. TR 28-29. This involved taking 46 cars off a train on one track and moving and connecting or "coupling" the 46 cars to another 46 car train which was on a separate track. TR 30. The process is called a "shove" and occurred on track 266. TR 32. The 46 cars the crew was shoving to track 266 were attached to a locomotive operated by Chupka, the engineer. TR 29, 32. The 46 cars being shoved included 10 empty cars and 36 loaded cars. JX 16 at 1-2. The total length of the 46 cars being shoved was 2,669 feet and weight was 5,203 tons. *Id.* The shoving movement required that cars go through a curve. TR 61; JX 25. Prior to a switching or shove move the train crew conducts a safety briefing to discuss the task. Complainant did not recall the specifics of the safety briefing on February 12th, but stated they are always held pursuant to Respondent's rules. TR 32.

Complainant explained the events depicted on a company surveillance video at the hearing. TR 34-41. Complainant noted he was riding the lead car or the 46th car, a lumber flatcar during the shove maneuver. TR 38-39, 44. The lumber flatcar carried bundles of lumber which were secured by cables. TR 91. This is the car that would be coupled into a stationary hopper car on the train which was to be joined. TR 38. Complainant was riding the east side of the northbound lumber car and Klapperich, the conductor trainee, was riding the west side of the same car. TR 39.

The lumber car had a flush-end called a bulkhead. TR 48. The purpose of the bulkhead is to prevent the lumber from shifting forward outside of the car. TR 90-92. The bulkhead had metal grab irons and stirrups for the conductor to use when riding the car. TR 48-49. The stirrups or ladder rungs are where conductors place their feet and the grab irons are where one's hands are placed when riding the car. *Id.*; JX 23. Complainant testified that the left grab iron was a vertical grab iron and attached to the end of the bulkhead. TR 48-51; JX 23, pic 2. Complainant testified handholds on some cars are horizontal and horizontal handholds provide better leverage than vertical handholds or grab irons. TR 49, 92.

Complainant explained that during the shove move, as the train was proceeding into the coupling, he was riding the lead car or "riding the point." TR 44. Complainant believed that under Respondent's Superintendent's Notice #20-12, he was required to be physically riding the car as the coupling was made. TR 39, 44-45.¹ The Superintendent's Notice states "every shove move must be protected with a person physically on the point of the movement regardless if the track is known to hold the amount of cars to be placed in that track." JX 21.

Complainant explained there are several cameras in the train yard. TR 35. He said the Railroad presented him with a DVD video showing part of the shove move in which he was injured. TR 34-36; JX 35.² Complainant said Chupka, the engineer, was operating the locomotive and Klapperich was controlling the movement and communicating by radio with the engineer. TR 40. Complainant explained that Klapperich controls the movement by counting down the car lengths between cars being shoved and the cars to be coupled into, so the engineer can control the speed to a stop. TR 41. Complainant illustrated this action stating Klapperich would count down ten cars, five cars, three cars, two cars, one car, half a car, 10 feet, five feet until the joint meets. *Id.* With respect to the shove being made on the day in question, Complainant stated Klapperich counted down three cars, two cars, one car, half a car, "that will do." TR 42. The phrase "that will do" is understood to mean stop. TR 42-44, 96, 170. Complainant acknowledged the manner in which Klapperich called out the cars was acceptable. TR 99. Complainant explained that controlling the speed of a coupling to a joint is important because if the speed is too fast, a conductor riding the joint on the lead car can be knocked off by the force of a coupling or there could be a derailment. TR 45-46, 59. Complainant noted the engineer controls the speed of the locomotive. TR 42-43. Complainant attempted to explain the

¹ A Superintendent's Notice is an amendment to the rules for the local territory that the superintendent covers. TR 294. It amends a rule to make it more restrictive. *Id.*

² JX 35 is a DVD video capturing a portion of the February 12, 2012 shove movement in which Complainant was injured.

concept of slack in a train. TR 51-52, 55-60.³ The amount of slack varies depending on the number of cars, the speed and the grade. TR 53, 55-60. An engineer can control the slack by braking. TR 59-60.

As the shove move was proceeding, Complainant was riding the lumber car toward the joint and testified his hands were on the vertical grab irons. TR 47. He thought the cars on the train he was riding into the joint were going faster than they should have been. TR 46. Complainant testified he thought the train was going 3-4 miles into the coupling. TR 97. Because he thought the train was coming in too fast, Complainant said he took his left hand off the grab bar, moving it to a radio that was in his chest pack, as he intended to call the engineer to stop. TR 50, 64, 65.⁴ However, at that moment, the slack ran out, it “jerked” his body around a little bit, he got off balance, his shoulder rolled to the end of the car right where he was hanging on, he made a quick move to try to readjust, he saw Klapperich on the other side of the car, and he yelled to him “that’ll do.” TR 46-47, 64-66, 103-04; JX 35.⁵ Complainant stated he made a quick move to get himself away from the end of the car, put his foot against the second step, moved his left hand off the radio, tried to regain his balance, and attempted to grab the grab iron because he believed they were going to hit the cars they were joining hard. TR 66. Instead of reaching the grab iron, two of his fingers landed on the “smooth edge of the bulkhead, flat between there and the lumber.” TR 66-67. When the coupling made, the lumber in the car shifted, slammed into the bulkhead and his two fingers were crushed for a second and then released as the lumber shimmied, and he jumped off the car. TR 67-68. Complainant maintains the lumber was not properly secured which permitted it to move when the coupling was made. TR 67. Complainant estimated the whole event from the time he took his hand off the bulkhead to having his fingers smashed was approximately three seconds. TR 69.

After jumping off the train, Complainant took his gloves off to look at his left hand, called the yard office on the radio and stated he needed medical attention. TR 69-70, 72. Dan Keclik, the yardmaster, came to his location in a vehicle. TR 70. Complainant said Keclik asked him what happened and he told Keclik what he thought had happened. TR 69-70. Keclik told Complainant they were waiting for Ed Steinbeck, the Assistant Superintendent, to arrive on the scene, so Complainant assumed Keclik had called Steinbeck to tell him of the injury. TR 70-71. Once Steinbeck arrived on the scene he asked Complainant some questions then took Complainant to St. Agnes hospital, where he was treated for injury to the index and middle fingers on his left hand, and released. TR 71. Complainant filled out an injury report and his personal physician completed a medical status report. TR 71-72, 89; EX 3, 4.⁶ Complainant’s

³ Slack is the “play” in cars of a train as it is moved. TR 51-52, 55-60, 190, 193-94.

⁴ At the hearing before me, Complainant credibly explained he was incorrect when at his deposition he said he moved his right hand from his chest to the handhold at the time of the coupling. TR 102-03.

⁵ JX 23 is a photograph of a lumber car similar to the one Complainant was riding. TR 47-48. Complainant agreed the location of the stirrups and grab irons on the lumber car pictured are similar to the location of stirrups and grab irons on the car he was riding. *Id.* He agreed the grab iron is attached to the end of the bulkhead. TR 50-51.

⁶ On the injury report form section asking the employee to “describe how the injury occurred and what you were doing,” Complainant wrote:

physician diagnosed the injury as a crush injury and Complainant was out of work for a time. TR 71, 113; EX 4.

Complainant noted Trainee Klapperich had counted down three cars, two cars, one car, half a car that will do. TR 42. According to Complainant at the half a car command engineer Chupka should have been able to stop in half the distance. TR 43-44. Complainant believes Chupka was required to be able to stop in half the distance of the last command from Klapperich and to use the automatic brakes during the shoving move. TR 42-44, 61-62, 128-29.⁷ Complainant maintains Superintendent's Notice #8-12 required use of the automatic brake because they were operating on curved track and to prevent roll-out of the cars.⁸ TR 61-63. And because Chupka instead applied the independent brakes, Complainant contends Chupka violated Operating Rule 211 and Superintendent's Notice #8-12. TR 129-30.⁹

Making joint on car with trainee, cars were coming in a little fast and I reached for radio to tell engineer to stop and at that t[ime] the car I was riding slowed and I started to jerk toward rear of car[.] I grabed [sic] for the hand hold and got two fingers caught between wood and car at same time the joint made and lumber shifted and pinched fingers. Trainee was in control of move.

JX 3 at 1-2.

⁷ Relevant to the issues here, Complainant stated the locomotive has an independent brake and an automatic brake. TR 60. The automatic brake is an air brake that applies braking to the engine and all the cars in the train. *Id.* The independent brake only controls the engine. *Id.* Complainant testified that if one uses only the independent brakes the engineer cannot control the slack in the cars, whereas if the automatic brakes are used the slack is controlled because each car is braked. TR 60-61.

⁸ Rollout is another term for slack. TR 62.

⁹ Operating Rule 211 titled Directing Shoving Movements Via Radio states:

When radio communication is used to direct shoving movements, do not move until instructions, including distance and direction, are received. Each time a new instruction is given, the engineer will acknowledge the distance or information, except when the distance remaining to move is 4 cars or less, acknowledgement is not required. When the movement will stop within 4 car lengths, the employee directing the movement is not required to use the engine number as long as there is no possibility of confusion with another movement.

Example: "CN 2641 3 cars – 2 cars – 1 car – half car – 10 feet: that will do."

Stop within one half the distance specified, unless additional instructions are received. If stop has been made before reaching the end of the shoving movement, engineer must verify point protection is still being provided before resuming movement.

JX 19 at 275.

Superintendent's Notice #8-12 provides:

Shove movements through Main Track X-Overs, Turnouts and curved territory

Engineers are reminded to take into consideration long car/short car combinations and loaded car/empty car combinations while using power when the automatic brake is applied. There have been several derailments which involve those combinations. Engineers when making a shove movement with cars should :

...

On or about February 15, 2012, Complainant received a Notice of Investigation signed by the Superintendent, John Goldman. TR 73; JX 5. The formal investigation was conducted pursuant to the collective bargaining agreement between the Railroad and Complainant's Union. TR 112-13. The Notice stated the purpose of the investigation was to determine whether on February 12, 2012 at approximately 8:57 a.m. Complainant "violated any Company rules while engaged in switching operations at Shop yard in Fond du Lac, WI on N266 track, (outside lead) while you were riding car, CN 624079 and coupled into car, BGEX 2050." JX 5. The notice indicated the hearing would occur on February 21, 2012 and identified the witnesses as Messrs. Chupka, Klapperich, Keclik, Steinbeck and Klebs, the mechanical supervisor.¹⁰

Following the hearing on or about May 10, 2012, Complainant received a letter from Superintendent John Goldman issuing him a 10 day deferred suspension. JX 26; TR 77. Complainant maintains he did not violate any of the rules. TR 77-80. Complainant testified that he was not surprised when he received either the Notice of Investigation from Goldman, or the letter assessing a 10 day deferred suspension, stating it was standard practice for the Railroad to hold an investigation whenever there was an injury and to assess discipline for employees injured on the job. TR 73, 77; JX 26.

Complainant testified that although he did not seek medical or psychological treatment due to the formal investigation he worried he might lose his job. These concerns affected his ability to sleep, causing him to wake each night and go over the events of his injury. In addition, he worried about telling his wife he might lose his job and that as the safety officer, he would be tagged for not working safely. TR 85-87. He viewed the investigation and later the finding he violated rules as an assault on his character and worried that might affect how the other Union employees felt about him as their elected leader. *Id.*¹¹

2. Scott Seggerman

Mr. Seggerman has been a conductor with Respondent for 18 years. TR 156. He is also the elected local Chairman of the Union, a position he has held for 15 years. TR 156-57. He has participated in hundreds of Investigative Hearings, usually representing conductors. TR 157, 173. He said he has represented employees in hearings where a safety violation was alleged and no injury occurred with the violation. TR 174. Seggerman represented Complainant at the formal investigatory hearing. TR 173. Seggerman stated based upon the evidence presented at

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- Use Automatic Brake to control the movement when Throttle Modulation and Independent brake are not sufficient to control the speed or to fully stop the movement to prevent a roll-out of cars.

JX 22.

¹⁰ Chupka did not appear as a witness as he was on vacation on the date the investigatory hearing was held. TR 75-76, 293.

¹¹ Complainant is not seeking damages for lost wages as he did not lose wages as he went to work full-time for the Union prior to the assessment of the deferred suspension. TR 83-84.

the investigatory hearing, he did not think Complainant violated any of the Respondent's rules. TR 165.

3. Ed Steinbeck

Steinbeck has worked in the railroad industry for 15 years. TR 269-71. He has held his current position as Assistant Superintendent in Fond du Lac, Wisconsin since May 2011. TR 181, 266. In that position he is responsible for the Fond Du Lac and Waukesha yards and oversees six trainmasters and roughly 180 employees. TR 181-82, 266, 268. In February of 2012, he reported to Superintendent John Goldman. TR 268.

As assistant superintendent, he is responsible for assuring there are enough crews to supply the trains coming in and going out of Fond du Lac, ensuring the engines are properly serviced, fueled, and maintained, and ensuring compliance with federal railroad regulations. TR 273-74. Steinbeck stated safety rules compliance is important to him and to Respondent. TR 274-75. He explained the purpose of LIFE Rule T-6 is to ensure employees position their hands and feet in grab irons, stirrups or ladders provided on the car. TR 272.

On February 12, 2012, Steinbeck received a call from Mr. Keclik, the trainmaster, telling him of Complainant's injury. TR 182, 278. When Steinbeck arrived on the scene he asked Complainant's his condition and then drove Complainant to the hospital. *Id.*¹² On the drive to the hospital, Steinbeck recalled Complainant told Steinbeck he believed the train was coming in too fast, the slack ran out and he swung around the end of the car. TR 279. As a result of Complainant's statements as to what happened, Steinbeck thought there may be a "train handling incident." TR 279.

Later that day, Steinbeck began a reenactment or informal investigation of the incident associated with Complainant's injury. TR 184, 197, 199-201, 279, 287, 339-40. Steinbeck testified the main purpose of the reenactment or informal investigation "is taking all the information, find out what occurred that contributed to this injury." TR 204. Steinbeck later said he does a reenactment to determine the factors that could have affected the incident and where he thinks there is a human factor to evaluate whether there was a rule violation. TR 340.

Steinbeck spoke with the engineer Chupka and the conductor trainee Klapperrich. TR 195-96, 199. He contacted the supervisor of locomotive engineers (SLE), Mike Andrews and asked him to obtain the download from the locomotive. TR 184. Steinbeck testified the download, or black box data from the engine Mr. Andrews received indicated that the independent brake was used to stop the train and reflected a "nice gradual increase in independent brake as the train slows." TR 188-89, 193-94, 281, 283-84. The automatic brake was not used. TR 188; JX 15. The download also indicated the speed of the locomotive at the time of coupling was 2 miles per hour. TR 189. The download does not reflect the speed of the cars at the time of coupling which may vary some from the speed of the locomotive pushing/shoving the cars depending upon the grade and braking. TR 189-90. Steinbeck agreed this can result in slack action or slack running out, explaining "it's one of the laws of physics

¹² Steinbeck stated Complainant completed a report of personal injury form the same day. TR 183.

objects in motion, remain in motion.” TR 190, 193-95. Steinbeck said they saw “a nice gradual increase on independent brake pressure and a nice gradual decrease in speed and train forces were minimized....” TR 193. He conceded that when an engineer uses only independent braking in a shove move there will be some amount of slack that runs out. TR 334, 293. Steinbeck agreed that factors which may affect the amount of slack include the grade as the largest factor but also load, car type, and the number of cars in a train. TR 193-95. Steinbeck recalled Andrews also provided a write-up of his analysis of the download. Andrews’ write-up indicated there was nothing exceptional in the graph data and no rule violation.¹³ TR 190-91, 284-85; JX 47. Steinbeck questioned engineer Chupka as to whether Chupka noticed any type of slack rollout and Chupka replied no. TR 196. According to Steinbeck the reenactment showed, based on input from the conductor trainee Klapperich and engineer Chupka, the coupling was coming in at an appropriate speed for the grade and the train weight, there were no exceptions noted in train handling, the car coupled as intended and the loads of lumber shimmied as expected. TR 191-92, 287.

He also contacted the mechanical department to inspect the car. Steinbeck wanted to determine if there was evidence of excessive speed coupling or any damage to the car which is common when an over speed coupling occurs. TR 279. His investigation found no damage to the rail car. TR 280. Steinbeck also looked at the lumber load in the car Complainant was riding to see if he saw signs of an over-speed such as random pieces of 2x4 or 2x6 sticking out of the bundles. TR 184, 201-02, 280.

In response to Complainant’s belief that the load of lumber shifted because it was improperly secured, Steinbeck believed the load was secured. TR 184-86, 287-88; JX 16, 24. However, he did concede the lumber shimmied a few inches when the coupling occurred and then the lumber moved back to its original position. TR 200-02. The lumber car held approximately 190,000 pounds of lumber. TR 186. The load was secured by cable straps. TR 287. Steinbeck explained that with the weight and the amount of inertia when the train couples with another train it causes the lumber to shimmy. TR 200-03, 287. He indicated a lumber load like the one here could shift with lumber shooting out the end if it did not have bulkheads. TR 288. This car had bulkheads and the purpose is to prevent the load from shifting off the end of the car in a fast or hard stop. *Id.* Steinbeck agreed that Complainant’s two fingers got caught when the lumber shimmied at the point of the coupling. TR 202, 209.

Steinbeck noted there is a DVD video of the coupling action in which Complainant was injured. TR 202-03; JX 35. Upon reviewing the video, Steinbeck concluded Complainant’s left hand was on the bulkhead the entire time. TR 203, 288. He acknowledged the video is grainy but stated he did not see a distinct movement of Complainant’s left hand or arm, nor did he observe Complainant’s body move from his position on the side of the car. TR 288-90. Steinbeck believed if the slack had gone out as Complainant alleges, that would have been visible on the video because it is “almost like a whiplash action between the cars, and I just don’t see evidence of that.” TR 290.

¹³ To obtain the “download” the supervisor of locomotive engineers gets on the lead locomotive, plugs a data card in and retrieves data from the locomotive engine on how the engineer was operating the locomotive. TR 186-87. This is referred to as the “black box” of the locomotive. TR 187. The data retrieved from the locomotive Chupka was operating in the shove move is reflected in JX 47.

After the reenactment or informal investigation, including reviewing the download data from the engine and talking with the engineer and conductor trainee, Steinbeck determined that the cause of Complainant's injury was his violation of Rule T-6 because his left hand was not on the grab iron, but was on the bulkhead for a longer period than what Complainant related. TR 208-09, 289-91.¹⁴ Steinbeck informed his supervisor Goldman, the evidence he had gathered was not consistent with the information Complainant entered on the injury form. TR 205-07, 289-91; JX 48. Steinbeck said after viewing the video, collecting data from the engine and the reenactment, he did not see Complainant off balance, or his weight shift requiring him to reach with his left hand for the grab iron and get bulkhead instead. TR 289-90. Steinbeck recalled Goldman asked him whether the evidence supported a (formal) investigation for a rule violation, and he replied yes. TR 205-10, 291.

Steinbeck did not support a formal rule violation investigation for Chupka because the information he obtained in the informal investigation from the supervisor of locomotives engineers, and in the reenactment, indicated it was a standard coupling and Chupka did not violate any rule. TR 190-91, 291-95. Steinbeck disagreed with Complainant's opinion that Chupka was required to use the automatic brake under Superintendent's Notice #8-12. First, Steinbeck indicated this Notice applied to main track crossovers, turnouts, or curved territory. TR 293-94. He said the Notice did not apply to the shoving move in question because this was "a very very slight curve." TR 294. Next, Steinbeck noted the third bullet in the Superintendent's Notice states "[u]se Automatic Brake to control movement when Throttle Modulation and Independent brake are not sufficient to control the speed or to fully stop the movement to prevent a roll-out of cars." JX 10 at Ex. 28. Even assuming this notice applied, Steinbeck opined Chupka did not err in not applying the automatic brake because the independent brake and throttle modulation was sufficient to control the movement. TR 294-95. If the independent brake and throttle modulation had been insufficient the "cars would have coupled at an over speed and damage would have occurred or possibly even a derailment." TR 295. Steinbeck conceded an engineer can use the automatic brake at his discretion in a shove move. TR 334.

Steinbeck determined that neither engineer Chupka nor conductor trainee Klapperich violated Operating Rule 211, Directing Shoving Moves Via Radio. TR 212-14, 292-93; JX 19 at 275. Steinbeck explained when one is shoving to a coupling after receiving instructions half a car, the engineer knows the next set of instructions will be "that'll do. So it's not ... shoving to the end of a track condition where you're expecting a stop; this is a coupling." TR 292. Chupka did not go beyond one-half the distance last specified without getting additional instruction from Klapperich. TR 213. And here Klapperich gave the instruction "that'll do" and no additional instructions would be coming to Chupka from Klapperich. TR 293.

¹⁴ He said that a conductor riding a lumber car is required to have both hands on the handhold except when he is using the radio. TR 277.

4. John Goldman

At the time of Complainant's injury, Mr. Goldman was the Superintendent of Respondent's Iowa and Valley zones which included the Fond du Lac Wisconsin yard where Complainant worked. TR 216-17, 247.¹⁵ His job duties as Superintendent included safety training and developing his direct reports, ensuring departments have supplies and resources needed for their work tasks and servicing the customer's needs. TR 249. He testified that his participation in an informal investigation varies depending upon the circumstances. TR 218-20. Here he recalled Steinbeck took the lead on the informal investigation/reenactment of the shove move in which Complainant was injured. TR 218-19.

Goldman explained that once he received Steinbeck's assessment of the incident, the same day as Complainant's injury, he relayed it along with the engine download and the inspection of the lumber car to Senior Vice President Jim Vena and General Manager John Klaus with a copy to Steinbeck and others. TR 224-25; JX 48. Goldman's e-mail references Complainant's injury along with information Steinbeck obtained from the engineer, and mechanical department, and the download. JX 48. The e-mail goes on to say the video shows a "slightly different picture of the events versus what Conductor Peachy describes in that the video doesn't indicate that there was anything wrong with the speed of the coupling (but instead confirms the locomotive download that it was a very good coupling) and the video does not indicate that Mr. Peachy's body was jerking towards the rear of the car but instead indicates that he was facing the car he was riding the entire time leading up to the coupling with the exception of right before the coupling was made he put his hand on the bulkhead and instead slightly turned to FACE the coupling." JX 48 at 2. Goldman's e-mail continues stating a formal investigation will be scheduled citing a violation of LIFE Rule T-6. *Id.*

Goldman claimed it was not a regular practice to discipline employees who suffered injuries. TR 256. He stated a more common occurrence was for employees to be disciplined for rule violations when there was no injury. *Id.*

5. Joe Witt¹⁶

Mr. Witt is the senior manager of operating practices and rules for Respondent. TR 343. His duties include incorporating any new railroad safety rules or regulations issued from the federal regulatory agencies into the Respondent's rule book, or making modifications to Respondent's rules as a result of policy changes Respondent initiates. TR 343, 346. Prior to this position he held several positions at Respondent including conductor, Chief Train Dispatcher, Operations Manager, Assistant Superintendent, trainmaster and superintendent of the Regional Operations Center. TR 345. Witt disagreed with Complainant's assertion that Rule 211 required the locomotive engineer to apply the automatic brakes when performing a shove move into a

¹⁵ Currently Goldman holds the position of President of the Louisville and Indiana Railroad. TR 216.

¹⁶ Respondent's brief spells Witt's name Whitt, whereas the transcript spells it Witt. Resp. Br. at 24. I will use the transcript spelling to avoid confusion.

coupling.¹⁷ TR 347-48. He said an engineer may use the automatic brake in a shove if he felt he needed it based on factors such as speed and grade, but it is not required. TR 348.

Witt contended that given the slow speed of the train into the coupling Complainant could not have been swung around the front of the train when the coupling was made. TR 348-50, 361-62. When asked about Superintendent's Notice #8-12 Shoving Movements Through Main Track X-Overs, Turnouts and curved territory, which addresses use of the automatic brake in circumstances listed, Witt was unable to provide a definition or clear explanation of the meaning of "curved territory" as used in the bulletin. TR 362-64.

B. Railroad's Formal Investigation of Complainant

Complainant filed the report of injury on February 12, 2012, the same day as the injury. Three days later, on February 15, he received a Notice of Investigation indicating a formal hearing on the injury incident would occur. JX 5. At Complainant and his Union's request the hearing was postponed several times and was finally held on April 26, 2012. JX 6-8. Complainant was represented by his Local Union Chairman Scott Seggerman. Prior to the formal investigatory hearing, Seggerman sought additional information from Goldman as to the specific rules Complainant was alleged to have violated, but Goldman did not reply. TR 161, 227; JX 43. Seggerman said it is common for the Railroad not to identify a specific rule alleged to have been violated in its Notice of Investigation. TR 158. Superintendent Goldman acknowledged the Notice of Investigation letter, also referred to as the Charge letter, did not specify the rules alleged to have been violated. TR 228. When asked why he did not respond to the union representative, Seggerman's, pre-investigative hearing request seeking to learn which rules the Railroad alleged Complainant violated, Goldman stated the decision not to include specific rules the Railroad alleges were violated in Notice of Investigation is a railroad policy over the last 2-3 years. Goldman said he did not make the policy decision. TR 228-29. Steinbeck also confirmed this policy stating the Railroad does not include the rule an employee is alleged to have violated in the Notice of Investigation or charge letter. TR 306. By way of explanation, Steinbeck explained that under the collective bargaining agreement with the union, the Railroad is only permitted to investigate the facts surrounding "what was on the charge letter, so if you have a specific rule while you bring evidence at the investigation, you can't bring in other rules to investigate if evidence suggests that [an employee] may have violated other rules." *Id.*

Steinbeck testified at the formal investigative hearing, and charged Complainant with rule violations. TR 209, 210, 295. There, he alleged, for the first time, that Complainant violated three safety rules:

- (1) U.S. Operating Rule, General Rule A titled Safety, which states "Safety and commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken";

¹⁷ Although the transcript cite refers to Rule 322, this appears to be in error. TR 347. Rule 211 addresses use of the automatic brake. No evidence was presented as to a Rule 322. Nor is there any indication in the Railroad's rules submitted as evidence, a Rule 322 exists. TR 347; JX 19.

(2) U.S. Operating Rule, General Rule C, which states “Alert and Attentive. Employees must be alert and attentive when performing their duties, taking care to prevent injury to themselves or others.”; and

(3) L.I.F.E U.S. Safety Rule T-6 (2) & (3) (LIFE Rule) titled, Getting On/Off and Riding Equipment, which states in part: “When getting on or off equipment or when riding on equipment, face equipment and use only steps, ladders and handholds provided” and “Maintain firm hold and stance when riding equipment.”

JX 10 at 37-38; *see also* JX 19 at 265; JX 20 at 358.

At the formal investigatory hearing, trainee Klapperich testified he heard Complainant attempt to say something but he could not hear him, stating he had jumped off the car and was walking next to it before the joint was made. JX 10 at 142-44. He also testified that when the train slowed right before the joint was made the slack came out. *Id.* at 150-51. He said that if Complainant was reaching for his radio and the slack ran out Complainant would have been thrown off-balance. *Id.* at 166. Klapperich testified he participated in the reenactment of the event and observed the lumber shift. *Id.* at 141. John Centar, the conductor who participated in the reenactment in Complainant’s absence, stated the slack went out when they made the coupling at 3-5 miles per hour. *Id.* at 171. He also saw the lumber shift, hit the end of the bulkhead and shift back when the joint was made. *Id.* Centar and Keclik, Complainant’s immediate supervisor both testified if the slack ran out it could cause one to get off balance and pivot. *Id.* at 185-86, 102-04. Steinbeck reported he read the transcript following the investigative hearing, and maintained it supported his assessment Complainant violated Rules A, C and T-6. TR 210-11, 297.

Superintendent Goldman did not participate in the formal investigatory hearing under the collective bargaining agreement. Following the investigatory hearing he reviewed the hearing transcript and the exhibits submitted at the formal investigatory hearing, and the video of the incident recorded on camera in the Fond du Lac yard. TR 230. Goldman concluded Complainant violated General Operating Rules A and C and LIFE Safety Rule T-6 by not holding the grab irons/handholds. TR 231, 233-38; JX 26. He recommended a 10 day deferred suspension to his boss Klaus who approved the recommendation. TR 231, 234-35, 252-53, 255, 264-66; JX 26.

C. Complainant’s Employee Performance Scorecard

Complainant’s performance scorecards for the years 2008-2011 were introduced. JX 28-31. Complainant’s rating varied from superior to fully meets during this period. Based upon Complainant’s performance scorecards from 2008 through 2011, Steinbeck agreed Complainant was “a very good employee.” TR 366. The Railroad also maintains a Personal Work Record for each employee. TR 310; JX 33-44. The Personal Work Record contains two sections, a Letter History and a Discipline History section. TR 310-12. Letter History includes anything related to an employee’s training, letters of accommodation, or letters of caution. Under the

CBA, a letter of caution is not considered discipline. TR 312. Discipline includes a letter of reprimand or greater disciplinary action. *Id.* Complainant's Personal Work Record reflects he had no discipline history other than the 10 day deferred suspension at issue herein. TR 367; JX 33. In fact his record shows he never received even a caution in the period from 2006 until his injury in 2012. *Id.* Complainant's 10 day deferred suspension remains on his disciplinary record for a period of three years. During this period, the 10 day deferred suspension can be used to impose greater discipline if there were any future rule infraction. TR 367.

D. Other Instances of Employee Discipline

Steinbeck recalled he had been involved in disciplinary incidents associated with a rules violation and injury other than Complainant's. TR 303-04. He noted some employees waive the formal investigation. Steinbeck contends an employee waives the formal investigation when he takes responsibility for his actions. TR 305. He also agreed that if an employee waives the formal investigation any discipline is usually reduced as a result of accepting responsibility for the incident. *Id.* Steinbeck testified that he was aware of other employees who were disciplined for violations of LIFE Rule T-6 but who had not suffered an injury associated with the rule violation. TR 309, 313-14; JX 36, 37, 38, 39, 40, 41. He further testified that he knew of four employees who were disciplined for other rule violations in situations where no injury occurred. TR 304-15; JX 36, 44, 45, 46. Steinbeck pointed to an employee, Witt, who was disciplined several times for rules violation when no injury occurred including a violation of T-6 regarding riding equipment. TR 304-310; EX 36. Steinbeck was also aware of other employees who reported injuries but who were not disciplined as there was no rule violation. TR 315-29.¹⁸ Steinbeck testified that during his time at the Fond du Lac yard it was "extremely rare to have discipline involving an injury." TR 315. When there is discipline with an injury it is because there is a rule violation. *Id.*

E. DVD Video

The Fond du Lac Yard has six cameras at various locations. TR 202. One of those cameras happened to be positioned to capture a portion of the coupling and shove move in which Complainant was injured. TR 202-03; JX 35. The camera was located 75 to 100 yards from where the coupling occurred. *Id.* The DVD showing a portion of the coupling action was played at the hearing and is an exhibit. JX 35. There is no dispute the video is grainy, and shot from some distance. The parties have differing opinions as to what the video shows in relation to Complainant's action riding the car in the seconds before his injury.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or

¹⁸ To the extent that some of the examples involved bee sting injuries, those examples are accorded less weight as the Railroad does not have a rule addressing bee stings. TR 321-23. Additionally, it is unclear how one performs one's duties to avoid bee stings.

in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. Protected activity under the FRSA **includes** notifying or attempting to notify the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109(a)(4). The FRSA whistleblower provision is governed by the legal burdens set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. *See* 49 U.S.C. § 20109(d)(2)(A)(i) and the applicable regulations at 29 C.F.R. Part 1982; *see also*, *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 evidence¹⁹ that: “(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.” *Hutton v. Union Pacific R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).²⁰ 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.” *Araujo*, 708 F.3d at 158; *Hutton*, ARB No. 11-091, slip op. at 8.

If a complainant proves that his protected activity contributed to the adverse action, the burden shifts to the employer, and 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; *Araujo*, 708 F.3d at 157; *Powers v. Union Pacific Ry. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11 (ARB Mar. 19, 2015). 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 probable or reasonably certain.”” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (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)).

Accordingly, I must consider all the evidence presented and determine whether Complainant has established that he engaged in protected activity, and that protected activity was a contributing factor to the adverse action taken against him. If Complainant meets his initial burden by a preponderance of evidence, then I must determine whether the Respondent has

¹⁹ The “[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting* *Black’s Law Dictionary* 1201 (7th ed. 1999)).

²⁰ At times, this test has identified four elements: (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. *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-CV-863, 2015 WL 914922 (S.D. Ohio Mar. 3, 2015).

established by clear and convincing evidence that it would have taken the same adverse employment action absent the protected activity.

A. Protected Activity

Protected activity under the FRSA **encompasses an employee’s “good faith” act in “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.”** 49 U.S.C. § 20109(a)(4). The evidence unequivocally establishes that when the coupling occurred, the lumber shimmied enough to crush Complainant’s fingers before the load shimmied back into place. I find Complainant sustained a work injury. The parties stipulated that Complainant reported a work-related injury. However, Respondent contends Complainant’s report of injury was not made in good faith because he was not truthful about the circumstances surrounding his injury, citing *Ray v. Union Pacific R.R.*, 971 F. Supp. 2d 869, 883-84 (S.D. Iowa Sept. 13, 2013); *Griebel v. Union Pacific R.R. Co.*, ALJ No. 2011-FRS-00011, slip. op. at 22-23 (ALJ Jan. 31, 2013); *Koziara v. BNSF Ry. Co.*, 13-CV-834-JDP, 2015 WL 137272, at *7 (W.D. Wis. Jan. 9, 2015); *Murphy*, 2015 WL 914922, at *5. Resp. Br. at 47-48.

In *Ray* and *Griebel* the courts have looked at whether at the time the employee reported the injury he genuinely believed the injury was work related. 971 F. Supp. 2d at 884; ALJ No. 2011-FRS-00011 slip. op. at 23.²¹ *Ray* involved a claim against Union Pacific in which the plaintiff alleged he was terminated in retaliation for submitting an injury report. 971 F. Supp. 2d at 872. The plaintiff requested leave to have knee surgery and when asked, told Union Pacific his knee injury was not work-related. A month later he completed an injury report asserting his knee injury was work-related. In responding to a question on the injury report form, plaintiff indicated he first became aware the injury was work-related one year before. *Id.* Thereafter, plaintiff gave varying statements about when he became aware the injury was work-related and why he first told Union Pacific the injury was not related to his employment. *Id.* at 882. Citing Section 20106 of the FRSA, the court stated it does not apply the good faith requirement to all of an employee’s interactions with a railroad. Rather, the phrase “good faith” applies directly to the singular “act done . . . to notify . . . the railroad carrier . . . of a work-related personal injury.” 49 U.S.C. § 20109(a)(4); 971 F. Supp. 2d at 883-884. The court stated the “relevant inquiry remains whether, at the time he reported his injury to [the Railroad] plaintiff genuinely believed the injury he was reporting was work-related.” *Id.* Thus, the court held that for purposes of surviving summary judgment, plaintiff established the first element of his claim because he genuinely believed his injury was work-related at the time he reported the injury to Union Pacific. *Id.*

Similarly, in *Griebel*, the complainant, a conductor, filed a claim alleging he was fired in retaliation for filing a personal injury report. ALJ No. 2011-FRS-00011, slip. op. at 2. After being in a derailment, complainant experienced back pain. The complainant spoke with a railroad official about his pain, but was uncertain whether it was related to a prior back injury or to the derailment. *Id.* at 23. Within a short time, he did complete an injury report. The railroad

²¹ See also *Davis v. Union Pacific R.R. Co.*, No. 5:12-CV-2738, 2014 WL 3499228, at *6-7 (W.D. LA July 14, 2014) (citing *Ray* and *Griebel* for the proposition that the good faith standard is satisfied when an employee believes his injury is work-related when he submits an injury report to the railroad)

alleged his injury report was made in bad faith as he initially was uncertain as to whether the derailment of the train he was on exacerbated or aggravated a pre-existing back injury. The administrative law judge stated “the FRSA does not protect fraudulent or dishonest notification.” *Id.* 22-23. The judge concluded that even if the complainant had earlier expressed doubts as to whether his injury was work-related, he notified Respondent of a work-related injury in good faith, and thus, he engaged in protected activity under the FRSA. *Id.*

In *Murphy*, the complainant suffered a leg injury while using a chainsaw without wearing chaps. 2015 WL 914922. Complainant asked his supervisor not to escalate the report of his injury, he asked a coworker to keep his injury quiet, he told the hospital treating staff that he injured himself at home not at work, he did not admit his injury occurred at work until confronted by the railroad after an anonymous tip, and he would not complete the injury form unless he was with a union representative. *Id.* at *12. Norfolk Southern maintained the complainant failed to report his injury in good faith. The complainant argued the “good faith” requirement only requires an employee to have a good faith belief the injury is work-related. *Id.* The court held that the FRSA’s good faith requirement requires both that the employee must have a good faith belief the injury is work-related and that the employee must have actually made the injury report itself in good faith. *Id.* at *5 n.3. The court stated “a plaintiff might honestly believe his injury was work-related and report it, even though the injury was in fact due to another cause.” *Id.* In that situation, the employee would be protected by the FRSA. In contrast, an employee who had some ulterior motive in reporting an injury, or actually attempted to avoid reporting an injury would not be acting in good faith. *Id.*

In *Koziara*, the railroad alleged plaintiff’s injury report was not made in good faith because he initially lied about the source of the injury to co-workers and the record suggests plaintiff may have been injured at some other time. 2015 WL 137272. The court held that in satisfying the good faith requirement, a complainant must actually believe at the time he reports the injury that it was work-related, referring to this as the subjective component, and the belief must be objectively reasonable. *Id.* at *6.

The foregoing authority instructs that in establishing whether an employee’s **act in** “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee” was in good faith, an employee must subjectively believe his reported injury was work-related and his belief must be objectively reasonable. 49 U.S.C. § 20109(a)(4). In the present case, there is no dispute that Complainant crushed two fingers on his left hand at work on February 12, 2012, while riding the point into a joint during a shove move. The Complainant credibly testified that he immediately jumped off the car, took off his glove to examine his hand and radioed he had had an injury and needed medical assistance. Respondent’s witnesses largely confirm this sequence of events. TR 182-83, 279; JX 10 at 93-97. Nor is there any dispute an injury report was completed. TR 89. I find Complainant sustained a work injury, believed his injury was work-related when he reported it, and his belief is objectively reasonable. Therefore, Complainant engaged in protected activity when he reported the injury he sustained at work on February 12, 2012.

I am troubled by the Respondent’s argument, that Complainant lacked good faith in making his injury report, under the circumstances here. Complainant’s injury report stated he

thought the cars were coming in a little fast, he reached for his radio to tell the engineer, at the same time the cars slowed, slack ran out and he got off balance, grabbed for the handhold and got two fingers caught between the car and the lumber. He has consistently stated when he tried to reach for the grab iron he instead grabbed the bulkhead. Respondent asserts the injury report lacks good faith because it maintains Complainant's hand was on the bulkhead the entire time according to Steinbeck, or longer than Complainant stated according to Goldman. Steinbeck and Goldman's assertions as to the position of Complainant's hands are based entirely on the DVD video. The video is of poor quality, shot from some 75 to 100 yards from the car Complainant was riding, it does not provide a clear image of the location of Complainant's left hand in the seconds before the coupling is made, and even Respondent's witnesses concede the video is grainy. Under these circumstances, Respondent's argument that Complainant's report of injury was not made in good faith because it believes Complainant was not truthful about the placement of his left hand in the seconds before the coupling based upon the DVD video lacks merit and is unpersuasive. Respondent's construction of the statute, taken to its logical extreme, would mean an employee who suffers an undisputed injury at work, loses the protection of the FRSA whenever a railroad and the injured worker disagree as to precisely how the injury occurred. Such a reading of Section 20109(a)(4) of the FRSA is inconsistent with the language and intent of the provision and effectively nullifies the statutory provision.

B. Adverse Action

Following an investigative hearing, the Complainant was given a 10 day deferred suspension as discipline for safety rule violations. Under the Act, a suspension constitutes an adverse action by an employer. *DeFrancesco*, ARB No. 10-114. Accordingly, Complainant has established he suffered an unfavorable personnel action.

C. Contributing Factor

A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams*, ARB No. 09-092 at 5). In establishing the contributing factor element, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Araujo*, 708 F.3d at 158 (*quoting Marana v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)); *Lockheed Martin v. Admin. Rev Bd.*, 717 F.3d 1121,1136-37 (10th Cir. 2013) . A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer's adverse action. *Powers*, ARB No. 13-034 at 11; *DeFrancesco*, ARB No. 10-114 at 6; *Hutton*, ARB No. 11-091 at 7. This standard is intended to be protective of whistleblowers. The legislative history of the FRSA indicates the statute was intended to "ensure that employees can report their concerns without fear of possible retaliation or discrimination from employers" because testimony showed that railroads sometimes "either subtly or overtly intimidate[d] employees from reporting on-the-job injuries." H.R. Rep. No. 110-259 at 348 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 181; *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the House Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 22, 2007).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Powers*, ARB No. 13-034 at 11; *Williams*, ARB No. 09-092 at 6; *DeFrancesco*, ARB No. 10-114 at 6-7. Direct evidence “conclusively links the protected activity and the adverse action and does not rely upon inference.” *Williams*, ARB No. 09-092 at 6 (citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114 at 6 (holding employer’s suspension of employee who reported job-related injury “violated the direct language of the FRSA”). A complainant may also rely upon circumstantial evidence, which:

may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114 at 7; see also *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-00033, HTML at 13 n.69 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057 at 13-14. This is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (quoting *Sylvester v. SOS Children’s Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

Recent court and ARB decisions have found that injury reports contributed to discipline in situations similar to those here. *Koziara*, 2015 WL 137272 at *9-11 (Court determined railroad employee established contributing factor/causation because the evidence showed Koziara’s injury report triggered the investigation which led to termination); *Ray*, 971 F.Supp. 2d at 888 (employee was fired for failing to report injury in timely manner and court found that if employee had not reported the alleged work-related injury, the railroad would not have undertaken an investigation into either dishonesty of employee’s statement or timeliness of his injury report and employee would not have been fired); *Henderson*, ARB No. 11-013 at 13 (finding a presumptive inference of causation where complainant’s investigation and discipline directly stemmed from his report of injury); *DeFrancesco*, ARB No. 10-114 at 7 (finding because complainant’s report of injury triggered the employer’s review of his personnel records and led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, PDF at 8 (ARB June 20, 2012) (holding because complainant’s protected disclosures prompted the employer’s investigation that led to complainant’s discharge, the complainant’s disclosures were “inextricably intertwined” with the investigations that resulted in his discharge and complainant established the “contributing factor” element of his claim). The protected activity and adverse action are inextricably intertwined if the basis for the adverse action cannot

be explained without discussing the protected activity. *See Hutton*, ARB No. 11-091 at 15 (Corchado, J., concurring).²²

On February 12, 2012, Complainant sustained a work injury. The injury and Complainant's report of injury prompted a reenactment or informal investigation, a formal investigation, and a 10 day deferred suspension. On the same day the injury occurred, following the reenactment or informal investigation of the injury event, Steinbeck concluded Complainant's injury was caused by a violation of LIFE Rule T-6, and he recommended the Railroad initiate a formal investigative hearing charging Complainant with a rule violation. On February 15, 2012, Complainant received a Notice of Investigation directing him to attend a formal investigation hearing to determine whether he violated any rules associated with the shove move in which he was injured. Thereafter, the Letter of Suspension indicates at approximately 0857 hours on February 12, 2012, Complainant violated Company rules LIFE US Safety Rules T-6, and USOR General Rule A and C while engaged in switching operations at Fond du Lac on N266 track while riding car, CN 624079 and coupled into car, BGEX 2050. JX 26. This switching operation is precisely when Complainant was injured. Absent Complainant's report of injury, no investigation would have been initiated, nor would any discipline have been imposed. As the report of injury triggered the investigation which led to the suspension, this is persuasive evidence the injury and report contributed to the adverse action here.

The rules Respondent charged Complainant with violating and which the Railroad cites to defend the discipline also support a finding the injury influenced the discipline imposed. The Complainant was charged with violating three rules, two of which are general, vague and tied to not injuring oneself. For example, U.S. Operating Rules ("USOR"), General Rule A – Safety states and requires "Safety and a commitment to obey the rules are the most important elements in performing duties. If in doubt, the safe course must be taken." General Rule C – Alert and Attentive, requires that employees be "alert and attentive when performing their duties, *taking care to prevent injury* to themselves or others." Rule A and C are so general they could be violated any time there is an injury. *Peterson v. Union Pacific R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, slip op. at 3 (ARB Nov. 20, 2014). Respondent's witnesses acknowledged that the central focus was Complainant's violation of LIFE Rule T-6-2, failure to hold the

²² The Respondent contends in its brief that *DeFrancesco* and its progeny were wrongly decided by the ARB. *See* Resp. Br. 54-59. Respondent argues the *DeFrancesco* decision "virtually immunizes a railroad employee from employer discipline for unsafe conduct as long as that employee reports any resulting injury and the report is the only avenue by which the employer learned of the unsafe conduct." Resp. Br. at 55. Citing *Kuduck v. BNSF Railway Co.*, 768 F.3d 786 (8th Cir. 2014), Respondent states the Eighth Circuit rejected both the Third Circuit's *Araujo* and the ARB's *DeFrancesco* contributing factor analysis under the FRSA and instead required an employee to prove intentional retaliation prompted by the employee's protected activity. Resp. Br. at 55. To the extent the Eighth Circuit construes the FRSA as requiring a complainant to show animus or intentional retaliation in meeting his burden of establishing contributing factor, I disagree. As the present case does not arise in the Eighth Circuit, it is not controlling here. However, I am bound by the Board's decisions.

Respondent appears to assert burdens of proof used under the Federal Railroad Employers Liability Act (FELA) should be utilized. Resp. Br. at 56-58. It is incorrect. The FELA takes the place of workers' compensation in the railroad industry and requires an injured employee to demonstrate the railroad was negligent in order to recover for work place injuries. The burdens of proof under the FELA are different than the burdens of proof under the FRSA. Accordingly, cases decided under that statute are of little assistance in resolving this matter.

handholds while riding the point into the coupling during the shove move. Yet Respondent relied on the additional vague overly broad rules that are intrinsically linked with the fact Complainant sustained an injury. This was to ensure that any discipline could withstand the appeal process under the CBA.

In addition, the Notice of Investigatory Hearing did not identify any rule Complainant was alleged to have violated. Steinbeck acknowledged this was because under the CBA, the Railroad is only permitted to investigate the facts surrounding “what was on the charge letter, so if you have a specific rule while you bring evidence at the investigation, you can’t bring in other rules to investigate if evidence suggests that [an employee] may have violated other rules.” TR 306. Goldman, who assessed the suspension, acknowledged the Notice of Investigation letter did not specify the rules alleged to have been violated. When asked why he did not respond to the union representative, Seggerman’s, request prior to the investigatory hearing for information identifying rules the Railroad alleged to have been violated, Goldman stated the decision not to include specific rules an employee is charged with violating in the Notice of Investigation is a railroad policy initiated over the last 2-3 years. Goldman said the policy decision was not made by him and was out of his hands. TR 228-29. Moreover, although Steinbeck and Goldman assert the primary and specific rule Complainant is alleged to have violated is LIFE Rule T-6, I infer from the policy of citing broad general rules along with the specific rule, and of failing to inform employees of the rules allegedly violated prior to the Investigatory hearing, the Respondent sought to ensure it could impose discipline upon Complainant for violating some safety rule in connection with his workplace injury.

Finally, there is temporal proximity as Complainant’s suspension occurred less than three months following his report of injury. Taken together, the fact that without Complainant’s report of injury, no investigation or discipline would have occurred, in hiding the rules alleged to have been violated until the investigative hearing thus improving the Railroad’s chances of sticking the employee with discipline, and the closeness in time between Complainant’s injury and his discipline, Complainant has satisfied his burden of establishing his injury was a contributing factor in the Railroad’s discipline. Accordingly, the burden shifts to Respondent to establish by clear and convincing evidence it would have taken the same adverse employment action absent the protected activity.

D. Respondent’s Affirmative Defense

Respondent can avoid liability by demonstrating it would have taken the same adverse action absent the Complainant’s protected activity. Respondent maintains it disciplines employees for rule violations in situations where no injury occurred and it does not discipline all employees who report on the job injuries. For example, Respondent presented evidence establishing that at the Fond du Lac yard it disciplined six other employees for violations of LIFE Rule T-6 in situations that did not involve injury reports. TR 309, 314; JX 36, 37, 38, 39, 40, 41. It also presented evidence that four other employees were disciplined for violations of various other rules where there was no injury report. TR 305, 307, 310; JX 36, 44, 45, 46. Steinbeck identified other employees who reported injuries during his tenure who were not disciplined for an injury or charged with a rule violation in connection with the injury. TR 315-30.

Complainant acknowledges this evidence by Respondent. Compl. Br. at 31. However, Complainant discounts such evidence arguing the incident here involved two employees Complainant and engineer Chupka. *Id.* at 31-32. Complainant contends that he was injured and was disciplined whereas Chupka was not disciplined. Furthermore, Complainant asserts Chupka possibly violated Operating Rule 211 which required the engineer to stop within half the distance of the last command from the conductor. Compl. Br. at 33-34. However, I find Steinbeck's explanation of why Chupka's actions did not violate any rules persuasive. The evidence established no damage to the cars that were coupled, and the application of independent braking showed a measured consistent decline in speed into the coupling.

Upon considering Respondent's evidence of employee discipline and its explanation for not disciplining engineer Chupka here, I find Respondent has established by clear and convincing evidence, it would have imposed the same discipline absent the Complainant's protected activity.

ORDER

For the foregoing reasons, I find that the Complainant has established that his protected activity was a contributing factor in Respondent's decision to discipline him. I further find that Respondent met its burden of establishing an affirmative defense, namely that it would have taken the same adverse action absent the protected activity. Accordingly, the complaint is hereby **DISMISSED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts