

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 January 2016**

Case No.: 2014-FRS-35

*In the Matter of:*  
**JAMES RATHBURN,**  
Complainant,

v.

**BELT RAILWAY COMPANY OF CHICAGO,**  
Respondent.

Appearances:

Stacey E. Lynch, *Esq.*  
Law Office of Stacy E. Lynch  
6923 154<sup>th</sup> Place  
Oak Forest, Illinois 60452  
For the Complainant

Christopher Steinway, *Esq.*  
Belt Railway Company of Chicago  
6900 South Central Avenue  
Bedford Park, Illinois  
For the Respondents

Before: John P. Sellers, III  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("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 ("9/11 Act"), Pub. L. No. 110-053 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations ("CFR"). The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such employee engaged in certain protected activity. Protected activity includes an employee's lawful and good faith notification, or attempt of notification, to the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

## PROCEDURAL HISTORY

On September 27, 2012, James Rathburn (“the Complainant”) filed a complaint under the FRSA, alleging that Belt Railway (“the Respondent”) terminated his employment on April 29, 2012,<sup>1</sup> in retaliation for filing a personal injury report. (ALJX 2.) An investigation conducted by the Occupational Safety & Health Administration (“OSHA”) of the Department of Labor (“DOL”) followed. On November 21, 2013, the OSHA Regional Supervisory Investigator found that the Complainant had engaged in protected activity when he reported sustaining a workplace injury as the result of an altercation with another of Respondent’s employees on the Respondent’s premises on April 6, 2012, and that the Respondent had knowledge of the injury. (*Id.*) Further, the Regional Supervisory Investigator found that the Complainant had suffered an adverse action when he was terminated on April 19, 2012,<sup>2</sup> and that there existed a strong temporal proximity between the Complainant’s protected activity and the adverse employment action.

However, the Regional Supervisory Investigator found that the available evidence demonstrated that the Respondent had terminated both the Complainant and the other employee with whom he was involved in the altercation in violation of the Respondent’s workplace-violence policy of zero tolerance, thus refuting any allegation of disparate treatment. *Id.* Further, the Regional Supervisory Investigator found that the Complainant was terminated in part for improperly removing blue-flag protections from the track upon which the other employee had been working, thus resulting in the altercation. According to the Regional Supervisory Investigator, the available evidence demonstrated that the Respondent had terminated employees in the past for improperly removing blue-flag protection, that the Complainant had “affirmed that he removed blue flags from tracks that were under the control of another employee at the time,” and that the altercation stemmed from a disagreement with the co-worker over the removal of the blue flags. *Id.*

The Complainant’s request for a formal hearing was received by this Office on December 24, 2013. (ALJX 3.) The parties thereafter unsuccessfully participated in this Office’s Settlement-Judge Program. Pursuant to a Notice of Hearing and Prehearing Order issued on May 6, 2014, the undersigned conducted a hearing on this claim on August 19, 2014, and August 20, 2014, in Chicago, Illinois. The parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.<sup>3</sup> At the hearing, the following witnesses were examined:

1. Donald Mytnik, Yardmaster for the Respondent (Tr. 18-41);
2. John Schultz, Carman for Respondent (Tr.42-61);
3. Wayne Kizior, Assistant Superintendent of the Mechanical Department for the Respondent (Tr. 62-118);

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<sup>1</sup> It should be noted that there are conflicting statements as to when the Complainant was officially terminated. At the close of the hearing, the parties agreed that his discharge was effective on April 20, 2012. (Tr. 456.) The Notice of Discipline issued to Rathburn on April 19, 2012, stated that his termination was effective on 7:00 am on Friday, April 20, 2012. (JX Q.)

<sup>2</sup> See fn. 1.

<sup>3</sup> 29 C.F.R. Part 18A.

4. Michael John Romano, Director of the Police and Risk Management for the Respondent (Tr. 119-172);
5. Hugh J. Simon, Superintendent for Mechanical Department for the Respondent (Tr. 184-265);
6. Robert M. Perham, Repair Track Foreman for the Respondent (Tr. 266-305);
7. Thomas J. Sipple, Car Foreman for the Respondent (Tr. 307-337);
8. Richard Reilly, Carman for the Respondent and local chairman of Transportation and Communications Union and Brotherhood of Railroad Carmen (Tr. 338-364);
9. Timothy E. Coffey, General Counsel, Secretary, and Director of Human Resources for the Respondent (Tr. 370-4180); and
10. James Rathburn, the Complainant (Tr. 419-459).

### ISSUES

The issues contested at the outset of the hearing by the Complainant and the Respondent were as follows:

1. Whether the Complainant's report of a personal injury was a protected activity under § 20109 (a) (4) of the FRSA;
2. Whether the Respondent had knowledge of the protected activity;
3. Whether the Complainant's protected activity contributed to the Respondent's decision to discharge him;
4. Whether the Respondent can show by clear and convincing evidence that it would have discharged the Complainant absent his protected activity; and
5. Whether the Complainant is entitled to relief under the FRSA, and, if so, the appropriate measure of relief.

### STIPULATED FACTS

At the hearing, the parties agreed that the Respondent is a railroad carrier engaged in line haul freight operations throughout the United States, and therefore is engaged in interstate commerce within the meaning of the FRSA. (Tr. 13.) The parties further do not dispute that the Complainant was an employee of the Respondent and was therefore covered under the Act. (*Id.*) Finally, counsel for the Respondent made clear that it did not contest that by reporting an injury on April 6, 2012, directly after the incident, and seeking medical attention on April 8, 2012, the Complainant engaged in protected activity. Further, counsel for the Respondent stipulated that the Respondent had knowledge of the protected activity on April 6, 2012, and it later found out,

on April 9, 2012, that the Complainant had gone to the emergency room over the weekend. (Tr. 175, 182, 463-464.)

## EVIDENCE

### Overview of Events

This claim arises out of events that occurred beginning Good Friday, April 6, 2012, involving the Complainant, James Rathburn, and Mark Bradley. Both men were working the inbound yard, with trains arriving from between 25 to 1,500 miles away. (Tr. 100). The Federal Railroad Administration (“FRA”) mandated that an inspection be performed on each incoming train. Although both men were working in the inbound yard, they had divided up the labor so each man worked separate tracks. (Tr. 101, 420-421). Each man was responsible for placing his own blue-flag protections. The purpose of the blue-flag protections is to advise anyone coming on the scene that someone is on the track, which means that others are not to enter or occupy the track. In fact, assuming the track is properly physically locked out, entry onto the track is barred, thus providing safety for the employee inspecting the car, who may have to climb over it, or crawl under it, to perform the necessary check for defects and repairs. (Tr. 100-103.) During this process of inspection and repair, industry standards require that no other train attempt to tie onto the train as employees might be in a vulnerable position inspecting rolling stock. The blue-flag signal operates as a means to alert anyone on the outside that someone is involved in inspecting the car even if they are not otherwise visible, which is not infrequent. (Tr. 104-105.)

On the day in question, Rathburn responded to a call by the Hump Tower requesting that Bradley’s tracks be released. According to Rathburn, he felt justified in releasing Bradley’s blue-flag protections because Bradley had informed him earlier that he was finished with the tracks and because he had seen Bradley approximately ten minutes earlier. (Tr. 420-422.) Bradley, however, later went back to the tracks to perform a reinspection and was unaware until he attempted later to release the tracks to the Hump Tower that they had been released without his knowledge or permission. (JX H, JX A at 94-95.)

Rathburn and Bradley then became involved in a verbal exchange in the office or shanty that was witnessed by another employee, John Schultz. Schultz described Bradley as the aggressor in the verbal exchange but described both men as hostile, loud and exchanging profanity. (Tr. 96-97). Both Bradley and Rathburn portrayed the other as the aggressor in the verbal exchange. (JX A at 96, Tr. 4212. 452.)

After exchanging words, first Rathburn and then Bradley exited the shanty. Bradley denied that his purpose was to follow Rathburn; rather, he stated that he wanted to get to the Jeep to return to working on the tracks. (JX A at 96.) Rathburn, however, testified that he was trying to walk away from the situation, but Bradley appeared behind him as he was getting ready to get into the Jeep. (Tr. 423-424.) Bradley stated that Rathburn then threw a water bottle at him, causing him to fend it off with his hands and possibly scratching Rathburn’s forehead with his fingernails in the process. (JX A at 96-97.) Rathburn, however, testified that Bradley sucker punched him and in the process the water bottle flew from his hands, dousing Bradley. (Tr. 423-424.) The two men then squared off against each other, and there were other fighting words

allegedly exchanged between the two, but nothing further happened until management and the Belt police arrived on the scene.

There were no witnesses to the altercation outside the shanty and no surveillance camera recorded the incident. Rathburn was noted to have a laceration on his forehead. A photograph of that laceration is part of the record. (JX 1.) Statements were taken and both men were ordered to undergo a urinalysis to check for drugs and alcohol. Both men were taken out of service pending an investigation.

According to Rathburn, over the weekend he began feeling worse and reported to the emergency room on Easter Sunday. Rathburn testified that was diagnosed with a concussion and deviated septum. (Tr. 430.) He stated that he was given two shots as well as pain medication before undergoing a CT scan. (Tr. 430.)

The following Monday, on April 19, 2012, the Respondent issued a Notice of Discipline to James Rathburn. (JX Q.) The Notice advised Rathburn that he had been found to have violated 1) the Respondent's blue-flag protection rules, 2) the Respondent's rules of conduct regarding falsification of train records and altercations, and 3) the Respondent's Workplace Violence Policy. Rathburn was advised that as a result of these violations his job was terminated. On the same day, the Respondent issued a Notice of Discipline to Bradley. (JX R.) The Notice advised Bradley that he was found to have engaged in essentially the same violations as Rathburn. He, too, was advised that his job was terminated.

#### Written Statement of Mark Bradley<sup>4</sup>

On the day of 4-7-12 during my work shift, east yard receiving. At the beginning of the shift four tracks came in. Rathburn [sic] said he would work all four tracks. Because he had been so difficult to work with in the past I agreed right away. Last time I worked with him he left me and drove off so I knew it was going to be a problem that day. I agreed with everything he wanted to avoid any problems.

I worked a double that day....so afterword the next four trains that came in that morning. Two extra trains came in on tracks 10 and 11. Approx. 12:30 and 1 p.m. I started working them. Each track had over sixty cars.... Between 1 p.m. and 3 p.m. I worked both tracks. I never gave the tracks back to the yard master. I returned to the yard office to get some water and food. At approx. 3 p.m. Rathburn [sic] asked me what the turnover would be for the second shift. I told him track 10 & 11 and I still had them locked out. He asked me if I had worked them. I said don't worry about them. I have them locked out. He said I would have done the same. He left the yard office. He returned sometime later. At approx. 3:30 p.m. I started to put the trains in the computer. The screen showed

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<sup>4</sup> Corrections to grammar and spelling have been made to improve readability.

no trains on this track. I called the yard master right away and asked him did he hump the track. He said yes. I asked him how could he hump them when I had not released them. He said a carman took the locks off and dropped the flags and said it was ok to hump them. I called the car foreman and asked him did he give the tracks back to the yard master and he said no, Rathburn [sic] did it.

(JX H.)

Testimony of Mark Bradley on April 16, 2012 As Part of the Respondent's Formal Investigation

Bradley was called to testify as part of the formal investigation conducted by the Respondent. (JX A.) He testified that he had been employed by the Respondent for seventeen years. (*Id.* at 93.) Bradley denied using any profanity or being quarrelsome during the altercation with Rathburn. (*Id.* at 93-94.) He expressed his view that Rathburn was difficult to work with. (*Id.* at 94.) He stated that after working his tracks he discovered on the computer that the locks had already been removed. (*Id.* at 94-95.) According to Bradley, after making inquiries, he learned that Rathburn had removed the locks and confronted him in the shanty. (*Id.* at 95.) He denied raising his voice, stating that he asked Rathburn in a “calm, deliberate” manner whether he had removed his blue-flag protection. He stated that Rathburn admitted to having done so. He stated when he protested that Rathburn was not supposed to have removed his locks, Rathburn “snatched the phone off the hook,” called him a “dummy” and proceeded to call the foreman, accusing Bradley of not knowing what he was doing. (*Id.*)

Bradley denied following Rathburn out of the shanty, stating that he “went out to go work some tracks” rather than following behind him. (*Id.* at 96.) He stated that as far as he was concerned, he was “done” with Rathburn, who he described as already “belligerent,” calling him names. He testified that he was trying to get in the Jeep when Rathburn threw the water bottle at him, which caused him to go into a “defensive mode,” retreating as Rathburn further approached. (*Id.*) He accused Rathburn of rubbing a “little scratch” on his forehead to make it bleed “to make me look like I was some crazed lunatic that went wild and [was] just attacking people.” (*Id.* at 96-97.)

Bradley denied ever raising his voice while inside the shanty, claiming that it was not his nature. (*Id.* at 97.) He testified that he also did not use any profanity, as that was contrary to his character. (*Id.*)

He stated that when he and Rathburn were at the Jeep, both of them were trying to get in. (*Id.* at 98.) Asked if his hands ever struck Rathburn, he replied, “I am not sure, because when he—when he threw the water bottle I went up, I put my hands up in a defensive mode to try to block that bottle he threw.” (*Id.*) He added, “As I said, when I saw him he wasn’t bleeding. Then I saw him rubbing his head, and the next thing he is bleeding.” (*Id.*) Asked if Rathburn’s statements alleging him to have thrown a punch were untrue, Bradley replied, “Just about everything he said is untrue.” (*Id.*)

Bradley explained that when an employee is finished inspecting tracks he or she is not required to give the track back to the Yardmaster. (*Id.* at 99.) However, he also testified if an employee was finished with the track, the employee is supposed to release the tracks. (*Id.* at 100.) He stated, however, that he was not finished with the tracks on that day, and still needed to go back to them and reinspect one of the tracks because he was not “sure whether I had to bad order it or not.” He stated that when he went back to reinspect the track, the locks had already been pulled. (*Id.* at 100-101.)

Asked again concerning the altercation with Rathburn in the shanty, Bradley described himself as being calm and Rathburn as being belligerent and yelling. (*Id.* at 101-102.) He stated that he did not provoke an altercation with Rathburn but, rather, tried to avoid doing so. (*Id.* at 102-103.) He denied being either quarrelsome or discourteous. (*Id.* at 103.) He stated that when the two went outside, he was trying to get in the Jeep, and Rathburn kept pushing the door shut. (*Id.* at 104.) Asked if he could have struck Rathburn in the forehead, he stated, “I threw my hand up in a defensive motion and blocked that bottle. If Mr. Rathburn—I have long nails. Inadvertently he may have been scratched, but that’s all it was, was a scratch. It was not [done] intentionally. It was not premeditated.” (*Id.* at 104-105.)

Bradley was then asked about a written statement from John Schultz, a witness to the altercation in the shanty (whose hearing testimony will be summarized, *infra*), that he had approached Rathburn and stated, “Why in the fuck did you unlock my tracks without telling me?” (*Id.* at 110.) Bradley testified that Schultz had “heard what he wanted to hear,” and again he denied being the type of person who used such language. (*Id.*) Asked about Schultz’s statement that both men engaged in profanity and vulgarity, Bradley responded: “That is incorrect, also. Again, [Schultz] is a new person there. He don’t really know me, and he lumped in the same category as all the other profanity users.” (*Id.* at 111.)

#### Hearing Testimony of James Rathburn

Rathburn testified that he was employed by the Respondent for a little over 19 years. (Tr. 419.) He stated that on the date of the incident which led to his termination, April 6, 2012, his job title was that of Carman. (Tr. 420.) On that day, according to Rathburn, he worked a double shift that began at 7:00 am. He stated that he and Bradley were “doubling in the same yard the whole day” and therefore they worked out a game plan in which they worked separate tracks. Bradley was assigned tracks 10 and 11. According to Rathburn, Bradley later reported to him “personally” that he had “finished up working” tracks 10 and 11. (Tr. 420-421.) Rathburn testified that Bradley also called the Hump Tower and “gave the tracks back to the Hump.” (Tr. 421.) According to Rathburn, he was “sitting right there when he called the Hump Tower and gave them back to the Hump Tower.” (Tr. 450.)

Rathburn testified that, as he started walking tracks 1 and 2, the Hump Tower began calling on the radio for the east receiving Carman, and that he answered it after about the fourth call. (*Id.*) He stated that Dale McDale, who was on duty at the Hump Tower, asked him if he could remove the locks from tracks 10 and 11. Rathburn testified that that he “wasn’t too happy about it,” and tried calling Bradley on the radio see if Bradley was available to unlock the tracks himself. However, he testified, Bradley never answered the radio, and therefore he walked “15,

20 cars back to the Jeep,” which he then got in and travelled to tracks 10 and 11, “unlocking both ends for him.” He added, “I actually even threw the switch for the humper to come in the engine, the locomotive to come in to the end of the track.” (Tr. 422.)

Rathburn testified that he then went back to the shanty, which he also described as the Carmen’s office, and grabbed a bottle of water. (*Id.*) He testified that Bradley was also in the shanty and got out of his chair. He testified that Bradley asked him “who in the fuck are you to take my locks off my tracks?” Rathburn testified that he replied that he had done Bradley a “favor,” but Bradley viewed it differently and kept “getting on” him, becoming more aggressive and resorting to name calling. According to Rathburn he told Bradley, “[W]hoa. Hold on. We will take care of this real quick.” (*Id.*) He testified that he then called Bob Perham, the Repair Track Foreman, and told him that “we have a whiner over here” and he needed a foreman to report to the shanty. Upon questioning from the undersigned, Rathburn testified that he did not believe that his reference to Bradley as a “whiner” was made within Bradley’s hearing range, as Bradley was on the other side of the room. (Tr. 452.) He denied saying the term extra loud so that Bradley might hear it. (*Id.*) Asked concerning earlier testimony from Schultz that both men had exchanged vulgarities and profanity, Rathburn responded that he had not used either because he was determined that the situation would not escalate. (Tr. 453.)

Rathburn testified that he then “walked back outside to get away from the whole situation.” (Tr. 423.) According to Rathburn, when he got to his Jeep parked outside the shanty he turned around and found that Bradley had followed and was right behind him as he stood at the driver’s-side door. He then described how Bradley came around to the driver’s-side door, where he was standing with the water bottle in his hand, and opened the driver’s-side door and swung it open. Rathburn stated that when he tried to block the door, his water bottle “did go all over.” He then described Bradley pushing the door closed and punching him “right in the forehead.” He stated that the punch came as a surprise from a “60-year-old gentleman” and that he reached into the bib of his overalls, retrieved his cell phone, and was preparing to call the Belt police while Bradley continued to invite him to spar. He stated that Bradley called him a “wife beater, this and that,” and that he said, “[T]hat’s it. You’re done.” He described then walking back into the shanty and showed another employee, whom he identified as [John] Schultz, the mark on his forehead from Bradley’s punch. He stated that the two then got into contact with the Belt Police, and that the foreman, who was already on his way, arrived sixty seconds later. (Tr. 424.)

According to Rathburn, he did not consider that he had participated in a verbal altercation with Bradley. (Tr. 425.) He repeated that Bradley had personally told him that he, Bradley, was done with tracks 10 and 11. (*Id.*) Asked concerning Bradley’s investigation testimony to the effect that he was still planning to reinspect the tracks, he stated that the testimony did not make any sense because of the length of the tracks, and because Bradley had already told him that the tracks were done. (Tr. 425-426.) He further testified that the Hump Tower would never have called requesting that the tracks be unlocked unless the tracks had already been given back to the Hump Tower. (Tr. 426.)

Rathburn testified that he wanted to file criminal charges against Bradley, and that Michael Romano, director of the Belt police, placed Bradley in handcuffs when he showed up at

the scene. (Tr. 426.) He stated that after Romano talked to Bradley, he, Romano, talked him out of filing charges and instead allowing the matter to be handled internally. Rathburn testified that Romano told him not to worry about losing his job. Rather, Rathburn testified that he told Romano that as long as Bradley was discharged, he would forego pressing charges because “we don’t need this violence in the workplace.” (*Id.*)

Rathburn again denied using any profanity during his altercation with Bradley. (Tr. 427.) He testified, further, that at no time did he raise his voice above the level he was using at the hearing. He stated that he did not fight back because Bradley was sixty years old and because he did not “believe in violence” because he had “had enough of that in my life.” (*Id.*) He also denied intentionally throwing water at Bradley. Rather, he stated that the bottle flew out of his hands inadvertently, as the result of Bradley flinging the door open and causing him to react spontaneously. (Tr. 428.) He stated that as Bradley punched him in the face, he threw his open hands straight up in the air, told Bradley he was through, and then retrieved his cell phone from his pocket. (*Id.*) He explained that he threw his hands up into the air because he believed that surveillance cameras were recording the event, and he wanted “everybody to see what was going down.” However, he noted that the Respondent explained to him later that the cameras were not angled in such a manner to record the event. (*Id.*)

Asked if he knew Bradley’s precise whereabouts when he removed the locks from tracks 10 and 11, Rathburn responded affirmatively. (Tr. 428.) According to Rathburn, he understood the rules to allow him to remove the locks on Bradley’s assigned tracks as long as he knew his co-worker’s whereabouts. (*Id.*)

Rathburn described Robert Perham, the Repair Track Foreman, as the first on the scene, followed by Thomas Sipple, the Car Foreman. (Tr. 436.) He stated that Sipple requested that he enter the train times before “they sent me for a piss test.” (*Id.*) He stated that he could not justify the times he entered “because I was pissed off.” However, he then described the times he entered as “a clerical error, a typo.” (*Id.*) He stated that such errors were “probably” common and he knew of no one who had ever been disciplined for making them. (Tr. 436-437.)

He stated that the Respondent had both he and Bradley undergo a drug-and-alcohol test, and were then pulled out of service pending an investigation. (Tr. 429.) Rathburn described his injury in the immediate aftermath of the altercation as “a big old gouge” with “blood coming down on both sides of my nose.” (Tr. 429.) He testified that he returned home “pissed” at being “sucker punched,” and was also experiencing pain, although he had been “hit in the head before.” According to Rathburn, he decided to take a couple of aspirins and felt that he would eventually feel fine. However, he testified, he began to feel worse over the weekend and his “eyes were starting to turn black-and-blue because I guess when he hit me, he broke the top of my nose.” He stated that the incident occurred on a Friday and by Saturday the swelling on his face “got really, really good.” (*Id.*) He stated that he spoke to Hugh Simon, the Supervisor of the Mechanical Department, who called to inquire about his wellbeing. According to Rathburn, Simon told him not to worry about losing his job “because you didn’t do anything.” (Tr. 434.)

Rathburn testified that on Easter Sunday he went to the emergency room and was diagnosed with a concussion and deviated septum. (Tr. 430.) He stated that he was given two shots as well as pain medication before undergoing a CT scan. (*Id.*)

Rathburn testified that the following day, Monday, he was called into the office of Wayne Kizior, the Assistant Superintendent of the Mechanical Department, to make a written statement. (Tr. 431.) He identified the other participants in the meeting as Hugh Simon, Michael Romano, and Richard Reilly, although he noted that Reilly “was a little late.” (*Id.*) He stated that as he was walking into the meeting, Romano put his arm around him and again assured him that his job was not in danger. According to Rathburn, Romano told him that the Respondent intended to discharge Bradley. (Tr. 434.) He testified, however, that when he entered the meeting and announced that he had been to the emergency room the day before, “[t]hese guys got irate.” (*Id.*) He stated that Kizior threw “stuff down...saying, what the fuck.” (*Id.*) He added, “And everybody was like, oh, man. You know, calling me a couple names. And it was like, what was I supposed to do? I was in pain.” (Tr. 432.) The undersigned then asked Rathburn as follows:

Q. What else did they say?

A. Up there in the meeting?

Q. I mean, you told them you were—you went to the emergency room. They said, what the fuck. What else did they say?

A. Well, no, that’s—the first thing I told them, I say, I want you guys to know that I went to the emergency room.

Q. Right.

A. And of the sudden Kizior is like, well, what the fuck. Then the other guy was like, oh, man. And I don’t know exactly what words they all used, but they were all upset at me because I told them I went to the emergency room.

Q. They said, what the fuck. They didn’t say anything else? They just said, what the fuck, and that was it?

A. I don’t recall the other words.

(Tr. 432.) Rathburn testified that all three individuals—Simon, Kizior and Romano—were visibly upset. (Tr. 433.) Later, upon questioning from the undersigned, Rathburn testified as follows:

Q. Okay. Again, you said that the response in the meeting when you showed up and told people that you had been to the emergency room was, what the fuck?

A. Yes. First thing out of Mr. Kizior’s mouth was, what the fuck. And whatever he had in his hand, the tablet or whatever, he just set it down on his desk.

Q. And nothing else? You can’t remember any other words that were said?

A. Well, no, not really. I think—I want to say somebody says, why didn’t you call me? Hugh Simon said, why didn’t you call me

to let me know you're going to the emergency room? I believe was one of the questions, but I don't—I can't remember.

Q. Well, wait a minute. You say you can't remember, but you believe that was one of the other questions?

A. That was being shouted in the background.

Q. So do you know whether their anger was because you had gone to the emergency room or that you had failed to inform them?

A. I did inform him the Sunday morning on the way in. The girl I was with—

Q. Right. I'm sorry. What did you say Mr. Simon said, or believe he said, shouted in the background?

A. Why didn't you call me or let me know.

Q. Okay.

A. And Sunday morning, I was with a lady named Tracy. She was driving me to the emergency room. I says, text Mr. Simon and let him know I am going in. She did.

Q. Okay.

A. So why this was a surprise on Monday, I don't know.

Q. So in your mind what was the expression "what the fuck" in reference to, the fact that you had gone, or the fact that you hadn't advised them, or they hadn't gotten word if you texted him that you had gone?

A. I think their response was, now it became a reportable.

Q. All right. Did they say anything in that regard or was that just your impression?

A. It's just my impression.

Q. Okay. Were any statements similar to that or any criticism like that directed towards you later on, specifically with regard to you going and reporting an injury?

A. No. Because after Monday, we had no contact with the Belt until the investigation.

Q. Okay. And you made a point to say that Mr. Romano, and I think Mr. Simon, both assured you that this would be taken care of internally and you would still be employed?

A. Correct.

Q. It is my understanding that those statements were made before the meeting when they were still beginning the investigation process.

A. That is correct, sir.

(Tr. 455-456.)

Rathburn denied ever having been involved in any workplace violence previously or during his altercation with Bradley. (*Id.*) Rather, he reiterated his view that Bradley had attacked him, and he had refused to fight back. (*Id.*) He stated that, in his view, the Respondent

was making an example of him to show others that “if you do show a workplace injury, look what happened to Rathburn; that could happen to you.” (Tr. 434.)

Rathburn testified that he enjoyed working for the Respondent and that he was willing “to bet...I’m one of the best inspectors they ever had.” (*Id.*) He stated that losing his job as a result of the incident “turned [his] world upside down,” and that he suffered financially “big time.” He testified that he lost his house and was on the verge of bankruptcy, moving back in with his parents. He described himself as not having “two pennies to rub together.” (Tr. 435.) He testified that he had a thirteen-year-old son, and he did not know if he was going to be able to put food on the table or pay his next bill. He stated that he was divorced now and had to pay child support. He added, “And it’s like you didn’t just take away from me, you took away from my family, my son.” (*Id.*)

Rathburn testified that he believed that if he had not gone to the emergency room over the weekend, he would still have his job with the Respondent. (Tr. 437.) He identified the basis for this belief the fact, as he described it, that he was told before the meeting on Monday that his job was not in danger. (*Id.*) He stated that after he disclosed his trip to the emergency room at the Monday meeting, “[t]hings went south big time.” (*Id.*)

On cross-examination, Rathburn defended his understanding of the Respondent’s blue-flag rules as allowing a co-worker to remove a fellow workers’ blue-flag protection not just when they are working on the same track, but when they are working the same yard. He stated that in the nineteen years he had been working for the Respondent that was how the rule was applied. (Tr. 439.) He added, “I mean, what is it? I have been doing it wrong for 19 years? All of a sudden you guys decide, that’s it, you’re wrong?” (*Id.*)

Rathburn was then asked whether it was not possible for him to have continued walking out of the parking lot, rather than stopping at the Jeep, to avoid a confrontation with Bradley. He responded that he did not know Bradley was right behind him until he arrived at the Jeep. (Tr. 441.) Later he testified that he had “no other place to go,” and that there was another vehicle on the other side, blocking him in. (Tr. 441.)

Counsel for the Respondent then asked Rathburn concerning his testimony during the Respondent’s investigation of the altercation. Specifically, counsel read the following testimony from page 77 of Joint Exhibit 1 (Transcript of Formal Disciplinary Investigation of April 16, 2012).

Q. Did he [Bradley] give you permission to remove his locks and flags?

A. No, he did not.

(Tr. 442; JX1, p. 77.) Rathburn responded by stating that he considered his response a typographical error because he had explained earlier in his testimony that Bradley had told him

previously that both tracks were finished. (Tr. 442.)<sup>5</sup> Rathburn was then asked about his testimony from page 79 of the transcript:

Q. Again, did you ever doublecheck with Mr. Bradley to see if you could unlock his tracks?

A. I was going to call him on the radio, but he never answers me on the radio ever. So no, I did not.

(Tr. 442; JX 1, p. 79.) Rathburn responded that he remembered his answer, but he stated that he was “nervous about the hearing.” (Tr. 442.) He added, “I remembered afterwards that, you know what, I did call him. But it was already past tense, so I couldn’t go back to you guys and say no. I remember afterwards very well. I remember calling him because I didn’t want to walk back 20 cars to the Jeep to unlock his tracks.” (Tr. 422-423.) He testified that he did not go back to inform the Respondent that his earlier testimony was in error because he felt the investigation was “over and done with.” (Tr. 443.) Asked if he had ever attempted to contact his Union representative in an effort to correct his earlier testimony, knowing that there was an appeal process to the Public Law Board, Rathburn responded, “Well, if I could ever get them to call me back, that would be nice.” (Tr. 444.)

Rathburn agreed with counsel that it had been “several hours” between the time Rathburn described Bradley telling him he was finished with the tracks and the radio call requesting that the tracks be given back to the Hump Tower. (Tr. 445.) Rathburn explained that sometimes the tracks would be given back to the tower without unlocking the blue-flag protections. (*Id.*)

Asked by counsel if he had ever filed charges against Bradley, particularly after learning of his own discharge, Rathburn stated that he “should have” and that he had been “stabbed in the back” by the Respondent. (Tr. 446.) He added, “I kick myself in the ass for [not filing charges] because [Bradley] should have went to jail.” (*Id.*)

Rathburn testified that he first told Reilly, the Union representative, that he believed his discharge was motivated by his going to the emergency directly after the Monday meeting, as the two were walking down the stairs to leave. (Tr. 448.) Asked how Reilly responded, he replied, “He goes, really?” Describing Reilly as “a real nice guy,” Rathburn questioned what, if anything, the Union might have done about his situation. (*Id.*) He further testified that he did not present his belief that he had been discharged for seeking medical treatment to the Respondent’s HR office. (Tr. 449.) Asked whether, during his testimony during the Respondent’s investigation into the matter, he ever commented on his belief that his discharge had been in retaliation for seeking medical treatment, Rathburn replied, “No.” He testified, however, that at the time of the investigation he did not know that he was going to be discharged. (Tr. 450.)

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<sup>5</sup> On the same page of the transcript, immediately preceding the question counsel asked about, Rathburn had been asked whether Bradley had given him permission to remove the locks and flags, and Rathburn had responded that Bradley had told him earlier that day that both tracks had been worked. (JX1, p. 77.) It was then that Rathburn was again asked whether Bradley had given him permission to remove his locks and flags, to which Rathburn responded, “No, he did not.” (*Id.*)

Finally, Rathburn testified that at the time he unlocked Bradley's blue flags, it had been approximately ten minutes since he had last seen Bradley. (Tr. 453.)

#### Hearing Testimony of Donald Mytnik

Rathburn called as a witness Donald Mytnik, who identified himself at the Respondent's Yardmaster. (Tr. 18.) He testified that as the Yardmaster it was his job to choose "what trains get humped after the car department works with them." (*Id.*) Recalling the events that took place on April 6, 2012, Mytnik stated that he recalled trying to get a track released from the east receiving car inspectors. (Tr. 19.) He recalled calling on the radio multiple times and eventually getting a response from Rathburn. (Tr. 19-20.) He remembered only learning about the incident that resulted from Rathburn releasing the track either later in the day or the next day. (Tr. 20.)

According to Mytnik, it was common for a Carman to forget to remove the locks and flags from a train. Asked if his partner could "fix what he forgot," Mytnik responded, "Yes, if they are working together." (*Id.*) He agreed that if the two men are working together and know their exact whereabouts, one of them could release the other's track. (*Id.*)

Asked if it was his impression that Bradley had forgotten to remove the flags and locks, Mytnik stated that he did not know if the track was available or not. (Tr. 21.) He stated that all he knew was that Rathburn released the tracks to him, but he did not know if Rathburn actually removed the blue flags or not. (Tr. 29.) He stated that he recalled only talking to Rathburn on April 6, 2012, not Bradley. (*Id.*)

Shown a copy of the Respondent's Rule 16.1, Mytnik was asked if the rule did not allow for a lock to be unlocked by a craft or group of workman applying the lock. (*Id.*) Mytnik replied that he understood the rule to make such an allowance. (Tr. 22.)

Mytnik testified that he did not have any knowledge that Rathburn was hostile or negligent on April 6, 2012. (*Id.*) He stated, however, that he had no firsthand knowledge of what transpired between Rathburn and Bradley, learning about it only later. (*Id.*) In the same vein, Mytnik testified that he also did not have any firsthand knowledge that Rathburn had entered into an altercation on April 6, 2012, or otherwise engaged in violence. (Tr. 23, 25.)

According to Mytnik, people disagree at the workplace but it was his understanding that "there's no fighting allowed." (Tr. 24.) He stated that he was aware of one other incident in which employees were arguing with one another, "pushing one another," but resolved matters between themselves and management was not called in. (*Id.*) He identified the two employees involved as Noel Lippert and James Gorney. (Tr. 25.) He stated that as far as he knew, neither man was disciplined. (Tr. 26.) He clarified that he was not present when the incident occurred. (*Id.*)

Asked if he was aware of any other employee who was fired for violating the blue-flag rules, Mytnik testified that there was another person whose name he could not recall. He stated that he thought he was working a track without blue-flag protection and his supervisor had

discovered the infraction. (Tr. 27.) He stated that he did not know if the employee got dismissed or reprimanded. (*Id.*)

Mytnik agreed that the Respondent had very specific rule about when to report an injury. (Tr. 30.) He agreed that an employee was supposed to report an injury immediately. (Tr. 31.) He testified that if you “go home hurt and come back the next day, it’s going to be an issue.” (*Id.*) Asked if the Respondent discouraged the reporting of injuries, Mytnik responded, “No.” (Tr. 32.) Asked if he understood that some of the Respondent’s employees “feel like they should not file an injury report despite being injured at work,” Mytnik replied: “I think they know they need to file one because if they are hurt, it’s not good to come back the next day and claim that I was hurt before.” (Tr. 32-33.)

On cross-examination by counsel for the Respondent, Mytnik testified that he had neither been trained nor tested on the company’s blue-flag rules because he was part of the transportation department with its own rule structure. (Tr. 34-35.)

#### Hearing Testimony of John Schultz

John Schultz was called as a witness by the Complainant and testified that he had worked for the Respondent for two and one-half years as a Carman. (Tr. 42.) He was a Carman on the date of the incident in question, April 6, 2012, and witnessed the altercation between Bradley and Rathburn in the shanty. (Tr. 42-43.) He described the incident as a “verbal altercation” with Bradley as the aggressor. (Tr. 43, 59.) He testified that Bradley asked Rathburn, “Why in the fuck did you unlock my tracks without telling me?” Asked if he agreed that Bradley was being hostile, he replied, “I would agree that they were both hostile.” (Tr. 51.) Pressed to explain how Rathburn was being hostile, Shultz stated, “Based on their exchange of words.” He described the words as “very” profane, although he could not recall the specific words. When counsel for Rathburn then suggested he did not have any actual evidence that he had acted hostilely, Shultz replied, “Yes, you are correct.” (*Id.*)

Shultz was then asked regarding his understanding of the circumstances under which an employee can remove another employee’s blue flags. Specifically, he was asked whether it was acceptable to pull a lock without knowing the whereabouts of your partner, to which he responded, “Absolutely not.” (Tr. 46.) Asked if it was acceptable with knowledge of the partner’s whereabouts, he replied, “Not without his permission.” Pressed if permission was still necessary if the partner had already released the tracks, Schultz replied that the partner’s actual permission was, in fact, still necessary. He stated: “He has to give you permission or be present.” (Tr. 46-47.) He clarified that this was his interpretation of the rules. Asked by counsel for Rathburn whether it was “acceptable to pull a lock when you know that the tracks are being worked, the hump tower has called for the tracks several times, and you know the exact location of your partner,” Schultz answered as follows:

I would say unless your partner is actually with you, you do not actually know his exact location. You do not know if he went back out there or where he could be. He could have gone back to fix something on the track. He could have gone back to do something.

So unless he's actually with you or you've spoken to him, then no, it's not okay to go unlock your partner's tracks.

(Tr. 47.) With regard to whether the employee has spoken to his partner, Schultz further clarified that an acceptable scenario was one in which the co-worker was actually speaking to his partner on the phone or radio "so that you know where he's at or he's physically with you." (Tr. 48.) In sum, Schultz stated that it was only acceptable to release a partner's tracks when the partner's exact whereabouts were objectively verifiable because he or she was either standing right next to you, or else he or she was speaking to you and verifying that he or she was in a safe location. (Tr. 48.) He denied that there existed any scenario in which an employee would be justified removing another's blue-flag protections without first obtaining permission. (Tr. 48-49.)

Asked if it was a common occurrence that a Carman would forget to remove his locks, Schultz replied, "It could happen." He stated, however, that it did not happen very often. (Tr. 49.) He did agree that it was common for a partner to remove the locks of another employee who forgot to remove his locks if he knew his exact whereabouts. (Tr. 49-50.) He agreed that the Respondent's blue-flag rule provided that locks could only be removed by the craft or group of workmen applying the lock. (Tr. 50.) He further agreed that therefore the rule did not require at all times that the person who applied the locks had to be the one who removed them. (*Id.*)

Schultz denied any knowledge of any other incident involving workplace violence, or any other case in which an employee had been fired for violating the blue-flag rule. (Tr. 52.) He stated that it was his understanding that workplace injuries were supposed to be reported immediately. (*Id.*) He denied any knowledge of Respondent's employees being mistreated or getting "flak" or "heat" for reporting an injury. (Tr. 53.) Similarly, he denied ever witnessing a supervisor react hostilely to a report of injury, or knowing of any employee who was afraid to file an injury report. (*Id.*)

Asked on cross-examination by counsel for the Respondent how he would have dealt with the situation that Rathburn found himself in when asked by the Hump Tower to release the tracks, Schultz testified that he would have actually had to see Bradley or have talked to him to make sure he was clear before removing Bradley's blue-flag protections. (Tr. 56.) He stated that this was the case even if Bradley had earlier told him that he was finished with the track. (*Id.*) According to Schultz, even in that situation it was still necessary to get in touch with Bradley before actually removing his blue-flag protections. (*Id.*)

Also on cross-examination, Schultz clarified that he deemed both Bradley and Rathburn hostile because both men had raised their voices and were using profanity. (Tr. 56-57.) He described the two men as "swearing back and forth...." (Tr. 58.) Asked by the undersigned if Rathburn was just standing up for himself, Schultz replied, "I mean, it was just both, just loud, raised voices back and forth, you know, name calling insults, that sort of thing." (Tr. 59.) On further questioning from counsel for the Respondent, Schultz testified that he never got the impression that Rathburn was afraid for his safety during the altercation. (Tr. 60.)

## Hearing Testimony of Wayne Kizior

Wayne Kizior was called by the Complainant and testified that his job title on April 6, 2012, was Assistant Superintendent Mechanical. (Tr. 63.) He described the duties of this position as supervising the daily activities of both the locomotive and the car shop. (*Id.*) He testified that he first learned of the incident involving Bradley and Rathburn in the evening on Friday April 6<sup>th</sup>, after being contacted by Hugh Simon. (Tr. 64.) According to Kizior, the following morning he discussed the incident with Simon, who provided him with the details insofar as he had ascertained them, and also advised Kizior that both men had been pulled out of service with pay “pending a union hearing.” (Tr. 64-65.) He testified that he also believed that Rathburn had come in that Saturday and prepared a written statement, but he denied having any significant contact with Rathburn then. (Tr. 65-67.)

Kizior described the Monday-morning meeting not as a disciplinary hearing, but “just an interview, I guess, to get more facts.” (Tr. 67.) He made clear that he had not actually witnessed the altercation, and was not even on company property that day. (Tr. 68.)

Asked if there were any exception to the Respondent’s blue-flag rules as written, Kizior replied that they were “pretty much the Bible.” (Tr. 68-69.) Asked if it was acceptable to pull a lock when the employee knew that the tracks were done being worked, the Hump Tower had called for the track’s release several times and the employee knew the exact location of his partner, Kizior responded, “Not if you are not working with the individual.” (Tr. 69.) He did agree, though, that it would be acceptable if “you’re working together as partners.” (Tr. 70.) Asked to look specifically at the Respondent’s blue-flag protection rule, Mechanical Rule 16.1 (JX K 1),<sup>6</sup> Kizior agreed that the rule indicated, by referring to a “group of workmen,” that two men working together can remove each other’s locks. (Tr. 71.)

Kizior was then asked to consider the Respondent’s Mechanical Rule 1.7, which requires that any act of “hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees” be reported and is sufficient cause for dismissal. (Tr. 72, JX L.) Asked if he had any firsthand knowledge, i.e., knowledge not gained secondhand from others, that Rathburn was hostile on August 6, 2012, Kizior replied, “No,” and emphasized that what information he had was based on the statements of others since he was not physically present. (Tr. 72-73.) He gave the same answer for whether he had any firsthand knowledge that Rathburn had engaged in any “misconduct or willful disregard.” (Tr. 73.) He also gave essentially the same response when asked whether he had any personal knowledge of whether Rathburn had violated the Respondent’s Mechanical 1.9. That rule expressly states that employees “must not enter into altercations, play practical jokes, wrestle or harass anyone, while on duty or on railroad property.” (JX M, *Id.*) Asked specifically if an employee could be found to have participated in an altercation if he was only a “victim [who didn’t] raise his hands to the other,” Kizior replied, “I would walk away and try to get out of the affected area, you know.” (Tr. 74.)

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<sup>6</sup> The rule provides that “[w]hen used in relation to a manually operated switch or a derail, a lock that can be locked or unlocked only by the by the craft or group of workmen applying the lock.” (JX K, p. 2.) A “group of workmen” is defined as “[t]wo or more workmen of the same or different crafts who work as a unit under a common authority and communicate with each other while working.” (JX K, p. 1.)

Kizior similarly testified that he had no personal, firsthand knowledge that Rathburn had violated the Respondent's "Workplace Violence Policy." (JX N, p. 1.) As defined in that policy, workplace violence could be "any act of physical violence, threats of physical violence, harassment, intimidation, or other threatening, disruptive that occurs at the work site." (*Id.*) Again, on questioning Kizior disavowed any personal knowledge that Rathburn had violated this policy, and that the sum of his knowledge was based on the statements of others. (Tr. 74-75.) Asked if he was aware, in his thirty-six years of working for the Respondent, of any other incidence of workplace violence, Kizior responded, "Not offhand, no." (Tr. 75.) He specifically denied having knowledge of another incident involving a chair being thrown during a safety meeting. (*Id.*) Asked even more specifically about two employees named Noel Lippert and James Gorney, Kizior responded that he did not know who the two individuals were. (*Id.*)

Kizior further denied knowing of any other incident where an employee had been dismissed for violating the blue-flag rule. (Tr. 76.) He stated, however, that there was a case in which an employee was fired "for running over a derail on a blue[-]flag protection at the locomotive shop." (*Id.*)

Regarding the Respondent's rules for reporting an injury, Kizior stated that they had not changed over the thirty-six years he had been an employee. (Tr. 77.) He testified that employees are supposed to report an injury immediately, and even if they decline medical report, the report will serve as a record of the incident. (*Id.*) He stated that the Respondent did not have a specific policy in place for injuries that became symptomatic after the fact. (Tr. 78.) He answered, however, "Of course," when asked whether he understood that symptoms could sometimes develop after a lapse of time, causing an incident report to turn into an injury report. (*Id.*) He stated that he did not agree with statement that it was better to not report an injury because the Respondent "would like to know what happened" at the time it happened to avoid being "shocked or surprised by it" several days later. (Tr. 79.) He denied that the Respondent discouraged the reporting of injuries to avoid "the hassle management has to go through." (Tr. 80.)

Kizior testified that he was unaware of any other incidents of workplace violence alleged against Rathburn. (Tr. 81.) Similarly, he stated that he was unaware of any other incidents in which Rathburn had been accused of violating the Respondent's blue-flag rule. (*Id.*)

On questioning from the Respondent's counsel, Kizior testified that the Respondent was a union shop, and that the collective bargaining agreement contained provisions regarding employee discipline. (Tr. 84.) He testified that the CBA required an investigation to determine the facts of any alleged rules violations, and that the employee has a right to union representation. One of the steps of that process, according to Kizior, is a notice of investigation, which contains the particulars of the alleged violation. (Tr. 84-85.) He stated that his role was to review the transcripts of the investigatory proceeding, including the testimony of all the witnesses, and make a judgment as to what discipline should be assessed. (Tr. 85.) He stated that he had followed this procedure in the present case and determined that Bradley should be terminated for engaging in an altercation violating the Respondent's workplace violence policy. (Tr. 85-86.) He testified that he came to "[p]retty much the same" conclusion regarding

Rathburn, specifying that he was found to be in violation of the policy and rules against workplace violence, engaging in an altercation, and falsifying train records. (Tr. 86.)

Asked further regarding his interpretation of Mechanical Rule 1.6, Kizior explained that in his view when two employees have been assigned a different set of tracks, he did not consider them to be working together. (Tr. 87.) He testified that in such a situation, if the Hump Tower was requesting that the other employee's tracks be released, he would ask the Hump Tower to contact the other employee, but would not proceed to unilaterally unlock the tracks. (Tr. 88.) He testified that it would have been proper to request that the Hump Tower contact the car foreman on duty at the time, who would then have the responsibility of tracking down the employee in charge of the tracks to determine if they could be unlocked. (Tr. 89.) Asked if there would ever be a situation in which it would be permissible for an employee working a different set of tracks to unlock the tracks being worked separately by another employee, Kizior replied, "No. If you've got permission from the individual, if you personally talked to him and said you wanted to remove his blue[-]flag protection and he states, yes, you can, then you have his permission to do so." (*Id.*) He testified that the fact that the other employee had earlier communicated that he had already worked the tracks in question would not change his answer. (*Id.*)

Kizior further stated that he did not know of any of the Respondent's employees who had been disciplined for reporting an injury. (Tr. 92.) Similarly, he denied being aware of any policy of discouraging employees from reporting an injury, and he stated that in his view the Respondent's employees felt comfortable reporting an injury. (*Id.*) Asked if the Respondent's employees routinely report injuries, he replied, "Sure do." (*Id.*)

Asked by the Complainant's counsel if he knew what condition Rathburn was in when he allegedly falsified records, Kizior replied, "No, I do not." (Tr. 94.) He then explained the basis of the charge against Rathburn that he had falsified records. (Tr. 107-113.) He stated that he had concluded that Rathburn had falsified records by representing that he had inspected a particular train between 3-4:00 p.m. when that train had not yet entered the clearing yard by that time. (Tr. 114.)

Kizior testified that Rathburn had never been charged with failing to report an injury or filing an untimely report of injury. (*Id.*) He stated that the reason why Rathburn was not charged was because Rathburn had pointed out the injury at the time of his injury to his superiors who responded. (*Id.*)

Upon questioning from the undersigned, Kizior testified that the Respondent does not make a distinction between which of its rules may lead to termination and which may not. (Tr. 115.) He stated, though, that every rule violation was considered on a "case-by-case" basis. (Tr. 116.) He testified that Rathburn was found to have violated the Respondent's "Workplace Violence Policy" by engaging in physical violence, and he recounted that Bradley had given testimony during the investigatory hearing which accused Rathburn of engaging in a physical altercation with him. (Tr. 117.) He stated that Bradley's statements were the basis of his finding that Rathburn had participated in a physical altercation. (Tr. 118.)

## Hearing Testimony of Michael Romano

The Complainant called as a witness Michael John Roman, who identified himself as the Director of Police and Risk Management for the Respondent. (Tr. 120.) He also stated that he was the reporting officer for “any kind of FRA injuries...” (Tr. 122.) He testified that certain “things” that made injuries subject to FRA reporting, and he gave as examples the prescription of drugs, the applications sutures, a fracture, and death. (*Id.*) Asked if supervisors were subject to “consequences” if anybody under their supervision had an FRA-reportable injury, Romano replied, “There is no consequence that I know of.” (Tr. 124.) Asked if they could be punished financially, Romano testified that the number of injuries could influence “certain categories that are part of the bonus situation,” but he described it “only as a small amount” that would affect management and department heads, not just any one person. (*Id.*; Tr. 126.) He agreed that the amount of a bonus could be less if a certain threshold number of FRA-reportable injuries was exceeded. (*Id.*) He described the non-FRA-reportable injuries as only “incidents,” but added that the Respondent wanted to keep track of these as well, although they did not affect bonuses. (Tr. 128.)

Romano testified that he first learned of the incident involving Bradley and Rathburn on April 6, 2012, when he received a telephone call from Hugh Simon. (Tr. 129.) He testified that he contacted the officer on duty, Officer Frierson, who explained to him that there had been an altercation which had calmed down. (*Id.*) He testified that he did not have any direct contact with Bradley or Rathburn that day. (*Id.*) According to Romano, he did not talk to either until the meeting in Kizior’s office the following Monday. (*Id.*) Asked regarding the possibility that he talked to Rathburn immediately before the meeting, telling him not to worry because he was not in danger of losing his job, Romano replied, “I would never say thing like that, nor did I say anything like that.” (Tr. 136.)

Asked if he reacted in any particular manner when Rathburn informed those at the meeting that he had been to the emergency room over the weekend, Romano replied, “I don’t think I reacted in any way. It’s like, you got a prescription; you got a prescription.” (Tr. 137.) Asked if he recalled Kizior’s reaction to the fact that Rathburn had sought medical treatment, Romano stated, “I don’t think he had any reaction, either.” (*Id.*) Asked if Kizior was angry at this revelation, Romano testified that he did not believe so. He stated that he did not think that Kizior had used any profanity or thrown anything. (*Id.*)

Romano testified that he did not recall if Simon was at the meeting, and therefore he could not remember if Simon got angry or used profane words. (Tr. 138.)

According to Romano, he had only “[v]ery minimal” knowledge of the blue-flag rules and was not involved in the decision as to whether Rathburn had violated them. (*Id.*)

Romano testified that he believed that the Respondent had had three other incidences of workplace violence during his tenure with the company. (*Id.*) He testified that two of the violators were discharged, and he did not know what discipline was meted out to the third. (Tr. 139-141.) Later, he testified that he believed that the third incident involved “intimidation in the diesel shop,” and the alleged culprit was “brought...up on charges.” (Tr. 163.)

Romano testified that Rathburn had not filed a late injury report. (Tr. 143-144.) Asked if he understood the Respondent's employees to be afraid to report injuries, Romano replied:

I don't believe they are. We stress that we want them to report it. One of the reasons why we like them to report it is because if it's environmental, perhaps of any sort, if there is some type of injury, we can correct the problem so nobody else, in fact, gets hurt in the same area. So we stress that we want them to report it, any incidents.

(Tr. 144-145.) He clarified that he had never been approached by anybody who said that they were afraid to file an injury report. (Tr. 145.) Asked if it was true that the reporting of an injury became a "hassle to management because they have to report it and it gets document intensive," Romano replied, "No," and stated, "It's not a hassle whatsoever." (*Id.*) He iterated that he was the one, and no one else, that filed the "FRA reportables" for the Respondent. He stated that in 2014 the Respondent had one FRA reportable injury and five in 2013. (Tr. 145-146.) He could not recall how many FRA reportable injuries the Respondent had in 2012. (Tr. 146.)

On cross-examination by counsel for the Respondent, Romano testified that there were three major categories upon which bonuses were based, and that the number of FRA reportable injuries never affected more than one-ninth of the complete bonus pay. (Tr. 149.)

Romano was then asked about the description of the altercation obtained from Schultz, and agreed that it was fair to say that Schultz portrayed Rathburn as an equal participant in the altercation. (Tr. 150.) He stated that from Schultz's description he concluded that Rathburn was participating in the altercation rather trying to avoid it. (*Id.*) Furthermore, he stated that Bradley's statements characterized Rathburn as the aggressor. (Tr. 150-151.) Asked whether the manner in which Rathburn had sought medical treatment was "routine," Romano stated, "Well, it could go either way. The best way is to notify us prior to going in case we can help with medical treatment. However, if he's having a headache or something that's hurting him, he should seek medical help and then tell us after the fact." (*Id.*) He testified that "there wouldn't really be too many more steps" added to the process if he was notified in such a manner. (Tr. 152.) He stated that he notified the FRA of the injury during the week following the incident, and noted that the FRA requires notification within seven days of a reportable injury. (Tr. 152-153.)

According to Romano, the Respondent had thirteen injuries in 2014 that were not FRA reportable. (Tr. 153.) He stated that he believed the number was twenty in 2013. (*Id.*)

Romano testified that he was familiar with the Respondent's Workplace Violence Policy and helped write it in 2006. (Tr. 154.) Asked about the part of the policy that requires anyone involved in an alleged violation to be removed from service pending an investigation, Romano testified that the rule was designed to diffuse the situation by removing those involved from the workplace to avoid another altercation while an investigation is conducted to determine who was at fault. (Tr. 155.) He stated that removal from service was automatic and not at the discretion of the supervisor. (Tr. 156.)

Romano stated that he did not know of any employee that had been disciplined for reporting an injury unless it was a “false injury.” (Tr. 157.) He recalled one incident in which an employee had left work on a stretcher but was later surveilled and determined to be jogging with his dog. He called such an incident “unique,” however. (Tr. 158.) He stated that the FRA had actually alerted them to the fact that the employee was not injured after investigating the accident and determining that the employee should not have suffered any jolt. (*Id.*) He stated that the Respondent does not normally perform surveillance of its employees out of work due to injury, but that it is done “on occasion...” (Tr. 159.)

On further questioning from the Complainant’s counsel, Romano indicated that he determined that Rathburn was an aggressor, along with Bradley, in the altercation based on Schultz’s statement that both men used vulgarity and raised their voice against the other. (Tr. 162.) Although he acknowledged that these actions were verbal, he stated, “But that’s still part of workplace violence, verbal.” (*Id.*)

Asked by the undersigned if he could recall anything negative or critical said about Rathburn as a result of his seeking medical treatment, Romano replied, “No.” He added, “No, not really, just we can’t criticize. If he’s telling me he has a headache and he needs medical help, none of us are going to criticize somebody for that. I have never heard anybody ever, but I’m talking about this incident, be critical of that.” (Tr. 164.) According to Romano, to his knowledge there was no consideration given to the timing of the injury report when deciding upon Rathburn’s discipline. (*Id.*)

#### Testimony of Hugh Simon

Hugh J. Simon was called as a witness by the Complainant and testified that at the time of the altercation he was a superintendent of the Belt’s mechanical department. (Tr. 184-185.) Specifically, he was Rathburn’s superintendent. (*Id.*) He testified that on the night of April 6, 2012, there were two foremen on duty, Bob Perham, and Tom Sipple. (Tr. 186.) He testified that when he spoke to Perham on the telephone, Perham told him that there had been an altercation between Bradley and Rathburn. He stated that at the time Perham was still trying to figure out what, exactly, had happened between the two, but he reported to Simon that Rathburn had a cut on his forehead and that Bradley was doused with water. (Tr. 197.) Simon testified that he then talked to both Rathburn and Bradley, and both had “conflicting stories.” (Tr. 188.)

According to Simon, Rathburn told him that Bradley had punched him in the forehead. (*Id.*) He stated that Bradley told him that he had got in an altercation with Rathburn and that Rathburn had hit him with a water bottle. (*Id.*) Simon stated that he told both men that they would be pulled from service pending an investigation. (Tr. 189.) He testified further that a digital photograph of Rathburn’s injury was taken and forwarded to him over his phone. He stated that he talked to Rathburn again and asked if he was all right and whether he needed medical attention. According to Simon, Rathburn responded negatively, indicating that he needed to clean off his forehead but would otherwise be okay. Simon characterized Rathburn as more interested in pressing charges against Bradley than concerned about his injury. (Tr. 190.)

Simon testified that it was standard for any employee involved in an altercation to be pulled from service and drug-tested. (*Id.*) He testified that his next involvement was the following day, Saturday, when he again talked with both Rathburn and Bradley. He stated that he checked with Rathburn again to see if he was all right and Rathburn relayed that he was fine. According to Simon, no incident reports were filed on Friday, so he asked both men if they would come in on Monday to fill out incident reports. He testified that he scheduled the two men at different times “just to keep them apart.” (Tr. 191.) He testified that each man separately filled out incident reports on Monday. (Tr. 192.) He stated that the filling out of the reports was the purpose of the meeting on Monday in Kizior’s office. (Tr. 193.)

Simon was asked if he recalled Rathburn reporting at the meeting that he had sought medical treatment over the weekend, and he responded, “No.” (Tr. 194.) He stated that he could not recall when he learned that Rathburn had sought medical treatment. (*Id.*) Asked if at any time during the Monday-morning meeting he witnessed Kizior react in an angry way to Rathburn reporting that he had sought medical treatment, Simon replied, “No.” (Tr. 195.) Additionally, he stated that he did not remember anybody throwing anything. Asked if he could recall his own reaction, he stated that he could not remember and stated it was Rathburn’s “business,” not his, whether he went to seek medical treatment. He denied knowing whether Rathburn’s trip to the emergency room over the weekend made the injury FRA-reportable, stating that Romano “handles that.” (*Id.*)

Simon agreed that his information regarding the altercation derived from other people, but he also pointed to the surveillance video inside the yard office or shanty. (Tr. 197.) He stated that there was no useful audio, however. (Tr. 198.) According to Simon, the video taken of the two men inside the shanty showed “a lot of hand waving going on.” (*Id.*) He clarified that both men were waving their hands. (Tr. 200.) He stated that after Rathburn left the building, in less than a minute Bradley had followed him out the door. He stated that although there were cameras outside, they were not facing in the right direction to record the interaction of the men. He described Rathburn coming back into the shanty in less than ten minutes with a visible cut on his head, followed by Bradley. (Tr. 198.) He testified that Rathburn next used the telephone, which Simon assumed was an attempt to call a foreman. (Tr. 201.)

Simon testified that he had direct knowledge of the Respondent’s blue-flag rules, and that it was not acceptable for an employee to pull a lock without knowing the whereabouts of his or her partner. (Tr. 202.) He testified that this was also true even if the employee knew that the tracks had been worked and the Hump Tower had called for the tracks’ release several times and the employee knew the location of his partner. Asked why not, he responded: “Because it is [the partner’s] protection that he put on the track. You can’t assume that just because you know where he is at and had done that, he is not going to go back out into the yard on those tracks to perform work.” (*Id.*) Asked for his understanding of how Rathburn violated the blue-flag rules, Simon responded:

My understanding is that rule is in place to protect the workmen on the track. So if he is working solely by himself, he is responsible for applying the protection and removing the protection. You wouldn’t want another person to remove your protection without

your permission because you are protecting your life. That's why the blue signal rule is in effect.

(Tr. 204.)

He stated that Rathburn and Bradley were working different tracks, as demonstrated by train records that showed that Rathburn was working on tracks 1, 2, and 3 whereas Bradley was working tracks 10 and 11. (Tr. 205.) He later clarified that the records showed that Rathburn had worked track 11 on the 7-9 am shift, but that Bradley worked track 10 from 4:20-5:10 pm. He stated that the records did not show when Bradley gave track 10 back to the Hump Tower. (Tr. 206-208.) He indicated that the records did not show that Bradley had worked track 11. (Tr. 208.)

Asked how he understood Rathburn had falsified documents, Simon responded, "If I remember correctly, he was actually showing working trains before they arrived in the yard. We have some scanners in the yard that when the cars go by, it takes the car numbers, which gives us time of when the train arrived." (Tr. 209.) He stated that the records did not show when Rathburn entered the times, and he was not aware of the condition Rathburn was in when he made the entries. (*Id.*)

Simon first agreed that the Hump Tower does sometimes call to have tracks released that have not been worked, but then clarified, "They will occasionally call the carmen in the yard to see when they will be done so they could put a locomotive in place to move those cars. It is a common practice." Asked if the Hump Tower would call to have tracks unlocked when the tracks have not yet been worked, Simon replied, "No." (Tr. 210.)

Asked how Rathburn had violated the Respondent's Conduct rule 1.7, Simon indicated that he had acted in a quarrelsome manner. (*Id.*) He stated that he drew this conclusion from the statements of Bradley and Schultz. (Tr. 211.) He clarified that he was basing this conclusion on Rathburn's conduct inside the shanty. Asked if he could specifically recall Schultz saying that Rathburn had engaged in profanity, Simon replied, "I don't remember. I would have to review the investigation. But at the time of the investigation, he said they were both arguing with each other inside the shanty." (*Id.*)

Asked how Rathburn had violated the Respondent's rule prohibiting altercations, Simon cited to the fact that although there were no witnesses, Rathburn had been in an incident in which he had a cut on his forehead and Bradley had "water all over his face, his glasses, and his shirt." (Tr. 112-213.) Asked how Rathburn had entered into an altercation, Simon replied, "Because Mr. Bradley also had water all over his person, and Mr. Rathburn on the video walked in the building, grabbed the water bottle, and walked out of the building with the water bottle in his hand." (Tr. 213.) Asked if he assumed that Rathburn threw the water bottle at Bradley, Simon replied, "Yes." (Tr. 213-214.)

Asked how he understood Rathburn to have violated the Respondent's Workplace Violence Policy, Simon replied, "Threat or threatening behavior." (Tr. 214.) He then added that he also considered Rathburn to have engaged in a violent act. (*Id.*) He explained, "Well,

according to the testimony of Mr. Bradley of the incident, basically it was a he said/she said case. There was two conflicting stories. One said one started it. The other said the other one started it. They both entered into an altercation. They engaged in a violent act on the BRC property.” (Tr. 214-215.) He was then asked whether, regardless of whether one person was the instigator, if both parties involved in altercation were “both automatically in violation of this workplace policy,” and he responded, “Yes.” (Tr. 215.)

Simon conceded that there were any number of incidents in which employees engaged in verbal arguments and unless these were reported to the supervisor or superintendent, no action would be taken. He made clear, though, he was not referring to “actual physical fights.” (Tr. 216.) He added, “Guys argue all the time.” (Tr. 217.) He stated that he did not know of any employee who had been fired for engaging in a strictly verbal altercation. (*Id.*) He stated that he could not “remember off the top of my head” if any anybody had been ever terminated for engaging in a physical altercation. (*Id.*) Asked if he could specifically recall a safety meeting in which there had been a verbal altercation and “maybe” punches or chairs thrown, Simon responded that he did not “have any recollection of that.” (Tr. 218.)

Simon testified that he was aware of another incident in which an employee had been fired for a blue-flag violation. (Tr. 219.) He stated that the incident involved a gentleman named Domaleczny “who got caught in the west departure yard that didn’t have locks on his tracks.” He explained that Domaleczny was working on a track that was locked, but also another adjacent track that was not locked out. (*Id.*) He stated that there might have been other incidences of employees being terminated for violating the blue-flag protection rules, but he could not remember them. (Tr. 219-220). He added: “I mean it is very serious offense, blue[-]flag protection. It is there for your protection so nothing happens to you out there in the yard. It is your only line of defense that the track is locked and secured and nothing else is going to roll onto it. It is a very serious rule.” (Tr. 220.)

Simon testified that he believed that when Rathburn called the foreman on the night of the altercation, his doing so fulfilled his obligation to report an injury. (Tr. 220.) Asked if Rathburn had a responsibility to inform the Respondent before he went to the emergency room on Sunday, Simon replied, “No. If he is having an issue and he thinks he needs to go to the doctor, fine.” (Tr. 221.) Asked if an employee could seek medical treatment without obtaining permission in the case of an injury that was originally deemed negligible but turned worse later, Simon replied, “Yes. It is your own personal health. Sure. Why not?” (Tr. 222.) Asked if he thought employees of the Respondent were fearful of reporting an injury, he responded:

No. Why would they? I mean we encourage our people to report injuries for one, to see if they need medical attention; two, to try to prevent that same injury again; three, to educate the rest of our employees so they don’t have the same injury. That’s the whole purpose of reporting an injury as far as I’m concerned.

(Tr. 223.) He stated that reporting a minor injury was up to the individual employee.

It's up to his discretion. If I'm a carman, speaking as a carman, if I'm working, and I cut my fingernail, and I going to go to management and say well, I got a cut on my finger. That is up to the sole person. We encourage people to report injuries at the BRC to prevent injuries.

(Tr. 224.) He added, though, that any injury that happens should be reported. (Tr. 225.) Still, speaking for himself, Simon stated that if he bumped his elbow and got a bruise, he would not report the injury. (*Id.*) He emphasized, though, that he was speaking personally, and "not talking about the rules" of the Respondent. Under the rules, he conceded, all injuries should be reported, but he added that he was "a grown man" and not going to report "a little bruise on my arm." (Tr. 225-226.)

Simon responded affirmatively when asked if Rathburn was a good worker prior to his termination. (Tr. 226.)

On cross-examination, Simon agreed that Romano was the Respondent's personnel who was responsible for the processing of FRA-reportable injuries, which explained why he was not aware of all the criteria as to what made an injury reportable. (Tr. 227.)

According to Simon, Rathburn told him on the day of the incident that both he and Bradley were struggling with the Jeep door. (Tr. 228.) He stated further that Rathburn openly admitted unlocking Bradley's tracks. (*Id.*) Simon reemphasized that an employee is "not supposed to remove anyone else's protection for safety reasons," even if another employee sees on the computer that the person working the track has released them to the Hump Tower. (Tr. 229.) Even in that case, he stated, as long as the track remained locked it was possible that the person who was working the tracks "could be going to get a part to go back into the yard to put on a train, [or] getting a bad[-]odor tag to go back in the yard to put on a train." (*Id.*) He agreed that it was "pretty common" for a Carman to go back to a particular track to inspect something even though he may have entered the track as worked on the computer. (Tr. 230.)

According to Simon, Bradley, when he spoke to him, told him that Rathburn had hit him with the water bottle as he was trying to get into the Jeep to leave the area, and that was when he accidentally struck him on the forehead with his flailing arms. (*Id.*) Asked if he had reason to suspect that Rathburn had committed a blue-flag violation when he first spoke to Rathburn, Simon replied:

Yes. I was told that on[] the phone that locks were removed on another individual's track, which is a violation of policy. We actually train that to our employees when we train our employees. We instruct them that if someone is called, and there is protection left on the track and they want to drop, either get a hold of that person on the radio, if they can't, call the car foreman and drop it in his lap for responsibility. He has more resources. He can see if the individual has punched out and went home for the day; see if

their vehicle is in the lot; talk to the yardmasters; talk to the repairmen to see if the guy is still out there or not.

(Tr. 232.)

Later, on cross-examination, Simon testified that when two employees are working separate tracks, they are not considered to be working together, and the blue-flag rule requires that the other employee, as a first step, must verify the whereabouts of the other employee before removing someone else's blue-flag protections. (Tr. 242.) He stated that the rule had always been applied that way, since he started with the Respondent in 1980. (*Id.*) On redirect examination, he testified that although the Respondent's blue-flag rule did not expressly address such a scenario as in the present case, and thereby state explicitly that Bradley's permission would have been required, the Respondent's employees were taught "that you do not remove someone else's protection due to safety." (Tr. 244.) On questioning from the undersigned, Simon testified that the Respondent's employees are trained not only on the Respondent's blue-flag rule, but FRA guidelines on blue-flag protection. (Tr. 256.) He reiterated that only the person working the track can remove his own locks. He stated, "Only he can unlock it for his own safety. It is common sense if you ask me." (*Id.*) He later made clear that in his view, Rathburn and Bradley were not working together, but separately. (Tr. 263.)

Simon further explained that the charge of falsifying train records arose from further investigation. (Tr. 233.) He agreed that falsifying train records was not always a serious offense, particularly where the trains were worked, but not at the time indicated. He suggested that if the only charge against Bradley and Rathburn had been falsifying records to this limited degree, they would probably not have been dismissed, but only given a verbal or written reprimand. (*Id.*) He agreed such a lesser penalty would be example of progressive discipline, which he described as "definitely" the policy of the Respondent. (Tr. 233-234.) He explained, though, that certain offenses were punishable by termination even if a first-time offense, and he gave a violation of the blue-flag protection rule as an example. (Tr. 234.) He also identified a violation of the Workplace Violence Policy as another violation which could lead to termination on the first offense. (*Id.*)

According to Simon, by pulling Bradley's locks at the behest of the Hump Tower, Rathburn violated the Respondent's rule of conduct by being careless of the safety of others, as it was possible that Bradley could have been severely injured or killed as a result. (Tr. 235.)

Simon testified that the Respondent's rule against engaging in altercations made no distinction between verbal and physical altercations, and therefore a person who became involved in a verbal argument with another had violated the rule. (Tr. 236.) He stated, however, that after investigating the incident, he came to the conclusion that Rathburn had become involved in both a verbal and physical altercation. (*Id.*) He stated that he had concluded that Rathburn engaged in a verbal altercation based upon his personal viewing of the surveillance video taken inside the shanty. (*Id.*)

According to Simon, it happened "a lot" that the Respondent's employees would report a very minor injury just in case it turned into something more serious. (Tr. 240.) Asked if based

upon his own observation and his “years of service” he had any reason to suspect that the Respondent’s employees had “any fear or apprehension” of reporting injuries, Simon replied, “No.” (*Id.*)

On redirect examination by the Complainant’s counsel, Simon was asked if the Respondent had applied progressive discipline in the present case. Simon responded, “No. This is a totally different case. These are—the charges against Mr. Rathburn, causes for those charges are termination. Workplace violence, blue[-]flag violation, those are all terminal offenses for him.” (Tr. 247.) Asked if it was anywhere stated in writing which rules violations were considered terminal offenses and which were subject to progressive discipline, Simon responded, “There is no written policy, no.” (Tr. 248.) He added that it all depended upon the severity of the offense. (*Id.*)

Asked by the undersigned if it was ever determined where Bradley was when Rathburn unlocked his blue-flag protections, Simon replied that supposedly Bradley was in the shanty. (Tr. 253.) He agreed, therefore, that Bradley was not in any particular danger. (Tr. 254.) Asked if he was skeptical of Bradley’s story that he had only scratched Rathburn’s forehead with his fingernails accidentally, while flailing his arms to fend off the water bottle thrown at him, Simon replied that although Bradley had long nails, “the contusion on [Rathburn’s] head was not a scratch.” (Tr. 257.) Later he described Bradley’s version of how Rathburn was injured as “totally unbelievable.” (Tr. 258.) He further indicated that he did not believe Rathburn’s version of how Bradley got wet because Bradley was “just drenched in water,” and therefore he concluded that neither Bradley nor Rathburn was being completely honest. (Tr. 258-259.) He stated that he considered both men to have mutually contributed to the altercation. (Tr. 259.) Asked if he essentially disbelieved Rathburn’s version in which he did not throw the water bottle at Bradley, Simon replied, “Like I said, both of them denied things. There were multiple things that got Rathburn dismissed.” (Tr. 262.)

Asked by the undersigned about the progressive nature of the Respondent’s disciplinary process, Simon agreed that there was nothing written that imposed disciplinary steps. (*Id.*) He testified, though, that the discipline meted out was based upon the seriousness of the offense. (Tr. 259-260.)

According to Simon, Bradley had, before the incident here, been discharged for a violation of the blue-flag rules, but was able to return to work by filing a union grievance. (Tr. 261.)

Asked by the Respondent’s counsel if he believed that there was any confusion among the Respondent’s employees that that they needed to get verbal permission to unlock a co-worker’s blue-flag protections, Simon responded, “No. There is no confusion because you are dealing with someone’s livelihood, someone’s safety. These guys take it very seriously. It is serious.” (Tr. 264-265.) Asked whether, based on his twenty years of experience as a Carman, Simon believed that Rathburn had any confusion about what the rules required of him, Simon stated, “No.” (Tr. 265.)

Finally, Simon testified that he did not think that a purely verbal altercation would be a dischargeable offense, but he qualified his response by stating that he would need to consult the Respondent's general counsel. (Tr. 265.)

#### Hearing Testimony of Robert H. Perham

Robert H. Perham was called as a witness by the Complainant and testified that he been employed by the Respondent since 1995. (Tr. 266.) He testified that he had been made a Carman in 1998, and had served as foreman since 2007. (*Id.*) He testified that on April 6, 2012, he was a repair track foreman whose job it was to oversee the repairing of cars. (*Id.*) He testified that Thomas J. Sipple, the yard foreman, was Rathburn's direct supervisor, but he was also Rathburn's supervisor on that day. (*Id.*)

According to Perham, he first learned about the altercation at approximately 5:30 pm through a phone call from Rathburn, telling Perham that he needed a foreman because he had a "whiner." (*Id.*) He stated that he hung up the phone and arranged for Sipple to meet him at the shanty. (*Id.*)

Perham stated that he was the first supervisor to arrive on the scene, and found Rathburn near the back door of the shanty with a cut between his eyes and "two streams of blood coming down." (Tr. 268-269.) He testified that Rathburn was very upset and agitated and wanted Bradley to be placed in handcuffs. He further described Bradley coming out the door with an empty water bottle in his hand and water on his face and glasses. He stated that he asked Bradley if he had struck Rathburn, to which Bradley responded by asking if he did not have a right to defend himself. According to Perham, Bradley claimed that Rathburn had thrown the water bottle at him. (Tr. 269.) He stated that he learned that the altercation had started because the Hump Tower had requested that the tracks be unlocked and Rathburn had done so. (Tr. 270.) Perham testified that Rathburn had told him that he knew Bradley was in the shanty ("east yard office"), and that Bradley did not dispute this as his location. (Tr. 270.)

According to Perham, he did not believe that he had tried to talk Rathburn out of pressing charges against Bradley. (Tr. 271.) He testified that, because he arrived at the scene after the fact, he did not know whether Rathburn was the aggressor or the victim. (Tr. 71.) He testified that after Bradley and Rathburn were properly separated, he went over to Rathburn and asked him if he wanted to go to the clinic because of his wound. (*Id.*) He testified that Rathburn responded negatively, stating that at the moment he was "fine." (*Id.*)

Perham testified that it was not acceptable to remove a lock without knowledge of the whereabouts of one's partner. (Tr. 273.) Asked how he understood Rathburn to have violated the Respondent's blue-flag rules, Perham responded:

Mark Bradley locked up these tracks. Mark Bradley should be one taking the locks off. Jim wasn't working those tracks. He didn't know if Mark Bradley had to go and repair a car, anything. I don't know.

(*Id.*) Although Perham first stated that he believed it was in the rules that permission was required, he later, upon reading the rule, stated, “I don’t see where it says you need to have permission.” (Tr. 274.) He added, though, “But you can’t just go start taking locks off tracks when somebody has them locked down. That is just—that’s insanity.” (*Id.*) He added that this principle was in the company rules and in the testing the employees were required to take every three years. (*Id.*) He explained that in his view just knowing the whereabouts of the Carman was not sufficient: in order to remove the locks of another, an employee needed to receive permission from the person who was working the tracks or else contact a supervisor. (Tr. 275.) He added: “The guy working the tracks might have to make a repair. He might have to get readings. He might have had to use the washroom and come back. Who knows? No one knows the reason except for the guy that has the track locked up.” (Tr. 275-276.) He clarified that even if the person unlocking the tracks knew the exact whereabouts of the person working the tracks, there was always the possibility that the person working the tracks would assume that the tracks were still locked and go out and make further repair unless he was in on the decision to unlock the tracks. (Tr. 276.) He agreed that in the present case Bradley was in the yard office and thus, given the circumstances, was not placed in any real danger. (*Id.*)

According to Perham, in his opinion Rathburn violated the blue-flag rule by removing Bradley’s locks without his permission. (Tr. 277.) He stated that he also believed that Rathburn violated other rules by being careless for the safety of himself and others, and then being quarrelsome when he got into an altercation with Bradley. (Tr. 277-278.) He added: “But the bottom line is this whole thing, if he didn’t unlock those tracks, those two gentlemen would still be working there today. That’s the bottom line.” (Tr. 279.)

Perham testified that he was aware of only one other person being previously disciplined for a violation of the Respondent’s blue-flag rule: Bradley on a previous occasion. He testified that Bradley was “brought back” although he did not know the details of his return to work—describing it as above his paygrade. (Tr. 280.) He denied being aware of any other physical fights at the company, although he stated that he was aware of a “half a dozen” verbal arguments that never made it to the management level. (Tr. 281.) He did acknowledge, though, hearing rumors of a physical altercation at a safety meeting during which chairs were thrown. He described it as a “fish story” that got bigger. (Tr. 282.) Perham later clarified that the rumored incident involving a safety meeting in which chairs were thrown would have occurred before the implementation of the Respondent’s workplace violence policy in July 2006. (Tr. 298.)

Asked if there was a culture at the Respondent’s workplace to go home and sleep off injuries, Perham responded, “No.” (Tr. 284.) Asked if there was any fear among employees to report an injury, he also responded, “No.” (*Id.*) He described injury reports as a “learning tool” to avoid future injuries. (*Id.*)

On cross-examination by counsel for the Respondent, Perham stated that he administered the rules testing program for the Respondent’s car department. (Tr. 295.) Specifically, he identified himself as the foreman who administered the rules test every three years. He stated that there was a specific examination on the subject of blue-flag issues. He stated that he administered the rules test to Rathburn in 2009 and 2011, and that each examination had a specific question dealing with whether it was permissible to unlock a partner’s flags when the

Hump Tower is calling for the tracks, and that each time he was tested Rathburn answered correctly that it was not permitted. (Tr. 297.)

On redirect examination from the Complainant's counsel, Perham made clear that Rathburn never admitted throwing the water bottle at Bradley, although he did admit to unlocking the tracks. (Tr. 300-301.)

Asked concerning the language in the rule that referred to a group working on the same track, Perham refuted the idea that Bradley and Rathburn were working together on the same set of tracks. (Tr. 302.)

### Hearing Testimony of Thomas J. Sipple

Thomas J. Sipple, who was called by the Complainant, testified that he had worked for the Respondent for thirty-nine years, starting out as a Carman and working as a supervisor since 1999. (Tr. 307.) He gave his job title as Car Foreman. (*Id.*) He described his duties as supervising the carmen, the operation of the yards, derailments, "man line," and "anything that has to do with the Belt...." (Tr. 307-308.)

Sipple testified that he responded to a call from Perham and arrived at the scene of the incident involving Bradley and Rathburn after Perham had already arrived on the scene and separated the two. (Tr. 308.) He testified that the first thing he noticed about Rathburn was the cut on his head and he asked him if he wanted to go the clinic, to which Rathburn responded negatively.

According to Sipple, he had earlier on that day received a telephone call from Bradley, asking him if he, Sipple, had unlocked any of his tracks. (Tr. 311.) Sipple testified that he told Bradley that he had not, and that he, Bradley, needed to check with his partner. (*Id.*)

Asked concerning his understanding of how Rathburn violated the Respondent's rule concerning blue-flag protections, Sipple responded, "He unlocked another man's track without his permission." (Tr. 312.) He explained that the only person that can unlock a blue-flag signal is the person who locked it "unless he calls you and asks you to remove his lock or move his lock." (*Id.*) Asked where he was "getting that from," Sipple replied, "It is in the rules. That's a policy. That's just the way we do it. It is a serious matter. You don't—you do not remove—even when you are working with a partner, you do not remove the blue flag or start work until you have communication that the track is secured." (Tr. 312-313.) Shown a copy of the rule, however, and asked to point out where it stated that permission to unlock another man's blue-flag protections could only come from the man or his foreman, Sipple stated, "I don't see it in there." (Tr. 313.)

Asked whether he understood Bradley and Rathburn to be working separately or together, Sipple stated, "They were working separate." (*Id.*) He testified that he learned that the two men were working separately by talking to them. (Tr. 313-314.) He acknowledged that the two men had "doubled" earlier in the day. (Tr. 314.)

Sipple acknowledged that it happened that a Carman would forget to unlock a track, but he stated that even if a person knew the exact location of that person, it was still necessary to obtain the Carman's permission before removing his protection. (Tr. 315.)

According to Sipple, he was not involved in the determination of which of the Respondent's rules Rathburn may have violated. (*Id.*) Asked if he was aware of any other verbal altercations occurring in his thirty-nine years of working with the Respondent, Sipple replied that there was "always arguments" and he was not aware of any of those arguments resulting in discipline. (Tr. 316.) Asked if he was aware of any other physical altercations, Sipple testified that he knew of one "for sure," and he described a safety meeting that he attended in which he personally got into a physical altercation with a person named Sal Veralli. (Tr. 316-317.) He stated that punches were thrown, but not chairs. (Tr. 317.) According to Sipple, as a result of the altercation he was removed from service pending an investigation for six months. Following the investigation, he testified, it was determined that he had a "temper disorder" and after receiving treatment he was reinstated. He stated that the Respondent did not have "the workplace violence rule back then" and therefore Veralli was not pulled out of service, and he could not state whether Veralli was subjected to any discipline. (Tr. 317-318.) He stated that the incident in which he was involved was the only other instance of a physical altercation at the Belt of which he was aware. (Tr. 318.)

Sipple further testified that he was aware of two other instances in which employees were found in violation of the Respondent's blue-flag rules. (*Id.*) He identified an employee named Jeff Hoter who he discovered working without blue-flag protection and who was subsequently terminated. (Tr. 318-319.) He stated that Hoter did not get his job back. (Tr. 319.) He also identified an incident in which Bradley was found in violation but was able to get his job back. (*Id.*)

Sipple testified that it was his understanding that not all workplace injuries were reportable. He explained, "I mean, you get a little nick and bump, you don't remember, you know, it is minor, a little scrape. But if you are bleeding or twist an ankle or something major like that, you report it." (Tr. 320.) Asked if an employee would get in trouble for not reporting an injury that was first thought to be minor but got worse, Sipple responded, "Well, yes. But that's your option, I mean, you know. You are supposed to report it, but a lot of guys don't report it. That's the way it is." (*Id.*)

Asked if he understood there to be any fear or intimidation among the Respondent's workers regarding the reporting of an injury, Sipple stated, "None whatsoever." (Tr. 321.) Asked, though, if was not better for an employee to go home and try to "sleep it off" when it came to an injury, Sipple replied, "It's up to the employee. He has a right for medical attention. That's his call. We can't force them to go for medical attention. Our job is to ask them if they are okay and do they want medical attention. We can't drag them to the clinic." (Tr. 322.) He stated that as a Car Foreman he did not have the authority to pull someone out of service if he thought he had an injury which put the person or others in danger, but someone else with the "proper authority" could do so. (*Id.*) Later, on cross-examination by the Respondent's counsel, he testified that he "could probably make that call on my own if I thought it was that serious." (Tr. 328.)

Sipple further testified that he had never gotten the feeling that the reporting of an injury was deemed a “hassle to management.” (Tr. 323.)

Sipple testified that he considered Rathburn a good worker. (Tr. 323.) He testified that he was not present at the meeting conducted by Kizior on the Monday morning following the incident. (Tr. 324). He stated that he did not work on Mondays. (Tr. 325.)

On cross-examination from counsel for the Respondent, Sipple stated that Rathburn had acknowledged that he unlocked Bradley’s tracks. (Tr. 328.) He further testified that Rathburn told him that he and Bradley were arguing and swearing, and that Bradley had thrown a water bottle at him. (*Id.*) Conversely, he stated that Bradley had told him that Rathburn had thrown the water bottle and that he, Bradley, was protecting himself. (Tr. 329.) Asked about the importance of the blue-flag rules, Sipple testified that the rule was always considered a “[v]ery serious” rule. He explained: “Guys take that real serious. It is real dangerous. Stuff could happen so fast. And one little weak link, a guy can be gone.” (*Id.*) Asked if he could imagine any scenario in which it would be permissible to unlock someone else’s flags without their permission, Sipple responded, “No.” (*Id.*)

Asked to reflect on the Respondent’s history of dealing with workplace violence, Sipple stated that while previously “a lot of stuff was kept hush, hush,” the culture changed “100 percent” in the 1990s. (Tr. 331.) He stated that in contrast to the time he was involved in a physical altercation at the safety meeting, the Respondent had adopted a “real strict” policy of zero tolerance for the past twenty years. (Tr. 331-332.) He stated that it was now a common understanding among the Respondent’s workers that the company had a policy of zero tolerance. (Tr. 335.)

Upon questioning from the undersigned, Sipple testified that the Respondent’s employees did not receive any training on the workplace violence policy. (Tr. 336.) He stated, though, that workers are given a copy of the safety rules containing the policy. (Tr. 337.)

#### Hearing Testimony of Richard Reilly

Richard Reilly, who was called as a witness by Rathburn, testified that he is a Carman for the Respondent and also a union representative. (Tr. 338-339.) He testified that he was the union representative at the time of the incident between Bradley and Rathburn. (Tr. 339.) He identified the union as TCU, meaning the Transportation and Communications Union and Brotherhood of Railroad Carmen. (*Id.*)

According to Reilly, he attended the meeting in Kizior’s office following the incident. (Tr. 342.) Asked if he recalled anyone at the meeting getting upset after Rathburn informed them of his trip to the emergency room over the weekend, Reilly stated, “No, I do not.” (Tr. 343.) However, Reilly stated that Rathburn had gotten to the meeting “approximately five minutes before me.” (*Id.*) He stated that when he arrived Rathburn was already making his statement regarding the incident. (*Id.*)

Asked about his understanding of the blue-flag rules adopted by the Respondent, Reilly stated that it was permitted to remove a partner's locks "to an extent," and he clarified that to apply only "[a]s long as you are working directly with your partner." (Tr. 345.) He explained his position as follows:

I mean if you consider a train, I mean part of a train. So let's say so many thousand feet. You are criss-crossing it. So at some stage you are going to meet in the middle of that train, and then you continue to work out. If I got out and I know he went to the other side of the yard and I'm on this side of the yard. I know he is off the track, then I can remove the lock and go and pick him up. But you need to be in direct contact with him.

(*Id.*)

Asked by the undersigned how the rules operate when two employees are working different tracks, Reilly responded, "I unlock the track I'm working on. Wait until I see him or physically speak to him and then remove that." (Tr. 346.) He testified that he did not know if that was in the rule itself, "[b]ut the understanding of me being there and working for the last five years is pretty much how I described it." (*Id.*)

Asked by counsel for the Complainant whether a worker could remove the locks of a partner as long as he knew the whereabouts of his partner, Reilly replied, "You've got to define partner." (Tr. 346-347.) He added: "If you are not working together, you don't know where he is or who is actually working that track. There could be three or four different people in the same area working different tracks different times." He further explained, "Direct contact to me with a partner is somebody who is in the Jeep or in the truck with you and you drop him at one end. You start at the other end. You criss-cross, make contact in the middle. You finish and go and physically see him and remove the locks." (Tr. 347.)

Counsel for the Complainant then accurately described the events leading to Rathburn removing blue-flag protections, after a morning in which they had earlier worked together and the Hump Tower was calling for Bradley's tracks and Bradley was not answering his calls. (*Id.*) Reilly testified that he would still not have unlocked Bradley's tracks and that he considered it a violation of the blue-flag rule "to an extent...." He gave an example of when he had been asked to remove another worker's blue-flag protection, and although he did so, he made clear that before he did he had visual confirmation that the worker had taken a break for lunch. (Tr. 348.)

Reilly testified that in his experience working for the Respondent he did not know of anyone disciplined for a purely verbal altercation. (Tr. 350.) He testified that he did not report every minor injury himself. (*Id.*) Asked if he considered the Respondent's employees afraid to report injuries, Reilly replied, "No, I wouldn't think they are afraid." (Tr. 353.) He added that some employees were afraid to report injuries that resulted from breaking the safety rules. (Tr. 354.) He stated that he had never witnessed management harass anybody for reporting an injury, nor was he otherwise aware that they had done so. (*Id.*) He stated that he had never had the impression that management did not want workers to report an injury because of "the hassle they

have to go through.” (Tr. 355.) He added: “They want and I encourage the members that I represent to report all injuries.” (*Id.*) He testified that he had heard “secondhand” about supervisors receiving financial incentives for reporting fewer injuries, and that past and present union members had talked about this, but he had “never witnessed any of it.” (Tr. 356.) On cross-examination from counsel for the Respondent, he made clear that everything he had heard was “all rumors.” (Tr. 359.)

On cross-examination by counsel for the Respondent, Reilly made clear that he did not believe that employees working different tracks could be said to be working together. (Tr. 357.) He stated that if the Hump wanted the track back that was being worked by another employee, he would try to contact that individual or a foreman. (Tr. 357-358.)

Upon questioning from the undersigned, Reilly testified that he would agree that the Respondent’s workplace violence policy was one of zero tolerance. (Tr. 360.) He stated that he may have arrived at the Monday-morning meeting in Kizior’s office, following the incident, five-to-ten minutes late. (*Id.*) Asked if any time after the meeting Rathburn described a confrontation during the period before he arrive, sparked by his seeking medical treatment over the weekend, Reilly replied:

He had disclosed he had been to the hospital. Hostility, I don’t know if he mentioned the word hostility or conveyed that. Oh, you know, he would have got the notice of investigation. So, yes, I’m sure he would have brought that into the forefront, yes. He had said that they are just mad now that I received the injury.

(Tr. 362.) He stated that Rathburn told him this “a week or at least 10 days after the incident.” (*Id.*)

Reilly testified, though, that during the meeting in Kizior’s office he could not recall any negative reaction from any of the individuals present. (Tr. 363.) He further stated that he did not recall at the time he entered the meeting having the impression that people were upset or angry from anything that had just transpired. (*Id.*)

#### Hearing Testimony of Timothy E. Coffey

The Complainant called as a witness Timothy E. Coffey, the Respondent’s General Counsel, Secretary, and Director of Human Resources. (Tr. 370.) He testified that he had been all three positions since 1998. (*Id.*) He stated that after the hearing was conducted in this matter, he was given the transcript to review (JX A), and he further talked with certain of those concerned. (Tr. 371.)

According to Coffey, after concluding that Rathburn was guilty of “two very severe offenses,” he considered Rathburn’s history of past discipline. (Tr. 372.) He stated that Rathburn had been previously dismissed for a violation of the Respondent’s alcohol policy in 2002, but was reinstated by the Public law Board in 2003 in what was described as a “last-chance

agreement.” (*Id.*) He testified that Rathburn also had been previously suspended for excessive absenteeism, and had reprimands for various issues. (*Id.*)

In addition to the transcript of the hearing and Rathburn’s record of past discipline, Coffey stated that he reviewed all of the exhibits that were generated as part of the hearing, as well as past arbitration awards. (Tr. 376.) Coffey described the decision to fire Rathburn as a group decision, and he identified the members of the group as himself, Simon, and Kizior. (Tr. 377.)

Coffey described the blue-flag rule as a “cardinal rule, meaning it is the type of rule that absolutely has to be followed” (Tr. 379.) He stated that it was a safety rule that if not followed could result in injury or death. (*Id.*) He identified two prior violations—one involving Bradley and another involving “Mr. Domalczny”—each of which resulted in termination, with Mr. Bradley being reinstated on a “leniency basis” and Mr. Domalczny never regaining his job. (*Id.*) He stated that both men violated the rule by working a track and failing to place it under blue-flag protection or locks. (Tr. 380.)

Coffey testified that he was not aware of any exception to the blue-flag rule. (Tr. 381.) He allowed, though, that under certain circumstances a worker could remove another man’s locks—when the two men together working as a group—“meaning that they’re working on the same track together”—or through communicating with a supervisor. (Tr. 382.) He emphasized that a “partner” is someone working the same track as the other co-worker. (Tr. 385.) He stated that he did not know if this was stated in the written rule, but it was “absolutely the way the rule has been applied on the property for as long as I’ve been there.” (*Id.*) He added, “The facts surrounding Mr. Rathburn’s removal of the locks and blue flags are irrelevant. He violated a cardinal rule. He violated a rule that’s in place to save lives. And if he had an impatient Hump conductor, or Hump master, who wanted tracks given to him, that was no reason to violate the rule.” (Tr. 387.)

Coffey stated that he found Rathburn in violation of the Respondent’s Rule 16.1 for removing Bradley’s locks without speaking to Bradley or any car foreman or supervisor. (Tr. 388.) He stated that he found him in violation of Rule 1.7, Conduct, for entering into a verbal altercation that escalated into a “subsequent fight, such as it was, for lack of a better term...” (Tr. 389.) He stated that he concluded that Rathburn had engaged in a verbal altercation based on the testimony of Schultz at the investigatory hearing, as well as statements by Bradley. (Tr. 391.) He stated that, in his view, Rathburn should have continued to walk away from the situation, once outside the shanty, rather than be engaged in the altercation that ensued at the Jeep. (Tr. 392.) He testified that he also found such conduct encompassed by the Respondent’s Rule 1.9, which prohibited altercations, practical jokes, and harassment. (Tr. 392-393.) He noted that Rule 1.9 refers to “quarrelsome behavior, discourteous behavior, hostility, willful disregard for someone’s safety.” He stated that “[a]ll of those apply in this case.” (Tr. 393.)

Although he allowed that “[e]ach case has its own facts,” Coffey rejected the suggestion that Rathburn was the victim, or dragged into an altercation with Bradley. (Tr. 394.) He cited to the fact that the physical altercation had escalated from the verbal exchange between Rathburn and Bradley, in which, he implied, Rathburn had been a willing participant. (*Id.*) He stated that

he also concluded that Rathburn violated the Respondent's workplace violence policy based on his conclusion that Rathburn was involved in a physical altercation, as well as "disruptive behavior occurring on the job site." (Tr. 395.) Asked to specify the disruptive behavior that Rathburn allegedly engaged in, Coffey replied, "Throwing the water bottle; the allowance of the argument to get elevated; the name calling; the fight." (Tr. 396.)

Coffey testified that at the time of the investigation, there was no allegation that Rathburn had filed a late injury report. (Tr. 397.) He stated that he did not consider the evidence "strong enough" to justify a finding that Rathburn had falsified records. (Tr. 399.) He added that there was disputed testimony regarding the charge of falsification. He added, "I didn't, quite frankly, really think I had to go there. Everything else was so strong with respect to the more serious—far more serious charges." (*Id.*)

Coffey was asked concerning previous incidents of workplace violence and cited to several. First, he cited to an instance in 2007 or 2008 in which a trainman got into a verbal dispute with his foreman, became "very loud" and "very intimidating" when asserting to the Manager of Train Operations that he could no longer work with a particular co-worker. Coffey stated that the gentleman was terminated under the workplace violence policy and his dismissal was upheld on arbitration. (Tr. 400.) He also cited to an example in 2000 when "one of signalmen took it upon himself to call one of our managers' wives while the manager was out of town and complained about the manager, disparaging him and, you know, basically scaring the wife half to death." (Tr. 401.) He stated that the signalman was terminated and his dismissal was also upheld. (*Id.*) He noted, though, that this incident took place before the implementation of the Respondent's workplace violence policy, and the signalman was fired under the conduct rules. (*Id.*)

According to Coffey, discipline under the workplace violence policy is "department specific" regarding a "recipe for discipline, for lack of a better word, progressive in nature." (Tr. 403.)

Coffey agreed that under the Respondent's rules, all injuries were to be reported, even bee stings. (Tr. 404.) He explained, "Every incident that results in a personal injury, no matter how minor, is considered worthy of reporting to the company." (*Id.*) He stated that the Respondent had one FRA-reportable injury "thus far" in 2014, three in 2013, ten in 2012, and six in 2011. (Tr. 407.) He stated that annually fifteen percent of the incentive compensation plan for managers and department heads was based on a "FRA reportable for frequency ratio." (Tr. 408.)

On cross-examination by counsel for the Respondent, Coffey stated that in his view, for purposes of the blue-flag rule, two employees are working together only if they are working the same track or tracks. (Tr. 410.) He agreed that the only time it was permissible to remove another co-worker's blue-flag protection was when two employees were on the same track at the same time. (*Id.*) When employees are not working on the same track, he stated that they needed to communicate. (Tr. 410-411.)

On questioning from the undersigned, Coffey stated that the fact that Rathburn sought medical treatment over the weekend following the incident played no role whatsoever in determining the discipline that was meted out. (Tr. 416.) He stated that in his experience with the Respondent he had negotiated approximately 100 injury claims by employees, and none had been subject to discipline, including those who had filed multiple injury claims or lawsuits. (Tr. 417.)

#### APPLICABLE LAW

The Federal Rail Safety Act (“FRSA”) provides for employee protection from discrimination if the employee has engaged in protected activity while employed by a railroad carrier engaged in interstate or foreign commerce. 49 U.S.C. § 20109 (a). Specifically, the FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee’s protected activity. 49 U.S.C. § 20109 (a). An employee engages in protected activity if, among other things, the employee in good faith, notifies or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness. 49 U.S.C. § 20109 (a)(4).

On November 9, 2015, the final rule governing the employee protection provisions of the National Transit Systems Security Act (“NTSSA”), enacted as § 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Commission Act”), and the FRSA, as amended by § 1521 of the 9/11 Commission Act, was published in the Federal Register.<sup>7</sup> Pursuant to the 9/11 Commission Act, enacted into law on August 3, 2007, Congress transferred authority for rail employees’ whistleblower claims from the National Railroad Adjustment Board to the Department of Labor under OSHA. The amendments changed the legal burdens of proof in FRSA claims, requiring they be harmonized with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), codified at 49 U.S.C. § 42121. OSHA’s jurisdiction over such claims became effective on August 3, 2007. *Xavier A. Rosadillo v. Union Pacific Railroad Co.*, ARB Case No. 10-085 AU Case No. 2009-FRS-008.

#### DISCUSSION

As a preliminary matter, Rathburn, in order to have a cognizable claim under the Act, must be employed by a covered employer, which is defined by the FRSA as a railroad carrier engaged in interstate commerce. 49 U.S.C. § 20109(a). The parties agree that Respondent is a railroad carrier engaged in interstate commerce and that the Complainant was an employee of Respondent. (Tr. 13.) Therefore I find the parties fall under the jurisdiction of the FRSA.

In order to prevail on his FRSA claim, Rathburn must prove by a preponderance of the evidence that “protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. §1982.109(a). If Rathburn has satisfied his burden, however, the Respondent may avoid liability by demonstrating by clear and convincing evidence that it “would have taken the same adverse action in the absence of any protected behavior.” 29 C.F.R. §1982.109(b).

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<sup>7</sup> To be codified at 29 CFR Part 1982.

## Elements of a *Prima Facie* Claim

To satisfy his *prima facie* burden under the FRSA, a complainant must prove, directly or indirectly, by a preponderance of the evidence that: (1) he engaged in protected activity as defined by the FRSA; (2) his employer knew he engaged in the protected activity; (3) he was subjected to an unfavorable personnel action; and (4) his protected activity was a contributing factor that led to the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a); *Clemmons v. Ameristar Airways Inc., et al*, ARB No. 05-048, AU No. 2004-AIR-11, slip opinion at 3 (ARB June 29, 2007); *Sievers v. Alaska Airlines, Inc.*, ARE No. 05-109, AU No. 2004-AIR-028 (ARB Jan. 30, 2008).

Each of these elements will be discussed in turn.

### 1. The Complainant Engaged In Protected Behavior

The FRSA protects from retaliation or discrimination any employee, who in good faith, notifies or attempts to notify the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109 (a)(4). Rathburn has alleged that he engaged in protected activity by notifying the Respondent of a personal work-related injury. Furthermore, the Respondent, at the hearing, made clear that it was willing to stipulate that Rathburn engaged in a protected activity when he first reported an injury on April 6, 2012, the day of the incident, when he called his foreman to the scene of the incident between him and Bradley, and it was evident that he had sustained a cut on his forehead. (Tr. 175.) Counsel for the Respondent made clear that Rathburn had satisfied its rule that all injuries be reported immediately, and there was no allegation on the part of the Respondent that Rathburn had filed an untimely report of injury. (*Id.*) Counsel for the Respondent also stated that it was willing to stipulate that Rathburn also engaged in protected activity when he reported to the emergency room over the weekend, although counsel was not willing to stipulate that it was aware of his visit to the emergency room until the following Monday. (Tr. 182, 463-464)

Accordingly, pursuant to the stipulation and in accordance with the evidence, I find that Rathburn notified the Respondent of a work-related injury in good faith, and therefore engaged in protected activity as defined by the FRSA.

### 2. Respondent Was Aware of the Protected Behavior

The Complainant must next demonstrate that the Respondent was aware of his protected activities, such that they contributed to his termination. The fact that the Respondent was aware of his filing an injury report cannot be seriously argued. As noted, the Respondent stipulated that Rathburn had reported an injury on April 6, 2012, when it was evident to the foremen who arrived on the scene that he had suffered a laceration on his forehead. (Tr. 175.) The evidence is conflicting whether Rathburn successfully texted Simon on the Sunday he went to the emergency room (Tr. 455-456), but he testified that he advised those in attendance at the Monday-morning meeting in Kizior's office that he had. (*Id.*) Although the Respondent disputed Rathburn's version of their response to this news, none of the witnesses disputed that Rathburn had advised

the meeting of his trip to the emergency room. Hence, I find that the Respondent was clearly aware of both Rathburn's injury and his trip to the emergency room by April 9, 2012.

### 3. Complainant Suffered an Unfavorable Personnel Action

The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. *See Burlington Indus., Inc. v. Ellen/i*, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). It is clear from the testimony and record that Rathburn suffered adverse employment action when he was pulled out of service and subsequently terminated from his employment with the Respondent on April 20, 2012. (Tr. 466.)

### 4. Complainant's Protected Behavior Was A Contributing Factor In The Unfavorable Personnel Action

As Rathburn has established the first three elements of a *prima facie* claim of retaliation under the FRSA, he must next show that his protected behavior was a contributing factor in his termination.

In its comments to the Interim Final Rule, the Department of Labor, citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), stated that it considered a "contributing factor" to be "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The comments also cited to *Klopfenstein v. PCC Flow Techs Holdings, Inc.*, No. 04-149, 2006 WL 3246904 (ARB May 31, 2006). In that case the Board discussed the contributing-factor test under the whistleblower provisions of the Sarbanes Oxley Act of 2002. Specifically, quoting from *Klopfenstein*, the DOL observed that a Complainant need not necessarily prove that the respondent's articulated reason for the adverse job action was a pretext in order to prevail, but can alternatively prevail by showing that the respondent's reason, while true, "is only one of the reasons for its conduct...and that another reason was the complainant's protected activity." 75 Fed. Reg. 53,544, 53,550 (Aug. 31, 2010) (citing *Klopfenstein*, 2006 WL 3246904 at 13).

In the preamble to the final rule, effective November 9, 2015, the Department of Labor explained that "the complainant must demonstrate (i.e. prove by a preponderance of the evidence) that the protected activity was a 'contributing factor' in the adverse action." 80 Fed. Reg. 69115, 69127 (Nov. 9, 2015) (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) ("The term 'demonstrates' [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provision] means to prove by a preponderance of the evidence.")). Thereafter, if the complainant "demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by 'clear and convincing evidence' that it would have taken the same action in the absence of the protected activity." 80 Fed. Reg. 69115, 69127 (Nov. 9, 2015) (citing 6 U.S.C. 1142(c)(2)(B)(iv); 49 U.S.C. 42121(b)(2)(B)(iv)).

A complainant can sustain his or her burden through either direct or indirect evidence. *Sievers, supra*. Direct evidence is evidence that conclusively links the protected activity and the

adverse action. *Id.* at 4-5. The ARB has described direct evidence as “smoking gun” evidence that “conclusively links the protected activity and the adverse action and does not rely on inference.” *Williams v. Domino’s Pizza*, ARE No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). Alternatively, the complainant may rely upon circumstantial evidence. For example, the complainant may show that the respondent’s proffered reason for termination was not the true reason, but instead “pretext.” *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-OI 1, slip op. at 6 (ARB Nov. 30, 2010). If the complainant proves pretext, it may be inferred that his or her protected activity contributed to the termination. (*Id.*) According to the Board, “If the complainant proves pretext, [the fact finder] may infer that his protected activity contributed to his termination, although [the fact finder is] not compelled to do so.” *Williams v. Domino’s Pizza*, *supra*, slip op. at 6. In evaluating the merits of the circumstantial evidence, courts may take into consideration the following factors: 1) timing of the unfavorable personnel action in relation to the protected activity; 2) disparate treatment of the complainant; 3) deviation from routine procedures; 4) attitude of supervisors towards the whistleblower and protected activity in general<sup>8</sup>; and 5) the complainant’s work performance rating before and after engaging in protected activity. *Sievers*, *supra*, slip. Op. at 26.

Finally, it should be noted that the Administrative Review Board (“ARB”) has recently considered whether the respondent’s evidence of legitimate, non-retaliatory reasons for its action may be weighed against the complainant’s causation evidence in determining whether the complainant has met his or her burden of proving by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action at issue. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014.) A split panel of the ARB ruled, *inter alia*, that an Administrative Law Judge may not weigh a respondent’s evidence of a legitimate, non-retaliatory reason for an adverse action when determining whether the complainant has met his or her burden of proving contributing factor causation by a preponderance of the evidence.

More recently, however, in *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the ARB affirmed, but clarified, the *Fordham* decision, stating:

While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant’s proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation *as long as the evidence is relevant to that element of proof.* 29 C.F.R. § 18.401.

*Powers*, slip op. at 23. The ARB in *Powers* said the *Fordham* majority “properly acknowledged that ‘an ALJ may consider an employer’s evidence challenging whether the complainant’s actions were protected or whether the employer’s action constituted an adverse action, as well

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<sup>8</sup> Proof of *animus* towards protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers*, *supra*, slip op. at 27. “[R]idicule, open hostile actions or threatening statements,” may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996).

the credibility of the complainant's causation evidence.” *Powers*, slip op. at 23 (quoting *Fordham*, slip op. at 24.)

Reading the ARB's decisions in *Powers* and *Fordham* together, therefore, it appears that the Board has settled on the view that there is no inherent limitation on evidence that a factfinder can evaluate when determining whether the Complainant's protected activity was a contributing factor in the alleged adverse action, provided only that the evidence is relevant to that element of proof. It should be noted, also, that in this case Rathburn called all of the witnesses as part of his affirmative case.

The specific grounds for Rathburn's dismissal, as contained in the Notice of Dismissal dated April 19, 2012, were: 1) violations of Mechanical Rules M-16.0 (“Blue Signal”) and M-16.1 (“Protection of Workmen”) regarding a blue-flag protections; 2) a violation of M.1.7 (“Conduct, regarding the falsification of train records); 3) violations of M 1.7 (“Conduct”) and M 1.9 (Altercations, Practical Jokes, Harassment”); and 3) violation of Policy # 5 (“Workplace Violence Policy”). (JX Q.)

Notwithstanding these stated reasons, Rathburn argues that his termination was caused, at least in part, by the fact that he reported an injury, that is, the laceration of his forehead that arose out of the incident with Bradley. Moreover, as presented at the hearing, he also attempted to demonstrate that his going to the emergency room over the weekend for treatment of worsening symptoms was further motivation for his discharge because it turned the injury into one that was FRA-reportable, causing the management “hassles” with which it did not want to deal, and because FRA-reportable injuries had the potential to reduce the amount of bonuses awarded to managers and supervisors at the end of the year.

As noted, one method of establishing a *prima facie* case is through direct or “smoking gun evidence.” The only evidence truly of this nature was Rathburn's testimony that when he reported going to emergency room at the Monday-morning meeting in Kizior's office the news was met, as he described it, with obvious displeasure. (Tr. 432.) Indeed, he stated that the participants called him names and that Kizior threw “stuff down...saying, what the fuck.” (Tr. 434.) I found his testimony unpersuasive, however. Upon questioning from the undersigned, he was oddly unable to recall what exactly was said by everyone, nor could he state with certainty whether the anger he detected was directed to the fact that he had gone to the emergency room or simply failed to notify management of his actions. (Tr. 455-456.) He admitted that his belief that the anger was inspired by the injury becoming FRA-reportable was just his impression, and he could not recall any words being said to this effect. (*Id.*) To the extent that he was able to remember any other thing being said, it was only Simon asking him why he had not called and informed him. (*Id.*)

The other participants in the meeting, moreover, did not corroborate his version of the start of the meeting. Kizior was not asked concerning his alleged reaction to the news that Rathburn had gone to the emergency room by either counsel for the Claimant or counsel for the Respondent. Romano testified that he did not think Kizior displayed any reaction to the news. (Tr. 137.) He also testified that he did not think Kizior used profanity or threw anything. (*Id.*) For his part, Romano testified that he did not think he personally reacted in any way. (Tr. 137.)

Simon could not recall Rathburn reporting at the meeting that he had sought medical treatment over the weekend. (Tr. 194.) He denied seeing Kizior angry or upset at any point during the meeting. (Tr. 195.) Nor could he remember anybody throwing anything. Although he could not remember his own reaction, he stated that he considered it Rathburn's "business" whether he sought medical treatment. (*Id.*) Unfortunately Reilly, the union representative, arrived five-to-ten minutes late to the meeting and thus may have missed whatever exchange took place. (Tr. 343.) He testified, though, that after he arrived at the meeting he could not recall any negative reaction among the individuals present, nor did he recall having the impression that people were upset or angry over anything that had just transpired. (Tr. 363.) He did verify, though, that Rathburn communicated to him after the meeting that he felt he had angered management by visiting the emergency room over the weekend. (Tr. 362.)

In sum, the only direct evidence of management's displeasure with his reporting an injury and seeking treatment is Rathburn's own testimony regarding what happened at the beginning of the Monday-morning meeting in Kizior's office. The testimony of Romano and Simon disputes his version of events, and Reilly's testimony chips away at it further. Observing the demeanor of the witnesses and assessing their credibility, I cannot say that I find any reason to accept Rathburn's version of what transpired over that of the others. Rathburn's memory of the meeting struck me as curiously vague given the circumstances. For example, he stated that he was called names but did not appear to recall any names that he was called. Indeed, he could not recall much except Kizior saying "what the fuck" and Simon asking him why he had not called to inform him—two utterances which are subject to interpretation. As Rathburn finally acknowledged, most of his testimony was based upon his own impression.

There is no other direct evidence that Rathburn's reporting an injury or seeking medical treatment played any role in his discharge. As for circumstantial evidence, as noted the following non-exhaustive list of factors may be taken into consideration: 1) timing of the unfavorable personnel action in relation to the protected activity; 2) disparate treatment of the complainant; 3) deviation from routine procedures; 4) attitude of supervisors towards the whistleblower and protected activity in general; and 5) the complainant's work performance rating before and after engaging in protected activity. *Sievers, supra*, slip. Op. at 26.

Here, the first factor—temporal proximity—is certainly present. Rathburn reported the injury on April 6, 2012, the date of the incident with Bradley, and he sought treatment on April 8, 2012, at the emergency room. Rathburn, as noted, was taken out of service on April 6, 2012, and discharged on April 20, 2012. But temporal proximity does not always connote causality. Sometimes it is only coincidence. Here, Rathburn was injured as a result of an altercation with Bradley. He reported the injury and sought treatment before the Respondent had begun its investigation into the matter and was in a position to mete out any discipline for the altercation that led to the injury. Simply by reporting an injury and seeking treatment for an injury that grew out of a rules violation does not insulate an employee from discipline so long as it does not play any role in the discipline.

I cannot find any evidence, even of a circumstantial nature, that the discipline here was motivated by Rathburn reporting an injury and seeking treatment. Certainly there was no evidence that the Respondent has an attitude or workplace culture that discourages the reporting

of injuries. Indeed, Rathburn never disputed Perham's testimony that when he arrived on the scene, Perham asked if he wanted to go to the clinic for his wound. (Tr. 271.) Sipple, the second foreman on the scene, testified that he, too, asked Rathburn if he wanted to go to the clinic. (Tr. 308.) These hardly seem the actions of management seeking to discourage either the reporting of an injury or the seeking of its treatment. The testimony of the other witnesses uniformly supported that the Respondent does not have a policy or culture of discouraging the reporting of injuries, or retaliating against those who do. Indeed, Reilly, the union representative, stated that he did not believe his fellow members were afraid to report an injury, with the exception of those whose injuries arose from breaking the safety rules. (Tr. 354.) He stated that he had not witnessed management harass anybody for reporting an injury, nor was he aware of any instance of this happening. (*Id.*) He also rejected the notion that management discouraged the reporting of injuries to avoid the hassle of going through the necessary paperwork, adding, "They want and I encourage the members that I represent to report all injuries." (Tr. 355.)

Furthermore, there is no evidence of disparate treatment. Bradley was terminated as well. As articulated at the hearing, the Respondent has a zero-tolerance policy when it comes to workplace violence. Moreover, the evidence of record established that previous violations of the Respondent's blue-flag rules had been met by management with dismissal.

As noted, if a claimant is able to demonstrate that the reasons given for his discharge were pretextual, that may be further circumstantial evidence of retaliatory intent. *Riess v. Nucor Corp.*, *supra*, slip op. at 6 ; *Williams v. Domino 's Pizza*, *supra*, slip op. at 6. Here, however, Rathburn failed decisively to show that the reasons for his discharge were pretextual. Although he insisted that the Respondent's blue-flag rules allowed him to unlock Bradley's tracks although he had not seen him for the previous ten minutes, his understanding of the rules was rejected by all the other witnesses, who insisted that unless two workers were working on the same track, and thus in direct contact with each other, it was strictly forbidden for a worker to remove another's blue-flag protections. As stated by Coffey, the fact that Rathburn "had an impatient Hump conductor, or Hump master, who wanted tracks given to him, that was no reason to violate the rule." (Tr. 387.) Significantly, Rathburn's interpretation of the rules was not only rejected by his supervisors, but also Reilly, the union representative. (Tr. 345-347.)

There was clearly evidence that Rathburn had violated the Respondent's rules regarding blue-flag protections. I can find absolutely nothing pretextual about this charge and finding of guilt. As confirmed by almost every witness, Rathburn was not working the same track with Bradley. Therefore, Bradley's blue-flag protections were not his to remove, nor the track his to release, even when confronted with an impatient Hump master. Furthermore, I do not find anything pretextual in the charge that Rathburn violated the Respondent's zero-tolerance policy regarding workplace violence. There was clearly sufficient evidence based on Bradley's and Schultz's statements to find that Rathburn had participated in a heated verbal exchange with Bradley in the shanty, and was not simply a passive onlooker as Bradley expressed his anger at Rathburn taking it upon himself to remove his locks without his permission. Moreover, based upon the evidence available to the Respondent at the time the decision was made, I cannot say that there was anything pretextual in the determination that both men were culpable when the altercation between the two moved outside and resulted in Bradley being doused in water and Rathburn cut on the forehead. Both Rathburn and Bradley told wildly differing versions of who

said and who did what to whom. The Respondent's conclusion that both were sufficiently responsible for what transpired between them to fire both cannot be said to be unreasonable or unjustified.

Further, I was impressed by the manifest sincerity of the witnesses who described the seriousness of the blue-flag protections and their importance to worker safety. Every witness who discussed the rule stressed its importance to the safety of the person who had applied the blue-flag protections, and the risk to life and limb that a violation could pose.

Finally, it was revealed at the hearing that a small percentage of the annual bonus given to management could be affected by the number of FRA-reportable injuries. (Tr. 124-126, 355-359, 408.) Although Rathburn would have this fact as evidence that management had a motive to discourage the reporting of injuries, and thus his doing so may have played a role in his termination, there was absolutely no evidence presented that this component of the bonus equation had anything to do with the decision to terminate him. Coffey's testimony was convincing that he gave absolutely no consideration to Rathburn's injury, or his decision to seek treatment for his injury, in determining that Rathburn should be terminated for his violation of the blue-flag rules and the policy against workplace violence. (Tr. 416.) He persuasively supported this statement by noting that he had negotiated approximately 100 injury claims by employees, some of whom had filed multiple injury claims and initiated lawsuits against the company, and none had been subject to discipline. (Tr. 417.)

In sum, I find the direct evidence offered by Rathburn of retaliatory intent—the alleged reaction of management during the Monday-morning meeting in Kizior's office—less than persuasive for the reasons stated. Further, the only circumstantial evidence of retaliatory intent is the temporal proximity between his injury and his visit to the emergency room and his discharge. However, whatever inference of causation such temporal proximity may suggest is negated when viewed in context, particularly when one considers that Bradley, for whom there is no evidence that he suffered any injury other than a dousing, was also terminated.

I find, therefore, that Rathburn failed to present a *prima facie* case that his reporting of an injury on April 6, 2012, and his seeking treatment at the emergency room on April 8, 2012, played any role in the Respondent's decision to terminate him for a violation of its blue-flag rules and policy against workplace violence.

##### 5. Same Adverse Action Absent Protected Behavior

Under 29 C.F.R. § 1982.109 (b), relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1982.109(b). In other words, even where a complainant has proven discrimination by a preponderance of the evidence, liability does not attach if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams v. Domino 's Pizza, supra*, slip op. at 6. In the preamble to the final rule, effective November 9, 2015, the Department of Labor explained a “‘clear and convincing evidence’ standard is a higher burden of proof than a ‘preponderance of the evidence’ standard. Clear and convincing evidence is evidence indicating that the thing to be

proved is highly probable or reasonably certain.” 80 Fed. Reg. 69115, 69122 (Nov. 9, 2015) (citing *Clarke v. Navajo Express*, ARB No. 09–114, 2011 WL 2614326 at 3 (ARB June 29, 2011); *Araujo v. New Jersey Transit Rail Ops., Inc.*, 708 F.3d 152, 159 (3d Cir. 2013)). See also *Brune v. Horizon Air. Indus., Inc.*, ARE No. 04-037, AU No. 2002-AIR-008, slip. op. at 14 (ARB Jan. 31, 2006) (citing Black’s Law Dictionary at 577)). Thus, the burden of proof under the clear and convincing standard is more rigorous than the preponderance of the evidence standard. *DeFrancesco v. Union Railroad Co.*, ARE No. 10-114, AU No. 2009-FRS-9 (ARE Feb. 29, 2012).

It should be pointed out, for the sake of appellate review, that even were it to be determined that Rathburn had made out a *prima facie* case that his reporting and seeking treatment for his injury played a contributory role in his termination, I would still find that the Respondent demonstrated clearly and convincingly that it would have taken the same action in any event. The testimony adduced at the hearing, particularly that of Coffey, produced in my mind, as the trier of fact, a firm belief that the Respondent would have terminated Rathburn regardless of his injury or decision to seek treatment given the seriousness of the rules violation and the zero-tolerance nature of the Respondent’s policy against workplace violence.

### CONCLUSION

The Complainant, James E. Rathburn has proved that he engaged in FRSA-protected activities when he reported an injury on April 6, 2012, and sought medical treatment for that injury on April 8, 2012. Further, Rathburn proved that he suffered an adverse action when his employment was terminated on April 20, 2012. However, Rathburn failed to establish that any of his protected activities was a contributing factor in his termination of employment. Specifically, he failed to establish a *prima facie* case of retaliatory intent based either on direct or circumstantial evidence. Moreover, even assuming that a *prima facie* case had been established, the Respondent demonstrated clearly and convincingly that he would have been terminated in any event due to his violation of the Respondent’s rules and policy regarding blue-flag protections, conduct, and workplace violence.

## ORDER

Accordingly, having failed to establish the requisite element of causation necessary to obtain relief under the FRSA whistleblower-protection provision, the FRSA complaint of Mr. James Rathburn is **DISMISSED**.

**SO ORDERED.**

JOHN P. SELLERS, III  
Administrative Law Judge

**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](mailto: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).