



Issue Date: 12 December 2018

Case No.: 2014-FRS-00054

In the Matter of:

BRAD RIDDELL,
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent.

DECISION AND ORDER AWARDING DAMAGES

This matter arises under the employee protection provisions of the Federal Rail Safety Act, as amended, 49 U.S.C. § 20109 (“FRSA” or the “Act”), with implementing regulations at 29 C.F.R. Part 1982. The FRSA prohibits an employer from discriminating against, or taking an unfavorable personnel action against, an employee because the employee reported a work-related injury or engaged in other protected activity. In this case, Complainant contends that Respondent retaliated against him for reporting unsafe conditions.

Preliminary Matters

Complainant argues that drug use, and concealment thereof, was the driving factor for his alleged adverse personnel action. Complainant’s argument is dependent on his credibility, and his credibility is dependent, in part, on the veracity of his statements regarding the alleged drug use. If the record were to establish that there was no drug use, Complainant’s credibility would be degraded. Conversely, if the record were to establish that there was, Complainant’s credibility would be enhanced.

I am an administrative law judge (“ALJ”) considering a matter brought under the FRSA; I am not a judge empowered to adjudicate criminal matters, and thus I cannot determine whether or not any individual engaged in criminal conduct. Despite this, I may, on review of the evidence, determine that Complainant’s allegations of drug use are factually correct, and that some of Respondents’ employees were using drugs on the job. Any such determination is not a determination of criminal liability. This is a civil case; the burdens of proof imposed on the parties are vastly different than the burdens in a criminal case. Whether or not any person used

drugs, though related to Complainant's retaliation claim, is not an issue that I must definitively decide in this FRSA matter. Moreover, the alleged drug users did not testify in this matter.

Given the foregoing, the parties are advised that my findings regarding any individuals' drug use are limited to this matter, and do not represent any finding of criminal liability.

Factual Findings¹

The record in this case consists mostly of statements, witness reports, and transcripts of statements by Complainant, Complainant's coworkers, Complainant's managers, and others. This record means that the facts of this case turn largely on the credibility of the witnesses. Given these circumstances, I begin my analysis with credibility determinations of the witnesses.

I. Credibility Determinations

A. Complainant Is a Credible Witness

I observed Complainant testify at the hearing. During his testimony, Complainant bore a credible demeanor. He provided detailed answers, readily admitted unflattering information, acknowledged his lack of knowledge on certain issues, and remained consistent. In fact, Complainant's testimony has remained largely consistent since 2013. *See* JX 22 at 63-72; CX 37 at 43-44; RX 38; Tr. at 37-169. Additionally, the record supports Claimant's other contested assertions, which I address below.

1. Alleged Drug Use

A critical issue on which Complainant's credibility turns is the alleged drug use on the S-1 system production gang.² While there is no direct evidence, beyond the assertions of various witnesses, that drug use occurred during Complainant's tenure on the team, the record shows that an individual on the S-1 gang was charged with drug use during Complainant's removal. Tr. at 325 (acknowledging that an individual was removed from the S-1 gang for drug use after Complainant left); *id.* at 485-86 (recalling S-1 gang members testing positive for drugs sometime in 2013, and that he was "pretty confident" Bobby Hatmaker was implicated); CX 40 at 89-93 (recounting police ticketing someone for drug use shortly after Complainant's hearing). Moreover, Geoffrey Preece supports Complainant's assertion of drug use, noting that "[a]nybody with some common sense could figure out stuff was being done. . . . I never witnessed it myself, but I wasn't born yesterday either." *Id.* at 99.

Beyond these individuals, no other S-1 gang member stated he observed drug use on the railroad. *See, e.g.,* CX 37. However, those denials do not contradict Complainant's assertions.

¹ Exhibits in this matter are abbreviated as follows: "CX" refers to Complainant's Exhibits; "EX" refers to Employer's Exhibits; "JX" refers to Joint Exhibits; "ALJX" refers to Administrative Law Judge Exhibits, and "Tr." refers to the January 2017 Hearing Transcript.

² The terms "system production gang" and "system production team" are interchangeable. *Compare* CX 1 at 10 and CX 37 at 28 with CX 12; JX 5; and Tr. at 39, 181.

The machines of the S-1 gang were spread out over an extensive distance. *See* CX 3 at 34; CX 40 at 47. Though no individual stated they smelled drugs, Complainant went in depth explaining the methods by which Mr. Hatmaker and Chuck Domiano camouflaged the smell of their drug use. *See* Tr. at 53 (alleging Mr. Hatmaker and Mr. Domiano would spray an air freshener called “Ozium” in the cab and then smoke cigarettes to hide the odor). Complainant’s allegations of camouflage are supported in part by the first audit of the S-1 gang, in which the auditors reported that the cab “smelled lightly of cigarette smoke.” RX 23 at 2. Respondent does not allow smoking of cigarettes on the cab. Tr. at 54, 337-38, 513.³

Moreover, some of the individuals who denied any knowledge of drug use were the very individuals that Complainant implicated in his ethics calls. As I explain in more detail below, *see* Factual Findings Part I.B.3-4, the statements made by these individuals are contradicted by the record, and I grant their testimony little weight due to their credibility issues.

Given this information, the record supports Complainant’s allegations of drug use, which bolsters Complainant’s credibility.

2. Alleged “Tip Offs” by Dennis Rhodes

Complainant also alleges that Mr. Rhodes “tipped off” Mr. Hatmaker and Mr. Domiano to audits prior to the auditors’ arrival. The record, again, supports Complainant’s testimony. Specifically, Respondent’s own auditors admit to contacting Mr. Rhodes. Adam Gerth, one of the first two auditors, noted that he called Mr. Rhodes five minutes prior to his arrival at the S-1 Gang. CX 37 at 11-12. This supports Complainant’s timeline that, shortly before the auditors arrived, Mr. Rhodes contacted Mr. Hatmaker to warn him about the incoming audit. Tr. at 54-56.⁴

The second group of auditors also supports Complainant’s assertion. Colin Gray admitted to calling Mr. Rhodes thirty to sixty minutes prior to the second audit. CX 37 at 13-14. Mr. Gray’s testimony is partially contradicted by Bill McDaniel, another auditor, who stated that Mr. Gray had admitted that he had told Mr. Rhodes about the audit days before. *Id.* at 27. Mr. McDaniel also noted that Mr. Rhodes had initially called him days before seeking information regarding any upcoming audits. *Id.* at 26-27. Mr. McDaniel further remarked that the S-1 gang did not seem surprised at the second audit. *Id.* at 27. In any event, Mr. Gray and Mr. McDaniel state that Mr. Rhodes was given notice of the audit.

This information supports Claimant’s assertions that Mr. Rhodes tipped off Mr. Hatmaker and Mr. Domiano to the audits. Accordingly, Claimant’s credibility is further bolstered on this issue.

³ Both managers Chris Brigman and Kelly Piccirillo explained at the hearing that an individual caught smoking would first be counseled to cease smoking on the job, and discipline would only occur were the individual to persist. Tr. at 337-38 (Mr. Brigman), 512-13 (Mr. Piccirillo).

⁴ Claimant asserts that he heard Mr. Rhodes mention Kelly Piccirillo as the tipster. Tr. at 54. The evidence suggests that the person who gave Mr. Rhodes the information was Mr. Gerth. Given that Claimant testified that he heard Mr. Hatmaker’s cell phone conversation with Mr. Rhodes because it was picked up by the 2X Tamper crews’ three-way headset, Tr. at 54, it is very possible that Claimant misheard this detail. Regardless, the discrepancy is minor.

3. No Threatening Statements

Complainant also testified that he did not make threatening statements. As I explain in more detail below, the majority of Claimant's coworkers, including the majority of those who rode with him to work, do not report that Complainant made threats against Mr. Rhodes. *See* Factual Findings Part I.B.1, I.B.5. The individuals who asserted Complainant had made threatening statements have significant credibility issues. *See id.* Part I.B.2-4, I.B.5.i. On the whole, the record supports Complainant's assertion that he did not make threatening statements. Once again, this supports Complainant's credibility.

4. Complainant's Prior Actions

Complainant accurately described other events, *e.g.*, an incident where he was yelled at for cursing or an incident where he was disciplined for wearing tinted glasses. *See* CX 37 (containing statements by Mr. Rhodes and multiple members of the S-1 gang regarding the glasses incident and the cursing incident); JX 25 (containing a record of the glasses incident in Complainant's employee record); CX 40; *see also* JX 26; RX 38 at 43-48 (acknowledging Complainant took contemporaneous notes of the incidents). This evidence shows that his recollection of other events on the railroad was accurate. Yet again, such accuracy lends support to Complainant's credibility.

5. Complainant Is a Credible Witness

Complainant's testimony is supported by the record as a whole. The members of the S-1 gang who contest Complainant's assertions have significant credibility issues, and those whose testimony supports Complainant are far more credible. Simply put, considering the record as it stands, I find Complainant to be a credible witness.

B. S-1 Gang Members

1. Geoffrey Preece Is a Credible Witness

Geoffrey Preece was an acquaintance of Complainant while the two men worked on the S-1 gang. Mr. Preece testified at Complainant's investigative hearing, JX 22, he was interviewed as part of Respondent's internal audit, CX 37, and he was deposed, CX 40.

Mr. Preece's testimony is remarkably consistent over time. *Compare* JX 22 with CX 37 and CX 40. Moreover, much of Mr. Preece's testimony is matched by the other members of the S-1 gang. For example, Mr. Preece stated he had not visually seen any drug use on the gang. *See* CX 37; *see also* Findings of Fact Part I.B.5, *infra*.⁵ Similarly, he stated that Mr. Barfield approached him to request statements regarding threats made against Mr. Rhodes. *Id.*; JX 22; CX 40 at 65-66. Mr. Preece also recounts the tensions between Complainant and Mr. Rhodes, and the events that caused that tension. *See* CX 37 at 35.

⁵ Mr. Preece goes further, however, asserting that drugs were being used. He specifically stated: "you don't have to be there to know if there [are] drugs being used. Anybody with some common sense could figure out stuff was being done. You know, you don't—I never witnessed it myself, but I wasn't born yesterday, either." CX 40 at 99.

The only area where Mr. Preece's statements seem to diverge from his coworkers is in regards to whether or not the gang knew that Complainant had made a call to ethics. In his phone interview on May 10, 2013, Mr. Preece stated that he had heard that Willie Williams had called the ethics hotline and that Complainant had called ethics up to eleven times. CX 37 at 36. Mr. Preece acknowledged that the rumors were that Complainant was responsible for the calls to ethics. *See* CX 37 at 36.

In his deposition, however, Mr. Preece stated that Mr. Domiano, Mr. Hatmaker, and Mr. Barfield told the gang that Complainant admitted he had called the ethics hotline. CX 40 at 62-63. Mr. Preece states that Complainant had even said openly at one point that he had called about the drug use. CX 40 at 74-75. Complainant does not testify that he told anyone he called ethics, but Mr. Preece's statement is supported by Mr. Domiano's statements that Complainant had admitted that he called the ethics hotline. *Compare* CX 40 at 49-50, 74-75 with JX 22 at 33 and CX 37 at 9.

While I acknowledge this discrepancy in Mr. Preece's testimony, I do not find it significantly affects his credibility. There were significant rumors that Complainant was responsible for the call to ethics. Moreover, I find the evidence shows that Complainant likely informed Mr. Hatmaker, Mr. Domiano, and Mr. Preece separately that he had called ethics, without telling the entire gang. This explains Mr. Preece's definite knowledge that Complainant called the ethics hotline.

Regardless, the evidence establishes that Mr. Preece's testimony is highly credible. While certain parts of Mr. Preece's testimony are contested by others, those contradictory statements are made by individuals with significant credibility problems. *See* Findings of Fact Part I.C.2, *infra*. Based on the evidence in the record as a whole, I find Mr. Preece credible and grant his testimony significant weight.

2. Stephen Barfield Is Not a Credible Witness

Stephen Barfield was the foreman of the S-1 gang. RX 36 at 7. There are multiple issues with Mr. Barfield's testimony, which I address below.

a. Mr. Barfield's Inconsistency

Mr. Barfield called the ethics hotline on April 11, 2013. On that call, Mr. Barfield stated that Complainant had made "very concerning comments about what he would do to [Mr. Rhodes]." JX 24 at 2. These statements included threats to "[b]low Mr. Rhodes' head off" and statements hoping "[Mr. Rhodes] would die and be buried." *Id.* Mr. Barfield further asserted that Complainant had said that he hated Mr. Rhodes, that he was "up all hours of the night thinking how much [he] hate[d] Dennis," and that Complainant's "hatred for Dennis ha[d] totally consumed [him]." *Id.* Mr. Barfield stated that "[e]mployees are very fearful that [Complainant] will snap and carry out his threat." *Id.*

Mr. Barfield's written statement provided further information. Mr. Barfield wrote:

[Complainant] was in my truck last week and all he talked about was Dennis Rhodes. [Complainant] said he can't eat, sleep and function because Dennis is always on his thoughts, and his mind. He said he has made numerous calls to get him GONE. I asked what he meant he said his job. He would not stop until he got him fired. For 4 hours he talked about his lawsuit and how much he wanted Dennis dead! Dennis has never mistreated [Complainant] in any way. Dennis is an asset to CSX, he is by the book, watches [overtime], spending and is to me is a Dang good manager. [Complainant] was in the van and I heard him say that if he had a gun he would blow Rhodes brains out and that would make him happy. On 4-9 were close to an airport a plane flew over and [Complainant] said he wish the plane would crash on Dennis and burn him to death while he watched and he was laughing. People get upset and mad we all have, but to wish death and say they would love to kill someone is psycho. This is the railroad and we are grown men doing grown men things but when an unstable minded person gets mad bad things happen. It can happen and probably will. [Complainant] is postal. Take it for you want but he is altered mental and needs help!! Too much to write about him everyday.

JX 13 (errors and emphasis in original); JX 22 at 49-50. At the Respondent's investigatory hearing, Mr. Barfield explained that he did not take the threats seriously to start, but that, after a month of continued threats, he notified Mr. Brigman of what was going on. JX 22 at 50-53. He also stated that he had gone to get statements from the gang because "he felt that the threat was serious." *Id.* at 52.

Mr. Barfield reiterated a similar account when interviewed as part of Respondent's internal audit. CX 37 at 1-2. In the audit, Mr. Barfield added that Complainant had told him about calling the ethics hotline some 11 times. *Id.* at 2.

After the audit, Mr. Barfield was deposed. At the deposition, Mr. Barfield's story changed. He admitted that, while "[Complainant] said he wanted to see [Mr. Rhodes] die, . . . he didn't say he actually wanted to kill him. He just wanted to see him dead." RX 36 at 3-4. Mr. Barfield also stated that Mr. Brigman and Mr. Rhodes were "just trying to get rid of [Claimant]" and that Mr. Brigman told him to get statements "from everybody that's heard something." *Id.* at 4. Mr. Barfield stated that the request for statements happened after rumors circulated that Complainant had made the ethics call. *Id.* at 5. Moreover, Mr. Barfield asserted that "if I did not get statements for Brigman to use against [Complainant] I would be disqualified as a foreman or taken out of service myself – it's easy for a manager to do. I asked for and took statements only because Brigman insisted on it." *Id.* at 6.

Mr. Barfield's testimony at the hearing added contradictory information. Mr. Barfield acknowledged that the crew was aware of an ethics complaint, Tr. at 176-77, and he asserted that Mr. Brigman had disqualified Complainant in front of the crew to set an example of what happens to those who make ethics calls, *id.* at 181-82. Mr. Barfield also admitted that he had not told Respondent during the investigative hearing that he had been asked to acquire statements about Complainant by Mr. Brigman. *Id.* at 178. Mr. Barfield claimed he did not say anything because he thought Mr. Brigman would disqualify him for saying so. *Id.* Mr. Barfield also

admitted that he wanted to protect Mr. Rhodes, as he thought Mr. Rhodes was a good manager and he didn't want to see Mr. Rhodes fired. *Id.* at 232.

In regards to Complainant's alleged threats, Mr. Barfield asserted that he had only heard Complainant talk about wanting to kill Mr. Rhodes once. Tr. at 191-92. Complainant allegedly spoke at length for hours in Barfield's truck one day about his hatred for Rhodes. *Id.* Mr. Barfield then stated that he told Mr. Brigman about the threats made in his truck, and that Mr. Brigman instructed Mr. Barfield to gather statements to "get [Complainant] gone." *Id.* at 202. Mr. Barfield also alleged that Mr. Brigman told him to call ethics, and that, absent Mr. Brigman's instructions, he would not have gathered statements or made the call. *Id.* at 231-32.

Finally, Mr. Barfield provided testimony regarding a document he allegedly signed as part of this adjudication. Tr. at 183-86. Mr. Barfield testified that the document did not bear his signature, instead asserting that his wife had signed it for him. Tr. 183-86; RX 36 at 3-4. Mr. Barfield did not recall if he wrote the document or it was a transcription of his answers. *Id.* at 184.

b. Disagreements with Mr. Barfield's Accounts

Mr. Barfield's accounts are contradicted by other witnesses. As discussed below, the other credible S-1 gang members did not recall Complainant making threats. Factual Findings I.A, I.B.1, I.B.5. The less credible S-1 gang members who did allegedly hear threats disagree with Mr. Barfield's timing. Mr. Domiano stated that he and Mr. Barfield had approached Mr. Rhodes for months about the issue. JX 22 at 31-32. Mr. Hatmaker even went so far as to state that he had made Mr. Barfield aware of Complainant's threats since January. *Id.* at 41. Mr. Rhodes also stated that Mr. Barfield had provided him prior notice of Complainant's complaints. CX 37 at 40.

Mr. Barfield's assertions regarding the alleged signature are contradicted by his wife. Mr. Barfield's wife, at her deposition, stated that the signature on the document was not her handwriting, but rather the handwriting of her husband. RX 37 at 4.

c. Mr. Barfield Is Not a Credible Witness

Mr. Barfield's own testimony shows shifting stories that vary greatly over time. Mr. Barfield goes from stating that Complainant made threats to admitting Complainant did not actually say he wanted to harm Mr. Rhodes, and then back again. *Compare* JX 22 at 49-52; RX 36 at 3-4; Tr. at 191-92. Mr. Barfield's timeline of when Complainant made threats is further disagreed with by Mr. Hatmaker, Mr. Rhodes, and Mr. Domiano, who each adopt differing times by which the threats were reported to management. *See* JX 22 at 31-32, 41; CX 37 at 40. Moreover, Complainant, Mr. Preece, and the other credible members of the S-1 gang state that Complainant made no threats. Even Mr. Barfield's wife contradicts him regarding the simple issue of who signed a document.

These contradictions, coupled with Mr. Barfield's demeanor on the stand (during which Mr. Barfield seemed confused and reticent to answer many questions), all support finding that

Mr. Barfield is not credible. His testimony is simply insufficient to serve as a factual foundation in this matter. Accordingly, I find Mr. Barfield is not credible and I grant his testimony little weight.

3. Chuck Domiano Is Not a Credible Witness

Chuck Domiano was a mechanic for the 2X. JX 22 at 6; Tr. at 268. On April 11, 2013, Mr. Domiano submitted a statement regarding alleged threats made by Complainant. JX 7. Mr. Domiano wrote:

Dennis Rhodes has done nothing but make this gang better by getting rid of the men who wont work or do their job. [Complainant] has had a problem with Dennis since he got here in Jan All [Complainant] does is complain about his job all day. He needs to be allowed to make a bid. He threatens to shoot Dennis if he had a gun with him and any time he talks about Dennis instead of using his name he calls him cocksucker. [Complainant] is still mad that Dennis made him take off his yellow glasses when working nights in Fla. He hates his job and says he will never bid in a tamper again. The only reason he bid the 2X was the pay. He wont help mechanics work on machine and dont know how to grease machine. He has never greased it. He takes forever to set up machine and when something goes wrong he sits and looks at computer screen. He has made accusations of men smoking pot on equipment and Dennis is helping them hide it. In my opinion he needs Sycic evaluation. He says there are people you like and people you don't but he hates Dennis when I told him Dennis was leaving he stopped machine and does a dance. Then later I told him Dennis would be back next week he said he was so mad he could kick a puppy. What a loser please allow [Complainant] to make a bid and leave so I don't have to.

Id. (errors in original); JX 22 at 30. At Respondent's investigative hearing, Mr. Domiano elaborated on the alleged threats, explaining that "[Complainant] threatens to shoot Dennis if he had a gun with him and anytime he talks about Dennis instead of using his name he calls him cocksucker instead." JX 22 at 30. Mr. Domiano also asserted that he had let management know Complainant's threats since the first weeks of January. *Id.*

Later, during Respondent's internal audit, Mr. Domiano stated that he heard Complainant threaten Mr. Rhodes "every day over the headsets." CX 37 at 10. Mr. Domiano also admitted that Complainant had told him about calling ethics, and that he relayed this information to Mr. Brigman and Mr. Rhodes. *Id.* at 9. Mr. Domiano asserted that Mr. Rhodes did not give him prior notice of the audits performed on the S-1 gang. *Id.*

Mr. Domiano's statements are problematic. As an initial matter, Mr. Domiano's written allegation focuses only briefly on the alleged threats made against Mr. Rhodes. *See* JX 7. Rather, Mr. Domiano focuses on his dislike of Complainant, resorting to ad hominem attacks (e.g. "[w]hat a loser") and criticizing Complainant's job performance. *Id.* This, coupled with the long relationship between Mr. Domiano and Mr. Rhodes, suggests that Mr. Domiano may have

had biases against anyone who spoke poorly of Mr. Rhodes. *See* CX 37 at 41 (Mr. Rhodes explains that he has known Mr. Domiano since the 1990s).

Moreover, Mr. Domiano's assertions are contradicted by other sources. While Mr. Domiano asserted that he told Mr. Brigman and Mr. Rhodes that Complainant called ethics, both men stated they did not know who called ethics. *See* Tr. at 300, 304-303 (Mr. Brigman asserting he had no knowledge of Complainant's ethics complaint); CX 37 at 4 (Mr. Brigman asserting he was not told who made the ethics complaint); *see also* CX 37 at 41-42 (Mr. Rhodes stating he had only heard rumors Complainant made the ethics complaint). Further, Mr. Hatmaker did not mention when and whether Complainant admitted to calling ethics.

Mr. Domiano's statements are also contradicted by Complainant, who I have found to be credible, *see* Factual Findings Part I.A., and other credible S-1 gang members (who did not hear Complainant make threats against Mr. Rhodes), *see id.* Part I.B.1, 5. Those S-1 gang members who do support Mr. Domiano's statements, *e.g.*, Mr. Hatmaker and Mr. Barfield, have significant credibility problems of their own. *See Id.* Part I.B.2, 4, 5.d.

Given these issues and the evidence in the record, I find that Mr. Domiano's statements are not credible. Accordingly, I grant his testimony little weight.

4. Bobby Hatmaker Is Not a Credible Witness

Bobby Hatmaker was the operator on the 2X. Tr. at 268; CX 40 at 121. Like Mr. Domiano, Mr. Hatmaker provided a statement against Complainant in April 2013:

Every since Dennis Rhodes wrote [Complainant] up for not the proper [personal protective equipment] at night in Florida, [Complainant] has had it in for Dennis. He said Mr. Rhodes had ruined his RR career. [Complainant] said it was his first time getting written up for anything. Ever since then he has lost sleep and it has messed with his head. He has said in the van every morning he wished he had a gun he would shoot Dennis in the head. [Complainant] went on to say he wished a plane would fall out of the sky on to of Dennis head. [Complainant] said he would do anything to get Mr. Rhodes job. He would write down every little thing that Dennis would do. He would do anything to get his job and that means anything. [Complainant] doesn't want to be on the 2X he wishes he had never bid on the 2X. He does not want to be here. In 4 months, he has not progressed on learning the machine, he takes a long time getting the tamper ready for work. He will not grease the tamper. He will not stay and help the mechanic. He will not do anything. He will not disqualify himself because he will not give Dennis Rhodes the pleasure. Therefore if he does not want to be here why make him stay. He told me on two occasions not to show him anything else about the tamper.

JX 8 (errors in original); JX 22 at 37. At Respondent's investigative hearing, Mr. Hatmaker further explained that he had heard these alleged threats since January 2013, and that he had gone to the foreman, Mr. Barfield, to complain about the threats at that time. JX 22 at 41.

Though Mr. Hatmaker was interviewed as part of Respondent's internal audit, he provided little additional information. Mr. Hatmaker only asserted that he had not been tipped off about the audits on the 2X, and that he was unaware of any drug use. CX 37 at 15.

Mr. Hatmaker's assertions are unsupported by his fellows. Mr. Hatmaker asserted that Complainant had been making threats "every day in the van" since January 2013. JX 22 at 41; JX 8. However, beyond Mr. Domiano, no other witness stated that Complainant began making threats in January. Moreover, Mr. Hatmaker's statement that Complainant made threats every day is contradicted by the other individuals who road in the van. *Compare* JX 8 with JX 9, JX 10, JX 11, JX 14, and JX 22 at 20-23, 45, 60-61. Even Dale Lewis, who stated that Complainant had made threats against Mr. Rhodes, only mentioned Complainant making threats on "several trips," not *every* trip. *See* JX 14. The other riders state that Complainant did not make any threats.

Mr. Hatmaker's statements also demonstrate potential bias. Mr. Hatmaker went into detail criticizing Complainant's job performance. JX 8. He also complained that Complainant "will not disqualify himself," and that "if [Complainant] does not want to be here[,] why make him stay[?]" *Id.* Mr. Hatmaker took issue with Complainant's taking notes about Mr. Rhodes. *Id.* Moreover, Mr. Hatmaker was friends with Mr. Rhodes, and had been for some time. CX 37 at 9 (acknowledging that Mr. Rhodes, Mr. Hatmaker, and Mr. Domiano were friends), 36 (noting Mr. Hatmaker and Mr. Rhodes are good friends), 41 (noting Mr. Hatmaker worked for Rhodes for several years); CX 40 at 32; JX 4 (asserting Mr. Rhodes is friends with the alleged drug users); JX 5 (noting the caller was unwilling to speak to Rhodes because of his friendship with Mr. Hatmaker). The evidence shows that, beyond any alleged threats made by Complainant, Mr. Hatmaker wanted Complainant removed from the 2X.

Upon reviewing the evidence and Mr. Hatmaker's statements, I find that Mr. Hatmaker is not credible. His assertions are contradicted by the other members of the S-1 gang, and his statement demonstrates bias against Complainant for his job performance. Mr. Hatmaker's statements are also contradicted by other, more credible witnesses (such as Complainant and Mr. Preece).

5. Other S-1 Gang Members' Credibility

a. Danny Cox

Danny Cox worked on the S-1 gang with Complainant, and he specifically drove the van in which Complainant typically rode to work. JX 22 at 17; JX 10. Cox provided a statement against Complainant, which read: "it is very apparent that [Complainant] has a strong dislike for supervisor Rhodes and I have no idea where it stems from because in my opinion Mr. Rhodes treats everyone on this team fairly." JX 10; JX 22 at 18. Cox did not hear Complainant make any threats against any other employees. JX 22 at 18; CX 37 at 5. He also, like the other S-1 gang members who were not on the 2X, did not see any marijuana being used on the job. CX 37 at 5.

b. David Deerfield

David Deerfield provided a written statement about Complainant, which read: “I ride in the company van along with several other CSX employees to and from job sites. On many occasions, I have heard [Complainant] make comments about his dislike and hatred toward Dennis Rhodes wishing bad things to happen to him. I do not know where all this [sic] bad feelings come from.” JX 22 at 20. Despite this statement, Mr. Deerfield stated at the investigative hearing and later phone interview that had had never heard Complainant make any threats against Mr. Rhodes. JX 22 at 21-22; CX 37 at 7.

Mr. Deerfield’s statements regarding the gathering of statements match his fellow coworkers, who stated that Mr. Barfield approached him asking for statements. CX 37 at 7. Mr. Deerfield was also unaware of who made the call to ethics, though he acknowledged there were rumors that Complainant had called. *Id.* at 8. He further stated that he never saw drugs being used or sold on the job. *Id.*

c. James Hunt

James Hunt was one of the S-1 gang members to provide a statement about Complainant. Hunt’s statement read:

[Complainant] talks about his ways to get Dennis run off and how he wishes he was dead or could beat the crap out of him.

Whenever [Complainant] refers to Dennis it is usually some kind of F every day in the side all he does is complain.

I’ve worked with Dennis before, do you work and what you’re asked to do, there are no problems. If you need help with anything, ask him, he is more than willing to show you anything that might help you.

JX 11 (errors in original); JX 22 at 23. Mr. Hunt stated, despite this, that he never heard Complainant make threats, only “comments,” which he supposed were threatening. JX 22 at 24-25. Mr. Hunt further clarified that he did not take Complainant’s statements seriously, and that “[i]t was just talk in the van.” *Id.* at 26-27. He reiterated this conclusion during Respondents’ internal audit interview. CX 37 at 21.

Mr. Hunt also stated that he had never seen or smelled drugs being used on the job. CX 37 at 21. Hunt further noted that there were rumors that someone had called ethics, and that Mr. Barfield had told him that ethics complaints were being called in on Mr. Rhodes. *Id.* Mr. Hunt explained that Mr. Barfield had approached him asking for a statement about Complainant, and that Mr. Hunt had not intended to file a complaint or make a statement against Complainant prior to Mr. Barfield’s request. *Id.* at 21; JX 27.

d. Dale Lewis

Dale Lewis was a coworker of Complainant who stated that he rode the van with Complainant for a couple months. JX 22 at 45. Mr. Lewis' written statement read in relevant part:

[Complainant] talked about Dennis Rhodes all the time and talked about killing Dennis Rhodes on several trips to the job site. The trip to work got so bad I had to change vans. I feel Dennis Rhodes is an asset to CSX and has showed great leadership skills on the job. Dennis Rhodes is never mistreated [Complainant] to the best of my knowledge. I feel Dennis Rhodes was doing his job when he wrote [Complainant] up for the dark lenses glasses. Dennis Rhodes gave [Complainant] a warning before he wrote him up.

JX 14 (errors in original); JX 22 at 45. Mr. Lewis also spoke of an incident where a person pulled up a picture of an AR-15 on his phone, which alleged prompted Complainant to say that he "wanted to blow Rhodes' whole head off." CX 37 at 22-23.

Mr. Lewis explained that Mr. Barfield approached him asking for written statements regarding any potential threats, and that Mr. Barfield told Mr. Lewis that he had called ethics about Complainant's threats. *Id.* at 23. Mr. Lewis further noted that he had heard rumors of drug use on the gang and that either Willie Williams or Complainant had called ethics. *Id.* Mr. Lewis stated that he was unaware of any drug use on the gang. *Id.*

e. Robert McDuffie

Robert McDuffie was another coworker of Complainant. He never heard Complainant threaten Mr. Rhodes, and he did not provide any statement to Mr. Barfield. CX 37 at 28. Mr. McDuffie was unaware of any drug use on the gang, though he had heard rumors about it. *Id.* Mr. McDuffie also did not know who called the ethics hotline. *Id.*

f. Craig Powell

Craig Powell was a coworker of Complainant. Mr. Powell never heard Complainant make a threat against Mr. Rhodes; he had only heard Complainant say he'd kill himself or A.D. Laws (the assistant foreman) if he had to work with Mr. Laws every day. CX 37 at 34. Mr. Powell was unaware of drug use or sale on machines or at the hotels at which the workers stayed. *Id.* He also stated that he did not know who called the ethics hotline, but that there were rumors circulating about it. *Id.*

Mr. Powell allegedly provided a written statement to Mr. Barfield which read: "I herd [sic] Complainant say if he had to work with AD everyday he would end up killing him or himself. He also said he hated Dennis [sic] guts and he would get his job." JX 12. Despite being written in legible script, Mr. Powell struggled to read the statement at the hearing, noting at times he couldn't make out what he wrote. JX 22 at 43. The version of the statement read at the hearing does not match the written version. *Compare* JX 22 at 43 *with* JX 12.

g. Willie Williams

Like Mr. McDuffie, Willie Williams did not hear Complainant threaten Mr. Rhodes, and he did not provide a written statement to Mr. Barfield. CX 37 at 54. Mr. Williams further was unaware of any drug activity, and he did not know who called ethics. *Id.*

h. Raymon Wilson

Raymon Wilson was another S-1 gang worker who did not provide a statement to Mr. Barfield. CX 37 at 55. He did not hear Complainant threaten Mr. Rhodes. Moreover, though he had heard rumors of drug use, he was not aware of any drug use on the gang. *Id.* He was unaware of who called the ethics hotline. *Id.*

i. Cox, Deerfield, Hunt, Williams, Wilson, and Powell are Credible; Lewis Is Not.

Upon review of the statements of the other S-1 gang members, I find that Danny Cox, David Deerfield, James Hunt, Willie Williams, Raymon Wilson, and Craig Powell are credible. Despite minor discrepancies, the statements of these individuals are in accord. The greatest potential discrepancy is between Mr. Hunt, who states Complainant made comments that were threatening (but which he did not take seriously) and the statements of Mr. Cox, Mr. Deerfield, Mr. Williams, Mr. Wilson, and Mr. Powell, who did not mention any such statements.

This discrepancy is minor and insufficient to render Mr. Hunt's statements incredible. Many people, including Complainant, admit that there was no love lost between him and Mr. Rhodes, and that Complainant did not hide his displeasure with Mr. Rhodes's actions. Moreover, Mr. Hunt's own statements are nebulous at best – while he acknowledged the statements could be threatening, see JX 22 at 28, it is clear he did not view the statements to be true threats, see CX 37 at 21; JX 22 at 24.

Mr. Lewis's discrepancies, however, are not so easily explained. Mr. Lewis is the only witness to mention a photo of an AR-15, and he is the only individual of the other S-1 gang members to assert that Complainant said he wanted to blow Mr. Rhodes' head off. Despite the alleged severity of Complainant's threats, Mr. Cox, the individual who drove the van Complainant typically rode to work, and Mr. Deerfield, who typically rode with Complainant, did not recall them. It is highly unlikely that both Mr. Cox and Mr. Deerfield would forget such severe, and memorable, statements.

Complainant further noted in his testimony that the people with whom he typically rode in the van were Mr. Lewis, Mr. Hunt, Mr. Wilson, Mr. Deerfield, Mr. Preece, Mr. Hatmaker, and Mr. Laws. CX 37 at 46. Of these individuals, Mr. Preece, Mr. Deerfield, Mr. Hunt, and Mr. Wilson make no mention of a gun or wanting to blow someone's head off – only Mr. Hatmaker, who Complainant accused of using drugs on company property, and Mr. Lewis make such an assertion. *Compare* CX 37 at 7, 20-21, 35-37, 55 *and* JX 22 at 19-28, 60-62 *with* CX 37 at 15-16, 22-23 *and* JX 22 at 37, 45-47. Further, even Mr. Domiano, who also stated that Complainant made threats against Mr. Rhodes, did not mention this AR-15 episode. CX 37 at 10 (containing

Mr. Domiano's statement that Complainant allegedly said he wanted to shoot Mr. Rhodes, but lacking specifics); JX 22 at 29-30 (Mr. Domiano states Complainant wanted to shoot Mr. Rhodes, with further specification). Additionally, Complainant asserted that Mr. Lewis was one of the individuals who favored, and was favored by, Mr. Rhodes. RX 38 at 49.

Considering the circumstances, I find Mr. Lewis's statements unbelievable. Mr. Lewis's very specific and (if real) memorable story about an AR-15 is not mentioned by *any* other employee. Mr. Hatmaker, Mr. Domiano, and Mr. Barfield, the only other individuals to even mention a gun in their statements, have extensive credibility issues, as explained above. *See* CD Part I.B.2-4. As such, Mr. Lewis's statements are unsupported by any other credible witness. I do not find him credible.

C. S-1 Management

1. Dennis Rhodes Is Not a Credible Witness

Dennis Rhodes was Complainant's manager, and the alleged targets of threats by Complainant. Mr. Rhodes stated that he was originally informed of Complainant's threats by Mr. Hatmaker, Mr. Domiano, and Mr. Barfield. CX 37 at 40. Mr. Rhodes also acknowledged that he had disciplined Complainant previously for wearing tinted safety glasses, and that he had spoken to Complainant about cursing. *Id.* at 41. Mr. Rhodes denied warning any members of his crew about the safety audits, and he denied receiving prior notice of any audit. *Id.* Finally, Mr. Rhodes denied any knowledge about alleged drug use, and stated that he first learned of the potential drug use during the first audit. *Id.* Mr. Rhodes stated that he had "no idea why someone would make these allegations against the gang and him except that [Complainant] was trying to get his job." *Id.* at 42.

Mr. Rhodes's limited account, however, is contradicted by the auditors. Specifically, Mr. Rhodes stated that he was not given any prior warning regarding the safety audits. *Id.* at 41. However, the auditors stated that Mr. Rhodes was given prior warning. Adam Gerth stated that he called Mr. Rhodes prior to arrival at the S-1 gang (roughly five minutes before) to tell him that he was going to inspect the 2X machine. CX 37 at 11. While not much time, Mr. Gerth admitted that Rhodes "could have used a cell phone to let Hatmaker know he was coming." *Id.*

Mr. Rhodes received even more advance notice of the second audit. Mr. Gray admitted to calling Mr. Rhodes at least 30-60 minutes prior to the audit. *Id.* at 13. Mr. McDaniel stated that Mr. Rhodes had actually called him four days prior to the second audit, apparently "fishing for information." *Id.* at 27. Mr. McDaniel also noted that Mr. Gray had admitted to telling Mr. Rhodes about the second audit days prior to its occurrence. *Id.* at 27; *see also id.* at 18 (Mr. Hinnant noting that Mr. McDaniel told him that Mr. Gray had informed Mr. Rhodes of the Tuesday audit that Friday). In either event, Mr. Rhodes received forewarning of the second audit.

Moreover, Complainant's testimony regarding Mr. Rhodes tipping off Mr. Hatmaker and Mr. Domiano to the audits contradicts Mr. Rhodes's statements to the contrary. *See* Credibility

Determination Part I.A.2, *supra*. Complainant's testimony better matches the testimony of Mr. Gerth, Mr. Gray, and Mr. McDaniel.

The contradiction in Mr. Rhodes's testimony regarding the tip-off is troubling. Mr. Gerth and Mr. McDaniel, in particular, have no connection with any members of the S-1 gang, and I can discern no reason for why the auditors would lie about the notice given to Mr. Rhodes. Rather, Mr. Rhodes's testimony is rendered highly suspect by this contradiction.

Mr. Rhodes's testimony is further contradicted by Complainant's testimony. While Mr. Rhodes's testimony is partially supported by that of Mr. Domiano and Mr. Hatmaker, I have found that both men are not credible, and thus they are of little help to Mr. Rhodes. Even were Mr. Domiano and Mr. Hatmaker credible witnesses, Mr. Domiano stated that he had informed Mr. Rhodes of Complainant's ethics complaint prior to Complainant's removal. *See* CX 37 at 9. Mr. Rhodes's statement that he had only heard rumors regarding the ethics call, *id.* at 42, is thus contradicted by Mr. Domiano.

Considering the above, and the record as a whole, I find that Mr. Rhodes is not a credible witness. His statements are contradicted by both credible and not credible witnesses.

2. John Christopher Brigman Is Not a Credible Witness

John Christopher Brigman ("Chris" Brigman) was a supervisor of the system production gang's mechanics. Tr. at 265-66. Mr. Brigman was the manager on duty when Complainant was removed from service. CX 37 at 3. Mr. Brigman asserted that he swapped with Mr. Rhodes on roughly March 25, 2013, because he had not yet worked with the S-1 gang that season. *Id.*

During Respondent's investigative hearing, Mr. Brigman stated, without specification, that the "employees made it aware to me that [Complainant] had made threats toward Mr. Rhodes." JX 22 at 10. Mr. Brigman stated that he "advised them that [he] would need written statements" to proceed, which were provided. *Id.* Mr. Brigman recalled, however, that he was not with the S-1 gang on the days that the statements were written, April 10 and 11. He thought Mr. Rhodes was with the S-1 gang at that time. *Id.* at 10, 14. Mr. Brigman changed this statement during Respondent's internal audit, instead stating that he was present and received the written statements April 11, 2013. *Id.*

Mr. Brigman's testimony at the hearing differed only slightly from his prior statements. Mr. Brigman stated that Mr. Barfield and Mr. Domiano had each informed him, weeks previously, that Complainant was making threats against Mr. Rhodes. Tr. at 270-73. Despite Mr. Brigman's concern, he did not appear to take any further action until receiving written statements. *Id.* at 273-74. Mr. Brigman also acknowledged that he had not heard Complainant make any threats. *Id.* at 272.

In regards to Complainant's ethics call, Mr. Brigman asserted that he did not know of the call and that it had no bearing on his actions. Tr. at 299-303. Mr. Brigman admitted he had heard rumors of drugs, but that he had not seen any drug use. Tr. at 296, 303, 307.

Mr. Brigman's knowledge of the ethics call is contradicted by credible and non-credible sources in the record. Though Mr. Brigman stated he was unaware of Complainant's ethics call, Mr. Domiano stated that he had informed both Mr. Rhodes and Mr. Brigman about Complainant's ethics call. CX 37 at 9. Mr. Preece's testimony supports Mr. Domiano's statement. Mr. Preece stated that Mr. Brigman had made comments about Complainant's ethics complaint prior to Complainant's removal. CX 40 at 75-76. Moreover, Mr. Brigman reported to Special Agent Scott E. Thompkins⁶ shortly after Complainant was removed that there had been a drug complaint. CX 22 at 4. Mr. Hinnant also testified that Mr. Brigman had told him that Complainant had made the drug complaint. Tr. at 368-69.

The record also shows that Mr. Brigman had informed other members of the crew that Complainant would be taken out of service on Monday, April 15, 2013. *See id.* at 4 (Complainant informed Special Agent Thompkins that he had known about the removal since the prior Thursday); CX 40 at 78-82; Tr. at 77-78 (Complainant describes being told by other members of the gang that he was going to be removed the coming Monday and that Mr. Brigman was bragging about taking Complainant out of service). Moreover, the record establishes that Mr. Brigman knew and had a good relationship with Mr. Rhodes and Mr. Domiano. Mr. Brigman admitted that he had known Mr. Rhodes since 2007-08, when they worked together in the same group and spent significant time staying at the same hotels. Tr. at 304-05. Mr. Brigman also explained that he had known Mr. Domiano since 2011, when he first started working for Mr. Brigman. *Id.* at 307.

Considering the above, I find that Mr. Brigman's testimony is not credible. The record contradicts Mr. Brigman's statements on the critical issue of whether he knew of the ethics complaint prior to removing Complainant from service. Moreover, Mr. Brigman's contradictory statements on this topic cannot be excused by mere misremembrance of the facts, as Mr. Brigman stated he did not know about the ethics complaint in the investigative hearing in May 2013. These contradictions greatly undermine his credibility, and I do not find him a credible witness.

3. James Hinnant Is a Partially Credible Witness

James "Mike" Hinnant was the Director of Program Construction under the Engineering Capital Group for Respondent. Tr. at 347-48. Mr. Hinnant testified that he learned from Mr. Brigman that Complainant had made the ethics call. *Id.* at 368. At that same time, Mr. Hinnant stated Mr. Brigman informed him that individuals were reporting that Complainant was making threats against Mr. Rhodes. *Id.* at 369. Mr. Hinnant explained that he was unaware of Complainant's role in the ethics complaint prior to learning of the alleged threats. *Id.* at 379. Mr. Hinnant admitted that he had heard "through the grapevine" that Complainant had called ethics, though he was unsure exactly when this occurred. *Id.* at 380. Mr. Hinnant was aware of the allegations of drug use, however, and he was involved in sending a safety audit team out to the S-1 gang. *Id.* at 381-83.

Mr. Hinnant further testified that he believed that the auditors should not search personal property. Tr. at 385-86. Mr. Hinnant stated that it was wrong to do such a search, and that he

⁶ Mr. Thompkins is a Special Agent with Respondent's railroad police.

believed such searches should be left to Respondent's railroad police. *Id.* at 386, 392-93. Mr. Hinnant also explained that he had been told by Mr. Gerth, at the time of the first audit, not to inform Mr. Rhodes of the audit. *Id.* at 392. Mr. Hinnant asserted he did not speak to Mr. Rhodes about the audit. *Id.* Moreover, Mr. Hinnant testified that he had not informed Mr. Rhodes about any audit, though he did talk to the auditors. *Id.* at 363, 392-95.

The record is largely in agreement with Mr. Hinnant's testimony. However, the record contradicts Mr. Hinnant in regards to when he learned that Complainant made the ethics call. In an email chain dated March 27, 2013, through April 1, 2013, Mr. Hinnant contacted Kelly Piccirillo about the ethics call. CX 17. In that email chain, Mr. Hinnant informed Mr. Piccirillo that the ethics caller was named Brad. *Id.* This shows that Mr. Hinnant knew that Complainant made the ethics call by at least April 1, 2013, ten days prior to Mr. Brigman receiving the threatening statements. *See* RX 5. However, on May 10, 2013, Mr. Hinnant stated as part of Respondent's internal audit that he was not aware of who made the call to ethics. CX 37 at 17.

This discrepancy is troubling. Mr. Hinnant admitted, after being shown the emails from April 1, 2013, he knew Complainant was the ethics caller at that time. Tr. at 380; *see also id.* at 368 (Mr. Hinnant stating that he learned from Mr. Brigman that Complainant was the ethics caller sometime in 2013). Mr. Hinnant acknowledged that he could not remember the exact dates he learned of certain information given the many years that had passed in the interim. This excuse does not suffice for his statements made during the internal audit, however, which occurred roughly a month after Claimant's removal. *See* CX 37. Even then, Mr. Hinnant stated he did not know who called ethics, despite the evidence to the contrary. *Compare id.* at 17 with CX 17.

Upon review of the record, I find that Mr. Hinnant's testimony regarding the timeline of events is credible. However, Mr. Hinnant's testimony regarding his knowledge of Complainant's status as the ethics caller is not credible.

4. Samuel Kelly Piccirillo Is a Partially Credible Witness

Samuel Kelly Piccirillo was the assistant chief engineer for Respondent. Tr. at 451-52. The factual testimony given by Mr. Piccirillo is largely similar to Mr. Hinnant's. *Compare* Tr. at 455-76 with *id.* at 347-78. Unlike that of Mr. Hinnant, however, Mr. Piccirillo's testimony is more inconsistent.

Mr. Piccirillo contradicts himself in regards to the complaints made against Complainant. For example, Mr. Piccirillo stated that it "never crossed [his] mind" that the statements made against Complainant may have been false. Tr. at 463. However, on cross-examination, he admitted that he had suspicions of misconduct when he received the written statements. Tr. at 493. He specifically noted that "when you've . . . that many employees criticizing one employee, then it's like, is this something where they're not happy with that employee and they're trying to get him off the team or whatever[?]" *Id.* Mr. Piccirillo also admitted that there were serious issues with the statements' credibility after the investigative hearing in May 2013. Tr. at 469, 494-95 (explaining that the employees were "all a little wishy washy, you know, not like their initial statement had indicated."). Despite this, Mr. Piccirillo explained that a "written

statement from an employee . . . to me is almost equivalent to being under oath, okay,” and that he relied on those statements in making his initial recommendation to terminate Complainant. Tr. at 523.

Mr. Piccirillo’s testimony also fluctuates regarding when he learned of Complainant’s ethics call. Mr. Piccirillo stated that he didn’t know that Complainant had made the ethics call at the time that Complainant was removed, though he acknowledged he might have known about the calls on the date of removal. Tr. at 496. On May 2, 2013, Mr. Piccirillo also stated that he did not know that Complainant made the ethics calls. CX 37 at 32. However, Mr. Piccirillo admitted to knowing that Complainant was involved in the ethics call since at least April 1, 2013, after he was confronted with emails he had sent to Mr. Hinnant. Tr. at 502; *see also* CX 17.

Mr. Piccirillo’s testimony is troubling. Like Mr. Hinnant, Mr. Piccirillo misrepresented when he learned Complainant made the call to ethics. Additionally, Mr. Piccirillo provided equivocal testimony regarding his suspicions about the veracity of the S-1 gang statements.

Given these issues, I find that Mr. Piccirillo is only partially credible. His recollection of the events that occurred are largely accurate and credible. However, Mr. Piccirillo’s assertions regarding his knowledge about the ethics call are not credible.

5. John West Is a Credible Witness

John West was the Vice President of Engineering. Tr. at 453. Mr. West was interviewed as part of Respondent’s internal audit. CX 37 at 51. Mr. West’s statements are supported by the record, and it is clear that he had little direct involvement with this matter. *See id.* (demonstrating that Mr. West’s information on this matter was provided by others, and that he had little to no firsthand involvement with this matter); *see also* Tr. at 480 (stating that Mr. West would be more involved with decision making had both Robert Miller and Mr. Piccirillo agreed that Complainant should have been dismissed). I find that Mr. West’s statements are credible.

D. Auditors

The auditors who inspected the 2X and S-1 gang were all interviewed as part of Respondent’s internal audit. *See* CX 37. I address the credibility of the auditors in turn, divided by when they performed their inspections. The auditors were not members of the S-1 gang.

1. Adam Gerth and Stephen Love Are Credible Witnesses

Adam Gerth attended the first and second audit of the S-1 gang. *See* CX 37 at 11-12. Mr. Gerth’s statements are supported by the record (excluding one statement which Colin Gray disagreed with, which is addressed Part I.D.2, below). Stephen Love joined Mr. Gerth for the first audit on March 19, 2013. *Id.* at 24. His brief statements are also supported by the record. I find that both Mr. Gerth and Mr. Love are credible.

2. Colin Gray Is a Partially Credible Witness; Bill McDaniel Is a Credible Witness

Colin Gray attended the second audit on March 26, 2013. CX 37 at 13. Bill McDaniel and Mr. Gerth were his co-auditors. CX 37 at 12, 26. Mr. Gray explained that he had a prior working history with Mr. Hatmaker and Mr. Domiano; he had been an acting manager for the two men in 2012. *Id.* at 14. Complainant stated that Mr. Gray's review of the 2X was not thorough, *id.* at 45, and that he sat and reminisced with Mr. Domiano and Mr. Hatmaker during the inspection, Tr. at 59; CX 40 at 52; RX 38 at 88-89.

Mr. Gray's testimony differs from his fellow auditors. Mr. Gray reported that, thirty to sixty minutes prior to arriving at the S-1 gang, he called Mr. Rhodes to determine where the S-1 gang was located on the tracks. CX 37 at 14. Despite this, Mr. Gray stated that the gang appeared surprised by the audit. *Id.* at 14.

Mr. McDaniel stated that Mr. Gray had told Mr. Rhodes about the audit on March 22, 2013, and that Mr. Rhodes had initially contacted Mr. McDaniel to "fish[] for information." *Id.* at 27. Mr. McDaniel also noted that the gang did not seem surprised by the audit. *Id.* Mr. Gerth agreed with Mr. McDaniel that the gang did not seem surprised about the audit.

Reviewing the record, it is clear that parts of Mr. Gray's statements are contradicted by Mr. Gerth and Mr. McDaniel. The contradictory evidence regarding when Mr. Gray informed Mr. Rhodes of the second audit and whether the gang appeared surprised damages Mr. Gray's credibility. Accordingly, I find that Mr. Gray's testimony is only partially credible. Specifically, Mr. Gray's statements regarding when he informed Mr. Rhodes of the audit and whether the gang appeared surprised are not credible.

I also find that Mr. McDaniel is credible. Mr. McDaniel's testimony is supported by the record. Further, Mr. Gerth agrees with Mr. McDaniel about the S-1 gang not appearing surprised to be audited, despite Mr. Gray's statement to the contrary.

3. Mike Price, Donnie Wiggins, and Robert Wolfe Are Credible Witnesses

Mike Price, Donnie Wiggins, and Robert Wolfe were auditors on the April 15, 2013 audit of the S-1 gang. CX 37 at 38, 52, 56. The auditors' brief statements are supported by the record. I find Mr. Price, Mr. Wiggins, and Mr. Wolfe credible.

E. Investigators

1. Scott Thompkins Is a Credible Witness

Scott Thompkins is a Special Agent with Respondent's railroad police. CX 37 at 48. Mr. Thompkins came to the S-1 gang as part of Complainant's removal from service. *Id.* at 48. Mr. Thompkins later provided an email report of his actions taken from April 12, 2013 through April 15, 2013. *See* CX 22. This report, taken roughly contemporaneously with the Complainant's

removal, is largely supported by the record. There is some disagreement with the report by Mr. Brigman, specifically on the issue of the drug complaint and Complainant's demeanor during his removal. *Compare id.* at 4 with CX 37 at 4 and Tr. at 300-303.

Beyond the contradictions in Mr. Brigman's testimony, the testimony of Complainant and Mr. Preece agrees with that of Mr. Thompkins. *See* CX 40 at 82-83; Tr. at 78-79, 81. Considering these circumstances, I find that Mr. Thompkins is credible. The supporting testimony from credible witnesses significantly bolsters his credibility.

2. David Morris Is a Credible Witness

David Morris is a Special Agent with Respondent's railroad police. JX 3 at 1. Mr. Morris's brief statements regarding the March 18, 2013 ethics call are supported by the record. Specifically, Mr. Morriss' statements are supported by a report generated by the railroad police, taken at the time of the call. *Id.* I find Mr. Morris to be a credible witness.

3. Deborah Wainwright Is a Credible Witness

Deborah Wainwright was the Manager of Employee Relations⁷ for Respondent. Ms. Wainwright's testimony is limited to the human resources response to the allegations of drug use threats. *See* Tr. at 404-48. I find most of her statements regarding when various reports were received, the naming conventions of Respondent, etc. to be credible. These statements are supported by the record.

Part of Wainwright's testimony, however, gives me pause and thus bears a brief discussion. Ms. Wainwright writes in an email from March 25, 2013:

On 3/22/2013, Kelly Piccirillo, Assistant Chief Engineer – Jacksonville, FL state that he would contact Mike Hinnant who is Dennis Rhodes' boss and have him schedule a surprise audit and inspect all the equipment. I reiterated the need for Confidentiality, but as you can see by the additional reports . . . not very much of a *surprise*.

Would it be possible to enlist the aid of your drug dogs? Seems my attempt to work through management have failed.

CX 11 at 5 (emphasis in original). The plain text of the email suggests that Ms. Wainwright was aware of issues with the S-1 gang being forewarned of audits. Her emphasized text specifically suggests that the surprise issue was crucial. At the hearing, Ms. Wainwright stated that this email was based solely on the calls by Complainant, and that the reports summarizing those calls were "taken at face value." Tr. at 420-22.

In an email dated March 28, 2013, Whelma Christopher, another human resources employee, wrote to Ms. Wainwright:

⁷ Ms. Wainwright admitted that her title may have changed over time, but that her job duties remain the same. Tr. at 428.

Spoke with Lavon and Frank Kirbyson about these three allegations of drug use and they stated that all who could be involved are aware that a complaint was filed so at this point, other than informing their agents that cover the territory that this gang would travel and conduct a random search (which they will do), there is nothing more that can be done with these specific cases.

As a side note, Frank informed me that these cases should have been assigned to them initially and that the general rule [I] should keep in mind is ‘if you can go to jail for it, send it to the police dept’.

CX 16. The syntax of “all who could be involved are aware that a complaint was filed” is ambiguous. At the hearing, Ms. Wainwright stated that she read the email to mean that the railroad police, not the people who were being investigated, were aware of the allegations. Tr. at 436-37.

Upon review of these emails and Ms. Wainwright’s testimony, I find that these potential issues of interpretation are minor discrepancies at best, particularly given the time that elapsed between the emails and Ms. Wainwright’s testimony at the hearing. Accordingly, I find Ms. Wainwright credible.

II. Factual Background

Complainant began working for Respondent on June 8, 2008. Tr. at 38. He remains an employee of Respondent. *Id.* Complainant is a member of the Brotherhood of Maintenance of Way Employees (“BMWE”), which has a collective bargaining agreement with Respondent. *Id.* at 8.

In early January 2013, Complainant bid onto a S-1 system production gang. Tr. at 39. The S-1 team used various rail-based equipment to resurface and relevel railroad track. *Id.* at 39-41. Complainant specifically worked as an assistant operator on the 2X machine. *Id.* at 39, 268. The 2X was the lead machine on the S-1. *Id.* at 39.

The 2X is a large device roughly 70 feet long and weighing nearly 60 tons. *Id.* at 39-40; JX 25. The other machines on S-1 followed behind the 2X at varying distances, which ranged from hundreds of feet to multiple miles. *See, e.g.*, CX 3 at 34; CX 40 at 47. The 2X moves on the rails, and it can reach speeds of up to 50 miles per hour. Tr. at 44.

Complainant worked on the 2X with two other individuals: Mr. Hatmaker and Mr. Domiano. *Id.* at 268. RX 38 at 27. Mr. Hatmaker was the senior 2X operator and Mr. Domiano was the 2X mechanic. Tr. at 268; RX at 27. The S-1 gang was managed by Mr. Rhodes. Tr. at 266; CX 1 at 2-3; CX 47 at 40-41. The mechanics on the 2X gang were under the supervision of Mr. Brigman. Tr. at 265-66. Mr. Rhodes, as manager, reported to Mr. Hinnant, the Director of Program Construction. *Id.* at 348-50. Mr. Hinnant reported to Mr. Piccirillo, an Assistant Chief Engineer. *Id.* at 453-54. Mr. Piccirillo, in turn, reported to Mr. West, the Vice President of Engineering for Respondent. *Id.* at 451.

In the third week of January 2013, Complainant noticed Mr. Hatmaker smoking marijuana on the 2X. Tr. at 41; CX 40 at 32; RX 38 at 59-61. Shortly thereafter, Complainant saw Mr. Domiano smoking marijuana on or around the machine. RX 38 at 60-62. Complainant eventually noticed a number of employees smoking marijuana on the machines, in the mechanic's trucks, or at the hotels at which the men stayed after work. Tr. at 44.

Mr. Hatmaker and Mr. Domiano were known friends of Mr. Rhodes. CX 37 at 2, 36; CX 40 at 32. Mr. Rhodes was aware of the drug use, but Mr. Hatmaker and Mr. Domiano "didn't do it in front of him." *Id.* at 52. Further, Complainant explained that Mr. Hatmaker and Mr. Domiano would spray a product called "Ozium" and light cigarettes to disguise the odor of marijuana on the 2X cab. *Id.* at 53.

Complainant informed Mr. Preece, a member of the S-1 gang and union president for the BMW local, about the drug use he observed. CX 40 at 32. Complainant also spoke to two other employees, James Hunt and Adam Panek, about the drug use. Tr. at 42-43. Based on those conversations, Complainant decided not to report the activity to Respondent. Tr. at 47.⁸

Sometime in the middle of February 2013, Complainant received a citation from Mr. Rhodes (specifically an efficiency-test failure) for wearing amber lens glasses while working at night. RX 38 at 37-78; CX 37 at 15, 35, 41; CX 40 at 24-26. Complainant felt Mr. Rhodes acted unfairly in giving the citation. RX 38 at 37-38. The relationship between Complainant and Mr. Rhodes began to deteriorate after that point. *See* CX 37 at 20, 22; CX 40 at 24-26, 30.

Complainant was also reprimanded for cursing after A.D. Laws, the assistant foreman, moved the 2X before Complainant was clear of the machine. CX 37 at 35; Tr. at 67-70; CX 40 at 27-29. Complainant admitted that after that incident he called Mr. Rhodes a "worthless piece of shit." Tr. at 70. Complainant could not recall the exact date of the cursing incident, but it was around the same time as the efficiency-test failure.

In mid-March 2013, Complainant was riding the 2X when Mr. Hatmaker abruptly traversed a railroad crossing going roughly thirty-five miles per hour. Tr. at 50. Such crossings were to be taken at five miles per hour according to company rules. *Id.* at 51. As they crossed, Complainant noticed that the 2X nearly hit a vehicle and its passengers. *Id.* Complainant, upset by the event, sought out Mr. Preece seeking guidance on how to handle the situation. *Id.* Complainant was also concerned because he was worried he might suffer discipline for not reporting the drug activity when he first noticed it. *Id.*

On March 18, 2013, Mr. Preece decided to call the railroad police and report the alleged drug use. Tr. at 38-39; JX 4; CX 40 at 32-36. The police determined that Mr. Preece's complaint was best handled by Respondents' ethics hotline, and they transferred him to ethics. JX 3 at 1. Mr. Preece then reported anonymously that machine operator "Bobby . . . uses and could be selling marijuana while working" and that he did not want to "go to the gang leader, Dennis Rhodes, about this, because he is friends with Bobby." JX 4 at 2. After reporting, Mr. Preece later informed Complainant of the ethics call. CX 40 at 38.

⁸ Complainant specifically stated that he was advised to just "leave it be" lest he end up with a bad reputation. Tr. at 47.

In response to the report, on March 19, 2013, Mr. Gerth and Mr. Love, two managers for Respondent, conducted a surprise audit of the S-1 gang. JX 21. While en route to the S-1 worksite, Mr. Gerth called Mr. Rhodes to inform him that he was going to inspect the 2X machine for marijuana. CX 37 at 11. Mr. Rhodes then called Mr. Hatmaker on his cell phone to warn Mr. Hatmaker of the audit and to advise Mr. Hatmaker to get any marijuana off the 2X. Tr. at 54. Complainant asserts that he overheard Mr. Rhodes mention that Mr. Piccirillo had tipped him off. JX 5 at 2. Mr. Hatmaker hid and temporarily disposed of the marijuana. Tr. at 56-58.

Mr. Gerth and Mr. Love inspected the 2X machine, and the other S-1 machines, upon arrival. They did not check any personal belongings, instead checking the extinguisher, tool box, and other parts of the cabin. CX 37 at 24. Mr. Gerth and Mr. Love were instructed not to search personal belongings by Mr. Hinnant. Tr. at 384-86. In their report, Mr. Love and Mr. Gerth found that “[t]he [2X] machine smelled lightly of cigarette smoke, but was otherwise neat and clean.” JX 21. The auditors noted no drug related findings in the conclusion of their audit. *Id.*

On March 23, 2013, Complainant called ethics alleging that the drug activity was still ongoing, and that Mr. Rhodes had been tipped off about the audit by Mr. Piccirillo. JX 5 at 2. On March 26, 2013, there was another audit of the S-1 gang machine, by auditors Mr. Gerth, Mr. Gray, and Mr. McDaniel. RX 23 at 1. Though told not to let anyone know of the impending audit, Mr. Gray informed Mr. Rhodes of the audit days prior. *See* CX 37 at 27. The auditors, again, did not search any personal belongings during the audit. CX 37 at 26.

On March 30, 2013, Complainant made another call to the ethics hotline explaining that the 2X had not been audited thoroughly. JX 6 at 2. Complainant stated that Mr. Gray was friends with Mr. Hatmaker and Mr. Domiano, and that they had reminisced together during the audit. *Id.*; Tr. at 59.

By April 7 or 8, 2013, Complainant contacted Mr. Albers, a Union representative, to discuss his frustrations. Tr. at 145. Mr. Albers called Mr. West and informed him of the drug use allegations. CX 37 at 51. Mr. West, in turn, contacted Mr. Piccirillo and Mr. Hinnant, ordering them to get an audit scheduled the following week. *Id.* By this time, rumors were circulating that Complainant had called the ethics hotline. *See* CX 37 at 62-64.

On Wednesday, April 10, and Thursday, April 11, 2013, Mr. Barfield, the S-1 foreman, went around to various members of the gang to gather statements regarding alleged threats that Complainant had made against Mr. Rhodes. Tr. at 176-77; CX 37 at 5, 7, 21, 23, 33; CX 40 at 65. Mr. Barfield also called ethics to report that Complainant had made violent threats against Mr. Rhodes. Tr. at 208-10. After collecting statements, Mr. Barfield provided them to Mr. Brigman, who forwarded them to ethics. Mr. Brigman informed the S-1 gang (excluding Complainant) that Complainant would be taken out of service the following Monday. CX 40 at 75-77; Tr. at 77-78.

Mr. Preece and another gang worker, Sheldon Larry, informed Complainant, who had returned to his home in Indiana for the weekend, that he would be taken out of service on Monday. *Id.* at 77. On Monday, April 15, 2013, Complainant returned to the S1 gang to begin work. Tr. at 78. As he prepared to go to work for the day, a railroad police officer arrived and

spoke with him. *Id.* During this discussion, Complainant told the police officer of the ongoing drug issues. *Id.* Complainant was then forced to return his company equipment in front of the gang. Tr. at 80-82. During this process, Complainant became agitated and yelled at Mr. Brigman for his actions, before returning the requested items to the police officer. *Id.*; *see also* CX 37 at 82-83. Complainant eventually returned home, while the remaining S1 gang continued their work. Tr. at 84; CX 40 at 84.

Later that day, another audit was conducted of the S1 gang. RX 22. The audit did not find any evidence of drug use. *Id.* The investigators, again, did not search personal belongings. *See* Tr. at 354, 360, 385. Ten days later, on April 25, 2013, Complainant filed a complaint with OSHA alleging retaliation under the Act.

On May 22, 2013, Respondent held an investigative hearing on the alleged threats. JX 22. Some days after the hearing concluded, Complainant called Mr. Preece to ask where the S1 gang was staying. CX 40 at 85. Mr. Preece informed Complainant of where they were staying, thinking that Complainant was soon to return to the gang. *Id.* at 88. Shortly after the call, police rushed to the hotel and one of the members of the gang was discovered to be in possession of marijuana and marijuana paraphernalia. *Id.* at 90-92.

On June 26, 2013, Respondent informed Complainant that it had withdrawn its charges regarding the threats of violence. JX 1 at 2. Respondent paid Complainant for his time out of work, and Complainant returned to work in a different position. *Id.* On February 7, 2014, OSHA issued its findings. *Id.* Complainant objected to the findings and requested a hearing in front of the Office of Administrative Law Judges (“OALJ”).

Procedural History

This case was assigned to me on March 5, 2014. On March 20, 2014, I issued a Notice of Docketing and Prehearing Order. ALJX 1. On April 8, 2014, I issued a Notice of Hearing scheduling the hearing for February 11, 2015, which was rescheduled by a Supplemental Notice of Hearing and Order Cancelling Hearing until April 21, 2015.

On March 26, 2015, I issued an Order Cancelling Hearing and Setting Briefing Schedule. On July 28, 2015, I issued a Stipulated Protective Order. ALJX 2. On September 4, 2015, Respondent filed a Motion for Summary Decision, which Complainant responded to on September 25, 2015. On February 29, 2016, I issued an Order Denying Respondent’s Motion for Summary Decision. On April 27, 2016, I issued a Supplemental Notice of Hearing scheduling this matter to be heard on November 15, 2016. ALJX 3. The matter was further rescheduled until January 24-26, 2017. ALJX 4.

I held a hearing in this matter from January 24, 2017, through January 26, 2017. At hearing, I admitted: ALJX 1-4; CX 1-4, 6, 8-37, 40, and 43; EX 1-38; and JX 1-26 into the record. Tr. at 7-24. At the end of the hearing, I scheduled a conference call for March 14, 2017 for argument on the admissibility of CX 5, 7, 41, and 42. Tr. 569-571. On March 14, 2017, I denied admission of CX 5, 7, 41, and 42. March 14, 2017 Transcript at 22. Following that conference call, I received the parties’ timely closing arguments.

Discussion

I. Legal Standard

The Act incorporates by reference the rules and procedures applicable to whistle blower cases brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”). *See* 49 U.S.C. § 20109(d)(2)(A). AIR-21 contains a two-part burden-shifting framework for evaluating whistleblower cases. *Palmer v. Canadian Nat’l Ry.*, No. 16-035, 2016 WL 5868560 at *31 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017).

The first part focuses on the relation between adverse action(s) suffered by an employee and that employee’s protected activity. *See id.*; *see also Harp v. Charter Comms., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). The Complainant bears the burden at this point, and he or she must show, by a preponderance of the evidence, that: 1) he or she engaged in protected activity; 2) he or she suffered an adverse action; and 3) the protected activity was a contributing factor in the adverse action. *Palmer*, 2016 WL 5868560 at *9 fn. 74, *31; *Dietz v. Cypress Semiconductor Corp.*, No. 15-017, 2016 WL 1389927 at *4, *4 fn. 24 (ARB Mar. 30, 2016); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3d Cir. 2013); *Harp*, 558 F.3d at 723 (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)); *Heim v. BNSF Ry. Co.*, 849 F.3d 723 (8th Cir. 2017) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014)).⁹

Should a Complainant meet this burden, the second part is implicated. The second part, sometimes called the “same action defense,” allows the employer to escape liability if it establishes, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at *31, 36. If employer fails to meet its burden at this point, the claim succeeds.

II. Analysis

A. Complainant’s Burden

1. Complainant Has Established that He Engaged in Protected Activity

The parties in this matter have stipulated that “Complainant engaged in FRSA-protected conduct by making an Ethics Helpline complaint on March 23, 2013.” JX 1 at 2. It does not appear that this stipulation covers the additional ethics hotline complaint made by Complainant after his initial call. *See* JX 1 at 2 (citing only to the first ethics call (JX 5) and not the second ethics call (JX 6)). Put simply, I find that all of Complainant’s reports of unsafe behavior were protected activity under the Act.

⁹ The circuit courts list a four prong test, including a knowledge requirement, which the Administrative Review Board (“ARB”) has avoided. *See Folger v. Simplex Grinnell, LLC*, No. 15-021, 2016 WL 866116 at *1 fn. 3 (ARB Feb. 18, 2016) (adopting a three prong test). The ARB has specifically explained, for the purposes of the AIR-21 whistleblower framework, that there is no explicit knowledge requirement. *Id.* The ARB noted, however, that the knowledge requirement “might be implicit in the causation requirement.” *Id.*

The Act protects an employee from “discharge, demot[ion], suspen[sion], threat[s], harass[ment], or . . . [any other] discriminat[ion]” in retaliation for certain acts performed by an employee. 49 U.S.C. § 20109(a). These acts include:

provide[ing] information, cause[ing] information to be provided, or otherwise assist[ing] in an investigation^[10] regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security[;] . . . refus[ing] to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security; . . . [and filing] a complaint, or directly caus[ing] to be brought a proceeding [under the Act].

Id. § 20109(a)(1)-(3). Determining the reasonableness of an employee’s belief involves a two pronged inquiry. *Sylvester v. Parexel, LLC.*, No. 07-123, 2011 WL 2165754 at *11 (ARB May 25, 2011) (en banc).

The first prong covers the employee’s subjective belief. *Id.* Subjective belief is “satisfied if the employee actually believed that the conduct complained of constituted a violation of relevant law.” *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015) (citing *Nielson v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014)); accord *Sylvester*, 2011 WL 2165854 at *11. The second prong covers the employee’s reasonable objective belief. Objective belief is satisfied if the totality of the circumstances known (or reasonably, albeit mistakenly, perceived) by the employee at the time of the complaint, analyzed in light of the employee’s training and experience, would lead a reasonable person to believe that the conduct complained of constituted a violation of relevant law. *Sylvester*, 2011 WL 2165854 at *12.

In this case, Complainant reported alleged drug activity to the ethics hotline. JX 5; JX 6; Tr. at 54, 58-60. Complainant additionally reported the drug activity to members of his union, Tr. at 42-43, 48, 145, and potentially the police, CX 40 at 84-90. It is clear from Complainant’s repeated testimony that Complainant subjectively believed that the drug activity was unsafe and a violation of railroad safety rules. *See* Tr. at 54-60; *see also* RX 38. Moreover, it is beyond cavil that a reasonable person would deem the use of illegal drugs while operating heavy machinery to be unsafe and in violation of Federal rail safety laws. Accordingly, Complainant has established that his belief that the drug activity was unsafe and in violation of applicable rules was both subjectively and objectively reasonable. Complainant has thus established by a preponderance of the evidence that all of his reports and calls to ethics, his union,¹¹ and the police regarding illicit drug use on the job constitute protected activity.

¹⁰ FRSA specifically protects providing information or assistance to “Federal, State, or local regulatory or law enforcement agencies,” members of Congress or any Congressional committee, or “person[s] with supervisory authority over the employee.” 49 U.S.C. § 20109(a)(1).

¹¹ While it is unclear whether Complainant’s union contacts were “person[s] with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct,” 49 U.S.C. § 20109(a)(1)(C), Complainant contacted his union in furtherance of his reporting efforts. *See, e.g.*, Tr. at 145.

2. Unfavorable Personnel Action

The parties dispute whether Complainant suffered an unfavorable personnel action. Complainant asserts that Employer engaged in unfavorable personnel actions, including: charging Complainant with six separate infractions; bringing ethics complaints against Complainant; subjecting Complainant to drug testing and a psychological evaluation; pressuring individuals to write misleading statements about Complainant to justify his termination; disclosing confidential information; depriving Complainant of a safe workplace and intimidating others; conducting sham investigations; frustrating inspections for narcotics; embarrassing Complainant and chilling other reporting by taking him out of service in front of his coworkers; referring false charges to the police; depriving Complainant of certain production bonuses and travel pay; depriving Complainant of healthcare coverage, unused travel allowance, and wages; and subjecting Complainant to ridicule. Claimant's Brief ("C. Br.") at 13-14.

Employer asserts that Complainant suffered no unfavorable personnel action. Employer explains that Complainant was removed from service based on accusations of workplace violence, as mandated by the collective bargaining agreement. Respondent's Brief ("R. Br.") at 31.¹² Employer further argues that Complainant was paid for his time out of work, and that it did not restrict the position to which Complainant could return. *Id.*

Adverse actions under the Act refer to "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, No. 14-047, 2015 WL 9257754 at *3 (ARB Nov. 24, 2015) (citing *Williams v. Am. Airlines, Inc.*, No. 09-018, 2010 WL 553815 at *8 (ARB Dec. 29, 2010)). Upon review of the circumstances of this matter, I agree with Complainant that he has suffered unfavorable personnel actions.

Complainant's removal from service was a more than trivial detrimental action. Respondent's actions caused Complainant significant embarrassment, as his removal from service was done in front of his coworkers, who were informed about the removal and gathered at the place of removal. CX 40 at 77-82; Tr. at 77-78. Complainant's alleged infractions were very significant, JX 20, causing further strain. While off work, Complainant did not receive pay and his insurance ceased. Tr. at 97.

These are not insignificant actions. Complainant was threatened with significant discipline for his alleged misconduct, and he had to suffer suspension for months, even if he was later reimbursed (at least partially) for that time. "[T]ermination, discipline, and/or threatened discipline" are sufficient to establish an adverse action under the Act. *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, 2017 WL 4466937 at *6 (ARB Sep. 29, 2017) (citing *Vernace v. Port Auth. Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 n. 4 (ARB Dec. 21, 2012)). Accordingly, Complainant has established by a preponderance of the evidence that he suffered an adverse action under the Act.

¹² While Employer attempts to link this mandatory investigation to numerous Title VII cases finding that mere investigation of a wrong is not an adverse action, R. Br. at 31, adverse actions under the Act are more expansive than adverse actions under Title VII. See *Fricka*, 2015 WL 9257754 at *3 (internal citations omitted).

3. Contributing Factor

The parties contest whether Complainant's protected activity served as a contributing factor to the adverse action in this matter. The contributing factor standard is "broad and forgiving." *Deltek, Inc. v. Admin. Rev. Bd.*, 649 Fed. App'x 320, 329 (4th Cir. 2016) (citing *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)). The protected activity "need only play some role in the adverse action, even an '[in]significant' or '[in]substantial role suffices." *Palmer*, 2016 WL 5868560 at *31 (brackets in original); see also *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013). A complainant may satisfy this "rather light burden by showing that her protected activities tended to affect [her] termination in at least some way," whether or not they were a primary or even a significant cause of the termination. *Deltek, Inc.*, 649 Fed. App'x at 329 (quoting *Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original). Such determinations may be done through direct or circumstantial evidence. *Palmer*, 2016 WL 5868560 at *32.

a. Direct Evidence

As direct evidence of retaliation, Complainant points to the testimony of Mr. Preece. Mr. Preece testified at his deposition that he overheard Mr. Brigman say that he would remove Complainant due to the problems that Complainant's ethics call had started. C. Br. at 15; CX 40 at 75-76. Employer contests the credibility of this testimony. R. Br. at 18. Respondent notes that Mr. Brigman disputed saying such things, that Mr. Preece only mentioned that statement at his deposition three years after the fact, and that no other S-1 employees remark that they heard such a statement. R. Br. at 18. Respondent also argues that, because the decision to remove Complainant fell solely within the purview of Mr. Piccirillo, Mr. Brigman's opinion is irrelevant. *Id.* at 18-19.

I found Mr. Preece's testimony credible and Mr. Brigman's testimony incredible. Factual Findings Parts I.B.1, I.C.2. Moreover, the record contains numerous statements by credible and even generally incredible witnesses that acknowledge that Mr. Brigman had knowledge of Complainant's ethics call. See CX 37 at 2, 9; Tr. at 368-69; see also CX 22 at 4. Though Mr. Barfield is not a credible witness, his testimony that he was told to get statements to take Complainant out of service is supported by Mr. Preece, who recalled Mr. Barfield's stating that he had helped Mr. Rhodes and Mr. Brigman only to then be disqualified himself. CX 40 at 132; Tr. at 175-176.

Respondent argues, nonetheless, that because Mr. Brigman did not have the authority to remove Complainant, Mr. Brigman's intent is irrelevant. These circumstances describe the quintessential "cat's paw" case, in which an employee seeks to "hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Staub v. Proctor*, 562 U.S. 411, 415 (2011) (citation omitted); *Rudolph v. Nat'l R.R. Passenger Corp.*, No. 11-037, 2013 WL 1647527 at *12 (ARB Mar. 29, 2013). In such cases, "the complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew." *Rudolph*, 2013 WL 1647527 at *12. In this case, the direct evidence shows that the party raising

and investigating the false allegations, Mr. Brigman, did so in response to Complainant's ethics call.

Given the record, particularly Mr. Preece's testimony and Mr. Brigman's knowledge of Complainant's ethics complaint, I find that there is direct evidence that Mr. Brigman gathered and brought charges against Complainant due to the ethics call.

b. Indirect Evidence

The parties also contest whether indirect evidence establishes that Complainant's protected activity was a contributing factor.

The major, and most compelling, indirect evidence that Complainant's ethics call was a contributing factor in the adverse personnel action is the temporal proximity between Complainant's ethics complaints and his removal from service. "Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation." *Feldman*, 752 F.3d at 348 (citation omitted); *see also Sharkey v. JP Morgan Chase & Co.*, 660 Fed. App'x 65, 67 (2d Cir. 2016) (noting that a "temporal proximity" of less than a month between the protected activity and the unfavorable personnel action could support a prima facie inference that the protected activity was a contributing factor) (*citing Zann Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013)). In this case, Complainant made an ethics call on March 23, 2018, and he suffered an adverse action roughly three weeks later on April 15, 2018.

The short time between Complainant's call to the ethics line, and his subsequent removal from service, is determinative. Employer attempts to argue that the temporal proximity was severed by the subsequent statements that Complainant was threatening Mr. Rhodes. R. Br. at 16-17. While an intervening event may serve to sever the temporal link between protected activity and an adverse action, *see Feldman*, 725 F.3d 339, 348 (citation omitted), the record does not establish that such an intervening event occurred.

Simply put, even were I to accept Respondent's assertion that Complainant made the alleged threats against Mr. Rhodes, those threats would not serve as a sufficient intervening event. Mr. Brigman and Mr. Rhodes admitted that Mr. Hatmaker, Mr. Domiano, and Mr. Barfield informed them of the threats against Mr. Rhodes prior to Complainant's removal from service. Factual Findings Part I.C.1-2. Mr. Domiano and Mr. Hatmaker state that they had informed Mr. Barfield, Mr. Rhodes, and Mr. Brigman of Complainant's threats since January 2013. JX 22 at 30, 41. Mr. Barfield stated, contrarily, that he had informed Mr. Brigman of the threats a month before Complainant was removed. *Id.* at 50-53. Though it allegedly took some time for statements to be presented to Mr. Brigman, CX 37 at 4, Mr. Brigman and Mr. Rhodes clearly did not see the threats as a pressing matter, and Mr. Brigman did not truly begin requesting statements in earnest until after the ethics phone calls. This would suggest that the decision to discipline Complainant for the alleged intervening activity was instead predicated on the ethics calls.

This conclusion is supported by the credible witnesses on the S-1 gang, who all state that Mr. Barfield approached them seeking statements against Complainant only *after* Complainant made the calls to ethics. *See* Factual Findings Part I.B.1, 5.a-c, f. Given those circumstances, any assertion that the subsequent removal was based on Complainant's alleged threats tends to indicate pretext.

Additionally, email communications between Mr. Hinnant and Mr. Piccirillo show that management was considering separating Mr. Rhodes and Complainant due to the ethics complaint. Mr. Piccirillo specifically stated in a March 30, 2013 email that “[w]hen [Mr. Hinnant] gets [his] new Manager, [he] may want to move Dennis away from [Complainant].” CX 17 at 1. No threats of violence are mentioned in the email chain, as the alleged threats were not reported by Mr. Brigman until April 2013. *See* JX 7; JX 8; JX 9; JX 10; JX 11; JX 12; JX 13; JX 14; RX 24 at 1. Rather, the email is sent as a “follow up to the ethics call.” CX 17 at 1. This information demonstrates that upper management was mindful of Complainant's ethics complaint, and that the call was a factor in their discussion of separating Complainant and Mr. Rhodes. Once again, this evidence undermines Respondent's assertion that Complainant's removal was predicated on unrelated activity that occurred after the protected activity.

Considered as a whole, this evidence establishes that Respondent's management was aware that Complainant had made the ethics call, that management was thinking of moving Complainant prior to his removal, and that management only began actively seeking information regarding the alleged threats after Complainant made the ethics calls. This serves as powerful indirect evidence that Complainant was removed due to his ethics complaint.

c. Complainant Has Established His Protected Activity Was a Contributing Factor

The evidence in this matter, both direct and indirect, establishes that Complainant's protected activity was a contributing factor to the unfavorable personnel action. Complainant's removal occurred less than a month after his call to ethics. Respondent's efforts to obtain statements regarding Complainant's alleged death threats began in earnest only after Complainant made the ethics calls, and the evidence shows that Mr. Brigman intended to make an example of Complainant.

Given the foregoing, I find that Complainant has established by a preponderance of the evidence that his protected activity was a contributing factor in Complainant's unfavorable personnel action. The record demonstrates that the protected activity played a role in Complainant's unfavorable personnel action. *See Palmer*, 2016 WL 5868560 at *31; *see also Araujo*, 708 F.3d. at 157.

4. Complainant Has Met His Burden of Proof

I find that Complainant has established by a preponderance of the evidence that he engaged in protected activity, that he suffered an unfavorable personnel action, and that his protected activity was a contributing factor in the unfavorable personnel action. *See* Discussion

Part II.A.1-3, *supra*. Accordingly, Complainant has met his burden under the AIR-21 framework.

B. Same Action Defense

Should a complainant meet his or her burden of proof, a respondent may still prevail if it shows, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at *31, 36. “It is not enough for the [respondent] to show that it *could* have taken the same action; it must show that it *would* have.” *Id.* at 33 (citing *Speegle v. Stone & Webster Constr. Inc.*, No. 13-074, 2014 WL 1758321 at *7 (ARB April 25, 2014)) (emphasis in original).

Clear and convincing evidence is the “intermediate standard” between mere preponderance of the evidence and beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 424 (1979). Clear and convincing evidence requires that “the ALJ believe that it is ‘highly probable’ that the employer would have taken the same adverse action in the absence of the protected activity.” *Palmer*, 2016 WL 5868560 at *33 (citing *Speegle*, 2014 WL 1758321 at *6). Were the clear and convincing standard quantified, “the probabilities might be in the order or above 70%” *Id.* (quoting *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff’d*, 603 F.2d 1053 (2d Cir. 1979)) (omission in original).

Respondent in this case asserts that it would have removed Complainant from service regardless of the ethics call. R. Br. at 32. Respondent’s argument is predicated on the accusations made by Complainant’s coworkers regarding alleged threats he made against Mr. Rhodes. *Id.* at 32-33. In fact, Respondent’s entire argument relies on the seriousness of the conduct Complainant was accused of, and the reasonable measures Respondent took to ensure the safety of its workers. *Id.* at 33-39.

Complainant argues that the complaints cannot satisfy the same action defense, as the employee statements were specifically procured at the direction of Respondent due to Complainant’s ethics call. C. Br. at 19-21. Complainant further argues that, given the circumstances, even if Respondent’s motives for removal were pure, the legal and illegal motives cannot be separated. *Id.* at 23-24. Complainant also argues that management’s failure to conduct an independent investigation before removing Complainant from service renders all management decisions tainted by the biases of Mr. Brigman and Mr. Rhodes. *Id.* at 24.

To begin, as is apparent from my factual findings, no credible witness in this case states that Complainant made any threats against Mr. Rhodes. *See Factual Findings, supra*. Upon review of the evidence in this matter, I find that Complainant made no threatening statements against Mr. Rhodes, though I do find that he made disparaging comments about Mr. Rhodes. Those disparaging comments, however, do not amount to threats of violence.

The question, then, is whether inaccurate statements regarding alleged misconduct can shield Respondent in this matter. Upon careful consideration of the specific circumstances in this matter, I find that they cannot.

1. Management Helped Fabricate the False Allegations

One point of agreement among almost all members of the S-1 gang is that the written statements provided to Mr. Barfield (and then to Mr. Brigman) were not produced *sua sponte*. Rather, statements were solicited. *See* CX 37 at 5, 7, 21, 23, 33, 36. Mr. Barfield specifically avoided certain employees; there is no evidence that he even asked Mr. McDuffie, Mr. Williams, or Mr. Wilson, employees who stated they had never heard Complainant threaten Mr. Rhodes, for statements. *Id.* at 28, 54, 55.¹³ Moreover, Mr. Hatmaker and Mr. Domiano, the men Complainant accused of using drugs, were the only men to say they approached Mr. Barfield on their own.

The record suggests there was a concerted effort to specifically acquire statements against Complainant. It is possible this effort was masterminded by Mr. Barfield. However, the record supports that Mr. Brigman, a member of Respondent's management, was behind this action. There is direct evidence that Mr. Brigman took Complainant out of service in response to his ethics call. *See* Discussion Part II.A.3.a, *supra*.

Mr. Brigman's role in the removal of Complainant changes the equation offered by Respondent. A manager of the S-1 gang appears to have drummed up ultimately false allegations of threats of violence against Mr. Rhodes. That manager then reported those threats to the supervisors above him. Mr. Hinnant, Mr. Piccirillo, and Mr. West, unwittingly or otherwise, authorized removal based on those false threats.

The knowledge of Mr. Hinnant, Mr. Piccirillo, and Mr. West is essentially irrelevant to this interpretation. Respondent must establish that it *would* have performed the adverse personnel action in the absence of Complainant's protected activity. However, Respondent's own managers solicited false allegations due to the protected activity. As the false statements would not have been requested by one of Respondent's managers absent the protected activity, Respondent cannot logically meet this burden. Whether the statements warranted removal is largely irrelevant; the statements themselves were created to effect retaliation.

2. The Circumstances of the Removal Differ from Other Allegedly Like Employees

The circumstances behind Complainant's removal complicate Respondent's arguments. As an initial matter, it can be stated with certainty that Mr. Hinnant and Mr. Piccirillo were aware that Complainant was the ethics caller. *See* CX 17. Moreover, Respondent was at least aware at that time of allegations that the S-1 gang had been tipped off about the drug audits. *See* JX 4 and JX 5; *see also* CX 11 at 5.

The statements solicited from the S-1 gang included statements from individuals who Complainant accused of using drugs. The number of statements provided was also unique, and Mr. Piccirillo acknowledged in a report that the employees who made the statements might have

¹³ Mr. Preece asserted that Mr. Barfield had asked "everybody on the gang except the black guys," because they were friends with Complainant. CX 40 at 66. It is unclear whether Mr. McDuffie, Mr. Williams, or Mr. Wilson are these individuals.

been trying to get rid of Complainant. Tr. at 493. He specifically stated that “I don’t know that I ever received that many statements from employees stating that one employee did whatever it is, okay? So . . . when you have that many employees criticizing one employee, then it’s like, is this something where they’re not happy with that employee and they’re trying to get him off the team[?]” *Id.* The above plainly shows that the circumstances behind the written statements cast suspicion on their veracity.

Respondent also provides evidence of other employees who were disciplined due to threats of violence. Those circumstances, however, do not have the significant history of this incident. *See* RX 35 (employee stated he should have gotten a gun and “taken out” another employee during an interview); RX 36 (employee displayed threatening and aggressive behavior during a safety meeting). Moreover, those statements involved threats made specifically to a person, not alleged threats made outside of the target individual’s presence.

Respondent also points to Mr. Preece as an example of an employee who made an ethics call about drugs and was not disciplined. R. Br. at 15. Respondent specifically states that “Preece did not suffer any repercussions for reporting alleged drug use on the S-1 team.” *Id.* This analysis is logically flawed. There is no evidence that anyone learned that Mr. Preece had called the ethics line, and there were no rumors that he had made an ethics call. Logically, there would be no way to test whether Mr. Preece would have been retaliated against for his call, due to its undiscovered nature.

In fact, the response to another call made by Mr. Preece suggests that there would have been a response to his ethics call. During the time Complainant was removed from service, he called Mr. Preece and asked for the name and location of the hotel at which the S-1 gang was staying. CX 40 at 88. Mr. Preece gave that information to Complainant, and shortly thereafter, police rushed to the hotel and ticketed a member of the S-1 gang for marijuana possession. *Id.* at 92-93. Mr. Preece explained that, once the S-1 gang learned that he had told Complainant where the gang was staying, everyone became angry with him. *Id.* at 92-93. Mr. Preece explained that he decided to bid off the S-1 gang due to the tension caused by his call, and that Mr. Rhodes (and others) were happy to see him leave. *Id.* at 95-97. The response to Mr. Preece’s call does not support Respondent’s argument.

3. Respondent Has Failed to Establish the Same Action Defense

Simply put, Respondent has failed to establish by clear and convincing evidence that it would have removed Complainant absent his protected activity. The evidence suggests that the written statements that prompted Complainant’s removal were only collected to retaliate against him for making an ethics complaint. Discussion Part II.B.1. The circumstances behind Complainant’s removal were suspicious, and they were different from other instances where employees were removed from service for making threats. *See id.* Part II.B.2.

Additionally, the evidence produced by Respondent does not meet the clear and convincing threshold. Respondent relies on the testimony of Mr. Barfield, Mr. Domiano, Mr. Hatmaker, Mr. Brigman, Mr. Rhodes, Mr. Hinnant, and Mr. Piccirillo to support its same action defense. Mr. Barfield, Mr. Domiano, Mr. Brigman, and Mr. Rhodes are not credible witnesses,

as I have explained at length above. *See* Factual Findings Parts I.B.2-4, I.C.1-2. Mr. Hinnant and Mr. Piccirillo are only partially credible, as they specifically misrepresented their knowledge regarding who made the ethics complaint. *Id.* Part I.C. 3-4.

Given the significant problems with the sources on which Respondent relies, I cannot see how Respondent's assertions meet the clear and convincing standard of proof. Respondent simply has not shown it was "highly probable" that it would have removed Complainant regardless of the protected activity. *Palmer*, 2016 WL 5868560 at *33 (citing *Speegle*, 2014 WL 1758321 at *6).

Accordingly, I find that Respondent has not met its burden of proof to establish the same action defense.

C. Complainant Is Entitled to Damages

I have found that Complainant has met his burden of proof, and that Employer has failed to rebut Complainant's case by means of the same action defense. Accordingly, Complainant's case succeeds and he is entitled to damages under the Act. 49 U.S.C. § 20109(e). Such damages include compensatory damages and punitive damages. *Id.* § 20109(e)(2)-(3). The regulations specifically explain that an ALJ may issue an order including:

Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of any compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. . . . The order may also require the respondent to pay punitive damages up to \$250,000.

29 C.F.R. § 1982.109(d)(1). In this case, Complainant seeks \$16,870 in lost pay and benefits, \$75,000 in emotional distress damages, and \$250,000 in punitive damages. C. Br. at 25-26. I address each type of damage in turn.

1. Lost Pay and Benefits

Complainant argues he is entitled to \$16,870 in lost pay and benefits. C Br. at 25. This value is the aggregate of pay and benefits that Complainant asserts he did not receive. Tr. at 100-103. Complainant testified that he did not receive: \$594 for his medical insurance over three months; \$1,850 in 401K contributions; travel allowance; and a \$1,000 bonus. Tr. at 102; *see also* C. Br. at 25. Complainant further stated that he had to take a position off the S-1 gang upon returning to work, and that this subsequent position paid \$14,000 - \$16,000 less. *Id.* I address these values in turn.

a. 401(k) Contributions

Complainant argues that he did not receive 401(k) contributions for the period that he was out of service. Tr. at 102. Complainant provides three pay statements from Employer, starting on June 22, 2013, to support his assertions. See CX 36. The three statements cover a check dated July 19, 2013, that covered the period of June 22, 2013 through July 5, 2013 (“Check A”); a check dated June 2, 2013,¹⁴ covering the period of July 6, 2013, through July 19, 2013, (“Check B”); and a check dated July 5, 2013, for the period of June 23, 2013, through July 1, 2013. *Id.* at 1-3 (“Check C”).

Each check contains a “Before-Tax Deductions” section, which includes a 401(k) deduction listing. See, e.g. CX 36 at 1. In Check A, that deduction is \$190.46, and the year to date (“YTD”) value is \$1,703.63. *Id.* In Check B, the deduction is \$193.26, with a YTD of \$1,896.91. *Id.* at 2. Check C’s deduction is for \$93.62 with a YTD of \$1,513.17. *Id.* at 3.¹⁵

These checks demonstrate that Complainant, on average, had a deduction of \$95.16¹⁶ from his paychecks for his 401(k) account. Using this average, I find that, by July 19, 2013, Complainant had deductions for roughly 19.93 weeks of 401(k) contributions. See CX 36 at 1 (dividing the YTD value by the average weekly earnings).

Complainant began working for Employer in early January. See, e.g., Tr. at 41, 70 (noting incidents that happened in the third week of January); JX 22 at 34 (Mr. Domiano asserts he had heard alleged threats from Complainant since the first weeks of January). While an exact date for Complainant’s employment is not provided in the record, the evidence suggests that Complainant began his S-1 tenure at the beginning of January (specifically, January 14, 2013). See CX 9. There are 186 days between January 14, 2013 and July 19, 2013, or 27 weeks and 4 days.

Assuming Complainant received an average 401(k) deduction each week during that period, Complainant should have had a total 401(k) deduction of \$2,623.70. This is \$726.79 above the YTD reflected in the record. See CX 36 at 2. This \$726.79 value is roughly equivalent to 8 weeks of average deductions. Complainant was removed from service on April 15, 2013, and the charges against him were withdrawn on June 26, 2013 (a 10 week period). See JX 23.

Given the information provided me in the record, I find that Complainant is entitled to \$726.79 to account for the lost 401(k) deductions that he would have received during his removal from service. Complainant’s proposed amount of \$1,870.80 reflects roughly 20 weeks of deductions. While the time between April 15, 2013, and September 16, 2013 (Complainant’s

¹⁴ This date appears to be a typographical error. Complainant had not even been returned to work on June 2, 2013, and it is doubtful the check would be written during his removal. See JX 23 (dating the Letter Withdrawing Charges to June 26, 2013).

¹⁵ Complainant did not return to work until September 16, 2013. See C. Br. at 11; R. Br. at 10. However, the record shows that Complainant began receiving paychecks and reimbursement after the withdrawal of the charges against him. Compare CX 36 with JX 23.

¹⁶ To obtain this average, I converted the earnings statements into weekly earnings amounts, and then averaged the results.

date of return to work) is roughly 20 weeks, the evidence shows that Complainant began to receive compensation, including 401(k) deductions, in June.

b. Medical Insurance

Complainant asserts that he entitled to \$594 for medical benefits suspended while he was removed from service. Complainant does not explain how he arrived at this number. Looking to CX 36, I note that there is a before-tax deduction of “Natl’ Hlth & Welfa,” presumably National Health and Welfare (“NHW”), that appears to be Complainant’s insurance payments. *See* CX 36 at 1-3. The NHW deduction is interesting because, excluding Check A, only the YTD value is provided on the checks to Complainant. *Id.*

With only the YTD value available, I must compare the initial starting NHW value (which did not appear to be added to in Check C) with the final NHW value provided in Check B. Taking these values and comparing them, it appears that, in an average week, Complainant would pay \$53.31 toward his insurance. This value is supported by taking the average of Complainant’s YTD health insurance payments for the period for which Complainant worked, which comes to roughly \$56.34. The discrepancy between these values is likely due to the exact billing practices of Respondent, which have not been provided into evidence. Considering these values, I find the \$53.31 value is most correct.¹⁷

As I have explained above, by July 19, 2013, Complainant had been working for 27 weeks and 4 days. Of that time, Complainant went unpaid for 10 weeks (72 days). Applying the \$53.31 value to the time during which Complainant was removed from service, I find that Complainant is entitled to \$548.31 for insurance payments.

c. \$1,000 Bonus

Complainant argues that he is entitled to a \$1,000 bonus that he would have received for six months of work on the S-1 gang. *Tr.* at 97; *C. Br.* at 25. Respondent disagrees, explaining that Complainant’s decision not to return to a system production gang was what caused him to lose the bonus. *R. Br.* at 45 fn. 6

Robert Miller, a System Vice President of Labor Relations, explained Respondent’s bonus policy. *See Tr.* at 552-53. Mr. Miller explained that System Production team members are eligible for a bonus “if they perform six months of service on a system production team.” *Id.* at 552. The work need not be consecutive; only the total time worked is relevant. *Id.*

Complainant has admitted that he could have taken advantage of his seniority to return to the S-1 gang (or potentially another system production gang). *Tr.* at 153. Specifically, a senior employee that is displaced from a position may “bump” a junior employee from a different position (should the senior attorney be qualified to hold that position). *Tr.* at 92-93. Complainant did not bump anyone from a system production gang, and Respondent argues that his decision not to do so renders him responsible for not getting a bonus. *R. Br.* at 45 fn. 6.

¹⁷ The YTD payment value can change based on when Complainant actually started working for Respondent. Given this uncertainty, I find it most prudent to rely on the \$53.31 value.

Respondent's logic is flawed. While Respondent has multiple "system teams," there were only two surfacing gangs; S-1 and S-2. Tr. at 252-53, 348. Managers from either gang routinely swapped with one another, and Mr. Brigman and Mr. Rhodes had actually swapped in March 2013. See CX 37 at 3. Were Complainant to have returned to either team, he might have been directly managed by one of the managers who actively retaliated against him. Moreover, Mr. Hinnant and Mr. Piccirillo were upper level managers of the system production gangs. As such, it is understandable why Complainant would be reticent to return to such gangs due to the presence of hostile managers.

Complainant also asserted that he believed that returning to the surfacing gangs would be dangerous. Complainant testified that both Mr. Preece and Lynn Buckley (his union representative at his hearing) stated that he would be "crazy" to go back to the S-1 team. Tr. at 90; Tr. at 91. Specifically, Mr. Preece had told Complainant that it could be dangerous to come back, as the "guys would be out to get [him]." *Id.* Mr. Preece, himself, left the S-1 team due to the tension on the team after he told Complainant of the gang's location. CX 40 at 94.

Moreover, Complainant's actions earned him derision from his coworkers, as evidenced by the names he was called after his role in the ethics complaint became known (or at least widely suspected). See Tr. at 65, 104-05 (noting that he is still called a rat due to his actions); CX 40 at 62-63, 74-75 (recalling Complainant was called a rat by members of the gang for his ethics call).¹⁸ This name calling reflects the attitude of much of the S-1 gang toward Complainant.

Given this information, I find that Complainant would not be able to return to either the S-1 or S-2 gang. Respondent's assertion that Complainant should have simply returned to a system production gang is not reasonable, particularly given the advice from Mr. Preece and Mr. Buckley not to return to the prior position due to the bad blood. Accordingly, I find that Complainant is entitled to the \$1,000 he would have received as a bonus.

d. Overtime

Complainant seeks damages for lost overtime. C. Br. at 25. Complainant does not explain, however, how much overtime he should have received. Complainant merely asserts that he did not receive the correct amount.

The evidence in the record includes scant mention of overtime, nor any indication of how much overtime Complainant usually received. Complainant describes issues with overtime during his tenure on the S-1 gang, but he does not provide any information regarding his normal overtime earnings. Tr. at 121-22. Check A, Check B, and Check C contain YTD overtime and holiday hours worked, but they do not provide any insight into how that overtime was accrued. See CX 36. Though the checks demonstrate that Complainant stopped receiving overtime payments in June 2013 (when Complainant was receiving pay but was not actively working), they provide little insight into Complainant's normally accrued overtime.

¹⁸ Although this point should be self-evident, it bears repeating: far from being a rat, Complainant was doing the right thing in reporting drug use on the railroad. It is extremely regrettable that at least some of Complainant's coworkers felt it appropriate to call him a rat for doing so.

Finally, Complainant acknowledged that he received payment for some amount of overtime. *See* Tr. at 156-58. While Complainant argues this overtime amount was deficient, without more evidence of his overtime habits, I simply cannot make a determination regarding the sufficiency of the reimbursement for lost overtime. Accordingly, Complainant is not entitled to additional overtime payments.

e. Travel Payments

Complainant seeks payment for the unused travel allowance he would have received while on the S-1 gang. Individuals on the system production gangs received a travel allowance while working. Tr. at 96; CX 1 at 10. If that travel allowance was not fully used, the employee could keep the rest of the allowance. *Id.* at 96; CX 1 at 10. Complainant asserts that, on average, he received \$1,480 per month (\$732 per week). Tr. at 96. Of this amount, Complainant would keep “better than half of it.” *Id.*

Respondent contests any damages award for travel allowance. R. Br. at 45 fn. 6. Respondent explained that Complainant did not receive travel payments because he was not travelling while off work. *Id.*

This issue is a tricky one, and there is little relevant case law on how to interpret per diems or travel allowances in a whistleblower case. The Administrative Review Board (“ARB”) has provided some guidance over the years in similar whistleblower situations. In *Douglas v. Skywest Airlines, Inc.*, the ARB upheld denying an award of per diems where complainant did not submit records that substantiated a “predictable pattern or rate” at which such bonuses, pay raises, and per diems were received. No. 08-070, 08-074, 2009 WL 3165859 at *12 (ARB Sept. 30 2009). The ARB has also refrained from considering a per diem to be compensation where the per diem was “intended to reimburse [complainant] for travel and living expenses while working away from home. *Tipton v. Indiana Michigan Power Co.*, No. 04-147, 2006 WL 2821407 at *8 (ARB Sept. 29, 2006) (refusing to offset a back pay award by per diem expenses provided by complainant’s subsequent employer).

The ARB has found, however, that a truck driver’s per diem was compensation where the per diem was “clearly paid whenever [c]omplainant was driving for [the employer.]” *Maddin v. Transam Trucking, Inc.*, No. 13-031, 2014 WL 6850014 at *7 (ARB Nov. 24, 2014). In that case, the ARB upheld the ALJ’s analysis, which hinged on whether the per diem was “intended to offset expenses” or was “part of a driver’s compensation.” *Id.*

The analysis employed and approved by the ARB is reminiscent of the Fair Labor Standards Act (“FLSA”) per diem analysis. The FLSA analysis focuses on whether to consider per diems as “wages,” typically by looking at the manner in which the per diem is provided. Where the per diem is tied to the hours worked, it is likely a wage. *See Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33, 39 (1st Cir. 2014) (finding a per diem calculated based on the number of hours worked to be part of the wage); *Sharp v. CGG Land (U. S.) Inc.*, 840 F.3d 1211 (10th Cir. 2016) (same); *see also Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1042 (5th Cir. 2010).

In this case, the travel allowance provided by Respondent does not appear to be tied to wages. Specifically, Complainant stated he received a specific value monthly. Tr. at 96. There is no indication this amount of money was predicated on certain work hours, nor does the record show that the allowance changed based on time worked or overtime performed. This factor weighs in favor of finding the travel allowance an unrecoverable per diem.

Additionally, Complainant provides little clarification as to how he used his travel expenses, how travel expenses differed between members of the gang, and how the travel expenses were calculated. Without additional information, I cannot determine the true nature of Complainant's travel expenses. I simply lack sufficient evidence to make a ruling on that issue.

On this record, I find that Complainant has not established his entitlement to damages on this issue.

f. Lower Paying Position

Complainant asserts that his pay decreased by \$14,000 to \$16,000 when taking a new position off the S-1 gang. C. Br. at 11; Tr. at 100-102. Respondent contests this value, asserting that Complainant could have returned to a systems production gang in an equivalent capacity at equivalent pay. R. Br. at 45.

While an employee has a duty to mitigate damages caused by the adverse action, it is well established that the employer has the burden of establishing that a back-pay award should be reduced because an employee did not use reasonable diligence in attempting to secure such positions. *Rudolph v. Nat'l R.R. Passenger Corp.*, Nos. 14-053, 14-056, 2016 WL 2892923 at *8 (ARB Apr. 5, 2016) (internal citations omitted); *see also Coates v. Grand Trunk W. R.R. Co.*, No. 14-019, 2015 WL 4674628 at *3 (ARB July 17, 2015). In this case, Respondent has argued that nothing prevented Complainant from returning back to work on the S-1 gang (or another system production group), and that Complainant took a lower paying position because it was closer to his home. R. Br. at 45.

Respondent's arguments are unpersuasive. Respondent's argument that Complainant could just return to his previous gang, under the very managers who retaliated against him, is unreasonable. *See* Discussion Part II.C.1.c., *supra*. Moreover, Respondent provides no evidence as to which jobs on those gangs were available, and what pay the available positions provided. While Complainant admits that he would have been able to bump a less senior person, Tr. at 153, Respondent has not provided any information regarding positions manned by those less senior employees. Moreover, though Complainant has admitted that he hasn't made an effort to get a position similar to the one he had on the S-1 gang, Respondent has not provided any evidence showing that such positions were available to Complainant. Respondent has similarly failed to provide any evidence regarding the salaries of those positions.

Simply put, Complainant has established he could not return to his prior position, and Respondent has not shown that, with reasonable diligence, Complainant could have returned to a similar paying position. Respondent's mere assertion that such positions existed is insufficient.

Accordingly, Complainant has established he is entitled to damages for the money lost when returning to a lower paying position.

Complainant stated that he received \$70,000.00 for the year of 2013, and that he would have received roughly \$85,000.00 had he kept his old position. Tr. at 102. The pay records provided demonstrate variable average weekly earnings for Complainant. See CX 36 at 1-3. I find it most prudent to use Complainant's pre-removal wages to determine his yearly earnings. This value includes overtime and holiday payments, which were not included in the payments received by Complainant after his return to service. Compare CX 36 at 1-2 with *id.* at 3 (displaying no YTD change in overtime or holiday pay from June 23 through July 19, 2013).

Taking the YTD value and dividing it by the number of weeks for which Complainant was paid, I find that Complainant earned an on average \$1,633.18 per week.¹⁹ Extrapolating from this value, Complainant's earnings for 52 weeks would equal \$84,925.42.²⁰ I note, however, that Complainant would not work the whole year. RX 38 at 10 (noting employees would leave a project at the end of the year and then bid back onto a project in the beginning of the year). Accounting for this reduced work amount, I find that Complainant's average salary in his S-1 position was \$78,392.64 per year (discounting 4 weeks).²¹

There is no evidence in the record, beyond Complainant's statement, to establish Complainant's total 2013 job earnings. As such, I accept Complainant's testimony that he earned \$70,000.00 in 2013. Comparing this value to what he would have earned had he stayed on the S-1 gang, I find that Complainant is entitled to \$8,392.64 in lost wages.

g. Total Lost Pay and Benefits

Considering the foregoing, Complainant has established entitlement to \$10,667.74 in lost pay and benefits. However, this value is representative of the lost pay owed to Complainant in 2013. To properly compute damages in current dollars, Complainant must also receive interest on this amount. The Secretary has explained, and the ARB has confirmed, that interest on awards under the Act will be calculated according to the methodology for underpayments in 26 U.S.C. § 6621 (compounded daily). See *Laidler v. Grand Trunk W. R.R. Co.*, No. 15-087, 2017 WL 3953476 at *9-10 (ARB Aug. 3, 2017). Moreover, the regulations at 20 C.F.R. § 1982.109(d)(1) explain that such back pay will be compounded daily.

The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. See INTERNAL REVENUE SERVICE *Index of Applicable Federal Rates (AFR) Rulings*, <https://apps.irs.gov/app/picklist/list/federalRates.html>. These interest rates can vary significantly depending on the date. See *id.* (compare RR-2018-19 *Applicable Federal Rates* (July 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

¹⁹ In making this calculation, I relied on the YTD value.

²⁰ This is consistent with Complainant's valuation of his salary, which he based on a 2013 paystub. See Tr. 100-102.

²¹ Given Complainant's assertions regarding the yearly work patterns on a gang, I find that Complainant's tenure with the S-1 gang would have naturally ended at the end of December, before he restarted work in January. RX 38 at 10-11. To account for this break, I reduce Complainant's earnings by 4 weeks.

To compensate Complainant most accurately, I apply daily compound interest using the average rates for each year. While this result may not be perfectly accurate, it is a reasonable way to account for the fluctuations in the interest rate. Upon determining that value, I then round the rate to the nearest full percent. *See* 26 U.S.C. § 6621(b)(3). Starting from the date Complainant was taken off the S-1 gang, April 15, 2013, I find that Complainant is entitled to an additional \$2,838.79 in interest.

In total (including interest), Complainant is entitled to \$13,506.53 in lost pay and benefits.

2. Emotional Distress Damages

Complainant seeks \$75,000 in emotional damages. *See* C. Br. at 25. He argues:

[Complainant] was subjected not only to losing friends, along [sic] suspension, and the prospect of losing his job forever, but due to the actions of the CSX managers in generating the false picture of violent threats, he also had to endure a police interview, the humiliation of his firing in front of the crew, being drug over 500 miles before he was sent home, the EAP program which included a psychological evaluation and drug test, and suffering through sham inspections . . . and finding out when his daughter needed emergency room care[] that his medical insurance had been cancelled.

Id. Respondent contests this characterization, noting that Complainant bears the burden of establishing emotional distress, and that mere assertions of distress are insufficient to meet this burden. R. Br. at 46.

To recover damages for mental suffering or emotional anguish, a complainant “must show by a preponderance of the evidence that the unfavorable personnel action caused [such] harm.” *Testa v. Consol. Edison Co. of N.Y.*, No. 08-029, 2010 WL 1260206 at *10 (ARB Mar. 19, 2010); *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986) (noting a party may “recover compensatory damages only if he proved actual injury”); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 723 (8th Cir. 2017) (noting a claim for emotional distress damages must be supported by competent evidence of genuine injury). Upon review of the record, I find that Complainant has provided evidence, via credible testimony, of some emotional anguish.

However, Complainant’s request for damages is excessive. As an initial matter, there is no evidence in the record to suggest Complainant suffered severe emotional distress. He continued to work for Respondent, albeit in another capacity, without any allegations of severe emotional damages. He does not state that he visited a therapist of any sort, or that he believed such action was required. Moreover, Complainant states that, while he is still called a “rat” for his complaints, he is still able to work despite this name calling. Tr. at 103-04.

Nevertheless, the record demonstrates that Complainant was placed in emotionally distressing situations. Complainant was paraded in front of his coworkers and removed in a highly public and humiliating manner. Tr. at 78-80; CX 40 at 77-80. He was not informed that

his health insurance had been stopped, causing him embarrassment when he attempted to take his daughter to receive treatment at the hospital. Tr. at 98-100. Complainant was (and still is) subjected to name calling. *See id.* at 103-106; CX 40 at 63, 74-75. Complainant was also forced to get a psychological evaluation due to the false allegations of threatening statements, and he was forced to get a drug test. Tr. at 88-90, 545-47.

Given the evidence provided, I find that Complainant is entitled to emotional distress damages. However, the damages Complainant suffered do not warrant the \$75,000 requested. While Complainant clearly suffered distress, it was not of sufficient magnitude to dissuade him from working for Respondent. Complainant has also failed to provide any evidence to support a finding of lasting emotional damage from his experience. Accordingly, I find that the emotional strain caused by Complainant's public removal from service, name calling, embarrassment regarding health insurance, psychological evaluation, and drug testing warrants \$3,500 in compensatory emotional distress damages.

3. Punitive Damages

Under certain circumstances, the Act permits an ALJ to award punitive damages to an aggrieved Complainant. 49 U.S.C. § 20109(e)(3); 29 C.F.R. § 1982.109(d)(1). Punitive damages are warranted where there has been a callous or reckless disregard of the Complainant's rights or intentional violations of federal law. *Beatty v. Celadon Trucking Servs., Inc.*, Nos. 15-085, 15-086, 2017 WL 6572143 at *8 (ARB Dec. 8, 2017); *Smith v. Wade*, 461 U.S. 30, 51 (1983) (*citing Adickes v. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting)). "The inquiry into whether punitive damages are warranted focuses on the employer's state of mind and does not necessarily require that the misconduct be egregious." *Carter v. BNSF Ry. Co.*, Nos. 14-089, 15-016, 15-022, 2016 WL 4238480 at *4 (ARB June 21, 2016).

In this case, the record establishes that Respondent meets those thresholds. *Ab initio*, Respondent's ethics system was flawed. Employees believed that information provided to the ethics line did not remain confidential, and that callers' identities would be leaked to managers. *See* CX 40 at 35-36, 41-44. Moreover, its audit system was plainly ineffective, as managers tipped off the S-1 gang prior to the audits. *See* CX 37 at 27. Complainant's identity was also quickly exposed; even the highest level managers learned his identity by April 1, 2013. *See* CX 17. Mr. Preece, who went through the railroad police first and specifically stated that he wanted to stay anonymous, was not exposed. *See* JX 3.

Respondent's investigation was also suspect and woefully inadequate. Respondent's managers did not authorize (and specifically disallowed) searches of personal belongings during the audits. *See* Tr. at 386. However, such searches are not forbidden by the BMW collective bargaining agreement. *Id.* at 561. The warnings and limited searches demonstrate that Respondent's managers stymied the effectiveness of the drug audits, despite the severe safety threat that such drug use could pose.

The behavior of Respondent's managers also establishes a deliberate effort to retaliate against Complainant in violation of the Act. Upon learning of the ethics call, Mr. Brigman and

Mr. Rhodes endeavored to find information to use against Complainant, even going so far as to solicit statements from other employees. *See* Discussion Part II.3.a, *supra*. This further demonstrates the attempts by Respondent's management to punish and discourage reporting of dangerous workplace conditions. While I did not find that all of Respondent's managers engaged in such activity, the ability of a cadre of managers to deliberately undermine Respondent's safety reporting system is unacceptable.

Moreover, the testimony of Mr. Barfield, Mr. Preece, and Complainant provides a troubling look at the culture among some of the Respondent's employees. It is clear that these employees actively discouraged "snitching," *i.e.* reporting the unsafe activity of their coworkers. *See* Tr. at 10-06, 198-99; CX 40 at 94-97, 110 (specifically noting the tension between "want[ing] to protect your brother" and reporting drug use; "[i]t is a fine line you have to kind of walk."). This culture, coupled with the actions of Respondent's managers, created an environment on the system gangs where it was more dangerous to one's employment to report a violation of company policy and federal law than it was actually to perform the forbidden activity.

Given these circumstances, I find that the behavior of certain of Respondent's managers consisted of intentional violations of company policy and amounted to a reckless disregard for Complainant's rights, and consisted of intentional violations of company policy and federal law. As such, Complainant is entitled to punitive damages.

In evaluating and applying punitive damage awards, the Supreme Court has provided guideposts that courts must apply, lest the punished party be denied due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003). The three guideposts to consider are: 1) the degree of reprehensibility of the defendant's misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;²² and 3) the difference between the punitive damages awarded . . . and the civil penalties authorized or imposed in comparable cases. *Id.* at 418 (*citing BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). The Supreme Court has specifically noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Id.* at 425.²³ Moreover, Congress specifically limited punitive damages under the Act to a maximum penalty of \$250,000.00. *See* 49 U.S.C. § 20109(e)(3).

Applying the first guidepost, I find that the behavior of certain of Respondent's managers shows a significant degree of reprehensibility. Essentially, these managers framed a person for misconduct in order to discredit, retaliate, and silence his complaints. *See* Discussion Part II.3, *supra*. Though the overall attempt to remove Complainant permanently from Respondent's employ failed, the actions of these managers undermined Respondent's ability to uncover illicit

²² This value is often represented as the ratio of punitive damages to other damages. *See State Farm*, 548 U.S. at 424-25.

²³ Some circuits have rejected strict applications of the *State Farm* proportionality guidepost in Title VII contexts. *See, e.g., Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) ("[the] ratio analysis has little applicability in the Title VII context . . ."). The extent to which this relaxed interpretation applies to whistleblower laws is unclear, as a stricter application of the guideposts was suggested by the 10th Circuit recently. *See BNSF Ry. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 644 (10th Cir. 2016).

drug use. Given the potential threat posed by an intoxicated individual operating rail equipment, this outcome is deeply troubling. Accordingly, this guidepost supports substantial penalties.

The second guidepost concerns itself with the harm suffered by Complainant. Overall, the harm was largely mitigated by Respondent's internal hearing process. While Complainant was certainly harmed, see Discussion Part II.C.1-2, *supra*, the harm was relatively minor. Accordingly, the degree of harm suffered by the Complainant does not support awarding substantial penalties.

The final guidepost requires comparison of this matter to similar cases. This is a somewhat difficult task, given the relative uniqueness of the circumstances in this matter. However, looking at a spectrum of cases provides some insight to the pattern of punitive damages awarded in FRSA matters. I provide brief summaries of some example cases below:

- The ARB approved \$50,000.00 in punitive damages in a case where a complainant was retaliated against due to his allegation of workplace injury. *Carter*, 2016 WL 4238480 at *2, 5. Employer retaliated against the complainant by conducting an investigative hearing and firing him. *Id.* at *2. The back pay award, however, covered a period of some five years and was a significant amount. *Id.* at *2-3.
- The ARB approved a punitive damage award of \$25,000.00 despite only \$906.00 in other damages. *D'Hooge v. BNSF Ry. Co.*, Nos. 15-042, 15-066, 2017 WL 1968504 at *9 (ARB Apr. 25, 2017). Complainant in this matter was retaliated against for reporting a safety hazard, which resulted in Respondent terminating the job he was working on (though he had the option to re-bid onto another job). *Id.* at *8. The ARB upheld the punitive damages amount, specifically noting that the value was required to deter Respondent from repeating the misconduct. *Id.* at *9.
- The ARB approved a \$1,000.00 award of punitive damages where an employer threatened discipline against a complainant who filed an injury report. *Vernace v. Port Authority Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 (ARB Dec. 21, 2012). Complainant received damages of two days of back pay. *Id.* at *2.

These example cases do not mesh well with the circumstances of this case. However, they provide a scale of ratios (with one, *Carter*, having a less than 1 to 1 ratio, and another, *D'Hooge*, having a 25 to 1 ratio), and they establish that punitive damages in most FRSA cases are highly fact dependent. On review of multiple FRSA decisions, I uncovered no factual patterns significantly on point.

Considering the guideposts, I find that this matter warrants \$150,000 in punitive damages, resulting in a roughly 9 to 1 ratio of damages to punitive damages.²⁴ This case is not sufficiently egregious to warrant punitive damages whose ratio to damages exceeds 10. Though the actions of certain of Respondent's managers were reprehensible, the portions of Respondent's management chain that were not involved in the wrongful actions successfully

²⁴ The constitutionality and sufficiency of punitive damages is not marked "by a simple mathematical formula," *State Farm*, 538 at 424-25. However, I find the ratio of damages to punitive damages a helpful tool.

mitigated much of the damage. Complainant suffered removal, but he was at least still able to remain employed and the false allegations raised against him were removed from his record. Moreover, the managers involved in the misconduct were relatively low level, and upper level managers and human resource specialists appear to have approached this matter properly.

That said, Respondent's ethics line, its audit practice, and its managerial oversight were severely lacking. The ethics line and audit practice particularly cause me pause; they are the first line of defense to counter misconduct. Their failure causes the entire system, regardless of its intentions, to fail. This warrants the relatively high punitive damages to damages ratio of 9 to 1.

Additionally, Respondent is a large railroad company, with operations all along the East Coast. *See, e.g.*, RX 38 at 17 (noting that the S-1 gang starts in the south and moves up the East Coast all year maintaining Respondent's railroad tracks). Given the egregious conduct of certain of Respondent's managers, the punitive damages must be significant to have any deterrent effect. I believe \$150,000 in punitive damages is necessary to deter further misconduct.

Accordingly, Complainant is entitled to \$150,000.00 in punitive damages.

4. Total Damages

Summing Complainant's compensatory and punitive damages, I find that Complainant is entitled to \$167,006.53 in total damages.

D. Attorney's Fees

Complainant is entitled to reasonable costs, expenses, and attorney fees incurred with the prosecution of his complaint. *See* 49 U.S.C. § 20109(e)(2)(c). Counsel for Complainant has not submitted a fee petition in this matter. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses (stating the work performed, the time spent on such work, and the reasonable basis for counsel's rate). Complainant's counsel is granted 30 days from the issuance of this order to provide a fee application, and Respondent is granted 30 days thereafter to file an objection (should it be warranted).

Conclusion

Considering the foregoing and on review of the entire record, I find as follows. By a preponderance of the evidence, I find that Complainant engaged in protected activity when he called the ethics hotline to report drug use. Discussion Part II.A.1, *supra*. By a preponderance of the evidence, I find that Complainant suffered an adverse personnel action; he was suspended from his position, temporarily lost benefits, and threatened with discipline. *Id.* Part II.A.2. By a preponderance of the evidence, I find that Complainant's protected activity was a contributing factor to the adverse action. *Id.* Part II.A.3. Moreover, I find that the record does not establish by clear and convincing evidence that Respondent would have taken the same adverse personnel action against Complainant in the absence of the protected activity. *Id.* Part II.B. Thus, Complainant's claim succeeds.

ORDER

Based on the foregoing:

1. Respondent shall pay Complainant \$13,506.53 in lost pay and benefits;
2. Respondent shall pay Complainant \$3,500.00 in emotional distress damages;
3. Respondent shall pay Complainant \$150,000.00 in punitive damages;
4. Complainant is granted 30 days from the date of issuance of this order to submit an application for attorney's fees; and
5. Respondent is granted 30 days thereafter to file an objection to the fee application.

SO ORDERED.

PAUL R. ALMANZA

Associate Chief 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.

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

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