

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 16 October 2015**

**Case Number: 2014-FRS-00044**

*In the Matter of*

**MARK RILEY,  
Complainant**

v.

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORP.  
d/b/a CANADIAN PACIFIC  
Respondent**

Appearances:

Jerry Easley, Esq.  
Pearland, Texas  
For the Complainant

Tara Duginske, Esq.  
Minneapolis, Minnesota  
For the Respondent

Before: Stephen R. Henley  
Administrative Law Judge

**DECISION AND ORDER**

**I. PROCEDURAL BACKGROUND**

This matter arises out of a claim filed under the employee protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No.

110-53, 121 Stat. 266, 444-48 (2007), and Section 419 of the Rail Safety Improvement Act of 2008 (“RSIA”), Pub. L. No. 110-432, 122 Stat. 4848, 4892-93 (2008).

On September 5, 2012, Mark Riley (“Complainant” or “Mr. Riley”) filed a formal complaint with the U.S. Department of Labor (“DoL”), Occupational Safety and Health Administration (“OSHA”), under Section 402 of the FRSA, alleging that his employer, Dakota, Minnesota & Eastern Railroad Corp. d/b/a Canadian Pacific (“Respondent” or “CP”) retaliated against him for reporting an on-the-job injury by suspending him without pay for forty-seven days. After conducting an investigation, the Secretary of Labor, acting through the Acting Regional Administrator, Region VII, Kansas City, Missouri, issued a final determination letter dated November 27, 2013, dismissing the complaint (ALJX1).<sup>1</sup>

By letter dated February 4, 2014, Complainant filed objections to the Secretary’s Findings with the Office of Administrative Law Judges (“Office” or “OALJ”); (ALJX 2). On August 7, 2014, after being assigned to the case and issuing three pre-hearing orders (ALJX 4, 5, and 6), I convened a formal hearing at the United States Federal Courthouse in Cedar Rapids, Iowa, at which both parties were afforded a full and fair opportunity to present evidence and argument. At the hearing, Complainant offered twenty-three exhibits, CX 1-23, all of which were accepted into evidence. (Tr. 6). I also accepted into evidence six exhibits offered by Respondent, RX 2, 4, 7, 9-11, and 16. (Tr. 164). Four witnesses testified at the hearing: Complainant; Jeremiah Christensen, Complainant’s trainmaster and immediate supervisor for the relevant period; Michael Morris, the hearing officer for the railroad’s formal investigation; and Brian Scudes, the labor relations manager who manages the Collective Bargaining Agreement at issue in this case. The record remained open for the submission of post-hearing briefs, which were subsequently received from both parties. In addition to back pay, Complainant also seeks \$15,000.00 in compensatory damages for mental anguish; attorney’s fees and litigation expenses; and \$250,000.00 in punitive damages. (Compl. Post-Hearing Brief at 8-10.)

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and evidence submitted, applicable statutory provisions, regulations, and pertinent precedent. Although I do not discuss below every exhibit in the record, I carefully considered all the testimony and exhibits in reaching my decision.

As will be explained in greater detail, I find Complainant has established that CP retaliated against him for engaging in a protected activity under the Act. Consequently, the claim for damages filed under the employee protection provisions of the FRSA is granted, in part.

## II. JURISDICTION

Any party who desires review of the findings and preliminary order must file any objections or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order. The objections and request for a hearing must be in writing and state whether

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<sup>1</sup> The following references will be used: “Tr.” for the official hearing transcript; “CX” for a Complainant’s exhibit; “RX” for a Respondent’s exhibit; and “ALJX” for an Administrative Law Judge’s exhibit.

the objections are to the findings or the preliminary order. Objections must be filed with this Office and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. 29 C.F.R. § 1982.106(a). Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will conduct a de novo hearing on the record and subsequently issue a decision in the matter. 29 C.F.R. § 1982.107(b), 1982.109.

Respondent asserts that this Office does not have jurisdiction over this matter, as the Railway Labor Act (“RLA”) provides the exclusive remedy for Mr. Riley’s claim. Respondent, however, fails to cite to binding authority that would support the contention that the RLA preempts this FRSA claim. *See* Resp. Post-Hearing Brief at 12-13 (citing *Monroe v. Mo. Pac. R.R. Co.*, 115 F. 3d 514, 518 (7th Cir.1997) (holding that a Federal Employer’s Liability Act claim was preempted by the RLA); *Bielicke v. Terminal Ass’n*, 30 F.3d 877, 878 (7th Cir. 1994) (same)); *Fry v. Airline Pilots Ass’n Int’l*, 88 F.3d 831, 836 (10th Cir . 1996) (addressing RLA preemption of state tort law claims) (“The mere fact that [plaintiffs] might be able to grieve [employers’] conduct under procedures provided in the collective bargaining agreement is not sufficient in itself to conclude that [plaintiffs’] tort claims are preempted.”).

It is well established that a rail carrier employee may pursue arbitration of his rights under a collective bargaining agreement and simultaneously seek whistleblower protection under FRSA, as Complainant has done here. *See, e.g., Ratledge v. Norfolk Southern Railway Co.*, No. 12-CV-402, 2013WL 3872793 (E.D. Tenn. July 25, 2013) (the election of remedies provision at § 20109(f) does not precludes a rail carrier employee from simultaneously pursuing arbitration of his rights under a collective bargaining agreement and seeking whistleblower protection under the FRSA).

Further, the ARB has consistently taken the position that the FRSA’s election of remedies provision, 49 U.S.C. § 20109(f), is not triggered by an employee pursuing arbitration under a collective bargaining agreement (“CBA”) because a CBA is a private contract and not another provision of law. *See Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 106, ALJ No. 2011-FRS-22 (ARB Jan. 28, 2014) (Section 20109(f) does not encompass grievances filed pursuant to a CBA); *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, 121, ALJ Nos. 2008-FRS-3,4 (ARB Sept. 29, 2011) (election of remedies provision does not bar an FRSA whistleblower claim because of a previously filed or pending collective bargaining grievance). *See also Norfolk S. Ry. Co. v. Solis*, 915 F. Supp. 2d 32, 41-46 (D.D.C. 2013) (an appeal of the ARB’s *Mercier* decision supporting deference to the Department of Labor’s interpretation). Additionally, the Public Law Board (“PLB”) may only hear disputes arising out of the interpretation of the CBA, which does not include retaliation claims under the FRSA. In other words, as Mr. Riley did not have the opportunity to litigate the same issues before the PLB, I will not defer to the grievance arbitration under the CBA. *See also Koger v. Norfolk S. Ry. Co.*, No. 13-CV-12030, 2014 WL 2778793 (S.D. W. Va. June 19, 2014) (Section 20109(f) FRSA election of remedies provision does not bar an FRSA complaint where Plaintiff had already challenged his termination under the RLA); *Reed v. Norfolk S. Ry. Co.*, 740 F.3d 420, 425 (7th Cir. 2014) (appealing grievance to special adjustment board is seeking protection under collective bargaining agreement rather than seeking protection under the RLA); *Pfeifer v. Union Pac. R.R. Co.*, No. 12-cv-2485-JAR-JPO,

2014 U.S. Dist. LEXIS 78675, at \*14-16 (D. Kan. filed June 9, 2014) (Court rejected contention that FRSA action barred when Complainant appeals a suspension to the PLB because it is the union and not the Complainant who seeks this protection, and the protection sought is not under the RLA, but rather under a CBA). Finally, if an employee can seek protection under both the FRSA and a collective bargaining agreement and not violate the election of remedies provision, then it stands to reason that Mr. Riley is not bound by findings made by the PLB pursuant to an interpretation of a CBA.

As Complainant's claim also fulfills the requirements that grant this Office jurisdiction under 29 C.F.R. Part 1982, I find that this Office does have jurisdiction to issue a decision in this matter.

### III. APPLICABLE LAW

FRSA provides that a rail carrier may not retaliate against an employee for engaging in certain protected activities, including reporting a work-related personal injury and reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109. FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a "contributing factor" motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity,<sup>2</sup> Complainant suffered an unfavorable personnel action,<sup>3</sup> and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under the FRSA, Mr. Riley must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) CP knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such

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<sup>2</sup> Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly indicated that there are only three essential elements of an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis. *See, e.g., Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013).

<sup>3</sup> An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

protected activity was a contributing factor in the unfavorable personnel action. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).<sup>4</sup> The regulations governing cases brought under the FRSA are found at 29 C.F.R. Part 1982, and incorporate the General Rules of Practice and Procedure before the OALJ, which are found at 29 C.F.R. Part 18.

#### IV. ISSUES PRESENTED

The parties have stipulated that Complainant is an employee within the meaning of the Act, and that Respondent was and is a railroad carrier engaged in interstate or foreign commerce within the meaning of FRSA. (JX1). I find that the record supports these stipulations. Therefore, the issues that remain for adjudication are as follows:

1. Did Complainant engage in a protected activity when he reported to his supervisor on July 5, 2012 that he had been physically assaulted by a co-worker?
2. If so, did he suffer an adverse employment action when Respondent pulled him out of service without pay; formally investigated him; and issued discipline against him for late reporting?
3. If so, has Complainant proven by a preponderance of the evidence that his protected activity contributed, in part, to Respondent’s decision to take adverse action against him, i.e. was the protected activity a factor which, alone or in connection with other factors, tended to affect in any way the outcome of its decision?
4. If so, has Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity?
5. If not, what are the appropriate compensatory damages, costs and expenses and what further relief, if any, is appropriate?

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<sup>4</sup> In *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir.1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). See also *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011), at 31-32 ; see also *Kudak v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (“[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

## V. CONTENTIONS OF THE PARTIES

Complainant. Complainant contends that on July 5, 2012, his coworker, Mr. Jonathan Bollman, attacked him while both men were on duty as locomotive engineers for CP. The attack occurred on board a train, while the two were working in close proximity to one another bringing the train into the yard. Without provocation, Mr. Bollman punched Complainant in the head and struck him in the chest with a lantern. Complainant did not feel safe or comfortable reporting the attack while he was still in such close proximity to Mr. Bollman; therefore, he did not call in the details of the attack until returning to his hotel room and clocking out of his shift. Thereafter, Complainant attempted to call his supervisor, but his calls went unanswered.

Later that morning and over the course of the day, Complainant made multiple reports of the attack and the resulting bruise on his chest. During these conversations, CP supervisors did not alert Complainant to any potential issue with untimely reporting. Complainant asserts that as a result of these reports, CP removed Complainant from service without pay for 47 days; noticed him for a formal investigation; held a formal investigation; and found him guilty of late reporting. While placed back in service, Complainant contends that he is entitled to back pay, damages for emotional distress, and punitive damages.

Respondent. Respondent contends that Mr. Riley had previously been fired from CP for submitting a visitor's badge on which he had written a fake Arabic name and noted that the badge was valid "after the explosions." Mr. Riley was subsequently reinstated pursuant to a "last chance agreement," under which Mr. Riley was to be considered to be at the final step of the discipline process. On July 5, while Mr. Riley was working with Mr. Bollman, Mr. Bollman entered the train and struck Mr. Riley with a lantern and with his fist. Mr. Riley did not report the incident to anyone at that time, but instead continued to work until his shift was completed at approximately 4:25 a.m. Mr. Riley did not contact anyone at CP to report the incident until approximately 11:00 a.m. or 12:00 p.m.

After Mr. Riley reported the attack, both he and Mr. Bollman submitted written accounts of the night's events. Mr. Bollman asserted that Mr. Riley had provoked the attack by yelling insults and expletives at him. Considering the two different accounts of the night, both Mr. Riley and Mr. Bollman were held out of service from July 5 to July 16, 2012, at which point the formal hearing took place. Following the issuance of discipline letters on August 21, 2012, Mr. Riley was placed back in service.

Respondent further contends that the Collective Bargaining Agreement (CBA) allows for an engineer to be held out of service pending the results of a formal hearing. The CBA also contains procedures and requirements for how a formal hearing is carried out. The hearing officer in Mr. Riley's case recommended that Mr. Riley be terminated for violations of the general code of operating rules, business code of ethics, and safety rules. The hearing officer's reasoning was that timely reporting was of utmost importance to the safe resolution of disputes. The hearing officer also took into consideration the two men's written statements and their respective discipline histories, including Mr. Riley's prior termination. Despite the hearing officer's recommendation, CP allowed Mr. Riley to remain an employee, and the time he had been held out of service was considered his formal discipline for failing to promptly report.

Respondent therefore contends that Mr. Riley's report of the attack had no bearing on its decision to discipline him.

## VI. SUMMARY OF THE EVIDENCE<sup>5</sup>

### Complainant – Mark Riley (Tr. 7-85).

Mr. Riley testified that he was hired by Canadian Pacific's predecessor railroad on July 7, 2007 as a switchman, and that he was later promoted to locomotive engineer. (Tr. 8.) On July 4, 2012 at 5:00 p.m., Mr. Riley reported for duty in Dubuque, Iowa, where he was to serve as a locomotive engineer on a loaded ethanol train traveling to Chicago, Illinois. (Tr. 9.) Mr. Riley was assigned to work with Jonathan Bollman, who was to serve as assistant locomotive engineer. The trip was "pretty much routine," and the train arrived in Chicago at 2:00 a.m. on July 5, 2012.

Mr. Riley detailed that, upon the train's arrival in Chicago, Mr. Bollman got angry at a work request Mr. Riley asked him to perform. (Tr. 10.) Without provocation, Mr. Bollman entered the car where Mr. Riley was seated, struck him with a railroad lantern "like a mace," punched him in the top of his face, and knocked him to the ground. Mr. Bollman pinned Mr. Riley to the ground. (Tr. 11.) When Mr. Bollman released Mr. Riley, Mr. Bollman asked him to hand back his lantern, to which Mr. Riley responded that Mr. Bollman should try to get control of himself so they could get the train back into the yard. Mr. Bollman continued to hover over Mr. Riley in a menacing way, but he did not take any further action.

After the attack, the two men proceeded to bring the train into the yard as instructed by the general in the yard. (Tr. 12.) This required Mr. Riley and Mr. Bollman to remain in close proximity as they completed the job over the course of five to ten minutes, and then as they took a cab together to their hotel. (Tr. 12, 35.) Mr. Riley indicated that he did not want to antagonize Mr. Bollman by getting on the radio to report the attack. (Tr. 12.) Mr. Riley indicated that the radio was on the other side of the control panel from where he had been sitting, and that while there were times when Mr. Bollman had to get out of the cab as they brought the train into the yard, Mr. Riley believed Mr. Bollman would have heard if he had used the radio to call in the incident. (Tr. 35.) Mr. Riley clarified on cross-examination that the general had been in radio communication with the train crew to provide instructions on bringing the train into the yard; however, Mr. Riley was uncertain as to whether this communication occurred before or after the attack. (Tr. 42.)

At the hotel, both men clocked out of their on-duty time on designated computers in the hotel lobby. (Tr. 13.) Mr. Bollman did not say anything further to Mr. Riley, but he did stand over Mr. Riley the whole time. Mr. Riley estimated that they clocked out at 4:25 a.m., which made for 11 hours and 25 minutes of total on-duty time. (Tr. 14.) Mr. Riley explained that the Federal Railroad Administration has an "hours of service" rule that limits a railroad worker to a maximum of 12 hours on duty time, and that once a worker clocks out of their duty time, he must have 10 hours uninterrupted off-duty time.

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<sup>5</sup> The summary of the evidence is not intended to be an exhaustive analysis of each exhibit or a verbatim transcript of the hearing but merely to highlight certain relevant portions.

Once the men clocked out, they parted ways and went to their respective hotel rooms. Mr. Riley tried to call Brandon Pregler or Jeremiah Christensen, his immediate supervisors, but his call went unanswered. (Tr. 15.) Mr. Riley was not sure who the on-duty supervisor was at that time, so he sent a text message to a “fellow railroader” that Mr. Bollman had assaulted him. Mr. Riley sat down to wait until an appropriate hour when people would be awake, and he proceeded to fall asleep.

Mr. Riley testified that ordinarily, he would expect to also work with Mr. Bollman on the return trip to Dubuque from Chicago. However, sometime between 10:00 a.m. and 11:00 a.m. on July 5, Mr. Riley was able to get a hold of Jeremiah Christensen on the telephone, at which point he let Mr. Christensen know about the attack and said he did not want to work with Mr. Bollman. (Tr. 16.) Mr. Christensen indicated that Mr. Bollman had a history of “being a bully and being violent with other employees” and asked Mr. Riley to make an official report. Mr. Riley was hesitant to report Mr. Bollman because he had a baby on the way. (Tr. 17.)

Mr. Riley then called friends he had in the railroad pool (Zack Brinmeyer and Morgan Brinmeyer), his wife, and his brother to ask for advice. (Tr. 17, 48.) After receiving more encouragement to report Mr. Bollman’s actions, he called Mr. Christensen back to make a formal complaint. (Tr. 18.) He informed Mr. Christensen that he had a bruise on his chest as a result of the attack. Mr. Christensen let him know that Mr. Riley and Mr. Bollman would be returning separately to Dubuque, and that once Mr. Riley had returned he should fill out a written statement. Mr. Riley proceeded to write out the events as he remembered them. Mr. Riley indicated that this written description likely captured the “freshest details of what happened.” (Tr. 33.)

Mr. Riley returned to Dubuque and met with Mr. Christensen as well as Dustin Heichel, the supervisor who was in charge of the training and certification of locomotive engineers. (Tr. 19.) Mr. Riley provided his written statement to these two men, spoke with them about the attack by Mr. Bollman, and showed them the bruise on his chest that resulted from the attack. Mr. Heichel took a picture of the bruise. Neither Mr. Heichel nor Mr. Christensen made mention of Mr. Riley’s report being untimely or otherwise in violation of a CP rule, policy, or procedure. (Tr. 20.)

Around ten or eleven hours after this meeting, which was the amount of time he had to be off-duty per the hours of service rule, Mr. Riley called in to the automated voice system that notifies CP employees where and when their next shift will be. (Tr. 21.) The system notified Mr. Riley that he was off-duty. Mr. Riley called again a day later and was again told he was off. At this point Mr. Riley called Mr. Christensen, who indicated that CP was “just making sure everything’s good before they put [Mr. Riley] back to work.”

After approximately three days, one of Mr. Riley’s supervisors called to inform him that Mr. Bollman had filed a counterclaim against him, asserting that Mr. Riley had called him a series of offensive names. (Tr. 21, 63.) The effect of this counterclaim was that Mr. Riley’s behavior on July 5, 2012 was to be formally investigated to “ascertain the facts and determine [Mr. Riley’s] responsibility, if any, in connection with [his] alleged involvement in a physical altercation.” (Tr. 22, 51.) Mr. Riley described these formal investigations as “the Salem Witch Trials,” and characterized the process as one that the railroad controls from start to finish. (Tr.

23.) Mr. Riley then called his supervisors and asked for a meeting with Superintendent Steve Cork. (Tr. 24.) This meeting was rescheduled a few times, but never took place.

A formal investigatory hearing took place on July 16, at which Mr. Riley was not represented by the union, but by a fellow railroad employee. (Tr. 25.) At the hearing, Mr. Riley detailed his point of view of what took place on July 5, 2012. (Tr. 57-60.) Mr. Bollman also spoke, though he did not repeat his assertion that Mr. Riley had called him names that night. (Tr. 64-65.) 47 days after the hearing, Mr. Riley received a discipline letter notifying him that the company should have fired him but had chosen not to; instead, the time he had been held out of service without pay would be considered his punishment. (Tr. 26, 27.) The letter detailed that Mr. Riley had been charged with a physical altercation and failure to properly report the incident, but that he had only been found guilty of failing to properly report. (Tr. 26.)

On cross-examination, Mr. Riley described a meeting he had with Mark Johnson, Mr. Riley's local union representative, and Mr. Bollman prior to the formal hearing. (Tr. 53.) Mr. Riley brought his friend and co-worker, Zack Brinmeyer, to represent him at this meeting. At the meeting, Mr. Johnson indicated that the union had chosen to represent Mr. Bollman because he was "the more at-risk employee." Mr. Riley testified that Mr. Johnson "basically chastised [Mr. Riley] for reporting the incident, and that Mr. Johnson suggested that both Mr. Riley and Mr. Bollman change their original statements in order to save their jobs. (Tr. 54-56.) Mr. Riley indicated that he and Mr. Brinmeyer "listened to [Mr. Johnson] politely and then went our ways scratching our head." (Tr. 56.)

Mr. Riley also testified as to the details of the "last chance agreement" under which he was employed prior to the incident on July 5, 2012. (Tr. 30, 66-77.) In February 2010, Mr. Riley was dismissed from service for inappropriate conduct and then returned to service in November 2010 under a last chance agreement. (Tr. 66.) The cited inappropriate conduct involved a security badge that Mr. Riley left at a coal power generation station while on duty for CP. (Tr. 69-70.) While on station property, Mr. Riley wrote an Arabic name on a security badge, listed the country of origin as Yemen, and wrote that the expiration date for the badge was "after the explosions." (Tr. 70.) Mr. Riley then inadvertently turned the badge in to the station. (Tr. 71.) An FBI investigation and a formal investigation with CP followed, which resulted in Mr. Riley's termination. Mr. Riley worked with union representation to be reinstated, this time under the terms of a "leniency reinstatement agreement," or last chance agreement, which stated that, Mr. Riley was to be considered at the final step of CP's progressive discipline process. (Tr. 74.) Mr. Riley testified that, at the time he signed the agreement, he did not understand that its terms would last in perpetuity. (Tr. 76.)

As a result of the formal investigation and findings, CP suspended Mr. Riley from service without pay for 47 days. (Tr. 77, 78.) Mr. Riley lost \$11,000 in wages during the time he was held out of service; \$262 per day for the days he did not work while he was deposed and for the hearing before OALJ; as well as travel and lodging expenses. (Tr. 27-29.) Upon his return to work, Mr. Riley also had to endure catcalls and negative remarks from coworkers. (Tr. 29.)

Jeremiah Christensen (Tr. 86-113).

Mr. Christensen has been employed by CP and its subsidiaries for about ten years. (Tr. 87.) During the past five years he has worked as a trainmaster, which is a management position over conductors and engineers. On July 5, 2012, Mr. Christensen received two calls from Mr. Riley concerning the incident with Mr. Bollman. (Tr. 87, 88.) He did not inform Mr. Riley that CP rules mandated timely report of that incident, though he did encourage Mr. Riley to make an official report. (Tr. 88.) Mr. Christensen then called his supervisor, Steve Cork to inform him of the situation. Mr. Cork did not make mention of potential discipline for untimely reporting. (Tr. 89.) Mr. Riley called a second time to inform Mr. Christensen that he would like to move forward with an official report of the incident. Mr. Christensen sent an email detailing Mr. Riley's report on July 5<sup>th</sup> at 4:44 p.m. (Tr. 90.)

Mr. Christensen confirmed that the Federal Railroad Administration requires employees to be provided with 10 hours of uninterrupted rest time after going off duty. (Tr. 90.) The same rule prohibits the railroad from compelling an employee to do anything during the rest period, including filling out an incident report. Because of this, Mr. Christensen waited for Mr. Riley to call him back.

Once Mr. Riley had returned to Dubuque, he provided Mr. Christensen and Mr. Heichel with a third report of what had happened and showed them the bruise on his chest. (Tr. 92, 109.) Neither Mr. Christensen nor Mr. Heichel stated that Mr. Riley had violated a rule regarding untimely reporting. There was also no discussion of a rule violation on Mr. Riley's part when Mr. Christensen spoke with Mr. Cork later that day. (Tr. 93.)

Mr. Christensen and Mr. Heichel subsequently met with Mr. Bollman, with whom they raised Mr. Riley's allegations. (Tr. 94.) Mr. Bollman initially "played dumb" as to the incident, but after Mr. Christensen asked him specifically about the assault, Mr. Bollman provided more information. Mr. Bollman also provided a written statement, which stated that he and Mr. Riley had been "ribbing each other" on July 5<sup>th</sup>. (Tr. 98; RX 4.) The statement further detailed that Mr. Riley had been leaning out the window of the train and yelling a number of expletives at Mr. Bollman, and that Mr. Bollman had not entered the train cab with the goal of causing bodily harm to Mr. Riley. (Tr. 99.)

Mr. Christensen testified as to his belief that Mr. Riley had not done anything wrong in the manner or timing of reporting his injury of Mr. Bollman's attack. (Tr. 96.) He also stated that he was "shocked" to hear of the results of the formal investigation, though he recognized that CP rules require employees to report all injuries. (Tr. 96, 109-111.) He acknowledged that, given the two different accounts of what took place on July 5<sup>th</sup>, it was part of his job as a manager to investigate and determine what actually occurred. (Tr. 101, 102.) Mr. Christensen further clarified that he was not the final decision-maker regarding punishments in this matter. (Tr. 106, 107.)

Michael Morris (Tr. 113-162).

Mr. Morris is employed by CP as a trainmaster and supervises 30 locomotive engineers. (Tr. 114.) He also served as the hearing officer for the railroad's formal investigation of the incident between Mr. Riley and Mr. Bollman. Mr. Morris detailed that CP managers are the individuals who initially charge employees with rule violations and who ultimately make discipline decisions. (Tr. 115, 116.) The steps for the formal investigation process are established by the collective bargaining agreement between the union and CP. (Tr. 123.)

In his role as hearing officer, Mr. Morris wrote up a recommendation for the ultimate decision-makers, based on the testimony at the hearing, any exhibits that were presented, disciplinary history, and CP progressive discipline policies. (Tr. 119, 125, 134, 137.) His recommendation was to terminate Mr. Riley for violating "the general code of operating rules, business code of ethics, rule of safety, maintaining a safe course, carrying out rules and reporting violations, conduct, and altercations." (Tr. 127.) Mr. Morris recommended the same for Mr. Bollman. Mr. Morris sent his recommendation to his supervisors and to the labor relations manager. (Tr. 125.) Mr. Morris's recommendation was not followed in this matter. (Tr. 120.)

As to the reasons why Mr. Morris recommended that Mr. Riley be terminated, he detailed that Mr. Riley did not report an incident that occurred at 4:38 a.m. until 2:38 p.m., and this "constituted nearly 10 hours of non-reported time." (Tr. 128.) Mr. Morris stated that Mr. Riley had time to report the incident while he was on the train and after he clocked out, and that there was a trainmaster on duty 24/7 at the yard. (Tr. 128, 143, 146.) Mr. Morris also stated that Mr. Riley could have used another radio channel that Mr. Bollman would not be on to report the assault. (Tr. 145.) Mr. Morris stated that if he had been assaulted, he would have gotten on the radio and reported the incident immediately. (Tr. 150.) Mr. Morris also explained that the hours of service law exists to protect employees' rest time; however, if there is an incident, the hours of service can be extended until an investigation is completed. (Tr. 116, 117.)

Mr. Morris testified that safety is the most important factor in reporting, and that both employees and supervisors should immediately report issues in order to allow managers to make the best decision for the railroad. (Tr. 128, 129, 143.) Waiting to report an assault could have allowed Mr. Bollman to attack Mr. Riley again, or to attack someone else. (Tr. 146.) Timely reporting also allows the company to document the clearest account and recollection of what took place. (Tr. 129.) Mr. Morris conceded that while Mr. Christensen and Mr. Heichel did not report Mr. Riley's injury or get the CP police involved as required by CP policies, discipline has not been assessed against Mr. Christensen or Mr. Heichel. (Tr. 155-157.)

Mr. Morris stated that the fact that Mr. Riley reported the assault did not have any bearing on his decision to recommend his termination. (Tr. 140.) Mr. Morris's decisions as a hearing officer give substantial weight to written statements. (Tr. 130.) In this case, Mr. Morris was also concerned that Mr. Riley and Mr. Bollman's testimony at the hearing had been coached and was therefore not an accurate account of the incident. (Tr. 131, 132.)

Brian Scudes (Tr. 165-183).

Mr. Scudes is employed by CP as a manager of labor relations. (Tr. 170.) He has worked in this position since January of 2014. In this role, Mr. Scudes works to ensure that the collective bargaining agreements are applied properly, including through grievance procedures, discipline proceedings, and arbitration processes. (Tr. 171.) Mr. Scudes explained that the collective bargaining agreements include a provision that allows for an employee to be suspended pending a hearing when the matter or incident is serious, such as a physical or verbal altercation. (Tr. 173.)

While Mr. Scudes was not employed by CP at the time of Mr. Riley's investigation and did not have any direct involvement with the assessment of discipline against Mr. Riley, he became familiar with Mr. Riley's case when he assumed the portfolio of the previous labor relations, Jen Manz. (Tr. 175, 179.) Mr. Scudes explained that labor relations does not decide what discipline will be assessed in any given case, but that they review the recommended discipline to assess whether that discipline is likely to be upheld if it were to go to arbitration. (Tr. 175.) In the course of this review, Mr. Scudes looks to the transcript of the hearing and the related exhibits, as well as the hearing officer's notes and recommendations. (Tr. 175-176.) Mr. Scudes further explained that Mr. Riley's case had recently been sent for arbitration. (Tr. 174.)

Mr. Scudes testified that he has recently reviewed two cases where employees were terminated for insulting other employees and making verbal threats of physical violence. (Tr. 176-177.) Neither of those cases involved any reports of physical assaults or injuries. (Tr. 177.) He stated that during his time at CP, he has not encountered cases where an employee was pulled out of service for failing to report an injury. (Tr. 181.)

## VII. DISCUSSION

I find that on July 5, 2012, during the course of their assigned duties on board a CP train, an argument ensued between Complainant and his coworker as to how to properly carry out their duties. This argument escalated into a physical altercation when Complainant's coworker entered the train cab and struck Complainant with a lantern and fist. Complainant waited to inform his supervisor about this altercation until later that morning, once he felt safe and was no longer in close proximity to his assailant. After collecting Complainant's report as well as a conflicting report from his coworker, Respondent pulled both men out of service pending the results of a formal investigation of the altercation. As a result of the investigation, Respondent came to the conclusion that Complainant was guilty only of late reporting, and assessed the 47 days that he had spent out of service as his punishment. Though Complainant was employed under a "last chance agreement," Respondent chose not to terminate his employment because of this incident.

Complainant now asserts that Respondent's actions constitute a violation of FRSA under sections 20109(a)(4) and 20109(b)(1)(a). Respondent counters that Complainant has not met his burden of proving that he engaged in a protected activity that was a contributing factor motivating Respondent to take an adverse employment action against him. Respondent further counters that, even if I find that Complainant met his burden of proof, Respondent has

successfully rebutted Complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of Complainant's protected action. I will consider each of these issues in turn below.

a. Protected Activity

Complainant asserts that he engaged in multiple instances of protected activity, including reporting a physical assault and injury via phone call, written report, and verbal reports. Respondent disputes that Complainant engaged in protected activity when he reported the physical assault to his supervisors. (Resp. Post-Hearing Brief at 16.) Respondent avers that Complainant did not engage in protected activity because 49 U.S.C. § 20109(a)(4) only includes "notifying, or attempting to notify the railroad of a work-related personal injury or work-related illness." Respondent asserts that, by the plain language of the Act, Complainant's activity was not "work-related" and is therefore not protected. I disagree.

As stated above, FRSA prohibits covered employers from disciplining its employees for reporting a "work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(4). The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, (1997)); see also *Dodd v. United States*, 545 U.S. 353, 359 (2005); *United States v. Gonzales*, 520 U.S. 1, 4 (1997); *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995). Forbidding discipline for reporting a "work-related personal injury or work-related illness of an employee" plainly and unambiguously prohibits Respondent from suspending an employee for reporting an on-the-job injury that resulted from a disagreement as to how to complete assigned duties.

Adopting Respondent's reading of the Act would also subvert congressional intent. In enacting the FRSA, Congress stated that "employees should not be forced to choose between their lives and their livelihoods." H.R. Rep. No. 96-1025, at 3 (1980). The purpose of the Act is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." And, in addition to these stark pronouncements, the Supreme Court has stated that "safety legislation is to be liberally construed to effectuate the congressional purpose." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). After reviewing the Act's text and purpose, I find the purpose of § 20109(a)(4) is to encourage employees suffering on-the-job injuries to report these injuries to their superiors without fear of reprisal.

FRSA further prohibits covered employers from disciplining employees for reporting a hazardous safety or security condition in good faith. 49 U.S.C. § 20109(b)(1)(A). Workplace violence has previously been found to be a safety issue under § 20109(b)(1)(A). See *Leiva v. Union Pac. R.R. Co.*, ARB Nos. 14-016, -017, ALJ No. 2013-FRS-19 (ARB May 29, 2015). A potentially violent situation between the two engineers working onboard a moving train has the tendency to create a hazardous safety or security condition. Mr. Morris, the CP hearing officer, testified that reporting altercations and injuries is essential to the safe operation of a train. (Tr. 128, 129, 143.) He further stated that reporting the assault was important to keep Mr. Bollman from attacking Mr. Riley again or attacking another individual. Mr. Riley also testified as to his concern for his own safety following Mr. Bollman's attack. (Tr. 81.) Thus, I find that Mr. Riley

reasonably believed that he was reporting in good faith a hazardous safety or security condition that was a violation of section (b)(1)(A).

b. Adverse Employment Action

The FRSA prohibits an employer from taking adverse actions against employees who report injuries, including discharge, demotion, suspension, reprimand, or “any other discriminatory action.” § 20109(a). Employment actions are presumptively adverse if they are considered discipline by policy or practice; are routinely used as the first step in a progressive discipline policy; or implicitly or expressly reference potential discipline. *See Williams v. American Airlines*, ARB No. 09-018 (Dec. 29, 2010).

Complainant asserts that he suffered an adverse action when Respondent pulled him out of service without pay; noticed him for and subjected him to a formal investigation; and disciplined him for late reporting. (Compl. Post-Hearing Brief at 5.) Respondent does not dispute that Mr. Riley’s 47-day suspension without pay constitutes an unfavorable employment action under the FRSA. (Resp. Post-Hearing Brief at 15.) Furthermore, Respondent makes no argument and presents no evidence to support a finding that the formal investigation process did not constitute adverse personnel action. I therefore find that Complainant suffered an adverse personnel action as contemplated under the FRSA.

c. Contributing Factor

To establish causation, Complainant need only show that his report of a work place injury was a contributing factor in the unfavorable personnel action, not a substantial, significant, “or even predominant one.” *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). In other words, whether or not the protected activity is a “contributing factor” in a FRSA whistleblower case is not a demanding standard. A “contributing factor” means “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of a decision.” *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20 (ARB May 31, 2013); *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Complainant is not required to prove that his protected activity was the only or the most significant reason for any adverse action taken against him; rather Complainant need establish only that the protected activity affected in any way the adverse action taken, notwithstanding other factors an employer cites in defense of its action. *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015). Furthermore, Complainant need not demonstrate the existence of a retaliatory motive on the part of Respondent in order to establish that his disclosure of the workplace injury was a contributing factor to his suspension. *Coppinger–Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (“A prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive.”). Neither motive nor animus is required to prove causation under FRSA as long as protected activity contributed in any way to the adverse action. *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014).

The evidence in this case demonstrates that Respondent’s decision to pull Complainant out of service was triggered, at least in part, on the reporting of his July 5, 2012 work-related

injury. Respondent became aware of the injury when Complainant came forward, albeit several hours later. In other words, Mr. Riley's report of the attack and resulting injury influenced Respondent's decision to investigate the timeliness of Mr. Riley's reporting or the underlying facts of how his injury occurred. Where such a report sets the subsequent investigation and disciplinary process in motion, this chain of events is sufficient evidence of a contributing factor. *See DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015); *Koziara v. BNSF Ry. Co.*, No. 13-CV-834, 2015 U.S. Dist. LEXIS 2382, at \*25-26 (W.D. Wisc. Jan. 9, 2015). Therefore, I find the protected activity was a contributing factor in the adverse personnel action in this case.

This court is not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury. Rather, a case is established here because the basis for Complainant's suspension cannot be discussed without reference to the protected activity. Simply put, Complainant's reporting of his injury set in motion the chain of events eventually resulting in the investigation and is inextricably intertwined with the eventual adverse employment action. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). *See also Ray v. Union Pacific R.R. Co.*, 971 F. Supp. 2d 869, 888 (D. Iowa 2013) ("If [Complainant] had not reported the alleged work-related injury, [Respondent] would not have undertaken an investigation into either the honesty of [Complainant's] statement . . . or the timeliness of [his] injury report, and [Complainant] would not have been terminated.")

While Mr. Riley's records may indicate a history of discipline, including the fact that he was employed under a "last chance agreement," the fact remains that his report of the injury triggered CP's review of his personnel records, which led to his discipline. Furthermore, an employer's evidence of a legitimate, non-retaliatory reason for the adverse action in the absence of any protected activity is, with rare exception, not to be considered at the initial causation stage, and is instead reserved for proof by clear and convincing evidence as an affirmative defense. Accordingly, I find that Complainant's report of his injury contributed to Respondent's decision to issue discipline.

In sum, preponderant evidence demonstrates that Respondent is covered under the FRSA, that Complainant engaged in protected activity, that Complainant's supervisor knew of the protected activity, and that the protected activity factored into Respondent's decision to discipline Complainant. Respondent is therefore liable under FRSA unless it can prove its statutory affirmative defense.

d. Statutory Affirmative Defense

Once an employee demonstrates that the protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. In a case where the FRSA-protected activity involves the filing of an injury report, yet the employer alleges that the adverse action was instead related to the complainant's unsafe conduct, the focus in determining whether the respondent meets the required affirmative defense is on whether the employer establishes that it would have taken the same action against an uninjured employee who engaged in identical unsafe conduct. *See DeFrancesco*, ARB No. 13-057, at 10. This analysis requires balancing the

railroad employer's ability to maintain and enforce legitimate workplace safety rules against the manipulation of such investigations as pretext for retaliation against employees who report workplace injuries. Respondent may satisfy this burden with evidence of extrinsic factors that would independently lead to the decision to take adverse action. *Menendez v. Halliburton, Inc.*, ARB No. 12-026, 2013 WL 1385561, at \*9 (ARB Mar. 15, 2013). Relevant evidence to this inquiry would include whether Respondent consistently imposes equivalent discipline against uninjured employees who violate the work rules Complainant was cited for violating, and whether Respondent routinely monitors and enforces discipline for late reporting. See *DeFrancesco*, ARB No. 13-057, at 11-12.

Respondent submits that the discipline it assessed in conjunction with the incident was lenient based upon Mr. Riley's standing in the disciplinary process pursuant to the last chance agreement, in that this agreement would have justified his termination regardless of any protected activity. Respondent argues that the fact that it disciplined both Mr. Riley and Mr. Bollman, even though the latter did not engage in protected activity, further illustrates that it would have reached the same decision regardless of Mr. Riley's alleged protected activity.

Respondent's contentions fall short of proving that Mr. Riley was not subjected to selective discipline as a result of his injury report. The comparison with Mr. Bollman's discipline is unconvincing, as Mr. Bollman was not disciplined for engaging in similarly unsafe conduct as Mr. Riley. While Mr. Riley's discipline letter explicitly states that he was found guilty of a "failure to promptly report the incident," Mr. Bollman's discipline letter lists a series of rule violations and makes no mention of finding him guilty of late reporting. (*Compare CX 19 with CX 20.*) A more direct comparison arises between Mr. Riley and his supervisors, who, similar to Mr. Riley, did not immediately file an official report of the incident. Testimony by Mr. Morris revealed that while the supervisors did not immediately report Mr. Riley's injury as required by CP rules, neither of the supervisors have been investigated or disciplined. (Tr. 155-157.)

While Respondent's decision in Mr. Riley's case may have constituted leniency in the context of his last chance agreement, I do not find that this factor in and of itself meets the high bar of clear and convincing evidence. Though CP's rules clearly state that incidents must be reported "by the first means of communication," Respondent did not submit evidence regarding the discipline of other employees who failed to promptly report incidents, regardless of whether they reported injuries. (*See RX 16.*) Similarly, no evidence was presented to suggest that CP monitors employees for compliance with the prompt reporting rule in the absence of an injury. Finally, nothing in the record establishes that a 47-day suspension would be routine or reasonable discipline for violation of this rule. Based on the foregoing, I find that CP did not adduce sufficient facts to prove by clear and convincing evidence that Complainant would have been suspended had he never reported his injury.

## VIII. REMEDY

FRSA provides, in general, that "an employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole." § 20109(e)(1). Relief shall include: (A) reinstatement with the same seniority status that the employee would have

had, but for the discrimination; (B) any back pay, with interest; and (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. § 20109 (e)(2). Furthermore, “relief in any action under subsection (d) may include punitive damages in the amount not to exceed \$250,000.” § 20109 (e)(2); *see also* 29 C.F.R. § 1982.109(d)(1).

*Reinstatement.* Complainant has already been reinstated in this case. However, as Respondent’s formal discipline letter did not specifically state that Complainant be reinstated with no loss in seniority status, I do so here.

*Loss of Wages.* Complainant lost \$11,000.00 in earnings from CP during his 47-day suspension, as well as \$786.00 for missing three days of work to attend his deposition and the hearing in this case.

*Emotional Distress.* Compensatory damages for emotional distress may be awarded for violations of the FRSA. 29 C.F.R. § 1982.109(d)(1); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ’s award of \$50,000 in compensatory damages for emotional distress). A complainant need not submit corroborating evidence of medical or psychological treatment to support an award for emotional harm or mental anguish, and a complainant’s credible testimony alone is sufficient to establish emotional distress. *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). A “key step in determining the amount of compensatory damages is a comparison with awards made in similar cases.” *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op at 32 (ARB Feb. 9, 2001), *aff’d sub nom. Hobby v. U.S. Dep’t of Labor*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished).

Complainant submits that he is entitled to \$15,000.00 in other compensatory damages for the “mental anguish from July 5 through August 21, 2012 over the specter of losing his job.” I find any “mental anguish” suffered by Complainant and his family as a consequence of the investigation itself is not compensable as an employer is entitled to reasonably investigate potential rules violations without subjecting it to compensatory damages for emotional distress. In other words, the actual investigation conducted by Respondent in this case, though admittedly a stressful event, is not an action for which Complainant may seek damages.

Furthermore, although Complainant alleged he suffered emotional distress while being investigated, there is insufficient support for this claim. A complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish in order to receive compensatory damages for those conditions. *Testa v. Consol. Edison Co. of N.Y.*, ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010). Here, Complainant testified that he was “angry beyond belief” when he was notified of the investigation, and that he was subjected to catcalls and insults by some of his

workers after he returned to work. (Tr. 21, 29.) Although I accept that he was upset about being investigated, Complainant submitted insufficient evidence demonstrating mental suffering or emotional anguish. Therefore, on the evidence before me, I find Complainant has not established by a preponderance of the evidence entitlement to emotional distress damages.

*Punitive Damages.* Punitive damages may be awarded under the FRSA where there has been a “reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law . . . .” *Ferguson*, ARB No. 10-075, slip op. at 8-9 (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The *Smith* court explained that purpose of punitive damages is to punish the defendant for outrageous conduct and to deter future violations. *Id.*, slip op. at 8. It further explained that “the focus is on the character of the tortfeasor’s conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that produced by compensatory awards.” *Id.*; see *White v. Osage Tribal Council*, ARB No. 96-137, ALJ No. 95-SDW-1, slip op. at 8 (Aug. 8, 1997) (overturning ALJ award of \$60,000 in punitive damages because Board fully expected future compliance).

Complainant submits that he is entitled to \$250,000.00 but does not put forth a compelling argument as to why he is so entitled. Respondent counters that it has presented overwhelming evidence regarding the legitimacy of the decision to suspend Mr. Riley, and that this discipline was proportionate, if not lenient, to his behavior. While the record reflects a failure by Respondent to clearly and convincingly demonstrate that Complainant’s report of injury was immaterial to its discipline decision, nothing here suggests an insensitive disregard for Complainant’s rights. This court is not charged with evaluating the quality of Complainant’s disciplinary process. While the reasons for the investigation and the conclusions reached may now reasonably be questioned, at the time CP made those decisions, it sincerely questioned what had taken place between Mr. Riley and Mr. Bollman on July 5, 2012. That the investigation can now be challenged does not change that Respondent acted in good faith at the time the decision was made to suspend Complainant, and certainly does not make Respondent’s behavior outrageous. Therefore, I find that Complainant’s decision to suspend Mr. Riley was not taken with callous disregard for his rights. See *Bailey v. Consol. Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013). Consequently, I find that punitive damages are not warranted.

### *Conclusion*

Complainant has demonstrated by a preponderance of the evidence that he engaged in protected activity, Respondent had knowledge of that protected activity, he experienced an adverse action, and his engagement in the protected activity contributed to his experience of the adverse action. Respondent has failed to demonstrate by clear and convincing evidence that it would have taken the adverse action despite Complainant’s engagement in the protected activity. Respondent is therefore liable pursuant to FRSA, and Complainant is entitled to the remedy described above.

**ORDER**

IT IS ORDERED that Respondent shall pay Complainant \$11,786.00 in back pay plus interest from the date such wages were lost until the date of payment at the rate prescribed in 26 U.S.C. § 6621(a)(2) (short term Federal rate plus three percentage points), compounded quarterly. *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-12, ALJ No. 1989 ERA 22, slip op at 18-19 (ARB May 17, 2000). No punitive or compensatory damages shall be paid.

IT IS FURTHER ORDERED that Respondent shall pay to Complainant all costs and expenses, including reasonable attorney fees incurred by him in connection with this matter before the OALJ. Counsel for complainant shall have 45 days from the date of this Order to submit a relevant petition. A service sheet showing that proper service has been made upon the Respondent and Complainant must accompany the petition. If Respondent disagrees with any aspect of the petition, it shall first confer with Complainant's counsel and make reasonable efforts to resolve such differences. If counsel for Complainant wishes to change its petition following such conference, it must file an amended petition within 10 days from the date of the conference. If instead there remain unresolved differences following the conference, counsel for Respondent must file objections, accompanied by a statement explaining why it has not been able to agree with opposing counsel, within 30 days of the conference.

**SO ORDERED:**

STEPHEN R. HENLEY  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one

copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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