



Issue Date: 29 May 2015

In the Matter of
SAMSON JACEK
Complainant

Case No.: 2014 FRS 91

v.

SOO LINE RAILROAD,
d/b/a CANADIAN PACIFIC
Respondent

Appearances: Mr. Samson Jacek, *Pro Se*
For the Complainant

Ms. Tracey Holmes Donesky, Attorney
Mr. Matthew Tews, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judges

**DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS” and “Act”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. Part 1982. Jurisdiction for this case is vested in the Office of Administrative Law Judges (“OALJ”) by this statute, under subsection 20109(c)(2)(a), which applies the rules and procedures set forth in 49 U.S.C. § 42121 (b), relating to whistleblower complaints under the Aviation Investment and Reform Act for the 21st Century, known as “Air 21.”

In general, Section 20109(a) of the FRS act, and 29 C.F.R. § 1982.102(b)(1), prohibit a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, or gross fraud, waste, and abuse of federal grants or other public funds intended to be used for railroad safety or security, if the information is provided, to a federal, state, or local regulatory or law enforcement agency; any member of congress; or person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; c) filed a complainant related to the enforcement of

provisions of the Act; d) notified the railroad carrier or the Secretary of Labor of a work-related personal injury or work-related illness of an employee; e) cooperated with a safety or security investigation relating to any accident or incident resulting in an injury or death to an individual or damage to property occurring in connection with railroad transportation; and f) accurately reported hours on duty pursuant to 49 U.S.C. Chapter 211.

Additionally, Section 20109(b)(1) of the Act, and 29 C.F.R. § 1982.102(b)(2), prohibit a railroad carrier, or an officer or employee of a railroad carrier from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: a) reported in good faith a hazardous safety or security condition; b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that the hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal, and the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not authorize the use of the hazardous equipment, track, or structures unless the condition is corrected immediately, or the equipment, track, or structures are repaired properly or replaced; and c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the act, and 29 C.F.R. § 1982.102(b)(3), prohibit a railroad carrier, or an officer or employee of a railroad carrier from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician, except a railroad carrier's refusal to permit an employee's return to work following medical treatment shall not be considered a violation of the Act if the refusal is pursuant to the Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

In addition to the specific terms, and the requirement of good faith, the complainant's belief in the protected activity must be objectively reasonable.¹ The subjective belief of the complainant is not sufficient.² The reasonableness of the complainant's belief concerning the protected activity is to be determined on the basis of the knowledge available to a reasonable person in the same circumstances with the complainant's training and experience.³

¹*Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. 25 (ARB July 14, 2000). See also *Hernandez v. Metro-North Commuter Railroad*, No. 1:13-cv-02077 (S.D.N.Y. Jan. 9, 2015) (2015 WL 110793; 2015 U.S. Dist. LEXIS 2457). Although the cases requiring an objective reasonable evaluation involved reported violations of the subject statute, such as the FRS protected activities under Section 20109(a), I find the same objective reasonableness standard is warranted for FRS protected activities under Section 20109(b)(1)(A) involving a hazardous condition.

²*Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-00012 (ARB Apr. 8, 1997).

³*Melendez*, ARB No. 96-051, slip op. at 27.

Procedural History

On March 13, 2013, Mr. Samson filed a complaint with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”), under the FRS employee protection provisions. Mr. Samson alleged that Canadian Pacific, d/b/a Soo Line Railroad, (“Soo Line”) wrongfully removed him from service on February 26, 2013 for filing an unsafe conditions report with management and refusing to perform work in an unsafe environment.⁴

On February 14, 2014, the OSHA Regional Administrator dismissed Mr. Samson’s complaint on the basis that he failed to establish a nexus between his protected activity and the adverse action, DR 6 and RX 40.⁵ On April 25, 2014, Mr. Samson appealed the adverse decision and dismissal of his FRS whistleblower complaint, RX 40.

Pursuant to a Revised Notice of Hearing, dated October 17, 2014, (ALJ VI), I conducted a hearing in Chicago, Illinois on January 13 and 14, 2015 with Mr. Samson, Ms. Donesky, and Mr. Tews. My decision in this case is based on the hearing testimony, and the following exhibits admitted into evidence: CX 3 (with the exception of pp. 201-212), DR 2, DR 3, DR 6, DR 8, DR 14, DR 16, DR 19, DR 21, DR 22, RX 1 to RX 27, and RX 30 to RX 62.

Timeliness

At the hearing, Respondent’s counsel renewed a timeliness objection to Mr. Samson’s appeal since the OSHA decision letter was dated February 14, 2014, and Mr. Samson did not submit his appeal until April 25, 2014.

On February 21, 2014, Mr. Samson informed OSHA that he had not yet received the decision letter; at the time, he was on active duty in Wisconsin through April 4, 2014, DR 6 and RX 40. On April 7, 2014, OSHA advised Mr. Samson that the original letter was returned on March 18, 2014 because it was not claimed; consequently, another decision letter would be mailed to Mr. Samson, DR 6 and RX 40. A copy of the February 14, 2014 OSHA decision letter, DR 6 and RX 40, contains two United States Postal Service (“USPS”) tracking numbers. The typed tracking number ends in 4953; and a hand-written tracking number ends in 1640, with an annotation “sent 04/07/2014.” I take judicial notice that the USPS website shows under both tracking numbers that the OSHA decision letter was delivered on April 11, 2014. I also note Mr. Samson testified that he filed his appeal when he returned from military training, TR, p. 76. Under these circumstances, and most significantly since Mr. Samson filed his appeal within 30 days of his actual receipt of the OSHA decision letter, I find his appeal was timely under 29 C.F.R. § 1982.106. Accordingly, Respondent’s timeliness objection of overruled.

⁴Subsequently, Soo Line terminated Mr. Samson’s employment on March 28, 2013.

⁵The following notations appear in this decision: ALJ – Administrative Law Judge exhibit; CX – Complainant exhibit; DR – Complainant exhibit (from a document request); RX – Respondent; and, TR – Transcript.

Parties' Positions

Complainant⁶

On February 20, 2013, when trainmasters, including Mr. Mugavero, created an unsafe work environment for himself and his co-workers through distracting interruptions that adversely affected his ability to stay alert and concentrate, Mr. Samson engaged in an FRS protected activity of refusing to work under unsafe conditions. He was also forced to engage in a protected activity by filing a hazardous safety condition report with Mr. Cork on the same day about the supervisors' interference in order to notify Soo Line of the situation so the company could correct the situation.

Then, on February 22, 2013, even though he was in protected status based on his protected activities on February 20, 2013, a Soo Line supervisor engaged in further discrimination when he falsely accused him of a rule violation. Due to that intimidation, Mr. Samson suffered a panic attack that forced him to leave the railroad property.

Shortly thereafter, within three days, Mr. Samson was pulled out of service, subjected to two investigations, and subsequently terminated. This temporal proximity demonstrates that his protected activities were contributing factors in the adverse actions that he suffered. Additionally, Mr. Samson's protected activities were inconvenient for Soo Line because the company was attempting to maintain productivity with fewer people. As a result, trainmasters used intimidation which put pressure on crews to work in an unsafe manner. Mr. Samson was terminated for speaking up against a trainmaster.

Causation is also established by several other factors. First, pretext is demonstrated by the Respondent's conduct of the two investigation hearings when the hearing officers did not consider the inconsistent testimony of the witnesses testifying against Mr. Samson; and the company appointed as the hearing officer for the first investigation hearing a supervisor who was directly involved in the second incident that led to the second investigation hearing. Second, the Respondent violated its own personnel policies when it permitted considered off a prior disciplinary record that should have been exempt. Third, various supervisors presented shifting explanations for his termination. Fourth, Soo Line did not consider his medical condition. Fifth, in providing evidence of disciplinary actions against other employees to support its actions against Mr. Samson, Soo Line failed to demonstrate that the other employees were similarly situated. And, sixth, the use of insubordination and failure to follow orders as the reasons for his termination were directly related to the actions he took during his protected activities.

The Respondent cannot establish by clear and convincing evidence that it would have taken the same adverse actions because in the absence of his protected activities, Soo Line would have no basis to charge that Mr. Samson had been insubordinate or failed to follow instructions.

⁶TR, pp. 23-33; and April 1, 2015 closing brief

In summary, the Respondent unlawfully terminated Mr. Samson's employment because he brought to its attention the existence of a safety issue. Mr. Samson seeks reinstatement, back pay, abatement of any continuing violation, and punitive damages due to the hardships he has suffered since the termination of his employment.

Respondent⁷

Mr. Samson's FRS complaint should be dismissed for several reasons. First, he failed to establish that he engaged in a protected activity on February 20, 2013. Second, none of his alleged protected activities was a contributing factor in the decision to terminate his employment. Instead, two investigations and hearings into Mr. Samson's two separate, and independent, violations of Rule 1.6 of the General Code of Operating Rules ("GCOR") confirmed the allegations, which warranted the termination of his employment. And, third, even if Mr. Samson satisfied his burden of proof, the Respondent has established by clear and convincing evidence that it would have taken the same adverse action in that absence of his protected activities. In particular, Soo Line has immediately dismissed other employees for the same misconduct rule violation. Consequently, the same disciplinary results would have occurred even absent Mr. Samson's protected activities.

As background, Mr. Samson started working for Soo Line in March 2008 as a conductor. In March 2011, he became an engineer. Around October 2012, he returned to his position as a conductor, and was working in that capacity in February 2013 out of Bensenville, Illinois. In that capacity, Mr. Samson was subject to GCOR, including Rule 1.6, which indicates in part that an employee may not be careless of the safety of others and himself, insubordinate, or quarrelsome. Depending on its severity, a violation of the rule can lead to immediate termination, despite the company's positive behavior and performance development policy.

The Bensenville yard conducts switching operations; and, in late 2012 and early 2013 was engaged in changing the methodology for switching cars, which decreased the number of cars being switched by half. To facilitate the transitions, more trainmasters were working in the yard. On February 20, 2013, Mr. Samson was assigned as a conductor/helper on a switching crew. Noticing an error on the crew's switching list, Mr. Mugavero, a trainmaster, attempted to explain the error to Mr. Samson who responded that according to union rules he did not have to listen to Mr. Mugavero. Mr. Mugavero responded that Mr. Samson could either follow his orders or go home and face an investigation. Mr. Samson indicated that he wanted to go home and departed. No other member of his crew left the yard. Under these circumstances, Mr. Mugavero did not create a dangerous situation as claimed by Mr. Samson. And, Mr. Samson never expressed a safety concern during their discussion and did not establish an imminent danger of death or serious bodily harm. As Mr. Samson walked off the job, he filled out a hazard/safety report and submitted the form to the Bensenville superintendent, Mr. Cork.

On February 22, 2013, Mr. Samson was again on duty with an eight hour shift starting at 3:00 p.m. A trainmaster, Mr. Lashbrook started his shift three hours later and noticed that Mr. Samson's crew was behind schedule on the number of cars switched. When he arrived at their location, Mr. Lashbrook observed Mr. Samson ride a car into a coupling which was a safety

⁷TRI, pp. 35-38 and March 31, 2015 closing brief.

violation. When he approached Mr. Samson, he started to first address the productivity issue. In response, Mr. Samson became irritated and stated that he was switching cars safely and efficiently. At that point, Mr. Lashbrook brought up his observation about the unsafe maneuver. In response, Mr. Samson walked away, saying he didn't have to talk to Mr. Lashbrook. When Mr. Lashbrook advised the superintendent at the time, Mr. Murphy, about the exchange, Mr. Murphy told Mr. Lashbrook to tell Mr. Samson not to leave the yard. When Mr. Lashbrook found Mr. Samson in the locker room, he advised Mr. Samson of Mr. Murphy's instruction to stay because he wanted to talk to him. However, Mr. Samson did not comply and left the property. At the time, Mr. Samson advised no one of any health problems. He did not seek any medical attention.

Under the collective bargaining procedures, investigative hearings were conducted. The hearing officers concluded Mr. Samson's actions represented violations of Rule 1.6 and recommended termination. Upon review of the recommendations, Mr. Peck determined Mr. Samson had violated a cardinal rule and recommended termination of his employment. Additionally, even if the February 22, 2013 incident had not occurred, Mr. Peck would still have terminated Mr. Samson's employment based on his behavior on February 20, 2013. The ultimate decision-maker, Mr. MacFarlane concurred.

Following his termination, Mr. Samson made no effort at re-employment for a few months. Subsequently, he only submitted two job applications. In January 2014, he obtained employment at an annual salary of \$54,000.

Mr. Samson's action on February 20, 2013 was not a protected work refusal under the FRS because it failed to meet numerous requirements, including notably the presence of an imminent danger of death or serious injury. Instead, Mr. Samson abandoned his job on that day. His report of a safety hazard after he walked off the job also is not a protected activity because he cannot establish that he reported a safety hazard in good faith. He also is unable to satisfy the objectively reasonable standard. Since Mr. Samson made his report only after refusing Mr. Mugavero's instructions, it was not made in good faith. And, as a trainmaster and supervisor, Mr. Mugavero had the authority to provide switching instructions to Mr. Samson and his crew, and his instructions were neither irresponsible nor unsafe. Any purported interference with Mr. Samson's work did not rise to the level of a safety hazard.

Concerning the events on February 22, 2013, there is no evidence that either supervisor, including Mr. Lashbrook, were aware of any purported protected activities by Mr. Samson on February 22, 2013. And, none of Mr. Samson's actions on that day constitute a protected activity.

In terms of causation, temporal proximity, standing alone, is generally insufficient. And, in Mr. Samson's case, none of his alleged protected activities played any role in Soo Line's disciplinary action. At all levels, from independent hearing officers, to review managers, to the decision maker, determinations, recommendations, and the final termination decision were based solely on Mr. Samson's serious violation of Rule 1.6 due to his insubordinate and quarrelsome behavior, which is intolerable.

The overwhelming evidence further demonstrates that even if Mr. Samson established that a protected activity was a contributing factor, Soo Line would still have terminated his employment even in the absence of his protected activity. In particular, two independent investigations and a multi-review process established that Mr. Samson's repeated work refusals for which there was no legitimate basis, were more than sufficient grounds for his termination, regardless of any protected activity. Notably, in further support, the record demonstrates that Soo Line has terminated other employees similarly situated.

Issues

1. Protected activity.
2. Adverse personnel action.
3. Contributing factor.
4. Affirmative defense
5. Damages.

Summary of Evidence

Mr. Jacek Samson (TR pp. 79-236)

[ALJ examination] Born in October 1975, Mr. Samson obtained a GED, and joined the U.S. Army in April 1996 as a track vehicle mechanic. After three years, he received an honorable discharge. After about a year in college, Mr. Samson worked in real estate, construction, and delivery services. On March 24, 2008, he joined Canadian Pacific as a freight conductor. His initial training included learning the GCOR. Usually riding in the engine cab with an engineer, a freight conductor is responsible for the safe and efficient movement of a train and its freight cars in compliance with safety and operational rules, and movement authorizations. After about a year and a half, and completion of additional training, Mr. Samson became an engineer, working out of the Bensenville freight rail yard, 20 miles west of Chicago. Freight trains are assembled and decoupled in the freight yard. Service and repair of freight cars is also accomplished. After another two years, furloughs started taking place, and as one of the newest engineers in terms of seniority, Mr. Samson had to revert back to working as a conductor on extra board on standby in October 2012.

Although he did not have regular hours, Mr. Samson still worked about five to six days a week. More than half of his conductor assignments involved riding a freight train to a destination and returning. The rest of his work occurred in the Bensenville freight rail yard, which has about 80 tracks, moving and switching freight cars and engines in a crew consisting of an engineer, a conductor, and at times, a brakeman/helper. During that process, the trainmaster is responsible for supervising the ground and operating crews. The yardmaster is in charge of the movement of cars and engines in the yard. The crews stays in touch with hand-held radios.

During the movement of the trains, as a conductor, Mr. Samson was responsible for throwing track switches, clearing the track, and coupling the freight cars and engine. He communicated with the engineer with hand signals and radio. The couplings are U joints that fit together, and latch, like two fists. At times, a freight train can stretch a mile and a half with up to 160 cars. The conductor is responsible for ensuring every car is coupled and has an air brake connection. The rail yard work usually has shorter hours, and is more predictable.

In February 2013, Mr. Cork was the superintendent of the Bensenville freight rail yard.

On February 20, 2013, Mr. Samson came in at 7:00 a.m. to work on a three man switching crew. He reported to the conductor-in-charge and received his workload from the yardmaster. His role on that day was to be a helper/brakeman on the crew consisting of a conductor-in-charge, an engineer, and a brakeman. The crew then went to the east end yard and commenced switching operations. Around 11:00 a.m., Mr. Mugavero, the trainmaster, showed up at their location to conduct a safety audit check. The crew proceeded with their work. At one point, while they were blocked by another train and stopped, Mr. Samson started to get preliminary switches “lined up” so he’d only have to throw one switch to move the cars to the intended track. At the point, Mr. Mugavero approached and gave Mr. Samson specific switching instructions. As Mr. Samson and his foreman were attempting to comply with those instructions, Mr. Mugavero stopped Mr. Samson and asked what he was doing. When Mr. Samson responded that he was following his instructions, Mr. Mugavero said no, and repeated his instructions. Meanwhile, the engineer continued to execute the switching instructions and the train was starting to move. As Mr. Samson returned to the switches, Mr. Mugavero kept “grabbing my attention.” Mr. Mugavero also asked what the engineer was doing and told the engineer that he was making the task harder. The engineer disagreed and continued to kick the cars onto another track. As Mr. Samson continued to perform his duties as brakeman based on what the engineer was doing, Mr. Mugavero again came up to him and diverted his attention by asking him a question that Mr. Samson wouldn’t know as a brakeman.

“At that moment, I realized something wasn’t right . . . the working conditions which we were in weren’t right.” Mr. Mugavero was changing the plan for the crew without a job briefing. Mr. Samson was already confused about what was going on, and then Mr. Mugavero started asking him specific questions when Mr. Samson was getting the switches set. He thought he understood Mr. Mugavero’s instructions but then Mr. Mugavero said he was wrong. Mr. Samson felt something was wrong and they hadn’t discussed the possible hazards associated with the changes that Mr. Mugavero was making. Further, the engineer was not getting the same information as Mr. Samson, which might affect his operation. Mr. Samson then realized that he could no longer comply with GCOR 1.1.2, which requires an employee to be alert and attentive, in his present environment. He also believed Mr. Mugavero had violated GCOR 1.6 because he was being careless of the safety of the crew. Mr. Samson concluded that the situation had to stop and be corrected before someone was hurt, equipment was damaged, or a derailment occurred.

Consequently, realizing that Mr. Mugavero was suppose to be doing a safety audit, Mr. Samson asked Mr. Mugavero to stay clear, observe them, and if necessary correct the crew after the train movement had stopped, since what he was doing at the moment was not safe. Mr. Mugavero “immediately became offended as if I was trying to challenge his authority and tell

him what to do.” He told Mr. Samson that he was his manager and Mr. Samson must listen to him. In a certain way, that was correct. However, Mr. Samson asked Mr. Mugavero if he was either the engineer or conductor on the crew because he was behaving as if he was the foreman. Mr. Samson took that approach because Mr. Mugavero was giving instructions like a foreman but had not done a job briefing. Mr. Mugavero then said they could handle the situation in two ways. Mr. Samson could switch the cars as instructed by Mr. Mugavero, or he could go home for insubordination. In response, Mr. Samson, “told Mr. Mugavero that if he’s not willing to stay clear and allow us to switch our tracks according to the foreman then I will – I refuse to continue to do switching because I feel unsafe and it’s creating a hazardous condition.” Mr. Mugavero again gave Mr. Samson that same two choices. Absent any reasonable alternative, Mr. Samson told Mr. Mugavero that he chose to go home if he was not willing to correct the unsafe condition.

Based on a radio call, the engineer and the conductor-in-charge, Mr. Allen, came over to Mr. Mugavero and Mr. Samson. Mr. Samson explained that Mr. Mugavero’s constant engagement, confusion about instructions, and interference with his ability to concentrate caused Mr. Samson to feel that he wasn’t safe performing his duties. So, Mr. Mugavero gave the other two crew members that same choice. But, the other two crew members remained silent. So, rather than bring them in on his decision, Mr. Samson went home while the other two crew members remained and worked their shift. As he was walking away, Mr. Mugavero followed him and asked if he was sure that he wanted to do this. Mr. Samson replied that he was sure.

Eventually, he arrived at the yard office at the west end, filled out a hazardous safety conditions report, indicating that Mr. Mugavero was constantly interfering with the crew’s plan, mingling in their operation, and creating confusion in Mr. Samson’s mind. He wouldn’t allow them to switch cars as they had intended. He submitted the report in the hope that Soo Line could do something to prevent that type of conflict from re-occurring. He submitted the report to Mr. Cork.

Then, just before leaving, Mr. Samson saw Mr. Mugavero in the yard office. When he asked Mr. Mugavero whether they needed to discuss anything further, Mr. Mugavero said no and told him to go home.

Mr. Samson believed that Mr. Mugavero’s changed switching instructions without a job briefing represented an imminent, or immediate, damage of death or serious injury. A job briefing would have address the new conditions associated with Mr. Mugavero’s switching instructions.

Mr. Samson acknowledges that Mr. Mugavero was not being irresponsible. However, since the switching operation involved the movement of large freight cars, is a switch isn’t properly aligned, or an engineer encounters an unexpected obstacle, a derailment can occur, which represents a serious risk of injury to a crew member.

What Mr. Mugavero was telling Mr. Samson to do, his instructions, which changed the switching order, was not unsafe. The problem occurred because Mr. Mugavero gave Mr. Samson those instructions while he was trying to do his job, and that process interfered with his ability to concentrate.

After the whole crew assembled with Mr. Mugavero, the cars were no longer moving; the switching had stopped. At that point, Mr. Mugavero was not interfering with his job. However, at the time Mr. Samson decided to notify Mr. Mugavero of his concerns, the engine and cars were on the move while he was throwing switches. Before Mr. Samson departed, Mr. Mugavero insisted that he talk to the crew first.

Before leaving that day, Mr. Samson also gave a union representative a copy of his hazardous safety condition report. The representative said the incident should not have happened and it was a good thing that Mr. Samson reported it.

On February 21, 2013, Mr. Samson returned to work as a conductor to take a train to another rail yard. At that other location, a safety audit was conducted and they passed.

On February 22, 2013, Mr. Samson was called into work again to be a foreman on a job, working with a helper. After working for awhile, the trainmaster, Mr. Parson, showed up, and gave him some pointers on how to be more efficient switching cars since he had recently reverted back to conductor. The trainmaster stayed around for awhile, observed, watched Mr. Samson stop his brakeman from running, which was unsafe, and then left.

A short while later, another trainmaster, Mr. Lashbrook came out to their location. At that time, Mr. Samson had two cars left in a cut and decided to shove, rather than kick, them, letting momentum move them into place. Since he didn't have the list for the next track, Mr. Samson did not think he was being inefficient. After completion of the process, Mr. Samson returned to the shanty break area. At that point, Mr. Lashbrook asked Mr. Samson why he shoved the two cars rather than kick them. After Mr. Samson provided his reason, Mr. Lashbrook did not appear to be happy with the explanation. He told them they should be kicking the cars, rather than shoving the cars. Mr. Lashbrook gave them another list and advised that they had only about 40 to 50 cars in the first half of their shift, while the company expects 150 cars to be switched each shift. When he suggested that they work smart, Mr. Samson responded that they would work safe.

After Mr. Lashbrook left, Mr. Samson and his brakeman proceeded to look at the next switching list. However, within a minute or two, Mr. Lashbrook asked over the radio for Mr. Samson to come outside of the shanty. Mr. Samson went outside and approached Mr. Lashbrook. At the time, Mr. Lashbrook asked Mr. Samson why he rode the hazardous tank car into a couple if it's against the rules. Riding a car to a coupling is unsafe. However, Mr. Samson responded that he did not ride the car; instead, he detrained it and walked it with a slow count to the engineer while he was on the ground. From Mr. Samson's perspective, something must have motivated Mr. Lashbrook to intimidate him after he had already talked to them. Mr. Samson also believed Mr. Lashbrook could not possibly have observed him riding the car even if that had occurred because Mr. Lashbrook was at the other end of the yard. So, Mr. Samson believed

Mr. Lashbrook was pressuring him to perform at an unreasonable, and unsafe, rate, and he was doing so by making a false accusation that he had broken a rule. During this thought process, within a couple of seconds, Mr. Samson experienced a panic attack. This was the second time a trainmaster was putting productivity ahead of safety, and he was willing to be untruthful in order to pressure Mr. Samson. And, Mr. Samson concluded that Mr. Lashbrook was intimidating and harassing him due to the fact that two days earlier he filed a hazardous safety report. As a result, Mr. Samson concluded that he could no longer continue to work in that environment in his condition. He contacted his immediate supervisor, and pulled himself out of service, and advised that he was going home because he was falsely accused by Mr. Lashbrook of breaking a rule. Since he didn't feel that he could continue to work safely, Mr. Samson was taking himself out of work pending an investigation. Due to his anxiety attack, with a palpating heart, and labored breathing, Mr. Samson doesn't recall whether he tied up before going home.

In the locker room, before he left, Mr. Samson had an exchange with another trainmaster, Mr. Walker, who asked how he was doing. Mr. Samson replied that he was not doing well and might see a doctor. When Mr. Walker then asked what happened, Mr. Samson told him. Mr. Walker said it would be best if Mr. Samson wait for Mr. Murphy, the assistant superintendent, to come up. That was not bad advise, but Mr. Samson did not follow it because Mr. Lashbrook had decided to intimidate Mr. Samson which caused Mr. Samson to be in a condition where he could not remain in the immediate environment. While in this panic attack, all that Mr. Samson had on his mind was leaving the property, which would help calm him down and preclude any further incidents.

Subsequently, he received notice that an investigation would be conducted regarding the events on February 20, and 22, 2013. He was also suspended without pay.

Since January 2014, Mr. Samson has worked as a civilian technician for the Army National Guard, maintaining equipment.

In February 2013, Mr. Samson earned about \$5,800 a month with Soo Line. As a civilian technician, he earns about \$4,000 a month.

After the loss of his conductor job, Mr. Samson worked with Career Builders, and unsuccessfully applied for work at another railroad and a trucking company.

Due to his termination, Mr. Samson has suffered fatigue and an inability to concentrate. As a new father, he also experienced stress with having to provide for his new child and wife without any means of support. He became depressed and was "broken" by the loss of his job. He sought help from Dr. McFaul in March 2013, and continues to periodically see him. He takes medication to control his anxieties, and help his concentration. He has health care through his civilian technician job.

[Cross examination] On February 22, 2013, Mr. Samson did not tell Mr. Lashbrook or Mr. Walker that he was experiencing an anxiety attack.

He experienced a delay seeing Dr. McFaul because he had to get permission from his health care provider. He saw Dr. McFaul periodically through May 2013 and then didn't see him until August 2014, due in part to his loss of insurance from his Soo Line employment.

Mr. Samson had never previously experienced an anxiety attack; he thought it might be a heart attack.

The basis for his conclusion that he was removed from service was that he was not called back into work after February 22, 2013.

Mr. Samson did not post his resume for two or three months after his employment termination.

At the National Guard, Mr. Samson works as a service maintenance mechanic. He likes the regular and consistent hours with that job.

Mr. Samson is not sure if his annual salary with the National Guard is similar to his earnings at Soo Line, since he no longer has overtime pay. Nevertheless, Mr. Samson seeks reinstatement because he had five years invested in a railroad career, and that's what he chose to do.

Prior to his termination, Mr. Samson was experiencing financial difficulties, and a pending foreclosure on his home. He also had experience depression prior to the loss of his job. In 2009, he sought medication for anxiety.

As a Soo Line conductor, Mr. Samson was a union member, and entitled to notice of disciplinary action, and a hearing. He attended, and testified at, two different hearings, with different hearing officers regarding the two incidents in February 2013. During the proceedings, he had a union representative.

Insubordination, quarrelsomeness, and dishonesty are provisions in GCOR 1.6 and may be grounds for termination. GCOR also indicates that indifference to duty will not be tolerated. Mr. Samson is familiar with the company's performance behavior and positive development policy. Under that policy some circumstances, including subordination, may warrant immediate termination.

During April/May 2011, Mr. Samson was disciplined for a rule violation with a five-day suspension, and a 30-day revocation of his engineer license. He waived a hearing, and took responsibility for the rules violation of running through a stop signal as an engineer, which is a cardinal violation.

On February 20, 2013, when Mr. Mugavero came out, the crew was already stopped due to being blocked by another train. However, Mr. Samson was still working, throwing preliminary switches. Yet, Mr. Mugavero's first instructions occurred while they were still blocked.

Later, Mr. Mugavero asked him about two cars on the switch list. That was when Mr. Samson asked him to stand clear and just observe. Mr. Samson did not answer Mr. Mugavero's question.

Mr. Samson is required to listen to supervisors, and trainmasters have the ability to help, and give instructions to crew members. Mr. Mugavero did not have Mr. Samson to put the cars in "foul." He never asked Mr. Samson to shove the cars blindly.

Based on the choices Mr. Mugavero gave him, Mr. Samson was aware that he would be going to a hearing.

Mr. Samson agreed to meet with the crew before going home because he wanted them to know what was going on and about the unsafe situation. The other two members of the crew remained and continued working.

When Mr. Mugavero followed him and asked if he was sure about his choice, Mr. Samson probably had another opportunity to discuss the situation with him. But, he still decided to go home.

Mr. Samson submitted his hazardous safety report after he had decided to go home, and was aware that there was going to be an investigation.

Mr. Samson told Mr. Mugavero that he felt unsafe. He is unsure whether he expressly included that statement in his hazardous safety report. He didn't check "yes" on the form because he was unfamiliar with the form. Eventually, Mr. Samson received Mr. Cork's response to the report, which indicated that Mr. Cork did not find the circumstances constituted a hazardous or unsafe condition.

Previously, during the three to four times that Mr. Samson brought safety issues to the attention of Soo Line, his supervisors responded to, and addressed the identified issues.

On February 22, 2013, when Mr. Samson saw Mr. Walker, he was no longer in the rail yard working around equipment. Neither Mr. Lashbrook nor Mr. Walker yelled at him. When Mr. Lashbrook spoke to Mr. Samson in the rail yard, the last two cars had already been shoved. There was no longer any movement. Mr. Lashbrook spoke to both Mr. Samson and Mr. Perry, the brakeman, about the number of car expected to be switch during a shift.

While in the locker room, Mr. Samson was reminded by both Mr. Walker and Mr. Lashbrook to stay and speak with Mr. Murphy.

[ALJ re-direct examination] Mr. Lashbrook came down to the locker room and urged Mr. Samson to stay.

Mr. Nicholas T. Mugavero, Jr.
(TR pp. 237-272)

[Direct examination] Mr. Mugavero has worked with Soo Line for 19 years; he has been a trainmaster since 2008. At the beginning of his career, he worked as a conductor.

In the fall of 2012, the Bensenville freight rail yard, which is a fairly large facility underwent some operational changes. Specifically, they move from “hump” switching, which was an automated switching system, to manual flat switching. That change lead to more flat switching and the requirement for more training for the crews.

On February 20, 2013, Mr. Mugavero went out to conduct a “train ride” with the crew consisting of Mr. Allen, Mr. Romano, and Mr. Samson. Noticing that the train they were working was blocked, Mr. Mugavero suggested over the radio that they shove back in the clear to get rid of a few cars. After Mr. Allen received the suggestion, he added another change. While they were accomplishing that task, Mr. Mugavero noted based on the cars’ class codes that two cars were incorrectly on the list. As a result, Mr. Mugavero approached Mr. Samson who was closet and asked about the two cars because Mr. Mugavero didn’t know if a change had been made verbally. In response, Mr. Samson turned around and asked whether Mr. Mugavero was either the conductor or brakeman on this job; and if he wanted to switch cars he “should just come back to the ground (change jobs). Mr. Mugavero tried to explain that the yardmaster may have made a mistake; and as a manager, he was just trying to see if the list was correct. However, Mr. Samson would not let him get a word in, and asserted that his union told him that he didn’t have to talk to him. Mr. Mugavero then explained that he was the manager of the terminal, and Mr. Samson was required to listen to him. He told Mr. Samson they could handle the situation in one of two ways; Mr. Samson could finish the work as Mr. Mugavero requested, or he could go home and they would finish the confrontation in Room 224, where investigations were conducted.

Mr. Mugavero then suggested that Mr. Samson talk to the rest of the crew first. When Mr. Mugavero explained the situation, the other two crew members did not say anything, and appeared not to want to get into it. So, Mr. Mugavero said they could continue working while Mr. Samson went home. As Mr. Samson was leaving, he told the crew member not to worry and that he would call them as his witnesses for the investigation. As Mr. Mugavero followed Mr. Samson, he asked whether Mr. Samson was sure that he wanted to do this. And, he said yeah. So, Mr. Mugavero asked Mr. Samson to stop by his office before leaving in the hope that he would cool down. When he stopped by later, he indicated that he was going to continue with his decision to go home.

At the time, Mr. Mugavero prepared an e-mail commemorating what occurred that day.

Based on his experience, and personal observations that day, Mr. Mugavero did not see anything that would have been any type of hazardous condition. The crew and Mr. Samson were engaged in normal operations following the switching list. Mr. Samson was not being asked to do anything extraordinary. Instead, Mr. Mugavero was directing the work be done in a different order. "They were going to do the same work regardless, but it would have been in different steps." There was nothing that he saw which would constitute an imminent danger of death or serious injury.

[Cross examination] Mr. Mugavero spoke to Mr. Samson because he was the closest crew member, and he didn't know who the foreman was.

The train ride was an efficiency, and switching, evaluation based on the track assignment for the crew.

When Mr. Mugavero arrived, got out of his truck, and approached, Mr. Samson was probably "lining up something for what they were going to do. He may have been throwing switches. The train was at a stop."

In his truck, Mr. Mugavero suggested over the radio that the crew doing the second part of the switch first for assignment 1339. Mr. Samson answered and then told the engineer what Mr. Mugavero wanted them to do. Then, Mr. Mugavero arrived at Mr. Samson's location. As the train started to shove the cars, Mr. Mugavero noted the issues with the two mismarked cars, and when they cleared, he asked Mr. Samson about them. He got out of his truck to start his walk with the crew which was part of his evaluation.

During a train ride, Mr. Mugavero's function is to both evaluate and make suggestions. Even if the change hasn't been briefed, the crew can not decline the suggestion if it affects operations. Normally, in response to a suggestion, most people just say okay and do it.

Mr. Mugavero acknowledges that at times when a person is doing his job, his suggestion might be viewed as interference. But, he does not think that was the situation on February 20, 2013. Mr. Samson did not tell Mr. Mugavero that he was interfering with his work. He did not ask Mr. Mugavero to stand aside and get out of the way for safety purposes.

When Mr. Mugavero noticed the mismarked cars, his first response was to ask Mr. Samson if the yardmaster had made the change. But, he got Mr. Samson's reaction rather than an answer.

When Mr. Allen made the other suggestion about shoving the cars, Mr. Mugavero advised that he was making things harder for himself, but Mr. Allen disagreed. And, Mr. Mugavero said okay and let them proceed.

Mr. Mugavero sent his e-mail summary to Mr. Cork, Mr. Murphy, and Mr. Sullivan.

During their exchange, Mr. Mugavero considered Mr. Samson to be insubordinate and quarrelsome. He didn't get an answer about the mismarked cars. Mr. Mugavero doesn't recall telling Mr. Samson that he was being insubordinate.

A job briefing is a quick discussion among the crew members about what they are going to do. Mr. Samson did not ask for a job brief when Mr. Mugavero made his suggestion about reversing the order of the switching.

Mr. Mugavero was not aware that Mr. Samson filed a hazardous safety report until the next day.

Mr. Mark A. Lashbrook
(TR pp. 272-305)

[Direct examination] In 2000, Mr. Lashbrook started his career in the railroad and has held a variety of jobs, including conductor. By February 2013, Mr. Lashbrook had been a trainmaster at Bensenville for five years. In that position, he supervised crews, and the operation of trains and cars.

On February 22, 2013, Mr. Lashbrook was working as the outside trainmaster, with a primary focus on crews. Sometime after he arrived at work at 6:00 p.m., he noticed that one yard crew, GH-21, seemed behind the productivity curve. When he asked the yardmaster about the situation, he responded that they had only switched about 40 cars in the first three hours of their shift. So, Mr. Lashbrook stated that he would down to the yard, and see what was going on. The yardmaster gave him additional switch lists for the crew.

Because Mr. Samson and the brakeman, Mr. Perry, had recently reverted back to conductor from engineer, he thought one explanation may be that they were a little rusty. When he arrived, he watched Mr. Samson complete shoving a tank car onto a track, while riding the car. He then drove around to their shanty to speak with Mr. Samson and Mr. Perry. When he asked about their status, Mr. Samson seemed a little irritated with his questioning. Mr. Lashbrook told them that the company's expectation was 150 cars a shift, and observed that over the course of the past four hours they had only switched 40 to 50 cars. Additionally, if they didn't have an explanation, then they needed to come up with a plan to switch smarter. Appearing to be agitated, Mr. Samson responded that he was switching efficiently and safely. In response, Mr. Lashbrook stated that Mr. Samson was not switching too safely because he rode the tank car into a joint (coupling), which required no further explanation from Mr. Lashbrook. Previously, Mr. Lashbrook had decided to have the productivity discussion first before he reminded Mr. Samson about the safety rule involving riding cars into a coupling. But, when Mr. Samson brought up safety, Mr. Lashbrook told him about his observation. Mr. Samson denied riding the car into the joint.

Mr. Samson then started to walk away. When Mr. Lashbrook called for him to come back, Mr. Samson replied that he didn't have to listen to him or do what he said. And, he walked off towards the shanty. And, Mr. Lashbrook returned to his truck. Because Mr. Samson's response was out of character, Mr. Lashbrook called his supervisor, Mr. Murphy. He explained

that the crew was behind on their switching and Mr. Samson appeared to have some problem listening to Mr. Lashbrook and declined to follow his instructions. Since Mr. Murphy lived nearby, he told Mr. Lashbrook to tell Mr. Samson to stay there and Mr. Murphy would come in and talk to him. When Mr. Lashbrook went back to the shanty, Mr. Samson wasn't there. After he found Mr. Perry on an engine and asked about Mr. Samson, Mr. Perry indicated that Mr. Samson was walking back to the office to go home. When Mr. Lashbrook told Mr. Murphy, Mr. Murphy directed Mr. Lashbrook to catch up with Mr. Samson and let him know that he was not to leave until Mr. Murphy arrived.

Mr. Lashbrook found Mr. Samson changing clothes in the locker room. He told Mr. Samson that Mr. Murphy would be there in 15 minutes to talk to him, and that Mr. Samson was not to leave the property until his arrival. Mr. Samson replied that he didn't have to listen to Mr. Lashbrook or do what he said. Mr. Lashbrook repeated Mr. Murphy's instructions, and left. Outside the locker room, the inside trainmaster, Mr. Walker, asked Mr. Lashbrook what was going on. Mr. Lashbrook told him that Mr. Samson was going home even though Mr. Murphy told him to stay on the property. Indicating that he got along well with Mr. Samson, Mr. Walker went in to talk to Mr. Samson. Fairly soon, Mr. Samson came out of the locker room appearing to still be upset, with Mr. Walker following. Mr. Walker told Mr. Samson that he at least had to stay there to talk to Mr. Murphy. Mr. Samson pushed a door open to leave, and Mr. Lashbrook said that it was the third time he was instructing Mr. Samson not to leave the property, and advised that Mr. Samson did not want to put himself in the position of not complying with instructions. Mr. Samson responded that if Mr. Murphy wanted to talk to him, he could talk to his union representative, or Mr. Samson, during an investigation. Mr. Samson then left.

Mr. Samson never indicated that he was experiencing a panic or anxiety attack.

When Mr. Lashbrook went out to talk to the crew, he saw Mr. Samson shoving two cars rather than just kick them. Since his view was obstructed from his position, Mr. Lashbrook drove around the rear end of the cars' movement to get an unobstructed view, and saw Mr. Samson ride the car into a joint. After that, he drove back around to their shanty. While riding a car as it's being shoved is not against the rules, it is against the rules to continue to ride the car as it joins another car because you can possibly get thrown off. Mr. Lashbrook saw Mr. Samson still on the tank car when it coupled with another car. He was not on the ground prior to the coupling. At the time, Mr. Samson was holding a lantern.

On February 22, 2013, Mr. Lashbrook had no knowledge of Mr. Samson's hazardous safety report on February 20, 2013. Although he knew Mr. Mugavero and Mr. Cork, neither of them told him about what happened on February 20, 2013. He didn't even see them because Mr. Lashbrook was off of work on the 20th and 21st. And, when he returned to work on the 22nd, the only person he talked to was Mr. Walker. The only thing he heard about Mr. Samson was during his conversation with the yardmaster, Mr. Hall. When the yardmaster gave him the additional lists for the crew, Mr. Hall said to be careful because Mr. Samson had a run-in with Mr. Mugavero a couple of days earlier. However, Mr. Hall didn't provide any details, and there was no mention of any unsafe conditions report. Mr. Lashbrook was in a hurry and left. He didn't plan a confrontation with Mr. Samson.

During his exchange with Mr. Samson, he asked why he was shoving the two cars. Mr. Samson responded because they were hazardous. Mr. Lashbrook responded that only certain types of hazardous cargo cars needed to be shoved. The type Mr. Samson had shoved was not in that category.

The 150 car expectation was doable, and being done on a regular basis.

[Cross examination] Since confrontations are not that all unusual, Mr. Lashbrook didn't ask Mr. Hall for more detail. And, in his experience, Mr. Samson never had a run-in with anyone, so he believed that what happened a few days earlier must have been an anomaly.

When Mr. Lashbrook drove around to observe Mr. Samson shoving the cars, it was nighttime and he was driving in a rail yard.

When he spoke with Mr. Murphy, he assumed Mr. Samson was headed for the shanty. Mr. Murphy instructed Mr. Lashbrook to tell Mr. Samson to stay there until he came in and talked to him. He didn't want Mr. Samson out working on switching cars. Later, when he talked to Mr. Samson in the locker room, Mr. Lashbrook had not talked to Mr. Murphy again. Since Mr. Samson was not in the shanty, the locker room was the first opportunity that he had to tell Mr. Samson about Mr. Murphy's instructions. He told Mr. Samson to stay on the property.

Mr. Lashbrook did not charge Mr. Samson for a rule violation. It was the first time that he had observed Mr. Samson doing something unsafe; and he decided to use coaching to address the issue. He didn't make a charge during the investigation because that seemed to be piling on.

Mr. Lashbrook didn't mention the rule violation first at the shanty because in his experience that type of conversation can be tense. He wanted to first have a positive conversation about their work, and then bring up the safety issue. He thought that order of conversation would be more productive.

He raised the issue about shoving the cars because he thought shoving cars was always slower than kicking the cars, which means letting the cars move on their own due to gravity or momentum. Mr. Lashbrook didn't know whether the two cars Mr. Samson shoved were the last two cars on their list. He just believed in general that kicking is more efficient.

Mr. Lashbrook did not ask Mr. Samson why he appeared to be agitated.

[Re-direct examination] Because Mr. Lashbrook did not expect to see Mr. Samson shoving cars when he arrived, he went around the other end to see if there was a good, logical reason that he was shoving the two cars.

Mr. Nicholas C. Walker
(TR, pp. 312-340)

[Direct examination] Mr. Walker has worked with Soo Line for nine and a half years. In February 2013, he was a trainmaster at the Bensenville freight rail yard. On February 22, 2013, he was working as the inside trainmaster.

After the yardmaster, Mr. Hall, advised Mr. Walker that the GH-21 switch job conductor was walking back to the office, Mr. Walker went downstairs to see what was going on. Mr. Lashbrook was standing in the hallway outside the locker room. Mr. Lashbrook explained that after talking to the GH-21 crew, Mr. Samson started walking back to the office. Mr. Lashbrook wasn't sure why, but Mr. Murphy was en route to talk to Mr. Samson. At that point, Mr. Lashbrook did not describe his conversation with the crew.

Since Mr. Walker had a good working relationship with Mr. Samson, he wanted to see what was going on based on his concern for Mr. Samson. He wanted to see if he could neutralize the situation. When Mr. Walker entered the locker room, Mr. Samson was changing his shoes. When Mr. Walker greeted Mr. Samson and asked what was going on, Mr. Samson did not have much to say. He simply said that he was leaving, and wasn't going to deal with this. Mr. Walker replied that Mr. Murphy was on the way so Mr. Walker wanted him to stick around and talk to Mr. Murphy. Mr. Samson responded that he wasn't going to stick around; that he didn't have to stay and Mr. Walker couldn't force him to stay. That response was true because Mr. Walker can't force anyone to stay on the property against his own free will. As Mr. Samson was leaving, Mr. Walker again asked him to just stick around and have a conversation with Mr. Murphy when he arrived. Then, in the hallway, as Mr. Samson was leaving, Mr. Lashbrook said that for the third time he was urging Mr. Samson go stay. Mr. Samson replied that if he had any further questions he should talk to the union representative, or bring it up during the investigation. Then, Mr. Samson left.

Mr. Samson showed no signs of a medical condition. He was just angry and agitated but did not indicate why. Mr. Samson did not say that he was not feeling well and might go see a doctor. If he had done so, Mr. Walker would have offered assistance in getting medical attention.

There did not appear to be any hazard in the locker room. Mr. Walker did not know what had happened in the rail yard.

On February 22, 2013, although he may have had some interaction with Mr. Mugavero and Mr. Cork, Mr. Walker was unaware of any incident involving Mr. Samson that occurred on February 20, 2013. They did not discuss Mr. Samson with him.

[Cross examination] When Mr. Hall advised that Mr. Samson was coming to the office, he did provide any other information.

Mr. Samson was not discourteous or quarrelsome with Mr. Walker. Mr. Walker asked Mr. Samson to stay. He did not order him to stay.

Safety is one of the company's five core principles. Following rules and procedures helps ensure safety.

[ALJ examination] Mr. Walker did not bring charges against Mr. Samson for the incident. Mr. Walker can not hold anyone as a prisoner on the property, but he can give an order that he needs to stay on the property. If an employee walks off the job, it's considered to be job abandonment.

Mr. Walker was never notified that Mr. Samson was sick that day. As of the present hearing, Mr. Walker still doesn't know why Mr. Samson left his job that day.

[Re-direct examination] In the hallway, when Mr. Lashbrook told Mr. Samson to stay, he also advised that his leaving would be considered insubordination. It was insubordination because Mr. Samson was refusing the order to stay. Although Mr. Walker didn't give Mr. Samson an order, Mr. Lashbrook did. Mr. Walker considered Mr. Samson's refusal to be insubordinate. He didn't bring up charges since Mr. Lashbrook handled the investigation.

[Re-direct examination] When Mr. Walker conducts train rides, he observes, coaches, teaches, and mentors. He talks to the crew. If a safety issue is involved, he'll interrupt the crew. If the issue involves how a task is being done, it's a judgment call whether Mr. Walker will wait to discuss the issue after the completion of the task, or during the task.

To address a mark-up issue with a car, Mr. Walker would seek clarification from the yardmaster. He might also ask a crew member.

Mr. Steven M. Cork
(TR, pp. 341-384)

[Direct examination] In February 2013, Mr. Cork had been the superintendent of the Bensenville freight rail yard for about a year.

On February 20, 2013, Mr. Murphy advised Mr. Cork that Mr. Samson had been removed from the crew on the east end by Mr. Mugavero due to a confrontation with Mr. Mugavero. Subsequently, around mid-morning, Mr. Samson came into Mr. Cork's office and asked if he could drop off a hazardous conditions report. In response, Mr. Cork asked if something was bothering him, or something for which Mr. Cork could provide help. Mr. Samson asked if he could turn in a report. Mr. Cork said yes and handed him the form. Mr. Cork then went to the restroom. When he returned, the hazardous condition report was on his desk, and Mr. Samson was gone.

In the report, Mr. Samson said an unsafe condition occurred when a manager was giving the crew guidance and direction on how to switch cars. In evaluating the report, Mr. Cork considered that providing guidance and direction was a normal responsibility for a train master, particularly considering that the rail had transitioned away from automatic switching.

Mr. Cork then discussed the situation with Mr. Mugavero, who is typically a very patient person. Since Mr. Samson was also patient, their exchange seemed out of character for both of them. So, he considered the incident to be a function of frustration, or something else other than an unsafe condition. He concluded the report did not have merit. The way it was written up, the condition was “certainly not unsafe.”

In his conversation with Mr. Samson in his office, Mr. Cork asked what happened. Mr. Samson said Mr. Mugavero was telling him what to do on how to switch. Mr. Samson indicated that he would take direction from Mr. Cork. Mr. Cork responded that Mr. Mugavero worked for Mr. Cork so Mr. Samson needed to take the same guidance and direction from Mr. Mugavero that he would accept from Mr. Cork. That’s when he asked if something was bothering since Mr. Samson was behaving out of character. Mr. Samson replied that he was perfectly fine. Then, Mr. Cork asked what he could do; that’s when Mr. Samson asked for the form. Mr. Samson appeared very frustrated about his conversation with Mr. Mugavero.

When he discussed the situation with Mr. Mugavero, he learned that when Mr. Mugavero gave Mr. Samson a suggestion about what he was doing, Mr. Samson gave a combative response. Mr. Mugavero attempted a resolution, but Mr. Samson wouldn’t acknowledge. When Mr. Mugavero told Mr. Samson that he could talk to him now, or during an investigation, Mr. Samson said he talk to him during the investigation. Mr. Samson still had work to do, but he chose to remove himself from the crew, and not perform his assigned duties.

At that time, Mr. Samson was not removed from service.

Eventually, a notice of investigation was sent to Mr. Samson, as required by the collective bargaining agreement. A hearing was conducted, which was separate from a second hearing conducted for a second incident involving Mr. Samson.

After the first hearing, Mr. Cork reviewed the transcript and hearing officer’s recommendation, which was termination for violating Rule 1.6. The second hearing officer also recommended termination based on a Rule 1.6 violation. The recommendations went directly to the general manager, Mr. Peck. Mr. Cork had conversation with Mr. Peck about what happened. Mr. Cork advised that he concurred with the recommendations.

In his 20 plus-year career, Mr. Cork has never dealt with a case involving insubordination. Mr. Cork did not recommend a lesser form of discipline such as probation or suspension because based on the hearing transcripts, Mr. Cork believed Mr. Samson had more than one opportunity to engage a manager in an amicable way, rather than going through the formal hearing process. Mr. Samson appeared to be taking a stand on something that wasn’t really an issue.

Neither hearing dealt with Mr. Samson’s hazardous safety condition report. Specifically, his report played no role in the proceedings involving the February 22, 2013 event.

As superintendent, Mr. Cork had also become aware of Mr. Samson’s exchange with Mr. Lashbrook.

The hearings occurred within 48 hours of each other. He only had one conversation with Mr. Peck. Each specific case had its own merit to support termination due to Mr. Samson's conduct. Absent the February 20, 2013 incident, Mr. Cork would still have recommended termination based on the February 22, 2013 event. Similarly, the February 20, 2013 incident standing alone supported termination.

Insubordination violates GCOR 1.6, and is considered to be a serious violation. Certain charges, such as insubordination, can lead to immediate termination

The labor relations officer in HR also reviews the recommendations, and the case goes up to the vice president of operations for a final decision. Although Mr. Cork did not make the final decision, he signed the termination paperwork because he was the senior officer at the terminal.

[Cross examination] Mr. Cork doesn't recall from his review of the transcript an explanation for Mr. Samson's behavior on February 22, 2013.

There are very few cases where an employee is removed from service based on a charge that will lead to an investigation. Typically, the company waits for the results of the hearing. At the same time, an employee can be removed from service pending an investigation.

Mr. Cork did not specifically reprimand Mr. Samson in his office on February 20, 2013. Other than looking for Mr. Samson in the lunch room after returning from the restroom, Mr. Cork made no other effort to contact Mr. Samson about the hazard/safety report before making his determination that it did not have merit.

After his exchange with Mr. Samson on February 20, 2013, Mr. Cork did not talk to either Mr. Lashbrook or Mr. Walker between that date and February 22, 2013 about what had happened.

Mr. Thomas P. Murphy
(TR, pp. 385 -415)

[Direct examination] In February 2013, Mr. Murphy was the assistant superintendent of operations in the Bensenville freight rail yard. He had just been promoted into that position three or four months earlier. He has spent 16 years in the railroad industry and previously worked as a conductor.

Mr. Murphy also serves as a hearing officer and had participated in over a hundred investigations. He conducted the hearing involving Mr. Samson's confrontation with Mr. Mugavero. He determined the evidence established the charge and recommended termination due to Mr. Samson's violation of Rule 1.6.

In making his determinations, Mr. Samson's hazardous safety conditions report played no role.

On February 22, 2013, in the evening, Mr. Murphy received a phone call from Mr. Lashbrook. Mr. Lashbrook reported that he was having an issue with Mr. Samson, “and that once again, I believe it was just him having trouble taking direction from the trainmaster.” Mr. Murphy responded that he was on his way in. And, he asked Mr. Lashbrook to ask Mr. Samson to stay because Mr. Murphy wanted to talk to him. He wanted to speak with Mr. Samson because his action seemed out of character. Up until then, he had been a very compliant employee, “and to have two incidents with him in a very short period of time led me to believe there’s probably something more going on.” In his capacity as assistant superintendent, and Mr. Mugavero’s supervisor, Mr. Murphy was aware of what happened with Mr. Samson on February 20, 2013. Mr. Mugavero indicated that when presented with the choice of following his instructions or going home, Mr. Samson went home.

About 20 minutes after Mr. Lashbrook’s call, Mr. Murphy arrived at the office. But, Mr. Samson was not there. Mr. Lashbrook indicated that Mr. Samson left and said he was a little stressed out and didn’t want to stay. Mr. Murphy then asked the union representative to try and contact Mr. Samson. Later, the union representative said Mr. Samson was not coming back in. Mr. Murphy directed Mr. Lashbrook to write up a charge for failure to follow instructions to stay on the property. Mr. Murphy then went home.

Insubordination was another charge.

Mr. Murphy directed the charge because Mr. Samson had left work twice, and absent the ability to engage in an informal setting, Mr. Murphy had to conduct an investigation to determine what was going on. Then, if warranted, he could drop the charge.

[Cross examination] Since Mr. Lashbrook indicated that Mr. Samson was leaving, he asked Mr. Lashbrook to tell Mr. Samson to stay.

[Re-direct examination] Since employees are valuable assets, Mr. Murphy tries to resolve issues informally. He was attempting to get Mr. Samson back as a productive asset.

His sole focus as the hearing officer was Mr. Samson’s conduct on February 22, 2013.

Mr. Jerry W. Peck

(TR, pp. 422 -449)

[Direct examination] Mr. Peck is the general manager of operations for Soo Line, he moved into that position in 2011. His direct supervisor is Mr. McFarlane, the vice president of operations. Mr. Peck started railroading in 1973 as a conductor.

GCOR 1.6 covers most of the cardinal rule violations. Some of the violations, including subordination which disrupts the chain of command and at times the entire operation, may warrant immediate determination.

Bensenville freight rail yard is a 24/7 operation. It is a central switching operation, with trains from different locations coming into the yard to be reclassified for delivery to various

customers. In 2012, the company changed the operations at Bensenville to flat switching which significantly reduced the number of cars handled each day from 2,000 to 1,100. During the transition, they started with a goal of 50 to 60 cars per shift. Eventually, the goal went up to 260 cars.

The absence of one member from work can have impact on the safety and efficiency of a work crew.

Following the two hearings regarding Mr. Samson for insubordination and desertion of duty, Mr. Peck read the transcripts, and reviewed the hearing officers' recommendations. He also received an update from the superintendent. Because the evidence from both hearings showed that Mr. Samson did not want to listen to instructions from his supervisor, and decided that he didn't want to be at work and left the property, Mr. Peck recommended to the vice president that Mr. Samson be dismissed due to the magnitude of the offenses. In particular, on February 22, 2013, Mr. Samson had been told to wait for a supervisor to show up and talk to him. He refused and went home. One of the exhibits in the second hearing may have been a hazardous safety report. It did not factor into Mr. Peck's decision since that reflected rule compliance, rather than a violation.

To the extent Mr. Samson was suffering an anxiety attack, not being able to work is one thing, but not sticking around to provide an explanation to a supervisor is quite another thing.

[Cross examination] Mr. Peck was aware of Mr. Samson's safety report before he made his termination decision. However, he only became aware of the anxiety attack afterwards.

It was very significant that Mr. Samson refused to stay and explain his situation when asked to do so by a supervisor.

Mr. Samson wasn't pulled from service after February 20th; that was a judgment call.

A reduction in force ("RIF") occurred due to the change in switching operations. That has an impact operations during the transition. The RIF would also add additional duties and stress on the employees who remained.

Mr. Peck wasn't aware of Mr. Samson's previous five-day suspension.

[ALJ examination] Mr. Peck does not know why Mr. Samson was not specifically charged with desertion of duty.

Mr. Peck believes Mr. Samson left on February 20th because he didn't feel comfortable with the situation. There was no explanation for his departure on February 22nd.

Had the February 22, 2013 event never occurred, Mr. Peck would still have recommended termination for Mr. Samson's actions on February 20, 2013. Likewise, absent the February 20, 2013 event, Mr. Peck would still have recommended termination for Mr. Samson's behavior on February 22, 2013.

Mr. John Sullivan⁸
(TR, pp. 450-462)

[Direct examination] In February 2013, Mr. Sullivan was an assistant superintendent at the Bensenville freight rail yard. He had been in that position for about a year. He has over 34 years of railroad experience.

Mr. Sullivan was the hearing officer for the incident that occurred on February 22, 2013. Based on the hearing evidence, Mr. Sullivan found that both Mr. Lashbrook and Mr. Walker instructed Mr. Samson not to leave the property until another supervisor arrived. Mr. Samson did not comply, and he went home. One of the exhibits was a hazardous condition report. That report played no role in his determinations. Mr. Sullivan recommended dismissal because failure to follow a supervisor's instruction was a dismissal offense.

Although Mr. Samson indicated during the investigation that he experienced an anxiety or panic attack, no medical evidence was provided to support his assertion. There also was no evidence that the two supervisors were aware of that condition.

Mr. Sullivan sent his hearing recommendation to the superintendent, and general manager.

[Cross examination] Although not in his recommendations, the hazardous safety report was mentioned in the transcript of the hearing. Mr. Sullivan did reference that Mr. Samson may have experienced some anxiety on February 22, 2013.

Mr. Sullivan was unaware that Mr. Samson saw a physician.

Ms. Christine A. Marier
(TR, pp. 462-486)

[Direct examination] Ms. Marier is a labor relations officer. She has been in the position for two years. The main collective bargaining agreement has been in effect since 2003. It covered the terms and conditions of Mr. Samson's employment, as well as disciplinary procedures. The agreement sets out specific time limits for the completion of various stages of discipline. A hearing, with a transcript, is also required for formal discipline. A labor relations officer will review a case if it involves dismissal.

Ms. Marier is aware of another Soo Line employee being immediately dismissed for quarrelsome and insubordinate behavior.

[Cross examination] The bargaining agreement requires supervisors to coach employees about unacceptable conduct.

An appeal may be made only after the vice president of operations has rendered an adverse determination.

⁸By telephone.

Ms. Marier has no idea why Mr. Samson received a letter addressed to another employee. She assumes the reference to another employee was a typographical error.

Under the company's personnel policy, an employee's discipline may progress from a five-day suspension, to a 10-day suspension, to dismissal. Informal coaching, formal coaching, and a progressive action plan, may also be used before a suspension is applied. However, some situation may warrant immediate termination as the first response.

Ms. Amanda Cobb
(TR, pp. 487-493)

[Direct examination] Ms. Cobb is an advisor at Soo Line, and responsible for employee relations. Based on her review of personnel records, she identified three employees who progressed immediately to termination.

[Cross examination] One employee was separated for inappropriate behavior towards a manager. The other two employees were terminated for inappropriate time claims, which essentially represented theft.

Ms. Cobb is not aware of a situation involving a discourteous and quarrelsome employee who was allowed to return to work the next day.

Mr. Doug McFarlane
(TR, pp. 500-529)

[Direct examination] Since February 2010, Mr. McFarlane has been senior vice president for U.S. operations for Soo Line. He has been with the company for 37 years. He is familiar with GCOR 1.6, which establishes some of the basic tenets for the company's operations. As a result, the GCOR 1.6 rules are placed at a higher level of discipline for a violation.

From 2012 through 2013, due to changes in railroad traffic, the Bensenville rail yard was converting from a hump operation to flat switching. While the hump system was effective and efficient at high volumes, the system becomes less efficient and more costly at lower volumes. Lower volumes caused the change, but once the change was made, even fewer cars came through Bensenville. At the time, they thought a production expectation of 150 cars per shift was reasonable.

After the hearings were conducted involving Mr. Samson's incidents on February 20 and 22, 2013, Mr. McFarlane received recommendations from the hearing officer and labor relations. Mr. McFarlane made the final determination. He reviewed the transcript and exhibits. And, since Mr. Samson was in violation of GCOR 1.6 on both occasions, Mr. McFarlane concurred with the dismissal recommendation. Mr. McFarlane was very troubled by the second incident when Mr. Samson did not accept the guidance to remain on the property and speak with Mr. Murphy. Mr. Samson took it upon himself to abandon the workplace, and "left me with no alternative but to agree with the dismissal recommendation."

The hazardous condition report exhibit from the second hearing wasn't relevant, and had no bearing on his decision.

[Cross examination] Mr. McFarlane had no evidence of an anxiety attack before him. There was nothing of significance introduced to support Mr. Samson's assertion.

Trainmasters are trained to deal with employees who may cause a disturbance. They have the authority to take action with would remove an employee who was being disruptive. Mr. McFarlane is satisfied with the way Mr. Lashbrook and Mr. Walker handled the situation. They called Mr. Murphy because he was their supervisor, and wanted to give him an opportunity to talk to Mr. Samson.

Between July 2012 and February 2013, there were probably fewer employees working at Bensenville.

If Mr. McFarlane had questions about productivity at Bensenville, he probably would have dealt directly with Mr. Peck. If production expectations were not met on an ongoing basis, and an investigation showed a trainmaster or manager wasn't taking appropriate action, there could be negative consequences. Managers are at-will employees who can be let go at any time. Everyone is an at-will employee, including Mr. McFarlane. It is in everyone's best interests if production is maintained on a daily basis.

A tension may exist between productivity goals and safety goals. However, Soo Line sets its efficiency expectations with "safety as the first tenet of the operation." Safety is considered when developing business models.

Based on the different circumstances between the two incidents, Mr. McFarlane understands why Mr. Samson was permitted to return to work after the events on February 20, 2013. It's not unusual to keep an employee in service during an investigation.

Although Mr. McFarlane is ultimately responsible for safety, he relies on other people to meet that responsibility. That's why immediate supervisors usually deal with hazardous condition reports. It would be unusual for Mr. McFarlane to deal directly with a hazardous condition report.

[ALJ examination] Based on the events that occurred on February 20, 2013 alone, Mr. McFarlane probably would have concurred with dismissal. Based on the events that occurred on February 22, 2013 alone, Mr. McFarlane "absolutely" would have decided to dismiss Mr. Samson because of his clear abandonment of duty after being asked to stick around and resolve the issue. And, absent the hazardous conditions report in the record of the second hearing, Mr. McFarlane again would have reached the same conclusion since it had no bearing on the GCOR 1.6 violation that occurred on February 22, 2013 when Mr. Samson walked off the job.

Treatment Records – Dr. Brian M. McFaul⁹
(CX 1, DR 19, RX 34, and RX 35)

On August 26, 2014, Dr. McFaul indicated that Mr. Samson had been diagnosed with generalized anxiety disorder, and attention deficit disorder. Although a highly functioning individual, Mr. Samson experienced a severe pain attack at least once in winter/early spring of 2013. Although he wasn't present for the panic attack that caused Mr. Samson to leave his railroad job, Dr. McFaul opined that Mr. Samson's behavior as described by him involving a situation with a high degree of anxiety and stress was possibly due to his condition. His proclivity for panic attacks was associated with his anxiety disorder. Mr. Samson's condition may also interfere with the ability to concentrate since his mind may "run rather busily." Mr. Samson had been compliant with his medications, and remained earnest about his treatment.

Mr. Samson had appointments with Dr. McFaul March 8, 15, and 27, 2013; April 10, 2013; May 1, 2013; August 26, 2014; and September 16, 2014. Dr. McFaul prescribed medication in March 2013 and August 2014.

SOFA – 2014 Update
(CX 1)

According to the SOFA summary, the six main switching safety issues are: inexperienced employees, close clearances, industrial hazards, job safety briefings, stuck by mainline train, and going between rolling equipment.

Concerning job safety briefings, ongoing communication is critical among employees during the entire switching operation, including periods when tasks are changing. A job briefing is a two-way exchange of information to reach an understanding of the tasks being performed. Many fatalities in rail yards occurred when a job task was changed and an update to the job briefing did not occur. A job briefing needs to occur when either the nature of the work changes, or safety concerns arise.

U.S. Army Personnel Records
(DR 3 and DX 16)

In June 2012, Sergeant Jacek Samson received an Army Achievement Medal for exceptional leadership and devotion to duty during annual wheeled-mechanic training.

In October 2013, Sergeant Jacek Samson received a second Army Achievement Medal for outstanding performance during his unit's deployment.

In his 2013 NCO evaluation report, Sergeant Jacek Samson received the highest rating in every category as a wheeled-vehicle mechanic. He was designated as being "among the best."

⁹While I have read/reviewed all the admitted exhibits, I have only summarized the potentially relevant content that was not unduly repetitious of the hearing testimony.

Mr. Samson was called to active duty training from September 13 to 27, 2013; November 10 to 21, 2013; and, from 21 February to April 4, 2014.

Safety/Hazard Report
(DR 3, RX 19, RX 30, and RX 31)

At 12:30 p.m., February 20, 2013, Mr. Samson filed a Safety/Hazard Report. He described as a hazardous condition Mr. Mugavero's act of coming out to the east end yard, and telling the 1399 two man-crew how to switch tracks, "creating an unsafe condition for the crew." According to Mr. Samson, Mr. Mugavero was constantly interfering and causing confusion. Mr. Samson insisted on being able to do the switching, but Mr. Mugavero refused. Mr. Cork received the report.

Mr. Cork replied that providing supervision to crew member is not a hazardous condition, or an unsafe practice. Observing a crew perform, and providing feedback guidance, are supervisory fundamentals.

Field Training Record
(DR 3)

On February 21, 2013, during an observation test, Mr. Samson satisfactorily complied with several evaluations rules. His performance was rated as very good.

Safety Rule Book for Field Operations
(DR 3)

Section 1, Core Safety Rules for CP (Soo Line) provide that job tasks are performed only by individuals qualified and authorized to perform the tasks. Additionally, job briefings are conducted before performing work, and when activity and/or conditions change from initial briefing.

Corporate Safety Policy
(DR 3)

The goal of Canadian Pacific (Soo Line) "is to be the safest railway in North America."

Flat Switching Guidelines
(DR 3)

"Job briefings are mandatory and must include all crew members. Additional Job Briefings must be held as situations change, and as work progresses."

Notices of Hearings

(DR 6, RX 11, RX 15, RX 16, RX 18, RX 19, and RX 38)

On May 6, 2011, Mr. Samson was notified of a formal investigation/hearing to be conducted into an alleged failure to stop at a signal displaying a stop indication on April 30, 2011.

In revised notices, dated February 28, 2013, Mr. Samson was advised that hearings would be conducted on March 14, 2013 at 1:00 p.m. and 2:00 p.m. to ascertain facts and determine responsibility for his alleged: a) unacceptable conduct and failure to comply with the trainmasters' instructions on February 20, 2013 at approximately 11:15 a.m.; and, b) his discourteous, quarrelsome, and insubordinate conduct, and failure to comply with the trainmasters' instructions on February 22, 2013 at 7:45 p.m.

Dismissal Letters

(DR 6 and RX 22)

On March 28, 2013, Mr. Cook advised that after full consideration of the testimony developed at both hearings concerning the charges stated in the revised notices of hearings, and since the investigations determined that Mr. Samson had violated GCOR 1.6, he was dismissed.

Eligibility for Engineer Certification

(DR 6 and RX 13)

On May 23, 2011, due to his failure to comply with a stop signal on April 30, 2011, Mr. Samson's eligibility for certification as a locomotive engineer was revoked from April 31 [sic], 2011 to May 23, 2011. His certification was reinstated May 24, 2011.

Creditable Compensation

(DR 14 and RX 57)

Mr. Samson's creditable compensation for his railroad retirement was: 2010 - \$48,076; 2011 - \$58,853; 2012 - \$59,163; and 2013 - \$14,464.

Resume

(DR 16 and RX 45)

Mr. Samson lists experience as track vehicle mechanic, exterior remodeler, independent contractor, freight conductor, freight locomotive engineer, and track vehicle mechanic.

Income

(DR 21, DR 22, RX 54, and RX 55)

On their 2012 federal income tax form, Mr. and Mrs. Samson reported wages in the amount of \$67,625. On their 2013 federal income tax form, Mr. and Mrs. Samson reported wages in the amount of \$24,052, and \$11,054 in unemployment benefits. For two weeks in August/September 2014, Mr. Samson earned \$2,114. His yearly gross income to date was \$29,760.

Collective Bargaining Agreement – Discipline and Investigations

(CX 1, RX 1, RX 3, and RX 38)

Part 1, Article 9 addresses employee discipline and investigations.

Employees continued in service pending an investigation of an alleged offense shall be notified within seven days of an investigation, which must be held within the next seven days. An employee will not be held out of service prior to a fair and impartial investigation except for the following causes: violation involving drugs or alcohol, theft, or conduct that threatens safety of the employee, other employees, or interferes with operation of the railroad.

The contents of the investigation transcript will be the basis for assessing discipline. If discipline is assessed, a reasonable explanation will be given based on the contents of the investigation transcript.

GCOR – April 7, 2010

(CX 1, DR 3, RX 7, RX 19, and RX 38)

Rule 1.1: “Safety is the most important element in performing duties.” If in doubt, “take the safe course.”

Rule 1.1.2: “Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.”

Rule 1.6: “Employees must not be: 1. Careless of the safety of themselves or others . . . 2. Insubordinate . . . 6. Quarrelsome, or 7. Discourteous.” Any misconduct affecting the interest of the company or its employee “is cause for dismissal . . . Indifference to duty, or to the performance of duty, will not be tolerated.”

Rule 6.5: “Equipment must not be shoved until the engineer and the employee protecting the movement have completed a job briefing concerning how protection will be provided.”

Personnel Records
(RX 5, RX 14, and RX 38)

On March 24, 2008, Soo Line hired Mr. Samson as a conductor. On March 1, 2011, Mr. Samson became an engineer. On April 30, 2011, Mr. Samson's engineer license was revoked. On May 16, 2011, Mr. Samson was placed on a five-day suspension for failure to comply with an absolute signal display stop. On May 23, 2011, Mr. Samson's engineer certificate was reinstated. On October 29, 2012, Mr. Samson was "demoted" to conductor. On March 28, 2013, Mr. Samson was dismissed for unacceptable behavior and failure to comply with a trainmaster's instructions on February 20, 2013, and discourteous, quarrelsome, and insubordinate conduct.

On October 24, 2012, management advised that effective October 29, 2012, Mr. Samson was being demoted to conductor. He had two options: a) attempt to remain an engineer at another terminal based on seniority, or b) demote himself to conductor at the Bensenville terminal.

Hazardous Material Instructions for Rail
(RX 8 and RX 38)

Section V advises that switching of hazardous materials shipments must be made in compliance the restrictions in the Switching Chart, which sets out six groups for hazardous shipments. The instruction cautions an employee that before coupling, he should position himself at the end of a tank car, away from any valves since the contents of a tank car may splash during, or immediately after, coupling due to either improperly secured covers, or the impact of coupling.

Positive Behavior & Performance Development Policy
(RX 9, RX 38, and RX 58)

Under this policy, disciplinary responses range from informal/formal coaching, progressive action plan, five day suspension for first incident, 10-day suspension for second incident within 24 months of previous incident, dismissal for third incident within 24 months of previous incident. Further, "employees who continue to fail to modify behavior or performance may be dismissed regardless of the seriousness of the third and final incident."

"For major offenses, immediate dismissal from service may be warranted depending on the gravity of the situation and specific circumstances. Immediate dismissal could result if an employee is responsible for insubordination, theft, violation of Drug and Alcohol policy, gross negligence, or unsafe or dangerous conduct on duty."

Employees directly involved in cardinal rule infractions "will be removed from service pending formal investigation/hearing."

As of March 17, 2013, infractions were dealt with using the following progression, unless they warranted outright dismissal: first infraction – five-working day suspension; second infraction – 10-working day suspension; third infraction – 30 working-day suspension; and, fourth infraction – dismissal.

Immediate dismissal, as well as suspension from service without pay pending a hearing, may be warranted depending on the gravity of the situation and specific circumstances, including cases involving insubordination,

Waiver and Suspension
(RX 12)

Pursuant to his May 16, 2011 waiver of a formal investigation/hearing, Mr. Samson received a five-day suspension for failing to comply with an absolute signal displaying a stop on April 30, 2011.

Transcript –Hearing for February 20, 2013 Charges
(RX 16 and RX 38)

On March 18, 2013, in the morning, after two postponements, Mr. Thomas Murphy conducted a hearing concerning the following charges: alleged unacceptable conduct and failure to comply with trainmaster’s instructions on February 20, 2013.

Mr. Mugavero

When Mr. Mugavero went out to check on Assignment 1339, the crew was waiting to switch because they were blocked by another train. Mr. Mugavero advised over the radio that they could shove the head 10 cars without having to waiting for the other train to clear. Mr. Samson replied that their list indicated they had to go to C4. However, Mr. Mugavero noted they could still clear the head 10 cars. Then, as the crew started shoving, Mr. Allen, the foreman stated that they could shove an additional car at the time.

After the cars were clear, Mr. Mugavero noted that two other cars were marked for tracks that were different the crew’s switch list. So, Mr. Mugavero asked Mr. Samson if the yardmaster had changed the assigned tracks. Mr. Samson replied, “Are you the conductor or brakeman because you can’t tell us how to switch. If you want to switch cars, then maybe you should come back on the ground.” Mr. Mugavero noted that he was Mr. Samson’s manager and if that hadn’t switch as he suggested, the crew would still be sitting there waiting for the other train to clear. However, Mr. Samson argued with Mr. Mugavero, stating that according to the union Mr. Mugavero could not tell the crew how to switch; he could only tell them what to switch. Mr. Mugavero then indicated that they could handle the situation in one of two ways. Mr. Samson could switch cars as directed; or, he could go home and have the situation handled later during an investigation. Mr. Samson chose to go home.

Prior to his departure, Mr. Mugavero suggested that Mr. Samson talk to the crew. So, the crew shoved clear, and Mr. Samson told them what was going on and that he was going home. Mr. Mugavero advised the crew that he had no issue with them, but Mr. Samson had chosen to go home. When Mr. Mugavero and Mr. Samson were walking back to the office, Mr. Mugavero asked Mr. Samson if he was sure that he wanted to go home. Mr. Samson said yes. The crew continued working without Mr. Samson.

Mr. Mugavero spoke to Mr. Samson rather than the foreman about the two mis-marked cars because Mr. Samson was closer. Mr. Mugavero didn't change the crew's list in regards to their job briefing. He only changed how the list would be switched to avoid having the crew just sit there waiting for the other train to clear.

Although Mr. Samson was quarrelsome and insubordinate, he wasn't pulled out of service because in that situation, it wasn't warranted. Instead, Mr. Samson was sent home for the day. Mr. Samson didn't comply with Mr. Mugavero's instructions because he said he didn't have to listen to Mr. Mugavero about switching cars.

Mr. Mugavero never changed the tracks for the cars. He just had them accomplish a portion of the switch first.

When he arrived, he watched the crew for about 10 minutes before talking to them. He was conducting a proficiency ride. But, he then saw the crew wasn't moving, so he approached Mr. Samson.

Mr. Mugavero did not recall giving Mr. Samson specific instructions about the switches he was throwing.

Mr. Samson did not seem confused by his instructions. He did not tell Mr. Mugavero that he was confused. To the contrary, after Mr. Mugavero made the suggestion about the head 10 cars, it was Mr. Samson who told Mr. Allen that they were going to shove back; he was the one who told Mr. Allen what to do. Mr. Samson did not tell Mr. Mugavero that he was making Mr. Samson feel unsafe. Mr. Samson did not say that the reason he was going home was because he felt confused and unsafe. He only asked Mr. Mugavero if he was the conductor or the foreman.

Mr. Samson's question about whether Mr. Mugavero was a brakeman was inappropriate. Mr. Mugavero was trying to coach, and Mr. Samson's questioned him in an unacceptable manner.

When Mr. Mugavero spoke to the crew, he told them that if they felt what he was doing was wrong, they could go home too.

Mr. Samson

When Mr. Mugavero arrived, he was just conducting a monthly check. However, as Mr. Samson started throwing some preliminary switches based on the foreman's job briefing, Mr. Mugavero started asking him what he was doing, and made changes that he indicated would make things go faster.

Although Mr. Samson complied, due to the difference between the foreman's directions and Mr. Mugavero's instructions, Mr. Samson had no idea what to do next. Mr. Mugavero continued to interfere, and grab Mr. Samson's attention. He eventually directed the switching of several cars while they were waiting for another train to clear out of the way. Mr. Samson again complied, and Mr. Allen added another car movement.

Mr. Mugavero then approached Mr. Samson again, and asked about two cars and their track assignments. In response, because he was confused and felt unsafe, Mr. Samson asked Mr. Mugavero to stand back, just observe, and make suggestions after the task was completed. He told Mr. Mugavero that he felt unsafe due to his confusion. In response, Mr. Mugavero gave him two options: follow his instructions or go home.

When he met with the crew, Mr. Samson described what was happening and stated that he felt confused and unsafe. The crew didn't respond. So, Mr. Samson left. Mr. Mugavero followed him, and asked if he was sure about what he was doing.

When Mr. Mugavero gave him the two choices, he felt threatened. Mr. Samson believed going home was the safest course of action because he couldn't do switching in his confused state; and if he went home, he would not do any damage.

Mr. Samson respects the position of trainmaster.

Hearing Officer Recommendation

(RX 17)

On March 23, 2013, Mr. Murphy advised Mr. Peck that based on a review of the transcript he found the failure to comply with instructions had been substantiated. He recommended dismissal for a violation of GCOR 1.6

Transcript –Hearing for February 22, 2013 Charges

(RX 19 and RX 38)

On March 18, 2013, in the afternoon, after two postponements, Mr. John Sullivan conducted a hearing concerning the following charges: alleged discourteous, quarrelsome, and insubordinate conduct and failure to comply with trainmaster's instructions on February 22, 2013.

Mr. Lashbrook

In the early evening, Mr. Lashbrook went to the crew to which Mr. Samson was assigned to inquire why they were behind on the expected production number for switching cars. Mr. Samson became irate; said he didn't have to listen to Mr. Lashbrook and didn't have to do what he said; and walked away. Mr. Lashbrook had no idea why Mr. Samson was upset; his approach had been personable.

When Mr. Lashbrook called Mr. Murphy about the situation, Mr. Murphy told him to tell Mr. Samson that he would be there in 15 minutes to talk to him. Mr. Lashbrook found Mr. Samson in the locker room and passed on Mr. Murphy's instruction to remain on the property. Mr. Samson again responded that he didn't have to do what Mr. Murphy said. Mr. Lashbrook replied that he couldn't make Mr. Samson stay but he highly advised that he remain on the property.

Mr. Lashbrook left the locker room and explained to Mr. Walker what had happened. Mr. Walker went into the locker room; but within a minute or two, Mr. Samson came out still very agitated. Mr. Walker followed Mr. Samson and urged him to stay. Mr. Lashbrook said to Mr. Samson that for the third time that he was being instructed to remain on the property, and warned that his action might be considered insubordination. Mr. Samson left the property.

When Mr. Lashbrook first went out to the crew location, he noticed Mr. Samson shoving a tank car and another car. Curious about why Mr. Samson might be shoving, rather than kicking, the cars, he drove around to the other side for a better view. After the task was complete, he had a discussion about why Mr. Samson shoved the cars. When Mr. Samson said because it was a tank car, Mr. Lashbrook observed that tank cars could be kicked as long as they did not contain flammable gas. The tank car Mr. Samson shoved did not contain flammable gas. He then gave Mr. Perry and Mr. Samson a switching list, and talked to them about their low production that day. Mr. Lashbrook thought he was being very reasonable because he recognized Mr. Samson and Mr. Perry had recently been demoted to conductor and were new to their work on the ground. He wanted to let them know what was expected. And, after Mr. Samson responded that he was switching safely, Mr. Lashbrook replied that he observed Mr. Samson ride the tank car into the joint which didn't appear to be safe. Mr. Samson denied doing that; he didn't explain anything. Mr. Samson seemed agitated and walked away. When Mr. Lashbrook called out, "Listen, Jack," Mr. Samson shouted, "I don't have to listen to you," and he continued to walk away. Mr. Lashbrook only had one conversation with Mr. Samson out in the yard. He brought this issue up last because he wanted to speak to both of them about the production issue first.

Mr. Lashbrook thought Mr. Samson was quarrelsome, discourteous, and insubordinate in violation of GCOR 1.6. Refusing to listen is quarrelsome. Turning your back on someone and turning away is discourteous.

Mr. Lashbrook had been off duty, and was not aware of the events involving Mr. Samson that took place on February 20, 2013. When going over the list with the yardmaster, the yardmaster mentioned that Mr. Samson had had a conflict with Mr. Mugavero two days earlier.

but he did not provide any details. He was not aware of the hazardous condition report Mr. Samson had filed.

Mr. Walker

Mr. Walker met Mr. Lashbrook, learned what was going on, went into the locker room to speak with Mr. Samson. Since that they had a good working relationship, he approached Mr. Samson in a sensitive manner. He urged Mr. Samson to stay and wait to Mr. Murphy. But, Mr. Samson didn't have much to say. He said that he was going home, and any further discussion could be with his union representative.

As Mr. Samson was departing, Mr. Lashbrook said that for the third time, he was instructing Mr. Samson to remain on the property.

Mr. Samson

Mr. Lashbrook approached Mr. Samson and asked why he had shoved the last two cars instead of kicking them. Mr. Samson responded that because one of the cars was a hazardous material tank car he was not comfortable kicking it. Mr. Lashbrook replied that he was expected to kick tank cars also. Mr. Samson asked Mr. Lashbrook to repeat his instructions over the radio for the record, and Mr. Lashbrook got offended, probably because he realized Mr. Samson couldn't be pressured into switching cars at an unsafe rate.

Later, Mr. Lashbrook came to the shanty and told Mr. Samson and Mr. Perry that they had only switched about 40 to 50 cars during the first half of their shift, while the expectation was 150 cars per shift. He told them to work smarter. Mr. Samson replied that he'd work safely. Again, Mr. Lashbrook was upset.

Shortly afterwards, Mr. Lashbrook asked Mr. Samson to come outside the shanty. He then accused Mr. Samson of riding the tank car into the joint which as a dangerous act. Mr. Samson explained that while he was riding the tank car as it started movement, he walked it into the joint. Mr. Samson was angry that Mr. Lashbrook accused him of doing something he didn't do. He also became anxious and scared, and felt threatened because Mr. Lashbrook was willing to make a false accusation to discredit his reputation. He believed Mr. Lashbrook created a dangerous situation because "he accused me of something I hadn't done in the hope that I would pick up the pace." Mr. Samson also felt he was being threatened because he filed a hazardous condition report on February 20, 2013.

These three exchanges occurred over a period of about 20 minutes. He didn't tell Mr. Lashbrook that he didn't have to listen to him. No one yelled at him.

Mr. Samson called his supervisor, Mr. Hall, and advised that he was being accused of something he didn't do and he no longer felt safe and able to operate, so he was taking himself out of service.

In the locker room, Mr. Lashbrook ordered Mr. Samson to stay, but Mr. Samson was having a generalized anxiety attack, with a pounding heart, inability to catch his breath, and needed to get out of there. This was the first time he had experienced this condition. Later, a psychiatrist said he had suffered a panic attack due to tremendous stress; and, the doctor prescribed medication for the condition. He was in no condition to stay and need to remove himself from the “dangerous-for-me” situation.

While Mr. Walker may not have intended to threaten Mr. Samson in the locker room, Mr. Samson still felt threatened by his presence.

Two discussions occurred out in the yard. The second conversation occurred when Mr. Lashbrook asked Mr. Samson over the radio to come outside the shanty. Only then did Mr. Lashbrook mention the violation about riding the tank car. Mr. Samson believes Mr. Lashbrook raised the charge because he realized Mr. Samson was not going to play ball, and he decided to intimidate him. Once he heard that Mr. Lashbrook was willing to accuse him, Mr. Samson had to leave that environment. “Given the prior incident that happened two days ago, I just felt unsafe.”

Hearing Officer Recommendation (RX 20)

On March 23, 2013, Mr. Sullivan advised Mr. Peck that based on a review of the transcript he found the charged violation of GCOR 1.6 as alleged in notice of investigation was substantiated. He recommended dismissal for a violation of GCOR 1.6.

E-Mail – Mr. Mugavero (RX 33)

In a February 20, 2013 e-mail to Mr. Cork, Mr. Sullivan, and Mr. Murphy, Mr. Mugavero summarized the events that occurred with Mr. Samson. Mr. Mugavero noted the crew with Mr. Samson was waiting for another train to clear. Although Mr. Samson was lining up switches, Mr. Mugavero told Mr. Samson to shove back and switch the head 10 cars while they were waiting. Mr. Samson said that he couldn’t because they had to go to CT04. He advised Mr. Samson that they could still switch the lead cars. As they were shoving back, the conductor (Mr. Allen) said they should add another car, which “was a good idea.” Mr. Mugavero then told the conductor that he might want to leave more cars because the conductor was making it hard on himself. The conductor disagreed. And, Mr. Mugavero left it at that since the conductor may have had a better idea.

Mr. Mugavero then went over to Mr. Samson to ask him about two cars on the list to see if the yardmaster had switched tracks because they appeared to be mismarked. Mr. Samson looked at Mr. Samson and said, “Nick, are you the conductor or brakeman? Because you can’t tell us how to switch. If you want to switch cars then maybe you should come back on the ground.” Mr. Mugavero told Mr. Samson that he was his manager and Mr. Samson did need to listen to him; and if they hadn’t followed his suggestion they would still be sitting there.

Mr. Samson continued to argue, and told Mr. Mugavero again that he couldn't tell them how to switch; he could only tell them what to switch according to his union. At that point, Mr. Mugavero indicated they could handle the situation in one of two ways. Either he followed the switching directions he provided, or he could go home and address the issue in an investigation. Mr. Samson chose to go home. And, Mr. Mugavero said he should talk to the crew first.

When they met the crew, Mr. Mugavero asked them what they wanted to do, and told them that he didn't have problem with them. Mr. Samson told the crew that the only reason Mr. Mugavero was down there was "because of what Mr. Best said earlier." Mr. Mugavero then told the crew that they could continue to work. Mr. Samson went home. As Mr. Samson was departing, Mr. Mugavero asked him if he was sure that he wanted to do this.

March 2013 Statement – Mr. Samson
(RX 37)

In March 2013, Mr. Samson summarized the events that occurred on February 20, 2013.

After being called in off the extra board, Mr. Samson chose to work as a helper. Over the course of the morning, his crew accomplished several switching assignments. At the completion of one assignment, the yardmaster, Mr. Best "questioned our efforts and pointed out the fact that it took us a whole hour to switch [a] track. This is when I suggested for the Yardmaster to come outside to assist us, and maybe the work would go faster." Mr. Best responded that he'd send a trainmaster to help.

About a half hour later, Mr. Mugavero arrived with more switching lists. He told the crew that he would be doing a ride-along with them. However, after few minutes, he changed his intentions and started taking charge of our assignment. At that time, Mr. Mugavero did not make himself part of the crew or conduct a job briefing. "Trainmaster Mugavero began telling me how to switch track C33 and constantly questioning my actions as a helper." When they became blocked by another train, "Trainmaster Mugavero took over our switching operation and flat out told us to shove half of the track back into C33 up to line 11 which had one car for C26 right away." The foreman (Mr. Allen) decided to also get rid of the C26 car right away. When Mr. Mugavero questioned that decision by indicating it would make things harder, the foreman disagreed and proceeded to kick the car because it was an efficient move. Mr. Mugavero continued to direct Mr. Samson on how they would do the switch. He also asked whether the yardmaster had instructed the crew on where some cars were to go. Since the yardmaster provided the lists, Mr. Mugavero should have asked the yardmaster that question. At that moment, after Mr. Mugavero had been changing or questioning the foreman's decisions in the middle of a move, Mr. Samson concluded Mr. Mugavero's presence was creating unsafe and hazardous conditions, and causing a lot of confusion for Mr. Samson. So, according to Mr. Samson:

I approached the Trainmaster Mugavero, and notified him that I was the Helper, [Mr. Allen] was the foreman, and that Nick Mugavero was the Trainmaster, and that we all have assigned positions to adhere to. I asked him to allow us to do our

jobs, and for him to stand in the clear, observe us, and at the end of our switching, he was more than welcomed to give us pointers and suggestions.

In response, Mr. Mugavero became offensive and told Mr. Samson that because he was the manager, Mr. Samson had to follow his direction. Mr. Samson repeated his request and stated that otherwise he would stop working in order to avoid any incidents caused by the confusion that Mr. Mugavero was creating by his interference. Mr. Samson then met with the crew and told them about his concern and intention to stop working unless Mr. Mugavero allowed them to switch according to their judgment. When Mr. Mugavero questioned the crew, they were silent. So, "I decided to take the safe course and I walked off the engine and drove to the west yard office." At the office, Mr. Mugavero told him to go home. Mr. Samson filled out a hazardous condition report, had Mr. Cork sign it, and left. The next day, he was back to work.

March 2013 Statement – Mr. Samson
(RX 37)

In March 2013, Mr. Samson summarized the events that occurred on February 22, 2013.

After starting his shift at the beginning of the afternoon as the foreman, Trainmaster Parsons advised that he was being watched and recognized that having returned as a conductor Mr. Samson needed additional practice. So, he offered some suggestions about kicking cars more efficiently, which Mr. Samson tried to incorporate into his work.

Later, Trainmaster Lashbrook arrived and after a cordial greeting asked why Mr. Samson had shoved the last two cars of the cut instead of kicking them. Mr. Samson responded that since one of the two cars was a hazardous tanker, he felt safe shoving. Mr. Lashbrook then said that they were allowed to kick hazardous cars and that was what they should do. "I asked him if it was alright for me to go on the radio and repeat the instructions he just gave me to have a record of this conversation." Mr. Lashbrook was offended by the request because "he realized that I wasn't about to be pressured into switching unsafely." Mr. Lashbrook then became aggressive and advised that crews were expected to switch 150 cars per shift, or there would be an investigation into the delay. He told them to work smart. "I replied that we should also work safely. He did not like my response, because safely means following set rules and precautions which doesn't always go hand in hand with unrealistic production expectations." They had been trained to follow certain procedures; and "now Canadian Pacific (Soo Line) was expecting us to cut corners to accommodate production. I wasn't willing to give into the pressure of the trainmaster." As result, realizing Mr. Samson wouldn't yield, Mr. Lashbrook then "decided to intimidate me by accusing me of a rules violation." Specifically, after giving them their lists and going to his vehicle, he asked over the radio for Mr. Samson to come outside the shanty. When Mr. Samson came outside, Mr. Mugavero asked him why he "made the joint on F6 while riding a hazardous tanker." Mr. Samson believed that Mr. Mugavero saw him start the shove while still riding on the car and assumed he made the joint while still riding the car; and Mr. Lashbrook as now using that assumption to intimidate him. Mr. Samson had actually got off the car, with one car length to go, and walked the joint in while on the ground. Mr. Mugavero had not been in position to actually observe Mr. Samson when he made the joint. Despite that, Mr. Lashbrook still made the assertion against him.

Because Mr. Lashbrook was trying to intimidate him with a false accusation, “I decided that this hostile work environment created by Mr. Lashbrook was too dangerous for me to safely perform by duties.” So, Mr. Samson advised his supervisor, Mr. Hall, about the situation, and told him that he was taking himself out of service pending resolution of the dangerous work environment.” Mr. Samson “couldn’t believe that after two days following the incident with trainmaster Mugavero and after filling out the hazardous conditions report, an incident of similar nature occurred.”

Disciplinary Actions
(RX 42 to RX 44, RX 59 and RX 60)¹⁰

On April 13, 2012, a Soo Line conductor was dismissed from service in part for insubordinate, discourteous, and quarrelsome conduct toward a supervisor in violation of GCOR 1.6.

On March 14, 2012, a Soo Line engineer was dismissed from service for submission of inappropriate time claims which led to incentive compensation in violation of GCOR 1.6.

On June 25, 2012, a Soo Line engineer was dismissed from service for submission of inappropriate time claims which led to incentive compensation in violation of GCOR 1.6.

On October 21, 2014, a Soo Line signalman was dismissed from service for failure to follow proper deactivation procedures in violation of several rules, including GCOR 1.6. for conduct.

On September 30, 2014, a Soo Line yard electrical helper was dismissed from service, after multiple prior disciplinary actions, including a 10-day suspension, for using an electronic device while operating a company vehicle in violation of several rules, including GCOR 1.6. for conduct.

¹⁰Each exhibit contained two copies of the disciplinary action. The first copy had the employee’s name redacted. The second copy contained the employee’s name. I have removed the later copies from the evidentiary record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility Determinations

Based on their demeanor, consistently direct answers, and general lack of equivocation, I found the sworn testimony of several witnesses in this case, including Mr. Walker, Mr. Cork, Mr. Peck, Mr. Sullivan, Ms. Marier, Ms. Cobb, and Mr. McFarlane, to be credible.

Of the remaining three witnesses, while Mr. Samson, Mr. Mugavero, and Mr. Lashbrook appeared to be earnest in their testimony and generally responsive to questioning, and although I consider most of the individual testimonial inconsistencies to be attributable to incomplete recollections, or individual perspectives, rather than purposeful inaccuracies, significant differences still exist between their individual recollections of the same events that occurred on February 20 and 22, 2013, which requires further discussion concerning their credibility, and the corresponding, respective probative weight of their testimony. As a starting point, a review of the background leading up to the two events, and consideration of the context within which the two events occurred, provides some assistance.

In 2012, due to changes in customer needs and Soo Lines' business model, and a corresponding, and dramatic drop in the volume of cars being switched, the Bensenville freight rail yard underwent a significant change. Rather than using automated switching, which was cost effective only at high volumes, the company started manual flat switching in the yard, which required the kicking of cars by crews, and an increase in the production expectation for the crews to 150 switched cars per shift.

A few months later, due to a change in the economy, and an associated reduction in work force, Mr. Samson was demoted from engineer to conductor, and started working in the Bensenville freight rail yard in the beginning of November 2012 as a conductor, which required him to learn the new manual flat switching system, and meet increased production expectations for switching crews.

By February 2013, while still learning the new switching system, Mr. Samson clearly had developed an opinion about the recent changes that affected his renewed role as conductor. Specifically, in his March 2013 statement about the February 22, 2013 incident, Mr. Samson characterized the new production expectations as "unrealistic." And, although he had been provided training regarding safety and the importance of following procedures, Mr. Samson believed the company was expecting Mr. Samson and other crew members to cut corners regarding safety to accommodate increased production.

Mr. Samson's attitude about the company's expectation and increased production quota was readily apparent in his consistent reaction¹¹ to supervisors' observations and comments about his work, which he apparently considered to be critiques of underperformance. On February 20, 2013, when Yardmaster Best remarked that Mr. Samson and the crew had taken an hour to switch a track, Mr. Samson told Mr. Best to come on out and help if he wanted the work

¹¹At times, how a person actually behaves has significant probative value.

to go faster. Later the same day, when Mr. Mugavero questioned Mr. Samson about the track assignments for two mis-marked cars, Mr. Samson told Mr. Mugavero to just stand clear and observe their work. When Mr. Mugavero tried to explain why he asked the question, Mr. Samson replied that he didn't have to talk to Mr. Mugavero. On February 22, 2013,¹² when Mr. Lashbrook noted that Mr. Samson did not have to shove all hazardous tank cars, and instead could kick tank cars that didn't contain flammable gas, which was the preferred, and more efficient, method, Mr. Samson asked if it was alright for Mr. Samson to go on the radio and repeat Mr. Lashbrook's instruction in order to have a record of that instruction. Next, in the same conversation, after Mr. Lashbrook observed the crew had only switched 40 to 50 cars half way through their shift when the production goal was 150 cars per shift, and advised them to work smarter, Mr. Samson replied that he would work safely. And, finally, in the locker room, when Mr. Lashbrook advised Mr. Samson that Murphy had directed that he stay and talk to him, Mr. Samson replied that he didn't have to listen to Mr. Lashbrook.¹³

While arguably one of Mr. Samson's replies might reflect a laudable concern for safety, not one of his responses acknowledged what the supervisor was trying to advise. Instead, Mr. Samson essentially, and effectively, provided a retort to each supervisory comment. That is, rather than acknowledge and accept the message each supervisor was trying to convey, Mr. Samson consistently challenged, confronted, implicitly argued with, and on at least two occasions rebuked, three supervisors who tried to talk to him about his work as a conductor, and related issues.

Consequently, in light of Mr. Samson's demonstrated inclination to react in opposition to supervisory comments about his work, I have diminished confidence in the accuracy of Mr. Samson's recollection about his exchanges with Mr. Mugavero and Mr. Lashbrook, and related actions. On the other hand, while Mr. Mugavero and Mr. Lashbrook obviously had a interest in ensuring the Soo Line's production expectations were met, upon consideration sequence and nature of their engagements with Mr. Samson, I believe they were engaged in no more than the execution of their normal and usual supervisory responsibilities, and find little probative of bias that would adversely affect their credibility.

Accordingly, when a conflict arises between his version of events and a supervisor's recollection, I am inclined to give Mr. Samson's testimony less probative weight.

¹²Although Trainmaster Parsons had observed Mr. Samson's work during the start of the shift, he did not critique his productivity.

¹³As subsequently explained, I find that Mr. Samson also rebuked Mr. Lashbrook following the allegation concerning Mr. Samson riding the tank car into the joint.

Factual Dispute Resolutions

In light to the above credibility determinations, I render the following findings concerning the exchanges between Mr. Samson and Mr. Mugavero on February 20, 2013; the alleged tank car violation; and Mr. Samson's actions after Mr. Lashbrook's allegation that he rode the tank car into the joint on February 22, 2013.

Verbal Exchanges – Mr. Samson and Mr. Mugavero

Both Mr. Mugavero and Mr. Samson provided similar descriptions about the events that lead up to their exchange when Mr. Mugavero asked Mr. Samson about two mismarked cars. Briefly, upon his initial arrival, and after advising that he was going to conduct a train ride, Mr. Mugavero noted that the crew was stopped due to being blocked by another train. As Mr. Samson was engaged in setting preliminary switches for their next move after the other train cleared, Mr. Mugavero first asked what he was doing, and then indicated that the crew should back track and switch at least the first 10 cars. Mr. Samson passed that instruction to Mr. Allen, the foreman, and the crew started the switch. During that process, Mr. Allen advised that he was going to add another car. When Mr. Mugavero responded that might make things harder, Mr. Allen disagreed and proceeded with his plan. After the switch, the crew was cleared, and still waiting for the other train to move. At that time, noting a mismatch between the switch list and two marked cars, Mr. Mugavero asked Mr. Samson whether the yardmaster had changed the track assignment for the cars.

According to Mr. Samson, he first responded by noting that Mr. Samson was the helper, and Mr. Allen was the foreman; and Mr. Mugavero was the trainmaster but he was behaving as if he was the foreman. He asked Mr. Mugavero to stay clear, observe the crew, let them do their job, and if necessary correct the crew after the train movement. After appearing to be offended, Mr. Mugavero replied that he was Mr. Samson's manger and they could handle the situation in two ways. Mr. Samson could switch the cars as instructed by Mr. Mugavero, or he could go home and face an investigation. Mr. Samson repeated his request and stated that otherwise he would stop working in order to avoid any incidents caused by the confusion that Mr. Mugavero was creating by his interference.¹⁴ Mr. Mugavero again gave Mr. Samson that same two choices. Mr. Samson then told Mr. Mugavero that he chose to go home.

According to Mr. Mugavero's recollection, Mr. Samson first asked whether Mr. Mugavero was the conductor or the brakeman, and if not, he couldn't tell them how to switch; if he wanted to switch cars, he should become part of a crew. Mr. Mugavero replied that he was Mr. Samson's manager and if they hadn't switched as he suggested, the crew would still be sitting there waiting for the other train to clear. As Mr. Mugavero then tried to explain that the

¹⁴At the January 2014 hearing, Mr. Samson testified that he told Mr. Mugavero that if he was not willing to stay clear and allow the crew to switch according to the foreman's instruction, he would refuse to do any more switching because he felt unsafe and Mr. Mugavero was creating a hazardous condition. However, during the investigative hearing in March 2013, Mr. Samson recalled that he told Mr. Mugavero he felt unsafe due to his confusion. And, in his March 2013 statement, Mr. Samson indicated that he told Mr. Mugavero that he would stop working in order to avoid any incidents caused by the confusion that Mr. Mugavero was creating by his interference. Since the March 2013 testimony and statement were made closer to the actual event, I consider those versions more reflective of the manner in which Mr. Samson expressed his concern.

yardmaster may have made a mistake about the two cars; Mr. Samson would not let him get a word in, and asserted that his union told him that he didn't have to talk to him. Mr. Mugavero then explained that he was the manager of the terminal, and Mr. Samson was required to listen to him. Mr. Samson relied that Mr. Mugavero could not tell the crew how to switch; he could only direct what to switch, Mr. Mugavero then told Mr. Samson they could handle the situation in one of two ways; Mr. Samson could finish the work as Mr. Mugavero requested, or he could go home and they would finish the confrontation in Room 224, where investigations were conducted.

While both recollections match regarding most aspects to this exchange, a significant dispute exists because Mr. Samson indicated that he told Mr. Mugavero that the situation was making him feel unsafe; whereas, Mr. Mugavero denied that Mr. Samson told him that he was making Mr. Samson feel unsafe. Notably, the correspondence they both prepared the same day reflects their divergence. In his safety/hazard report, Mr. Samson asserted that Mr. Mugavero caused confusion, and created an unsafe condition for the crew. On the other hand, Mr. Mugavero's e-mail summarizing their exchange makes no mention of Mr. Samson's claims of confusion or an unsafe condition.

In terms of why Mr. Samson choice to leave, both versions provided a reasonable explanation. Mr. Samson's recollection shows that he felt sufficiently confused by Mr. Mugavero's action that he believed it was unsafe to switch cars if Mr. Mugavero proceeded to give instructions. Mr. Mugevero's testimony supports a finding that Mr. Samson refused to take any switching instructions from Mr. Mugavero in his role as trainmaster based on what his union had told him.

Absent any other objective discriminating factor, I resolve this factual dispute based on my credibility determination that Mr. Samson's recollection has less probative value, and I find based on Mr. Mugavero's testimony that the evidentiary record is insufficient to establish that Mr. Samson told Mr. Mugavero that Mr. Mugavero had created confusion which caused him to feel unsafe.

Alleged Tank Car Violation

According to Mr. Samson, he did not ride the tank car into the coupling and asserted that from his position Mr. Lashbrook could only have observed him on the tank car as he began the shove. As a result, Mr. Samson assumed Mr. Lashbrook fabricated the allegation that Mr. Samson had violated a rule by riding the tank car into the coupling.

Mr. Lashbrook explained that after Mr. Samson started the shove, he drove around to another position to determine if there was some reason why Mr. Samson was shoving the tank car. From that second position, he saw Mr. Samson ride the tank car into the coupling, in part based on the lantern he was holding.

In attempting to resolve this conflict, I am influenced by three factors. First, Mr. Samson did not know that Mr. Lashbrook had changed positions, and thus adamantly believed that Mr. Lashbrook could not have seen whatever he did at the coupling, which might explain his reaction to Mr. Lashbrook's charge of a rule violation regardless of whether it was true or not. Second, although Mr. Lashbrook did not mention his observation to Mr. Samson until after he talked to Mr. Perry and Mr. Samson about their low number of switched cars during the first half of their shift, he provided a reasonable explanation that he believed they would be more receptive to his productivity comments if he addressed that issue first. Third, when Mr. Lashbrook went out to Mr. Samson's location it was near 7:00 p.m. in the evening in February, and thus already nighttime. Under those conditions, even from his new viewpoint, Mr. Lashbrook may not have recognized that Mr. Samson was on the ground just before the coupling. In light of these competing considerations, I am actually unable to determine whether Mr. Samson rode the tank car into the joint. At the same time, I find that a) Mr. Samson believed Mr. Lashbrook had fabricated the rules violation charge; and, b) from his perspective, Mr. Lashbrook believed Mr. Samson had ridden the tank car all the way in to the joint, such that his allegation of a rule violation was not fabricated.

Mr. Samson's Actions after Mr. Lashbrook's Allegation

As an initial observation, the recollections by Mr. Samson and Mr. Lashbrook about their conversation in the shanty area on February 22, 2013 are fairly parallel.¹⁵ When Mr. Lashbrook queried Mr. Samson about shoving the tank car, Mr. Samson responded that since one of the two cars was a hazardous tanker, he felt more safe shoving it. Mr. Lashbrook replied that that they only had to shove some tank cars, while most of tank cars could be kicked, which was the preferred method. Mr. Samson then asked if he could repeat Mr. Lashbrook's instruction over the radio for the record. Mr. Lashbrook then talked to Mr. Perry and Mr. Samson about the company's expectation that a crew would switch 150 cars per shift. And since half way through their shift they had only switched 40 to 50 cars, they needed to work smarter. To which Mr. Samson replied that he'd work safely. Then, after Mr. Samson came outside the shanty at Mr. Lashbrook's request, Mr. Lashbrook asked why he had ridden the tank car into the joint, which was an unsafe practice. Mr. Samson explained that while he was riding the tank car as it started moving, he walked it into the joint.

At this point, their accounts of what happened next vary somewhat. According to Mr. Samson, concluding that Mr. Lashbrook fabricated the accusation for the purposes of intimidation, he contacted his immediate supervisor, and advised that he was pulling himself out of service because he had been falsely accused by Mr. Lashbrook of breaking a rule, and he didn't feel that he could continue to work safely.

Mr. Lashbrook recalled that Mr. Samson denied riding the tank car in the coupling, and then started to walk away. When Mr. Lashbrook called for him to come back, Mr. Samson replied that he didn't have to listen to him, and continued to walk off back to the shanty.

¹⁵While Mr. Lashbrook didn't add that Mr. Samson asked him to repeat his instruction about kicking, rather than shoving, tank cars over the radio, he agreed with Mr. Samson regarding the content of their discussion about kicking tank cars.

Based on these recollections, and in part because Mr. Samson was silent about his immediate action after his denial of the allegation, I find Mr. Lashbrook's testimony establishes that Mr. Samson walked away, and when Mr. Lashbrook called out to him, he responded that he didn't have to listen to Mr. Lashbrook.

Concerning Mr. Samson's call to his supervisor, Mr. Hall, I have some hesitation relying solely on Mr. Samson's testimony based on Mr. Walker's testimony. According to Mr. Walker, after Mr. Hall told him that Mr. Samson was walking back to the office, Mr. Walker went downstairs in the office to see Mr. Samson and find out what was going on because he didn't know why Mr. Samson was leaving his job. In other words, Mr. Walker didn't know what had happened in the rail yard since Mr. Hall apparently provided no information why Mr. Samson was coming back in.

The dearth of further information from Mr. Hall about what had happened in the rail yard has one of two explanations. Either, Mr. Hall decided to withhold Mr. Samson's explanation for why he was coming in, which seems unlikely. Or, Mr. Samson did not tell Mr. Hall anything more than that he was pulling himself out of service.

As another consideration, according to Mr. Samson, due to Mr. Lashbrook's allegation, he became angry, anxious, and scared, which initiated an anxiety attack that compelled him to leave work, and had some affect on his memory since he couldn't recall whether he tied up before he left.

These considerations, again coupled with my diminished confidence in the accuracy of Mr. Samson's recollection, leads to my conclusion that the evidentiary record is insufficient to establish that Mr. Samson told Mr. Hall that he was pulling himself out of service because he had been falsely accused by Mr. Lashbrook of breaking a rule, and he didn't feel that he could continue to work safely.

Finally, Mr. Samson testified at the hearing before me that while in the locker room, in response to Mr. Walker's inquiry about how he was doing, he told Mr. Walker what happened and indicated that he was not doing well and might see a doctor. However, in an earlier proceeding, Mr. Samson indicated that he did not tell either Mr. Lashbrook or Mr. Walker that he was experiencing a panic attack. Mr. Walker also testified that in the locker room Mr. Samson appeared angry and agitated, but did not indicate why; he simply said that he was leaving. Mr. Samson did not say that he was not feeling well and might go see a doctor. As of the January 2015 hearing, Mr. Walker still didn't know why Mr. Samson left work on February 22, 2013. In resolving this testimonial conflict, since I have diminished confidence in Mr. Samson's recollections, I find that Mr. Walker's credible testimony establishes that Mr. Samson did not tell Mr. Walker what happened between him and Mr. Lashbrook, and why he was leaving work.

Issue No. 1 – Protected Activity

The first requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. Mr. Samson has asserted that he engaged in multiple protected activities on February 20 and 22, 2013 involving the refusal to work due to an unsafe condition, and reporting an unsafe condition.

Work Refusal

Sections 20109(b)(1)(B) and (2) of the Act, and 29 C.F.R §§ 1982.102(b)(2)(i)(B) and (ii), prohibit a railroad carrier from taking adverse action against an employee because he refused to work when confronted by a hazardous safety condition related to the performance of the employee's duties, provided: a) the refusal was made in good faith with no available reasonable alternative to refusal, b) a reasonable person in the circumstances then confronting the employee would conclude – the hazardous condition presented an imminent danger of death or serious injury and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal; and c) the employee, where possible, notified the railroad carrier of the existence of the hazardous condition; and his intention not to perform further work unless the condition is corrected immediately.

In *Davis v. Union Pacific Railroad Co.*, No. 12-CV-2738 (W.D.La. July 14, 2014) (2014 WL 3499228), in an FRS personal injury protected activity case, the court addressed the parameters of “good faith” under the FRS and determined that a plaintiff had to “actually” believe at the time of the protected report the validity of its contents. According to the court, “if the plaintiff did so believe, then his activities were in good faith and protected under the Act.” Likewise, in *Ray v. Union Pacific RR. Co.*, 971 F.Supp.2d 869, 882-883 (S.D.Iowa 2013), relying on ARB dicta,¹⁶ the court concluded that “good faith” requires a complainant to actually believe in the alleged violation that he is reporting.

Based on these principals, the requisite elements for the FRS-protected activity of work refusal are: a) good faith, b) notification, and c) objective reasonableness.

¹⁶See *Walker v. American Airlines*, Case No. 05-028 (ARB Mar. 30, 2007).

February 20, 2013

Mr. Samson claims that he engaged in a protected activity on this day when Mr. Mugavero's interruptions and instructions adversely affected Mr. Samson's ability to comply with GCOR 1.1.2, that requires an employee to be alert and attentive, which caused Mr. Samson to refuse to continue to work in order to prevent serious personal injury and equipment damage.

Good Faith

Based on the statutory language, and in light of the above principles, in order to invoke employee protection under the work refusal section, Mr. Samson must first establish he actually believed on February 20, 2012 that he was so confused by Mr. Mugavero's actions that he became unable to continue his work safely as a switching helper which represented a hazardous condition that presented an imminent risk of death or serious personal injury, and due to the urgency of the situation he had no alternative but to stop working.

As a an obvious starting point, Mr. Samson is in the best position to provide probative testimony about his subjective belief concerning the affect of Mr. Mugavero's actions on his ability to work. Although I have determined that the evidence is insufficient to establish that Mr. Samson told Mr. Mugavero he felt unsafe due to confusion, that determination does not preclude a finding that Mr. Samson actually experienced sufficient confusion to make him feel unsafe. Further, while his overt retorts seem more consistent with a frustrated employee who is angry with a supervisor's interference, Mr. Samson could nevertheless harbor more than one emotion. Consequently, his demonstrated frustration with Mr. Mugavero's interruptions and changing instructions could be due not only to his issue with the company's production goals, but also his resulting confusion.

As Mr. Samson explained, when Mr. Mugavero asked about the mis-marked cars, he realized that something wasn't right. Due to Mr. Mugavero's instructions which changed the plan the crew discussed in their job briefing, and in the absence of another job briefing about the changes, Mr. Samson became confused and was no longer sure what to do next. As a result, he didn't feel sufficiently alert and attentive to be able to continue work safely. So, he concluded that the situation had to stop and be corrected before someone was hurt, equipment was damaged, or a derailment occurred. And, when Mr. Mugavero directed that Mr. Samson follow his instructions or go home, he had no available recourse other than to stop working which given his subjective assessment of the situation was understandable.

Thus, I consider Mr. Samson's testimony about his mental state at that time sufficiently probative to establish that he was significantly confused by Mr. Mugavero's instructions in the absence of a job briefing to impair his alertness, attention, and ability to safely function as a switching helper. And, given the two alternatives presented by Mr. Mugavero, he sincerely believed that he had no alternative but to refuse to continue to work. Consequently, I find Mr. Samson's refusal to continue with his helper assignment on February 20, 2013 was subjectively honest and made in good faith.

Notification

As another requisite for whistleblower protection of a work refusal, Mr. Samson must establish that he notified the railroad carrier of the existence of the hazardous condition. As I have previously determined, Mr. Samson is unable to establish by probative evidence that he told Mr. Mugavero that Mr. Mugavero had created confusion, which caused him to feel unsafe.¹⁷

Objective Reasonableness

Although Mr. Samson has established that he engaged in his work refusal in good faith, and even if he had provided the requisite notification, for several reasons, I find that he is unable to prove that a reasonable person in circumstances then confronting Mr. Samson would conclude both that a hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusing to work.

Turning first to the characterization of the situation as a hazardous condition, Mr. Mugavero credibly testified that in light of his experience and personal observations, he did not observe any type of hazardous condition. Instead, when he arrived, Mr. Samson and the 1339 crew were engaged in normal operations following a switching list. His instruction to move a few cars while they were awaiting for a train to move did not change their assigned task; he only altered the order of the task so the crew would not just be sitting and waiting to be unblocked. After he gave the instruction to Mr. Samson who then passed it on to Mr. Allen, both Mr. Samson and Mr. Allen accomplished the switch without any question or difficulty; and, neither asked for a job briefing. Mr. Allen remained in full control during the movement so that when he decided to add another car which Mr. Mugavero indicated might cause some difficulty, Mr. Allen rejected the concern, and proceed with the switch. When Mr. Mugavero asked Mr. Samson about the two mis-marked cars, he was simply trying to resolve an apparent problem with the switch list that he had been given. And, during Mr. Mugavero's subsequent meeting with the crew, neither Mr. Allen nor the other crew member raised any issue about confusion or a hazardous condition due to Mr. Mugavero's presence. Finally, even Mr. Samson acknowledged that Mr. Mugavero was not being irresponsible; his instructions standing alone were not unsafe; and he neither put the switched cars in foul nor required Mr. Samson to move the cars blindly.

Objectively, the apparent issue between Mr. Samson and Mr. Mugavero appeared to be whether Mr. Mugavero had the authority to instruct the crew how to switch the cars. However, as Mr. Cork later commented, Mr. Mugavero was exercising his trainmaster responsibilities to provide guidance, and if necessary direction, during a train ride evaluation of switching operations. While Mr. Samson objected to the manner in which Mr. Mugavero provided his guidance, Mr. Samson also acknowledged that Mr. Mugavero was a manager who should be listened to.

¹⁷I also note that because Mr. Samson was behaving out of character, Mr. Cork asked him on February 20, 2013 if something was bothering him – Mr. Samson replied that he was perfectly fine.

Upon objective consideration of the entire circumstances, including the absence of dangerous confusion in the other crew members, I believe that an objectively reasonable person similarly situated would not find Mr. Mugavero's exercise of supervisor authority in changing the order of the cars to be switched to be sufficiently confusing that it created a hazardous condition.

Next, and closely related, based the actual sequence of events, I also conclude that an objectively reasonable person would not have perceived that a real threat of imminent death or serious injury existed due to Mr. Mugavero's presence at that time. Mr. Samson asserted that the danger with changing switch plans is attributable to the movement of cars while a crew member is confused about the switching order, or what to do next. However, when Mr. Mugavero passed on his instruction about switching out the 10 head cars, the crew was blocked and there was no movement of cars. That is, before making the switch, if any crew member had a concern, it was possible to obtain clarification. Notably, no one, including Mr. Samson asked for another job briefing. Then, while the cars were moving during the switch, the person who actually suggested a change while the cars were on the move by adding another car was Mr. Allen, and not Mr. Mugavero. And, at the time, Mr. Mugavero asked Mr. Samson about whether the track assignment had been changed by the yardmaster, the crew had already cleared and there was no movement of cars.

As to the future potential for imminent danger of death or serious injury, essentially for the same reasons just discussed, the events leading up to Mr. Samson's departure do not support a determination that an objectively reasonable person would have concluded that Mr. Mugavero's continued presence, and further guidance, if any, would create a very real and imminent risk of severe consequences. Again, Mr. Samson's claim of imminent danger was predicated on Mr. Mugavero's intervention, instructions, and interference with crew members while the cars being switch were rolling. But, Mr. Mugavero's interference in terms of asking what Mr. Samson was doing with the preliminary switch changes, instruction to move the 10 head cars, and his question to Mr. Samson about the mis-marked cars occurred with the cars were not moving. And, while Mr. Mugavero interjected a comment while Mr. Allen was making the switch, his observation did not direct a change. To the contrary, he was questioning a change Mr. Allen made while the cars were being switched.

An objectively reasonable person also would not have concluded that at the moment Mr. Samson chose to go home that no other recourse was available other than to stop continuing to work. Specifically, instead of confronting Mr. Mugavero on whether he had the authority to direct switching, a reasonable objective person would have addressed the difficulty he was experiencing with alertness, and concentration due to Mr. Mugavero's actions. Further, in addition to ensuring that Mr. Mugavero understood that his actions were causing disabling confusion, an objectively reasonable person could have asked for a job briefing in order to clarity with Mr. Allen and Mr. Mugavero what needed to be accomplished, and in what order; requested help from another supervisor, such as Mr. Cook who Mr. Samson saw in the office before leaving work; sought assistance from a union representative; or as Mr. Samson acknowledged taken advantage of Mr. Mugavero's offer of a second change to return and further attempt to more fully explain how his actions were creating confusion that was adversely affecting his or her ability to concentrate and work safely.

Finally, I recognize that Mr. Samson was later diagnosed with generalized anxiety disorder and attention deficient disorder, and Dr. McFaul observed that those conditions may have affected Mr. Samson in February 2013. However, while those conditions would support a determination that Mr. Samson acted in good faith, I do not believe the objective reasonable person standard requires consideration of how a hypothetical reasonable person with similar diagnoses would have acted in the same situation. Such analysis would be too speculative, especially since the probative force of Dr. McFaul's opinion is diminished by his acknowledgement that he was not present for the events in February 2013.

February 22, 2013

Due to his panic attack in reaction to Mr. Lashbrook's false accusation that he had ridden a tank car into a coupling, Mr. Samson pulled himself out of service because Mr. Lashbrook had created a dangerous environment in which Mr. Samson could no longer function safely.

Good Faith

Based on Mr. Samson's description of his symptoms in reaction to Mr. Lashbrook's accusation about the tank car, his demonstrated urge to leave the facility as quickly as possible with an associated unwillingness to discuss the situation with any supervisor, Dr. McFaul's partial corroboration, and my prior determination that Mr. Samson truthfully believed Mr. Lashbrook's charge was fabricated, I find Mr. Samson's refusal to continue to work in the environment as he perceived it was made in good faith.

Notification

As I have previously determined, the evidentiary record is insufficient to establish that Mr. Samson actually told Mr. Hall that he was pulling himself out of service because he had been falsely accused by Mr. Lashbrook of breaking a rule, and he didn't feel that he could continue to work safely. And, the probative evidentiary record demonstrates that Mr. Samson did not tell Mr. Walker what happened and why he was leaving work. As a result, no supervisor in a position to correct the alleged dangerous condition was aware why Mr. Samson had refused to continue to work on February 22, 2013.

Objective Reasonableness

While Mr. Samson made his work refusal in good faith, and even if he had provided notification, I find that his work refusal on February 22, 2013 was not objectively reasonable.

As preliminary considerations, having been off-duty on February 20 and 21, 2013, Mr. Lashbrook was not aware of Mr. Samson's actions that occurred on February 20th other than he had a run-in with Mr. Mugavero. Mr. Lashbrook did not know the details of that confrontation, and was not aware of any purported protected activities by Mr. Samson on February 20, 2013. Consequently, Mr. Lashbrook did not have an agenda with Mr. Samson concerning any prior protected activity when he arrived at Mr. Samson's worksite. In fact, as Mr. Samson recalled, Mr. Lashbrook's initial greeting was cordial. Mr. Lashbrook's demeanor only started to change

after Mr. Samson's first sharp response to his observation about kicking, rather than shoving, hazardous tank cars. And, as I have previously determined, Mr. Lashbrook believed that he observed Mr. Samson ride the tank car into the joint on February 22, 2013. He did not fabricate his allegation.

As a result, Mr. Samson held two personal assumptions that were not objectively reasonable in terms of the evidentiary record. First, Mr. Samson believed that Mr. Lashbrook was intimidating and harassing him due to the fact that two days earlier he filed a hazardous safety report. Second, Mr. Lashbrook had fabricated his accusation in order to coerce and pressure him to increase his productivity at the expense of safety.

In terms of objective reasonableness, Mr. Lashbrook's comment about a violation based on his personal observation neither represents a hazardous condition, nor creates an imminent threat of death or serious injury. Instead, in Mr. Samson's particular case, it was his incorrect assumptions about Mr. Lashbrook's motives and the truthfulness of the allegation that created the environment in which Mr. Samson could no longer function safely, or even tolerate, due to his panic attack.

Summary

Mr. Samson has proven that his work refusals on February 20 and 22, 2013 were made in good faith. However, the evidentiary record fails to demonstrate that he provided the requisite notification, or establish that a reasonable person in the circumstances then confronting Mr. Samson would have refused to continue working. Accordingly, Mr. Samson has failed to prove that his work refusals were protected activities under the FRS.

Report of Hazardous Safety Condition

Section 20109(b)(1)(A) protects an employee's activity of reporting in good faith a hazardous safety condition. And, as previously discussed, the reasonableness of the complainant's belief concerning the protected activity is to be determined on the basis of the knowledge available to a reasonable person in the same circumstances with the complainant's training and experience would have concluded that a hazardous condition presented an imminent danger of death or serious injury and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal to work.

February 20, 2013

Believing that Mr. Mugavero had violated GCOR 1.6 because he was being careless of the safety of the crew, and created an unsafe condition, Mr. Samson filed a safety hazard report prior to leaving work on February 20, 2013. Mr. Samson specifically reported that Mr. Mugavero was constantly interfering and causing confusion with work of the 1399 crew which created an unsafe condition for the crew.

Based on my findings about Mr. Samson's subjective state on February 20, 2013, I find that he filed safety hazard report in good faith. However, for the reasons previously discussed, concerning the objective reasonableness of Mr. Samson's work refusal, I again find that Mr. Mugavero's interaction with Mr. Samson and the 1399 crew on February 20, 2013 did not create a hazardous, or unsafe, working condition.

February 22, 2013

Mr. Samson asserts that he told Mr. Hall and Mr. Walker that Mr. Lashbrook's false accusation created a hazardous condition.

However, while Mr. Samson's perceptions about the events on February 22, 2013 were honestly held, I have determine: a) the evidentiary record is insufficient to establish that he had that discussion with Mr. Hall; and, b) the more probative testimony of Mr. Walker establishes that Mr. Samson did not tell him about his exchange with Mr. Lashbrook or why he was leaving work. And, to extent any such communications may have occurred, Mr. Samson's good faith belief that Mr. Lashbrook had created a dangerous situation by charging that he had ridden a tank car into a joint nevertheless was not objectively reasonable.

Summary

Mr. Samson's assessment of about the events on February 20 and 22, 2013 were held in good faith. However, the evidentiary record fails to demonstrate that a reasonable person in the circumstances then confronting Mr. Samson would found the situations to be hazardous. And, Mr. Samson did not provide the requisite notification for the alleged protected activity on February 22, 2013. Accordingly, Mr. Samson has failed to prove that his allegations of hazardous conditions were protected activities under the FRS.

Conclusion

Although all of Mr. Samson's assertions of engaging in FRS protected activities were made in good faith, he has failed to establish by the preponderance of the probative evidence other requisite elements in order to invoke the FRS employee protection provisions. Accordingly, Mr. Samson's FRS whistleblower compliant must be dismissed.¹⁸

¹⁸Since Mr. Samson has been unable to establish that he engaged in an FRS protected activity, I need not address the remaining issues.

ORDER

Accordingly, the FRS complaint of Mr. Samson Jacek is **DISMISSED**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 28, 2015
Washington, D.C.

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 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).