

**U.S. Department of Labor**

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**Issue Date: 06 August 2014**

CASE NO.: 2014-FRS-00018

*In the Matter of:*

**ERNIE SOTO,**  
Complainant,

v.

**BNSF RAILWAY COMPANY,**  
Respondent.

Before: Richard M. Clark  
Administrative Law Judge

**DECISION AND ORDER DENYING COMPENSATION AND BENEFITS**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (“FRSA”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53 and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. On September 24, 2013, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) denied Complainant’s whistleblower complaint. EX 44 at 1. Complainant requested a hearing in this office on October 24, 2013.

A formal hearing occurred in Albuquerque, New Mexico, on February 25 and 26, 2014. Ernie Soto (“Complainant”) represented himself at the hearing. Kristen Smith and Andrea Hyatt, Attorneys at Law, represented BNSF Railway Company (“Employer”). At the hearing, Complainant’s exhibits (“CX”) 1, and 3 through 5, Employer’s exhibits (“EX”) 1 through 16, 19, and 21 through 44, and ALJX 1 and 2, were admitted into evidence. Hearing Transcript (“TR”) 13-14, 18-22, 26-27, 39, 274. The record closed at the end of the hearing. TR at 344.

As explained below, this decision denies Complainant’s request for relief under the FRSA.

## **I. Issues in Dispute**

This matter presented the following disputed issues:

1. Was Complainant's request for a pilot engineer, on or about June 15, 2012, a contributing factor in any of the following adverse employment decisions by Employer:
  - a. To temporarily withhold Complainant from service on June 15, 2012?
  - b. To hold Complainant accountable for absenteeism?
  - c. To hold Complainant accountable for failure to carry his engineer's license?
2. If so, can Employer show by clear and convincing evidence that it would have taken the same employment actions absent Complainant's request for a pilot engineer?

TR at 6.

## **II. Stipulations**

The parties agreed to the following stipulated facts at trial:

1. The Act applies to Complainant's claim.
2. At the time of the incident and Complainant's subsequent discipline, an employer-employee relationship existed between Complainant and the Employer.
3. Complainant's claim was timely filed and timely noticed.
4. Complainant was engaged in protected activity on or about June 15, 2012, when he requested the assistance of a pilot engineer.
5. The following discipline issued to Complainant constitutes adverse employment action:
  - a. The Standard 20-Day Record Suspension issued to Complainant on October 15, 2012.
  - b. The Standard 10-Day Record Suspension issued to Complainant on November 16, 2012.
6. This Court has jurisdiction over this action pursuant to 49 U.S.C. 20109(d) and 29 C.F.R. § 1982.106.
7. Complainant is currently working for Employer as a locomotive engineer.

ALJX 2 at 1-3; TR at 13. The foregoing stipulations are supported by substantial evidence in the record and are accepted for all purposes.

## **III. Factual Findings**

### **A. Background**

Complainant has worked for Employer since January 3, 1995, and is a member of the Brotherhood of Locomotive Engineers and Trainmen union ("BLET"). ALJX 2 at 2. He has worked as a switchman, conductor, and engineer for Employer at multiple locations, most recently at the Belen, New Mexico terminal. Between January 3, 1995 and May 8, 2012,

Complainant attended dozens of training and safety courses, including training about the safety rules held every couple of years. EX 1 at 3-5; TR at 246. On May 22, 2006 and May 12, 2009, Complainant received training on the attendance guidelines. TR at 67; EX 1 at 4-5.

Complainant's supervisors receive annual training and certification on Employer's code of conduct, which includes provisions prohibiting retaliation against an employee for reporting a safety concern. TR at 228, 261; EX 28 at 9. The General Code of Operating Rules ("GCOR") states that "employees must cooperate and assist in carrying out the rules and instructions," and Employer's code of conduct requires employees to promptly report any violations or unsafe conditions to the proper supervisor. EX 3 at 101; EX 28 at 2. Employer also has a no-retaliation policy and an employee hotline for the good faith reporting of an apparent or actual violation of the law or a violation of Employer's policies or rules. EX 26 at 1; EX 27 at 2; EX 28 at 2.

Employer's Policy for Employee Performance Accountability states that:

Standard violations will be progressed as follows: the first standard violation will result in a formal reprimand with a 12 month review period. A second, third, and fourth standard violation within the 12 month review period will result in record suspensions of 10, 20, and 30 days, respectively. A fifth standard violation (or fifth violation of any kind...) committed in the 12 month review period may result in dismissal. EX 25 at 1, 3.

A formal reprimand and record suspension are forms of discipline that occur purely on paper, as employees do not lose any work, pay, or benefits as a result of these disciplinary actions. TR at 75, 300.

The attendance guidelines are communicated to employees through general notices and during the hiring process, and Employer's rules requires employees to be familiar with the attendance guidelines and comply with the general notices on the day they are in effect. EX 3 at 15-16, 18, 25, 68, 100.

#### B. Disciplinary Record Before Incident

Complainant admitted to violating Employer's attendance guidelines on June 20, 2006 and October 6, 2010, and entered into an "Alternative Handling Plan" with Employer for both instances. ALJX 2 at 3; EX 9 at 1. An alternative handling is a non-punitive response to rule violations in which an employee admits fault, and includes training and other non-disciplinary measures, but is only recorded on the employee's operational testing record to determine eligibility for future alternative handling. EX 32 at 1; TR at 143. On October 4, 2010, Greg Fox, vice president of transportation for Employer, informed the BLET general chairman that attendance-related policy violations were not subject to automatic alternative handling. EX 41 at 2. He clarified that employees who "lay off on call or miss a call shall be entitled to one [Alternative Handling] event per any rolling 12 month period." EX 41 at 2. Tyrone Fitzgerald, who was Employer's Terminal Superintendent at the Belen, New Mexico terminal in 2012 and

provided oversight for investigations and accountability, clarified at the hearing that Alternative Handling was meant for rules violations, not attendance violations. TR at 114, 144.

On September 19, 2011 and March 1, 2012, Complainant again admitted to violations of the attendance guidelines. ALJX 2 at 3; EX 1 at 2; EX 7 at 1; EX 8 at 1. For both instances, he signed an investigation waiver, and accepted a standard 10-day record suspension and a 12-month review period. *Id.*

### C. Protected Activity

On or about June 15, 2012, Complainant was working as a locomotive engineer in Employer's Belen, New Mexico terminal. ALJX 2 at 3. Complainant said that when he started his shift, the engineer from the previous shift expressed concern that a pilot would be needed to rescue a train. TR at 46-47, 94-95. If a train is in restricted limits, the employee does not need to be familiar with the area to rescue a train. TR at 210. Later in the shift, Complainant was instructed to rescue the train located on the southern line coming into the terminal. ALJX 2 at 3; TR at 47. Complainant's supervisor told him that the train was in restricted limits, but Complainant found the train to be about 3.5 miles past restricted limits. TR at 47. Complainant requested the assistance of a pilot at about 12:15am because he was not familiar with the area, but he said that the trainmaster questioned his request several times and told him that he should be able to bring the train in on his own. ALJX 2 at 3; TR at 47-48. Complainant said that a pilot was not provided until about an hour after his request. TR at 47.

Chris Cervenka is Employer's Terminal Manager for the Belen, New Mexico terminal, and manages the supervisors and the administrative duties for the terminal, which includes rule and attendance audits. TR at 207-208; EX 3 at 9. Immediately after the train was rescued, Mr. Cervenka told the crew he wanted to discuss the pilot request. TR at 50; ALJX 2 at 3. Complainant requested a witness and was provided one. *Id.* Complainant said Mr. Cervenka kept asking him what his safety concern was, and Complainant said he did not feel safe bringing the train in without assistance. TR at 51, 53. Complainant admitted to laughing during the interview, but claimed it was because he was nervous. TR at 97. Mr. Cervenka told Complainant he was being withheld from service, and required him to take an alcohol and drug test, which came back negative. TR at 51; CX 3 at 1. According to Employer's drugs and alcohol policy, reasonable cause testing may be used when an employee exhibits an inability to reasonably account details of an incident, or when an employee displays extreme negative behavior. EX 40 at 20.

Mr. Cervenka said trains are often rescued from the southern line location, but he has not had pilot requests for this location before, and no one told him that the train was not in restricted limits. TR at 209-10, 212. Mr. Cervenka said that the two other employees he interviewed had no safety concerns and felt comfortable rescuing the train without a pilot. However, he described Complainant as "borderline insubordinate." EX 23 at 1; TR at 213. When Mr. Cervenka asked what Complainant's safety concerns were, Complainant said he was unfamiliar with the area. EX 23 at 2. Mr. Cervenka said that employees must explain their safety concerns since they might impact other employees and supervisors need investigate them, but Complainant continued to be belligerent and refused to answer his questions. TR at 215. Mr.

Cervenka told Complainant that his behavior and refusal to address his safety concerns violated Employer's code of conduct, specifically that quarrelsome behavior and misconduct affecting the interest of the company or its employees is cause for dismissal. TR at 217-19; EX 38 at 6.

Employer temporarily removed Complainant from service for four hours on June 15, 2012, and reinstated him that same day. ALJX 2 at 2-3; TR at 127. Mr. Cervenka said that he would have withheld Complainant from work for misconduct even if he never requested a pilot. TR at 230. Complainant was paid for the entire shift and was not otherwise negatively affected by the temporary removal. TR at 100, 129. Complainant alleged that Mr. Cervenka had told his union representative that he would help out any other employee in this situation, but not Complainant, though he admitted Mr. Cervenka may have been referring to the fact that Complainant had already been given Alternative Handling twice. TR at 102.

In the early morning hours of June 15, 2012, Mr. Fitzgerald attempted to obtain information from Complainant about why a pilot was needed in order to assess whether the situation was unsafe. TR at 121-22. Mr. Cervenka contacted Mr. Fitzgerald and told him that Complainant was aggressive and using profanity, which is why an alcohol and drug test was ordered. TR at 122-24. Mr. Fitzgerald said that it personally is very important to him that employees report safety concerns because Employer had four fatal employee injuries in 2010, one of which occurred while Mr. Fitzgerald was supervising. TR at 160. Mr. Fitzgerald said that an engineer requested a pilot from that location before, but drew a distinction between that engineer, who was not a Belen terminal employee, and Complainant, who had worked at that location before. TR at 119-20.

Jeff Garrels is Employer's Director of Train Handling, and is responsible for the written instructions for engineers regarding air brake and train handling. TR at 241. With respect to Claimant's request for a pilot beyond restricted limits, Mr. Garrels said that there are rules that require employees to report safety concerns so that managers can rely on their employees and address the safety concern based on the facts given. TR at 244, 247. Managers are expected to take all safety concerns seriously and to verify the action the employee is reporting, and can be removed for not doing so. TR at 260. Employer also has policies to hold an employee accountable for not reporting a safety concern. TR at 246.

#### D. Adverse Employment Actions after Incident

##### 1. *Attendance Violations*

##### a. July 2012

On July 10, 2012, Employer issued a written notice to Complainant that it would be conducting a formal investigation about his alleged absence from duty for six weekend days during the months of April, May, and June 2012, which is more than the maximum layoff threshold allowed by Employer's rules and guidelines. ALJX 2 at 3; EX 2 at 1; EX 3 at 4-5. The notice charged Complainant with violating GCOR 1.3.3, which requires employees to be familiar with the rules and general notices on the day they are in effect, GCOR 1.4, which requires employees to comply with the rules and general notices, and System General Notice

Number 11, which was issued on November 1, 2011, and states that “for employees in unassigned and mixed service, there is a maximum [layoff] threshold of twenty-five percent of weekdays and weekends.” EX 3 at 100-102. The policy further states that “any layoff touching a weekend day will be considered a weekend day with a 30 minute grace period,” and “managers should never act in a rigid or ‘wooden’ manner, and in every case should use common sense.” *Id.* at 102-03. “Laying off on-call” is when an employee is not actually at the work site, but is technically working and is supposed to respond to calls from work for a 24-hour period, but does not respond to the work call. TR at 105; EX 3 at 76, 102-103. Once a Claimant has laid off on a weekend day, he cannot lessen his layoff time by working later that day. EX 3 at 69.

Employer has an attendance measurement system that requires employees to be available 75% of the time for their jobs. EX 3 at 9, 52; TR at 133-34. The system generates a monthly report that lists employees’ noncompliance with the attendance guidelines. EX 3 at 9; TR at 133-34. Once the report is generated, Employer’s headquarters in Fort Worth, Texas sends out an email to the Director of Administration identifying employees who have violated the attendance guidelines for a three-month review period, who then sends the list to the supervisors of the employees. TR at 221-222. Mr. Cervenka said that he decides whether an employee is investigated for attendance violations based upon the extent of the violation and the employee’s past history. TR at 222-23. On July 9, 2012, the report indicated that Complainant had failed to meet the attendance requirement for a three month period of April, May, and June 2012, as he was available for 73% of the time. EX 3 at 9, 19, 105. Mr. Cervenka’s recommendations for investigation are then sent for review to Mr. Fitzgerald and to Leslie Keener, Employer’s Director of Administration. TR at 224.

Employer held a formal investigation hearing on October 2, 2012, conducted by Mr. Fitzgerald. ALJX 2 at 4; EX 1 at 2; EX 3 at 1. Dwayne Tafoya, the BLET local chairman, was Complainant’s union representative, and Mr. Cervenka was the company witness at the hearing. EX 3 at 3. On May 5, 2012, Complainant was laid off for 59 minutes, from 12:00 am to 12:59 am, which is 29 minutes over the 30-minute grace period allowed by Employer’s policy, and which the system counted as one weekend day layoff. TR at 79; EX 3 at 105.

At the hearing, Complainant claimed that he was available more than 75% of the time, and contested the 24-hour layoff on May 5, 2012. EX 3 at 75. He asserted that he was only laid off for 29 minutes that day, and then proceeded to work a full eight hour shift later that day. EX 3 at 75, 124. Complainant admitted that he did not provide any documentation or reason for his layoff that day. TR at 333. He did not mention the June 2012 pilot request at the hearing. TR at 82.

Employer issued Complainant a Standard 20-Day Record Suspension on October 15, 2012. ALJX 2 at 2; EX 1 at 2; EX 4 at 1. Complainant felt that the discipline went against the company’s policy not to be “rigid” and “wooden” in their discipline decisions because he only violated the attendance policy by 29 minutes and worked an 8 hour shift later that day. TR at 56-57.

Based on Complainant's history of non-compliance, Mr. Cervenka and Mr. Fitzgerald did not consider the decision to investigate Complainant's alleged attendance violations and his subsequent discipline "wooden or rigid." EX 3 at 56; TR at 142. Mr. Fitzgerald explained that Employer repeatedly tried to work with Complainant on his attendance, and gave him formal training on attendance guidelines, but Complainant continued to violate the attendance policies. TR at 134-35. He said that the 8-hour shift Complainant worked on the Saturday he was laid off was taken into consideration when deciding how to discipline Complainant, but there were no extenuating circumstances for Complainant's earlier absence. TR at 188. Mr. Fitzgerald testified that Complainant had two attendance violations in the last year and so the 20-Day Record Suspension was in accordance with the attendance guidelines. TR at 145-46. Mr. Fitzgerald issued the discipline for this attendance violation, and Mr. Cervenka was not involved in the decision to issue discipline in this case. TR at 146-47. Mr. Fitzgerald also asserted that the 24-hour layoff policy is applied consistently. TR at 199.

b. April 2013

On April 25, 2013, Complainant was assessed a 20-Day Record Suspension as a result of an attendance violation on January 25, 2013. EX 19 at 1. A formal investigation took place on March 27, 2013. *Id.*

2. *Working without a License*

On September 23, 2012, Complainant alleged that he reported for duty, realized his engineer's license was missing, and requested a temporary license about 15 minutes into his shift. ALJX 2 at 4; EX 13 at 30-31; TR at 61-62. Complainant explained that two days earlier he had worked a 16-hour shift at a location two hours from home, and at the end of the shift, another employee inadvertently grabbed his vest with his attached license. TR at 58; EX 13 at 15. When he returned to his home terminal in Belen, he realized he didn't have his vest, but he did not realize until after he started his next shift that he was also missing his license. TR at 60-61.

On October 1, 2012 and November 2, 2012, Employer issued to Complainant a notice of a formal investigation about his alleged failure to ensure that his CFR Part 240 Certificate ("license") was in his possession prior to the beginning of his shift on September 23, 2012, allegedly resulting in train delays. ALJX 2 at 4; EX 13 at 48, 50. The notice said Complainant was eligible for Alternative Handling in lieu of a formal investigation. EX 12 at 1; EX 13 at 48, 50. However, according to Mr. Fitzgerald, Complainant was ultimately not eligible for Alternative Handling because he never accepted responsibility for the violation and did not request Alternative Handling. TR at 153-54, 182. He also did not utilize the provision to challenge the denial of Alternative Handling in this case. *Id.*

Employer requires engineers to ensure their license is in their possession prior to the beginning of each shift. EX 39 at 2. According to Section 240 of the Federal Railroad Administration rules, the failure of the engineer to carry his license can result in a \$1,000 civil penalty when done inadvertently, and \$2,000 when done willfully, which is one reason why Mr. Fitzgerald believes this is a serious violation. EX 16 at 3-4; TR at 151; *see* 49 CFR §

240.305(b)(1); 49 C.F.R. § 240.305(b)(1) app. A. Serious work violations include violations of any work procedure that is designed to protect employees, the public, or others from potentially serious injuries, and the first serious violation will result in a 30-day record suspension and a review period of 36 months. EX 25 at 4-5. "Unauthorized absence" is also listed as a specific serious violation, and Mr. Fitzgerald said that showing up for duty and not being able to work qualified as an unauthorized absence. TR at 196. Employer also requires employees to promptly notify the supervisor of any defect in the required equipment, which includes not having a license. EX 37 at 3.

A hearing was conducted on November 6, 2012, about Complainant's alleged failure to ensure that his license was in his possession prior to the beginning of his shift on September 23, 2012. EX 13 at 2. Mr. Tafoya represented Complainant, Franco Padilla served as an observer, and David Caraway was the company witness. EX 13 at 3-4. Mr. Caraway is the Trainmaster for the Belen, New Mexico terminal, and he was responsible for the overall operation of the terminal on the day of Complainant's alleged violation. EX 13 at 11-12. Mr. Caraway said Complainant started working the afternoon hostler shift at 3:00 pm, and called him for a temporary license at 3:30 pm. EX 13 at 12. Complainant received the temporary license within 20 minutes and performed his first task at work about an hour after starting his shift. EX 13 at 13. Mr. Caraway said there was about a 35-minute delay in train movement, and that investigations for missing equipment normally occur when trains are delayed as a result of the employee's violation. EX 13 at 15, 19. The internal alerts for that day, which are updated by Mr. Caraway, indicated at about 3:30 pm that the power to move the train would be on within the next 20 minutes. EX 13 at 55. At 4:30 pm, the power was still not on and no reason was indicated, and at 4:49 pm, the internal alert specified that the power was delayed because the hostler had to acquire a temporary license. EX 13 at 55.

Mr. Caraway and Complainant agreed that Complainant did not comply with the safety rules, which requires employees to be familiar with and follow all rules for continued employment, and with the engineer certification rules, which states that engineers must possess their license while on duty. EX 13 at 14-15, 28-29, 51-52, 54; EX 38 at 2, 4; TR at 61. Complainant admitted the missing license, but felt that the charge and investigation were excessive because he felt they were personal, and he had initially been told he was eligible for Alternative Handling. EX 13 at 43-44. Complainant also disputed that he caused the train delay because he notified Mr. Caraway at 3:15 pm about his missing license, was then told that the train would not be ready to move for at least 20 minutes, and he received a temporary license and was back at his station within 15 minutes. EX 13 at 30-31; TR at 61-62. He said the power was up at about 3:45 pm. TR at 61. Complainant did not mention the June 2012 pilot request at the hearing. TR at 87-88.

Mr. Fitzgerald said that this is the only reported case where an employee came to work without an engineer's license, and Mr. Cervenka explained that employees who have lost their licenses in the past would call in for a temporary license before starting their shifts. TR at 202, 227. Complainant asserted that John Lewis, another engineer for Employer, told him that a supervisor found Mr. Lewis without a valid license, but he never explained what happened to Mr. Lewis in that circumstance. TR at 329-30.

On November 16, 2012, Employer gave Complainant a 10-day record suspension for his failure to ensure his license was in his possession prior to beginning his shift. EX 14 at 1. Mr. Fitzgerald said that Employer considered Complainant's argument that someone else took his vest, but, given the seriousness of the violation, the 10-Day Record Suspension was lenient because Complainant could have received a Level-S three-year suspension. TR at 152-53, 176.

In March 2013, Mr. Tafoya, Complainant, and Employer's General Manager, Daryl Ness, met to discuss the pending formal investigation hearing for Complainant's alleged failure to be available on call on January 25, 2013, and the discipline Complainant received on November 16, 2012 for failing to ensure his engineer certificate was in his possession prior to beginning his shift. ALJX 2 at 4. Complainant asserted that Mr. Ness informed him that Complainant's supervisors perceived Complainant as hating his job and wanting to disobey rules and delay trains. TR at 63.

#### E. Appeals

On April 12, 2013, Milton H. Siegele, Jr., Assistant Vice President for Labor Relations at Employer, found substantial evidence to support Complainant's rule violations and denied BLET's appeal of Complainant's record suspension for attendance issues. EX 5 at 1. Specifically, Mr. Siegele found that the two weekend days in dispute were properly calculated as a 24-hour layover because Complainant's unavailability exceeded the 30-minute grace period allowed in the attendance guidelines. EX 5 at 2. Complainant was unavailable for six weekend days, which exceeded the layoff threshold of five days, and his discipline was appropriate under the attendance guidelines and because of Complainant's previous active violations.<sup>1</sup> EX 5 at 3-4.

On May 7, 2013, Mr. Siegele also found substantial evidence to support Complainant's rule violation regarding the missing license, and denied BLET's appeal of Complainant's Record Suspension for his missing license. EX 15 at 1. Mr. Siegele found that the 10-Day Record Suspension was appropriate considering Complainant clearly violated the rule requiring him to have possession of his license, and Complainant also admitted fault. EX 15 at 1.

Kathleen Bausell, the assistant manager in Employer's Labor Relations, has reviewed hundreds of disciplinary cases, including about 100 to 200 attendance violation cases. She reviewed Complainant's general chairman's appeal of the 20-Day Record Suspension for attendance. TR at 276-77, 281-82. When she reviews a disciplinary case, she looks at the employee's personnel record, the investigation hearing transcript, the union's arguments, and the exhibits presented at the investigation hearing, which she did in this case and found that Complainant's arguments did not have merit. TR at 277, 284-85. She also found that Employer had already granted Complainant leniency in two or three prior attendance violations, and that Complainant had clearly violated the policy because he exceeded the 30-minute grace period, which is built-in leniency. TR at 285-86. Employer recognized the hours he worked that day, but it also recognized the 59 minute layover, which includes the 30 minute grace period, because employees cannot "pick and choose" when they work. TR at 318. She said that it is important

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<sup>1</sup> Employer's records show that 181 employees were also disciplined for attendance violations for the same three month period as Complainant. EX 11 at 1-8. All of these employees received a formal reprimand, a record suspension, or dismissal. *Id.*

for employees to show up to work because absenteeism can cause train delays. TR at 281. She said that when the Alternative Handling policy changed to excluding attendance violations, all the employees were advised of the new policy. TR at 297.

For the appeal of Complainant's 10-Day Record Suspension for his missing license, Ms. Bausell again upheld Complainant's discipline because his violation was proven with substantial evidence, particularly because Complainant admitted to not having his license and violating the rule. TR at 301. Complainant did not take advantage of the procedure to appeal denial of alternative handling. TR at 302-303. Ms. Bausell said she would have upheld the discipline even if Complainant never requested a pilot. TR at 305-306.

When Ms. Bausell worked in the field for Employer, she checked engineers' licenses several times a month for five years, and never encountered a situation where an engineer did not have his license. TR at 299-300. She also has never seen another investigation for an engineer with no license. TR at 314-15. She said that a record suspension is just a mark on an employee's record and not an actual suspension. TR at 300.

#### **IV. Analysis and Conclusions**

As set forth below, the following findings of fact and conclusions of law are based upon analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. 29 C.F.R. § 18.57. In deciding this matter, the administrative law judge is entitled to weigh the evidence and to draw inferences from it. 29 C.F.R. § 18.29.

The FRSA incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* 49 U.S.C. § 20109(d)(2). AIR 21, and thus the FRSA, require a complainant to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (Jan. 31, 2008), slip op. at 4; *Clemmons v. Ameristar Airways, Inc., et al*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058 (Dec. 31, 2007), slip op. at 5.

Complainant argues that he was disciplined with the June 15, 2012 temporary withholding, the October 2012 20-Day Record Suspension and the November 2012 10-Day Record Suspension in retaliation for requesting a pilot on or about June 15, 2012. EX 43 at 1. Complainant admits that he violated Employer's rules, but alleges that he has been disparately disciplined because of his reported safety concern. *Id.*

Employer argues that Complainant's claim is without merit, and Complainant's disciplinary record is just one example of Employer's consistent application of its disciplinary policy. EX 32 at 1. Employer alleges that there is no evidence that Employer disciplined Complainant for reporting a safety concern, and, thus, Complainant has failed to establish retaliation. EX 32 at 1; TR at 159.

A. *Protected Activity and Employer Knowledge*

There is no dispute that Complainant engaged in protected activity on June 15, 2012, when he requested the assistance of a pilot engineer, and that Employer had knowledge of this activity. The parties have stipulated to these facts, and the stipulation is supported by substantial evidence in the record. ALJX 2 at 1-3; TR at 13.

B. *Unfavorable Personnel Action*

The standard for determining whether something is an adverse action is whether a reasonable employee in the same circumstances as the Complainant would be dissuaded from engaging in protected activity. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010). One of the considerations in determining whether an action is materially adverse is its effect on pay, terms, and privileges of employment. Other considerations include the permanency of the action, other consequences, and the context within which the action arises. *Burlington*, 548 U.S. 53 at 69.

With these principles in mind, I turn to the multiple adverse personnel actions alleged by Complainant, including the June 15, 2012 temporary withholding from service, his 20-Day Record Suspension on October 15, 2012 for an attendance violation, and his 10-Day Record Suspension on November 16, 2012 for his missing engineer license. The parties stipulated that his record suspension for violation of the attendance policy and his record suspension for not ensuring possession of his license prior his shift both constituted adverse employment actions. ALJX 2 at 1-3; TR at 13. However, the temporary withholding of Complainant from work on June 15, 2012, does not constitute an adverse employment action. Complainant admitted, and Employer substantiated, that Complainant did not receive any reduction in his pay, benefits, or work hours as a result of the withholding from service, and he was paid for the hours he was withheld. TR at 100, 129. Furthermore, the temporary suspension was not marked on his employee record, and he was only withheld for four hours before he returned to work. EX 1 at 2; ALJX 2 at 2-3; TR at 127. There is no evidence that Complainant suffered any adverse work consequences by the temporary withholding, and I find that it was not an adverse employment action.

C. *Contributing Factor*

It is the Complainant's burden to prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Clark v. Pace Airlines, Inc.*, ARB No. 04-150 (Nov. 30, 2006), slip

op. at 11. The legitimacy of an employer's reasons for taking unfavorable personnel action should be examined when determining whether a complainant has shown by a preponderance of the evidence that protected activity contributed to the unfavorable action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074 (Sep. 30, 2009); see *Fradley v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10, n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). In circumstantially based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Servs.*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider a "broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041 (Nov. 30, 2005), slip op. at 9. Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No 04-056 (Apr. 28, 2006).

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 (Jan. 31, 2006), slip op. at 14, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation, because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113 (May 21, 2009), slip op. at 7-8, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000). Once a complainant has shown that his protected activity was a contributing factor in the adverse employment action, the respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (July 7, 2008).

#### 1. October 15, 2012 Record Suspension for Attendance

Considering all of the evidence, as well as the reasonable inferences to be drawn therefrom, I find that Complainant's request for a pilot was not a contributing factor in Employer's decision to discipline him with a Standard 20-Day Record Suspension on October 15, 2012. Generally, I found that all the witnesses were credible and I believed their testimony. However, in the important aspects of the case, I found that Employer's witnesses were well versed in the applicable rules and guidelines in the case and articulated persuasively that they complied with the rules and consistently applied them to Complainant. Complainant, on the other hand, talked generally about his feelings of how things should be and why he felt singled

out, but his testimony was not as persuasive as Employer's witnesses. The testimony from Employer's witnesses was supported by the great weight of the other evidence in the matter, while Complainant's testimony was not.

The evidence shows that Employer had a legitimate reason for issuing the discipline to Complainant. Complainant was aware of Employer's attendance rules, given that he had regular rules training, and he also admitted his familiarity with the attendance guidelines. TR at 67; EX 1 at 4-5. Employer's Policy for Employee Performance Accountability states that an employee's third standard violation within a 12-month period will result in a 20-Day Record Suspension. EX 25 at 1, 3. Complainant admitted to violating the attendance guidelines twice since September 19, 2011, and received two 10-Day Record Suspensions, and Complainant also had two other prior attendance violations. ALJX 2 at 3; EX 1 at 2; EX 7 at 1; EX 8 at 1; EX 9 at 1. This attendance violation occurred in July 2012, which made him eligible for the 20-Day Record Suspension, as it was the third standard violation within the 12-month review period beginning in September 2011. ALJX 2 at 3; EX 2 at 1; EX 3 at 4-5. Employer also established that they applied the attendance policies consistently, as over 180 employees were disciplined for attendance violations in the same time period, many of whom received the same record suspension as Complainant. EX 11 at 1-8. Given Complainant's history of attendance violations and Employer's clear and consistent policy, I find that Employer has provided sufficient justification for the 20-Day Record Suspension.

Complainant's argument that Employer's decision is "rigid" and "wooden" and against company policy is without merit. TR at 56-57. He argued that Employer's discipline was excessive because he was only "29" minutes laid off and worked an 8-hour shift later that day. TR at 56-57; EX 3 at 75, 124. However, Employer's policy states that any time over the 30-minute grace period will count as a whole weekend day layoff, and Complainant admitted to being aware of these policies at the time of his violation. EX 3 at 73, 102-103. Not only was Complainant in clear violation, but I also find that, given Complainant's history of attendance violations, the discipline issued him in this case was lenient. A record suspension is a form of discipline that is purely on paper, as employees do not lose any work, pay, or benefits as a result of these disciplinary actions, and it appears to have no effect on the employee after 12 months. TR at 75, 300. As such, Complainant would not be adversely affected by this discipline until he violates the attendance policies two more times. EX 25 at 1, 3.

I note that Complainant's record suspension for the attendance violation directly followed his pilot request, but this temporal proximity is undermined by the totality of the evidence, which established Employer's legitimate reasons for the adverse action, and reflects that safety was a priority for Employer. Employer's policies, practices, hotline to encourage employees to report safety concerns, and anti-retaliation policies are displayed on Employer's website and in its code of conduct. EX 26 at 1; EX 27 at 2; EX 28 at 2, 9. Complainant provides no other evidence indicating that Employer was retaliating against him for his pilot request, and he did not mention the pilot request at the disciplinary proceeding. Thus, after considering all of the evidence, I find that Complainant's pilot request was not a contributing factor in Employer's decision to issue him a 20-day record suspension for his July 2012 attendance violation.

2. November 16, 2012 Record Suspension for Missing License

I find that Complainant's request for a pilot was not a contributing factor in Employer's decision to discipline him with a Standard 10-Day Record Suspension for his missing license. Complainant admitted fault, knew of the licensing rule, and was aware of and received training in Employer's accountability policies.

Complainant argues that Employer's disciplinary action was excessive because Employer originally stated in its investigation letter that Complainant was eligible for Alternative Handling, and because the missing license was not a "serious" violation. EX 13 at 43-45. However, the evidence shows that Alternative Handling is not an automatic discipline, and Complainant's union chairman was notified of this policy well before Complainant's violation. EX 41 at 1-2. The policy also requires that an employee must request Alternative Handling, and there was no evidence presented that either Complainant or his union representative ever did. EX 32 at 2; TR 91-92. Thus, this argument has no merit.

Moreover, the 10-day Record Suspension is lenient, considering the seriousness of the violation. While Complainant believed the violation was not very serious, the evidence established otherwise. TR at 41. The rule requiring an engineer's license while on duty is not just Employer's rule, but it is also a federal regulation that comes with a \$1,000 fine for an inadvertent violation. EX 39 at 2; EX 16 at 3-4. Therefore, even though Complainant may have accidentally lost his license, he still violated a federal regulation and could have been fined up to \$1000. A 10-Day Record Suspension, which has no actual adverse effect on Complainant, is comparably lenient, and is in accordance with Employer's policy, since it is Complainant's second violation in a 12-month period beginning on March 1, 2012. ALJX 2 at 3; EX 1 at 2; EX 7 at 1; EX 8 at 1.

I again note the temporal proximity between Complainant's November 16, 2012 discipline and his June 2012 pilot request, but Employer has provided sufficient evidence showing that the discipline was justified and appropriate. Thus, I find that Complainant's pilot request was not a contributing factor in Employer's decision to issue him a 10-Day Record Suspension for his missing license violation.

3. April 25, 2013 Record Suspension for Attendance Violation

I find that Complainant's request for a pilot was not a contributing factor in Employer's decision to discipline him with a Standard 20-Day Record Suspension for his second attendance violation since his pilot request. Again, this attendance violation is in accordance with Employer's accountability policies, as it was Complainant's third standard violation in a 12-month period beginning on March 1, 2012. ALJX 2 at 3; EX 1 at 2; EX 7 at 1; EX 8 at 1; EX 19 at 1. As already established, Employer consistently applies its attendance policies, Complainant was aware of these policies, and the attendance policies are fairly clear. EX 3 at 73, 102-103; EX 11 at 1-8; TR at 67; EX 1 at 4-5. Complainant's history of violations warranted discipline, and the application of Employer's rules by assessing a record suspension was not "rigid" or "wooden." TR at 75, 300. Employer considered the violations, looked at Complainant's prior history, applied the policy consistently, and overall showed restraint and leniency when it

assessed the discipline. Thus, I find that Complainant's pilot request was not a contributing factor in Employer's decision to issue him a 20-Day Record Suspension for this attendance violation.

D. *Employer's Burden – Clear and Convincing Evidence*

If a complainant establishes the elements of his case, an employer will not be liable if it demonstrates by clear and convincing evidence that it would have taken the same adverse employment action regardless of his protected activity. 29 C.F.R. § 1979.104(c). Assuming, *arguendo*, that Complainant had established the elements of his case, Respondent has demonstrated by clear and convincing evidence that it would have taken the same action regardless of Complainant's protected activity.

Employer consistently applied the attendance policy to Complainant, as it did to the 180 other employees who also received discipline for similar attendance violations during the same time frame. Complainant's records suspension were supported by independent documentation that was consistent with Employer's accountability policies, which demonstrates that Employer would have issued him this discipline regardless of his protected activity. The attendance noncompliance originated at the corporate headquarters in Texas, and not at the Belen terminal. Mr. Fitzgerald and Mr. Cervenka both established that they would have treated Complainant the same, regardless of his request for a pilot. TR at 159, 230. Furthermore, the appeal process allowed independent review, in the sense that Complainant's discipline was reviewed at the corporate headquarters and not at the local level, and Ms. Bausell established that she found substantial evidence to support the discipline, that it was consistently applied, and that Employer had actually shown leniency to Complainant. TR at 305-306. Complainant offered no evidence of retaliation beyond his testimony that he "felt" the discipline was personal, and that he was told that his supervisors had a negative perception of him. TR at 63; EX 13 at 43-44. Yet, he did not mention this or the pilot request in either of his investigative hearings, and there is no evidence that other employees have been retaliated against for reporting safety concerns. Therefore, had Complainant proved his case, I would have found that Employer has proven by clear and convincing evidence that it would have taken the same disciplinary actions regardless of Complainant's pilot request.

E. *Attorney's Fees*

Employer requested that, in the event it prevails, that Complainant be assessed attorney's fees because Complainant's case was frivolous or brought in bad faith pursuant to 29 C.F.R. § 1982.109(d)(2). Under 29 C.F.R. § 1982.109(d)(2), fees may be assessed under the NTSSA, but the section is silent on the FRSA: "If, upon the request of the respondent, the ALJ determines that a complaint filed under NTSSA was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney's fee, not exceeding \$1,000." The AIR21 statute and regulations also provide for the payment of attorney's fees not to exceed \$1,000 if the ALJ determines the complaint was frivolous or brought in bad faith. 29 C.F.R. § 1979.109(b).

I do not need to reach the issue of whether fees are appropriate under the FRSA, because I do not find that this complaint was frivolous or brought in bad faith. The ARB has declined to award attorney fees under AIR21 when a *pro se* complainant had maintained a firm and sincere belief that he had been the victim of retaliatory termination, even though he did not prevail following a hearing on the merits. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Complainant made a good faith, though misplaced, argument regarding his complaints under the FRSA, and I do not find any basis to award fees in this matter. Employer's request for fees is denied.

#### ORDER

1. Complainant has failed to establish the required elements of his claim, and his request for relief under the FRSA is denied.
2. Alternatively, had Complainant proved his case, Employer has demonstrated by clear and convincing evidence that it would have taken the same action regardless of Complainant's protected activity. Therefore, Complainant's request for relief would also be denied.
3. Employer's request for attorney's fees is denied.

RICHARD M. CLARK  
Administrative Law Judge

*San Francisco, California*