

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 09 January 2015

CASE NO.: 2014-FRS-00059

In the Matter Of:

JACOB WAGNER,
Complainant,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
d/b/a CN,
Respondent.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

James Kaster, Esq. & Nicholas Thompson, Esq., Nichols Kaster, Minneapolis, Minnesota, for the Complainant

David Goldstein, Esq. & Joseph Weiner, Esq., Littler Mendelson, P.C., Minneapolis, Minnesota, for the Respondent

DECISION AND ORDER DISMISSING COMPLAINT

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Jacob Wagner (the “Complainant”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Grand Trunk Western Railroad Company, d/b/a CN (“GTW” or the “Respondent”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

The FRSA complaint filed with OSHA alleged that Respondent suspended Complainant on January 18, 2012 and subjected him to increased scrutiny and audits, in retaliation for

reporting a work-related injury/accident. On February 18, 2014, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found that there was reasonable cause to believe the Respondent violated the Act by suspending Complainant for 20 days,¹ and awarded damages. On March 10, 2014, Respondent objected to the Secretary’s findings and requested a *de novo* hearing before the Office of Administrative Law Judges (“OALJ”).

A hearing was held before me in Detroit, Michigan, on July 22 & 23, 2014, at which time the parties were afforded the opportunity to present evidence and arguments. Formal papers were admitted into evidence as Administrative Law Judge Exhibits (“ALJX”) 1-13, and the parties’ documentary evidence was admitted as Joint Exhibits (“JX”) 1-63,² Complainant’s Exhibits (“CX”) 1, 5, 6 & 7³ and Respondent’s Exhibits (“RX”) 2 & 3.⁴ Hr’g Tr. (“TR”) 5-13, 321, 325, 390. Testimony was heard from the Complainant, Paul Beard, John Kerns, Alan Craine, and Sandro Scola.

The parties submitted post-hearing briefs (“Compl. Br.” and “Resp. Br.” respectively), and each party submitted additional exhibits with their briefs. Complainant submitted exhibits identified as A-F and Respondent submitted three exhibits, which I have identified as EX 5-7.⁵ Respondent objected to Complainant’s CX D & E, which are 2011 Scorecards for two supervisors of GTW, and CX F, which contains FRSA complaints filed by other employees against CN. A telephonic conference was held with the parties on November 6, 2014. Respondent’s objections were overruled and I admitted EX 5-7 and CX A-F into evidence.⁶ Respondent was allowed time to submit additional information pertaining to the other FRSA complaints, which it provided on November 12, 2014 and is admitted as EX 8. The record is now closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

¹ The Secretary found that the evidence failed to substantiate that Complainant was subjected to increased scrutiny and efficiency testing.

² The Respondent was allowed time post-hearing to file objections to JX 63, the deposition transcript of Lawrence Wizhauer. Respondent filed objections to the admissibility of excerpts of the transcript on July 29, 2014, and Complainant responded on August 7, 2014. On a conference call held on August 27, 2014, I overruled the objections and the transcript is admitted in its entirety.

³ Respondent’s objections to CX 1 were overruled. Respondent’s objections to the admittance of CX 2-4 were sustained.

⁴ Complainant’s objections to the admittance of RX 1 and 4 were sustained, and objections to RX 2-3 were overruled.

⁵ EX 5 is the deposition transcript of James Schwichtenberg, EX 6 is the deposition transcript of Thomas Sullivan, and EX 7 is a Letter to Nick Thompson, counsel for Complainant, dated August 1, 2014.

⁶ Complainant was directed to provide a redacted version of CX D & E, which he has since provided.

1. GTW is a railroad carrier engaged in interstate commerce, within the meaning of the FRSA;
2. Complainant has been employed by GTW since 2003;
3. Complainant has been employed as a Bridge and Building carpenter since 2007;
4. On December 14, 2011, Complainant reported for work to the Battle Creek Yard in Battle Creek, Michigan;
5. Complainant had the use of a locker at the Battle Creek Yard, where he kept, among other things, personal apparel;
6. The items Complainant kept in his locker included gloves, which GTW had provided to him;
7. On December 14, 2011, Complainant's daily assignment was in South Bend, Indiana (the "Assignment");
8. The Assignment was to cover an inoperative garage door using barn steel, which is similar to sheet metal;
9. The other employees working on the Assignment were foreman John Kerns and carpenters Roger Sims and Marty Sadlin;
10. The Assignment required Complainant to spend some of his time working outside;
11. During the Assignment, the temperature was approximately 45 degrees Fahrenheit and it was raining;
12. After the barn steel was in place, but before cleanup of the work site had concluded, Complainant removed his gloves;
13. Complainant observed a piece of sheared barn steel approximately two feet by thirteen feet lying on the ground;
14. Complainant picked up the piece of sheared barn steel;
15. Complainant cut his finger on the sheared edge of the piece of barn steel (the "Injury");
16. On December 14, 2011, Complainant submitted a Report of Personal Injury or Occupational Injury form to GTW;

17. The Injury was work-related;
18. Complainant received three stitches for the Injury;
19. Complainant missed no work because of the Injury;
20. Complainant had a contractual right to an internal investigatory hearing before GTW could discipline him for alleged rule violations;
21. On December 21, 2011, GTW issued a Notice of Investigation to Complainant, which directed him to attend a formal investigatory hearing to develop the facts and to determine whether he violated any company rules, regulations, and/or policies in connection with the December 14, 2011 incident;
22. On January 4, 2012, GTW held an investigatory hearing to develop the facts and to determine whether Complainant violated any company rules, regulations, and/or policies in connection with the December 14, 2011 incident;
23. On January 18, 2012, Complainant received notice that he was being suspended by GTW for 20 days for violations of safety rules on December 14, 2011 (the "Discipline");
24. Pursuant to Rule 25, Section 3 of CBA, Complainant had the right to appeal from the Discipline and did so through his union on January 21, 2012. The appeal is currently pending and has not been resolved;
25. Complainant served fifteen days of the twenty day suspension;
26. Complainant borrowed \$3,000 from his 401k;
27. A record of the Discipline is in Complainant's personnel file;
28. GTW must report certain injuries to the Federal Railways Administration ("FRA");
29. GTW was required to report the Injury to the FRA;
30. Complainant filed a Complaint with OSHA on July 16, 2012;
31. The Secretary of Labor issued Findings on February 18, 2014; and
32. GTW appealed the Secretary's Findings on March 10, 2014.

Joint Pre-Trial Stmt. 1-3.

At hearing, the parties further stipulated, for the purposes of this proceeding, that Complainant's lost wages from his suspension were \$5,652.36. TR 199-200.

The issues before me are: (1) whether the Complainant engaged in protected activity under the Act; (2) whether GTW had knowledge that Complainant engaged in any protected activity; (3) whether any alleged protected activity was a contributing factor in GTW's suspension of the Complainant; (4) whether GTW has proven by clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity; and (5) whether Complainant is entitled to punitive damages. Joint Pre-Trial Stmt. 5-6.

Based on the record as a whole, I find that Complainant engaged in protected activity by reporting a work-related injury and his protected activity was a contributing factor in Respondent's decision to suspend the Complainant. I further find that Respondent has proven that it would have taken the same adverse action in the absence of the protected activity, and thus Complainant is not entitled to relief under the FRSA.

III. EVIDENCE PRESENTED

A. Witness Testimony

1. Complainant

The Complainant, Jacob Wagner, began working for GTW in 2003, and has been in the Building & Structures Department as a first class carpenter since 2007. TR 161.

Complainant was disciplined twice in 2009 for safety rule violations; he did not sustain an injury in either of those instances. TR 167. In January 2009, Complainant was disciplined for descending stairs facing away from equipment. TR 168; JX 22 at 134. He received five days deferred suspension, meaning he would not be suspended for the 5 days unless he received additional discipline in a specified period of time. TR 168. In March 2009, Complainant hit the side of his supervisor's truck when backing up his vehicle. TR 170. He was given a 3 day suspension plus the 5 days deferred from the previous violation. TR 170; JX 22 at 133. Complainant chose to waive his right to an investigation in both instances. TR 169; *see* JX 22 at 135; RX 2; RX 3.

On December 14, 2011, Complainant had worked outside all morning in the rain, putting up barn siding. TR 175-76. He wore gloves, which he testified become slippery when wet. TR 177, 178, 219. While the crew was cleaning up around lunch time, Complainant went inside the building and took off his gloves because they were cold and wet. TR 178. He then saw a piece of scrap metal in the walkway and proceeded to pick it up because it was creating a tripping hazard in the walkway. TR 174. In the process of moving the metal, the front end dipped down and the corner of the metal piece hit the concrete floor, causing Complainant's hand to slip and cutting his finger. TR 179.

Complainant testified that there were no other dry gloves available, but acknowledged he could have put his wet gloves back on before lifting the metal. TR 175, 178, 222-23. He did not ask the project foreman, Mr. John Kerns for another pair of gloves that day. TR 213, 223. He testified that he did not believe he violated any safety rules by picking up the metal, and at the

particular time, he felt it was safer to move the metal without gloves, as the metal created a tripping hazard in the walkway. TR 174, 223-24. Complainant testified that others were working without their gloves that day, including Mr. Kerns, who had his gloves off when cutting the metal. TR 189.

Complainant told Mr. Kerns that he cut his finger and needed to go to the hospital. TR 222. He testified: "I let John Kerns and them guys know and then they made the call, so [the Respondent] was aware of the incident." TR 234. Upon returning from the hospital, Complainant participated in a reenactment of the injury with GTW management. TR 188. Complainant filled out a Report of Personal Injury or Occupational Illness form at the reenactment. TR 225; JX 2. He testified that all the managers at the reenactment were concerned about his safety and treated him respectfully. TR 227.

Complainant received a Notice of Investigation for the workplace events leading to his December 14, 2011 injury. TR 190. Complainant was given the option of waiving the investigation and taking a 10 day suspension with 10 days deferred, which he declined. TR 190, 228. Complainant testified that he chose to proceed with the investigative hearing because he thought the proposed discipline was too severe. TR 191. After the hearing, he was given a 20 day suspension and served 15 days. TR 193.

Complainant is married with two young children. TR 154-55. Complainant testified that during his suspension, he took a loan out of his 401(k) in the amount of \$3,000 because he needed money to pay bills. TR 200. He testified that his wife was not working at the time, and he was living pay check to pay check. TR 200, 202. He testified that he was constantly worrying about money. TR 203. He testified that he feels like an outsider at work now, and it is hard to focus in the workplace. TR 204, 249.

Complainant testified that at the time of the injury he was qualified on the CN operating and safety rules and had his own copy of the rules. TR 206, 246. He testified that he believed the company wanted employees to report injuries. TR 230. He acknowledged there were occasions where discipline was imposed with no underlying injury. TR 171.

2. John Kerns

John Kerns was employed at GTW for 40 years, 26 years of which he worked as a foreman.⁷ TR 71. Although he worked with Complainant periodically, he was only Complainant's direct foreman on the day of his injury. TR 71-72 118.

Mr. Kerns testified that there was a job briefing during the morning of December 14, 2011, during which the unit discussed the rule of the day, the job assignment, and the materials and tools needed to complete the job. TR 77, 119. They then drove two hours to the worksite, where they covered a deteriorating garage door with barn siding. TR 77-78, 119. The job required the shearing of metal so that it would fit properly on the door. TR 82. After completing the job around 12:45 PM, Mr. Kerns told the crew to clean up and head to lunch. TR 84.

There was a piece of sheered metal left over from the job. TR 82-83. Mr. Kerns testified that the location of the remaining metal could have been a tripping hazard, but he was not

⁷ This is a non-managerial position. TR 116-17.

concerned because he intended to lean it up against a wall. TR 129. Mr. Kerns testified that Complainant asked him what he was going to do with the piece of metal and Mr. Kerns responded that he would take care of it after he finished cleaning his tools.⁸ TR 90.

Mr. Kerns did not see the injury occur, but heard Complainant yell out after he cut himself. TR 90, 146. After Complainant left for the hospital, Mr. Kerns called Complainant's supervisor, Robert Patsey,⁹ and told him that Complainant had cut his finger and was on his way to the hospital for medical attention. TR 137-38. Mr. Kerns recommended that Complainant not be given time off for the incident resulting in his injury. TR 80. Mr. Kerns also spoke on the phone with Mr. Craine, Mr. Patsey's supervisor, who asked about the seriousness of the injury. TR 139.

Mr. Kerns testified that GTW in the past has awarded units for the amount of time it was injury-free. TR 73. At the time of Complainant's injury, the unit had been injury free for five years. TR 72. He testified that Complainant was hesitant to seek medical treatment after his injury because he did not want to ruin the safety record.¹⁰ TR 73-74. Mr. Kerns stated that if Complainant did not want to report the injury, he would have "let it go." TR 104.

Mr. Kerns testified that he had cut his own finger earlier in the morning of December 14, 2011, when he was not wearing gloves, and as a result, reminded everyone to wear their gloves when they were working with the metal "because if you slide your finger on it you're going to get cut." TR 84-85, 87. He testified his cut was minor and he did not report it because it was not serious and did not require medical attention. TR 86. Mr. Kerns testified that at the reenactment of Complainant's injury, he told Mr. Craine that he had also cut himself and had told everyone to wear their gloves.¹¹ TR 87, 149.

Mr. Kerns testified that the gloves can be difficult to put on when wet. TR 130. He did not have a problem with his own gloves being slippery that day, although his gloves were not as wet as the rest of the crew. TR 127. Mr. Kerns thought he had access to dry gloves in the truck

⁸ Complainant denied having a conversation with Mr. Kerns about the metal piece before he moved it. TR 179-80, 182.

⁹ Mr. Patsey was in fact on vacation that day, and Mr. Anthony Thompson was acting supervisor in his absence. TR 224; JX 20.

¹⁰ To the contrary, Complainant testified that he did not hesitate on whether he should report the injury, and did not have a conversation with Mr. Kerns about whether he should seek medical treatment. TR 181.

¹¹ I find Mr. Kerns' trial testimony regarding cutting his finger and telling the crew to wear their gloves when handling metal lacks credibility as it is not supported by the record. He did not mention in his witness statement to GTW or his testimony at the internal investigative hearing that he had cut his own finger that day and had instructed the unit to wear gloves when handling the metal. JX 37. Complainant testified that Mr. Kerns never told the crew that he cut himself or to wear gloves, and Mr. Craine testified that he did not recall Mr. Kerns telling him at the reenactment that he had cut himself and instructed his unit to wear gloves. TR 180-81, 183, 218, 254, 286, 297, 361. Mr. Craine stated that Complainant was not disciplined for failure to follow Mr. Kerns' instructions. TR 254, 361. This is just one example of inconsistency in Mr. Kerns' trial testimony. Accordingly, any discrepancy between Mr. Kerns' account of the events on December 14, 2011 and that of Complainant, I construe in favor of the Complainant.

on the day of the incident, but was not sure.¹² TR 131. He testified the decision to wear gloves as required under Rule E-23 would be that of the foreman and the employees. TR 136-37.

Mr. Kerns testified that he has not personally seen an employee disciplined for reporting an injury if “they complied with safety rules.” TR 114, 144-45. He was aware of times when individuals were injured and no discipline was assessed. TR 145.

3. Alan Craine

Mr. Craine is the Senior Manager of Structures at GTW. TR 253. At the time of Complainant’s injury, he was a Manager of Bridges and Structures, and was Mr. Patsey’s supervisor. TR 253.

Mr. Craine was informed of Complainant’s injury by Larry Pears, the Senior Manager of Engineering, approximately a half hour after it occurred. TR 357, 359. He was told that Complainant cut his finger and was being taken to the hospital. TR 259. Mr. Craine testified that his focus at the time was on ensuring Complainant received proper medical treatment. TR 360.

After arriving at the scene of the injury, Mr. Craine’s assessment was that Complainant was attempting to remove the siding from the floor to get it out of the walkway, for good reason, but that he was in a hurry and believed it to be a minor task, so he did not take the proper precautions to wear gloves while handling material with a sharp edge. TR 362. He believed there was some complacency involved, in that Complainant was wrapping up for lunch and did not take the time to think about what he was doing and whether he was following the rules. TR 347. Accordingly, Mr. Craine spoke with his direct supervisor, Mr. Scola, and they agreed that a hearing should be set up to investigate the incident and the safety rule violations that may have occurred. TR 362. Mr. Craine testified that he did not ask any of the witnesses at the reenactment whether they were wearing gloves. TR 258.

Mr. Craine stated that he initially recommended 10 days actual and 10 days deferred suspension in his Discipline Assessment Form with the idea that it was going to be used as part of the waiver process. TR 365. In deciding on the discipline, he considered the fact that Complainant previously served an 8 day suspension for his prior violations. TR 365. He testified that the waiver process is an opportunity for employees to settle for less discipline than what may be expected if they proceeded with the investigatory process. TR 351. He testified that “the philosophy within certainly the engineering department is that we want to assess the least amount necessary to change behavior.” TR 354. Mr. Craine also testified that it is common practice to cite to any and all rules that may conceivably have been violated in case the discipline is appealed under the collective bargaining agreement (“CBA”) and certain rule violations are overturned. TR 351.

Mr. Craine testified that GTW’s injury reporting policy requires that all injuries be reported, whether or not the employee needs medical treatment. TR 254-55, 344-45. He

¹² At the investigative hearing, Mr. Kerns testified that they did not have dry gloves with them in the truck or at the job site. JX 22 at 64-65.

testified that Complainant's injury was a FRA reportable injury, and he filed a report to send to the FRA. TR 255; JX 4.

Mr. Craine testified that if he had seen Complainant pick up the piece of metal on December 14, 2011, he would have submitted an efficiency test failure, and after looking at his work history, GTW most likely would have commenced an investigation. TR 362-64.

4. Sandro Scola

Mr. Scola is the Assistant Chief Engineer of Structures. TR 266. At the time of Complainant's injury, he was the Senior Manager of Bridges and Structures and oversaw the GTW Bridges and Structures employees, including the Complainant. TR 266. Mr. Craine reported directly to Mr. Scola. TR 266. Mr. Craine informed Mr. Scola of Complainant's injury on December 14, 2011 and after the reenactment, it was Mr. Scola's opinion that Complainant should have been wearing gloves. TR 269-70.

Mr. Scola made the decision to impose discipline, namely a 20 day suspension, following an investigative hearing, relying on the written summary and opinions of the hearing officer, Mr. Wizauer, and the fact that there was a rule violation.¹³ TR 275, 278. He did not independently review the transcript of the investigative hearing or the exhibits presented at the hearing. TR 278-79. He testified that he relied on Mr. Wizauer's opinions because he had multiple years of experience in conducting hearings and was an instructor on conducting hearings. TR 279. Mr. Scola testified that he was influenced in part by the number of rules that Mr. Wizauer found Complainant violated, but agreed it was primarily about wearing required Personal Protection Equipment ("PPE"). TR 281, 285, 305. In determining the amount of discipline imposed, he considered Complainant's previous discipline history¹⁴ and the facts of the event in question. TR 277. He acknowledged that the decision to wear gloves is within the discretion of the individual, depending on the material being lifted or carried. TR 286.

Mr. Scola testified that other employees have been disciplined for PPE violations that did not involve an injury. TR 281. As an example, he testified that employee Juwan Harrison was observed using a chainsaw without his chaps and he received an efficiency failure. TR 281. Mr. Harrison admitted he was not wearing proper PPE, waived an investigation, and was given 5 days deferred suspension. TR 281.

Mr. Scola testified that since the FRSA amendments, managers are required to advise the Chief Regional Engineer prior to noticing an investigation when an employee has been injured. TR 303-04. He acknowledged the railroad's policy that if an employee is injured and there is a violation of any safety rule, the employee can be disciplined. TR 311. Mr. Scola also conceded that some of the safety rules are broad. TR 300.

¹³ The Chief Engineer had to review his recommended discipline and ratify it, but Mr. Scola was the primary decision maker. TR 276. He explained that the 20 day suspension was more than the initial 10 days actual suspension plus 10 days deferred because the initial lesser proposed discipline was offered as a settlement and to induce Complainant to waive an investigation. TR 280.

¹⁴ GTW has a policy of progressive discipline. TR 259.

5. Paul Beard

Paul Beard was a union representative for the Brotherhood of Maintenance and Way Employees Division (“BMWED”) of the International Brotherhood of Teamsters from 1991 to 2012 when he retired. TR 28. He frequently represented employees of the Maintenance of Way Department in internal investigative hearings. TR 30-31. He estimated that he represented members in 350 investigations during his time as a union representative, with four different railroad companies. TR 31, 52-53.

Mr. Beard represented the Complainant at his January 4, 2012 investigative hearing. TR 36, 51. Mr. Beard testified that he did not know prior to the hearing what the alleged rule violations were, making it impossible to prepare any reasonable defense. TR 37. He stated that he could have called witnesses at the investigation but without knowing the alleged rule violations, it is difficult to determine what witnesses to call. TR 64.

Mr. Beard testified that the parties can discuss resolving potential discipline prior to an investigative hearing by agreeing to a waiver as allowed by the governing Collective Bargaining Agreement. TR 68; *see* JX 19. Mr. Beard met with Labor Relations personnel in Complainant’s case to attempt to resolve the issue. TR 67.

Mr. Beard testified that he was aware of employees not reporting injuries because “there is a general trend in the railroad industry that employees who are injured, should, if at all possible, avoid reporting that injury . . . [because] there has been massive retaliation to employees who have reported injuries.” TR 50. He stated that the union has no involvement in the safety rules published by the railroads, and a lot of the rules are vague and difficult to understand. TR 58-59.

6. Lawrence Wizauer

Mr. Wizauer was employed by Illinois Central Railroad Company, a subsidiary of CN, for 43 years. JX 63 at 5-6. At the time of his retirement and at the time of Complainant’s injury, he was an Operations Supervisor. *Id.* at 7.

Mr. Wizauer acted as the hearing officer in Complainant’s investigative hearing. JX 63 at 13. He stated that a hearing officer conducts the formal investigation, and asks questions of the witnesses and the charged employee in order to develop the facts. *Id.* at 13-14. He estimated that he was a hearing officer in excess of 500 investigations during his career. *Id.* at 14. He stated that as a hearing officer, he is not the decision-maker and other than his Summary of Investigation, he had no input on the outcome of the investigation or the amount of discipline imposed. *Id.* at 14, 30. He stated that the managers who were the ultimate decision makers were not required to rely on his opinions presented in his summaries of investigation. *Id.* at 38-39.

Mr. Wizauer testified that in his position, he was given bonuses and the amount of the bonus depended on a variety of factors. JX 63 at 9. He stated that there were performance goals that the company set, one of which related to safety, and specifically the FRA personal injury ratio. *Id.* at 9. If there were too many FRA injuries, the safety goal would not be met, and this could affect the bonus amount. *Id.* at 10.

7. Thomas Sullivan (by Deposition)

Mr. Sullivan is the Director of Human Resources and Labor Relations for the southern region of CN. CX C at 5. He testified that all managers in the Southern region are entitled to some level of a bonus. *Id.* at 8. He stated that 70% of the target bonus is tied to company targets, which are economic in nature; the other 30% is tied to the individual employee's performance goals. *Id.* at 9. The individual performance goals are determined by the employee and his manager. *Id.* at 10. He testified that FRA reportable injuries may be a component of the individual goals portion of the bonus, depending on the particular employee and the division and department in which he works. *Id.* at 11, 17.

Mr. Sullivan also testified that GTW provides training to its frontline supervisors on federal laws including a brief overview of the FRSA and its elements. CX C at 20-21. The company also provides some training on its overall anti-discrimination/anti-retaliation policy. *Id.* at 23.

8. James Schwichtenberg (by Deposition)

Mr. Schwichtenberg is employed by Illinois Central Railroad Company, a subsidiary of CN, as the Director of Safety and Regulatory Affairs for the U.S since 2012.¹⁵ EX 5 at 4, 6. He is responsible for CN's Internal Control Plan, injury and accident reporting to the FRA, and investigating alleged harassment or intimidation under the company policy, for all of CN's U.S. operations, including GTW. *Id.* at 5.

Mr. Schwichtenberg testified that the Internal Control Plan contains an anti-retaliation and anti-harassment policy. EX 5 at 7. He stated that there are monthly leadership calls that at times will discuss the policy. *Id.* Human Resources provides training for managers that covers, among other topics, the anti-retaliation policy and accurate reporting. *Id.* at 8. There is also a supervisor's guide that covers the anti-retaliation policy and reportability. *Id.* For non-managers, policy information is posted in all on-duty locations. *Id.* at 9. Mr. Schwichtenberg testified that the policy has remained the same since 2001 and has not substantively changed after the FRSA was enacted in 2008. *Id.* at 25.

Mr. Schwichtenberg testified that his bonus assessment includes accident and injury objectives. EX 5 at 13. He stated that 70% of his bonus is a corporate measure, which does not include criteria like accident and injury numbers. *Id.* The remaining 30% of his bonus consists of five categories of individual objectives. *Id.* One category is safety, which could include the FRA accident/injury ratio for the U.S as a factor. *Id.* He explained that ratio is one of 20 items underneath the safety category. *Id.* at 13-15.¹⁶ He does not believe the bonus structure discourages injury reporting, because the FRA ratio is such a small part of the criteria, and because one injury is not going to sway the ratio one way or the other, as it involves many factors. *Id.* at 22.

¹⁵ Prior to working at CN, Mr. Schwichtenberg worked for the FRA from 2003 to 2012. EX 5 at 5.

¹⁶ Complainant submitted two supervisor EPS Scorecards for 2011; of the 30% for individual goals, 6% of the rating focused on safety, and 1 of the 6 enumerated criteria for safety was FRA reportable injuries. CX D & E.

Mr. Schwichtenberg testified that he has not investigated a manager for violating the Internal Control Plan policy. EX 5 at 27. His testimony as to whether he was aware that some employees are fearful of reporting an injury was evasive. He said he has not spoken with employees about whether they feel safe reporting injuries. *Id.* at 29-32. However, he then said he does not believe it is an issue because employees are very forthcoming with their reports of injury. *Id.* at 29-32. He also stated that when he worked at the FRA, he never heard concerns about injury reporting at CN, although he did hear of issues with other railroad companies. *Id.* at 33. He acknowledged that his predecessor did investigate some claims for policy violations in the early 2000's, but his predecessor told him it was a rare occurrence. *Id.* at 28. Mr. Schwichtenberg testified that an internal investigation is the same whether it is for an unsafe condition, rule violation, an injury, or an accident. *Id.* at 39.

B. Documentary Evidence

1. Work Injury and Investigative Process

On December 14, 2011, Complainant filed a Report of Injury after cutting his finger on a piece of metal barn siding. JX 2. The same day, Mr. Craine emailed Mr. Scola an "Injury Summary," which listed "potential incident related rules" as "Engineering LIFE E-22 Personal Protective Equipment (PPE) and Clothing, E-23 Personal Protective Equipment (PPE) charts, [and] Core Safety Rules, Rule 3." JX 38. Mr. Scola notified Chad Anderson, the Regional Chief Engineer, and Nigel Peters, the Assistant Chief Engineer of Structures, of the injury by email, stating "clearly he should have been wearing gloves." JX 59; TR 271. Mr. Anderson responded that an investigation was warranted. JX 59.

On December 20, 2011, Mr. Craine filled out a "Discipline Assessment Form," stating that Complainant had two past disciplines on his record: (1) on January 21, 2009, he received 5 days deferred suspension for violating LIFE E-21, by descending steps facing away from equipment; and (2) on March 5, 2009, he was given 3 days actual suspension (plus the 5 deferred days) for backing a vehicle into his supervisor's truck. JX 1. Mr. Craine opined in the Discipline Assessment that Complainant injured himself on December 14, 2011 because he was not wearing gloves when he handled the metal barn siding, and cited to the company's rules LIFE E-22, E-23 and Core Safety Rule 3, which "require gloves when handling material." JX 1. Mr. Craine recommended 10 days actual suspension with 10 days deferred. JX 1.

On December 21, 2011, Respondent sent Complainant a "Notice of Investigation," which stated that an investigation would be held to "develop the facts and to determine whether you violated any Company rules, regulations and/or policies in connection with an incident that occurred at approximately 1245 hours, December 14, 2011 at or near the S&C Headquarters. . . . which resulted in an alleged personal injury." JX 7.

In an email sent on December 22, 2011, Mr. Scola agreed with Mr. Craine's recommended discipline of 10 days actual suspension and 10 days deferred, and Mr. Anderson approved the discipline. JX 23. After discussing the proposed discipline with Complainant, he chose to go through a formal investigation under the CBA rather than waiving the investigation and accepting the discipline. JX 23.

The investigative hearing was held on January 4, 2012; the hearing officer was Lawrence Wizauer and the witnesses were the Complainant, Alan Craine and John Kerns. JX 22 at 6. Complainant's union representative, Paul Beard, made objections on the record based on the fact that the charging letter did not contain any alleged rule violations, making it impossible to develop a defense, and that the admittance of Complainant's personal work history created a biased hearing. JX 22 at 8, 27; *see also* JX 19. Mr. Craine acknowledged at the hearing that the Complainant's leather gloves were wet at the time of the injury and that Complainant was attempting to make the work environment safer by removing the piece of metal. JX 22 at 49-50. However, Mr. Craine alleged that Complainant violated numerous company rules by handling sharp metal material without wearing gloves. JX 33 at 37.

After the hearing, on January 14, 2012, Mr. Wizauer sent Mr. Scola a summary of the hearing. JX 3. He stated: "I believe Mr. Wagner's actions were well intended and that he did not believe he needed gloves to move the material. Mr. Wagner's testimony seemed credible." JX 3. However, Mr. Wizauer concluded "the facts show that Mr. Wagner said he knew the metal siding had been sheared on one side and that it would be sharp. Based upon that knowledge I believe Mr. Wagner should have put his gloves on before lifting and carrying the metal siding." JX 3 at 2. He stated that the facts show Complainant violated company safety rules.

In an email on January 17, 2012, Mr. Scola recommended 20 actual days suspension, which Mr. Anderson approved. JX 23. On January 18, 2012, Mr. Scola notified the Complainant that he was found to have violated the following rules:

- (1) **U.S. Operating Rules ("USOR"), General Rule C – Alert and Attentive**, which states: "Employees must be alert and attentive when performing their duties, taking care to prevent injury to themselves or others." JX 22 at 125;
- (2) **USOR, Rule 100 – Rules, Regulations, and Instructions**, which states: "Employees must be familiar with and obey all rules, regulations and instructions" and "must cooperate and assist in carrying out the rules and instructions." JX 11;
- (3) **LIFE U.S. Safety Rules, Section II: Core Safety Rules, Rights and Responsibilities No. H**, which states: "We must comply with all CN rules and policies that relate to our job task(s)." JX 12;
- (4) **LIFE U.S. Safety Rules, Section II: Core Safety Rules, Clothing and Personal Protective Equipment (PPE) No. 3**, which states: "Know, wear, and maintain approved *personal protective equipment (PPE)* and clothing as required by job task and/or *work environment*, including off-site industries as required." JX 13;
- (5) **LIFE U.S. Safety Rules, Section II: Core Safety Rules, Work Environment No. 13**, which states: "Protect against *unsafe conditions* in *work area* before and during job activity." JX 14;
- (6) **LIFE U.S. Safety Rules, E-22: Personal Protective Equipment (PPE) and Clothing No. 3**, which states: "Wear gloves as required in

the craft-specific Personal Protective Equipment (PPE) chart.” JX 15;
and

- (7) **LIFE U.S. Safety Rules, E-23: Personal Protective Equipment (PPE) Charts**, which indicates that gloves may be required when lifting and carrying. JX 16.

Mr. Scola wrote: “In consideration of the incident, the proven rule violations, and your past discipline record, you are hereby assessed the following discipline: 20 Days Actual Suspension From Service.” JX 24.¹⁷

On March 24, 2012, Complainant was notified his suspension would be from March 26, 2012 through April 20, 2012. JX 26. On April 20, 2012, a “Memo- Note to file” stated that Complainant’s 20 actual day suspension was reduced by 5 days, from April 20, 2012 to April 16, 2012, to per authority of Larry Pears, Senior Manager Engineering. JX 27.

2. Complainant’s Employee Performance Scorecards (EPS)

Complainant’s 2008 EPS indicated he had a good safety record and was a “Superior Railroader.” JX 32.

Following Complainant’s two disciplines in 2009, his EPS indicated Complainant “Needs to Improve,” and stated Complainant “gets [into] a hurry sometimes[;] needs to think more about ‘what can go wrong.’” JX 33.

Prior to Complainant’s injury, his 2011 EPS stated he was committed to safety and his rating was “fully meets.” JX 25.

In 2012, following Complainant’s 2011 injury and discipline, his 2012 EPS rating was “needs improvement” and the comments stated: “Jake understands why he is on the needs development. He is a very good worker, he is always willing to help out his fellow employee. He comes to work every day on time. He is never late. He takes good care of the company’s tools and property.”¹⁸ JX 39.

In Complainant’s 2013 EPS, his overall performance rating returned to “fully meets.” JX 40.

3. Other Instances of Employee Discipline

There were a total of 14 reported injuries in GTW’s Bridges and Structures Department from 2009 to 2013. TR 282; JX 50; *see also* JX 42; JX 43; JX 44; JX 45; JX 48; JX 49; TR 286-293. Of the 14 injuries, two employees were disciplined, one being the Complainant. JX 50; TR 283-84. The other employee who was disciplined following an injury was John Burns. JX 41. On January 5, 2010, Mr. Burns started a fire at a project site using gasoline as an accelerant. The

¹⁷ Mr. Beard filed an appeal of the disciplinary decision on behalf of the Complainant on January 21, 2012. JX 60.

¹⁸ Complainant credibly testified that his supervisor, Robert Patsey, told him the “needs improvement” rating was because he was injured. TR 173, 251-52.

rapid ignition of the fire caused second and third degree burns to his face. JX 41; TR 284. On January 27, 2010, Mr. Burns waived his right to an investigation and was given a 10 day suspension for failing to comply with LIFE Rule E-8-2, which prohibits the use of flammable liquids or accelerants to start or intensify a fire. JX 41; JX 51. Mr. Burns was again injured on May 6, 2013, when he stepped into a hole that had been previously covered by a guardrail. JX 47. He was not disciplined for the second injury. JX 50.

4. Other FRSA Complaints

The record also contains all FRSA complaints filed against Respondent alleging retaliation for reporting an injury for the three years prior to Complainant's injury, along with responses by Respondent to OSHA and any final determinations on the merits or voluntary resolution. CX 1; CXF; EX 8. There are a total of 15 complaints. Of those 15 complaints, 6 were settled, 7 were dismissed by OSHA, 1 was decided in favor of the complainant by an ALJ, and 1 was decided in favor of the Respondent by an ALJ. *Id.*

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW¹⁹

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. Protected activity under the FRSA includes notifying or attempting to notify the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109(a)(4). The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence²⁰ that: "(1) he engaged in a protected activity, as statutorily

¹⁹ The Respondent, for the first time in its post-hearing brief, raised the defense of timeliness. This was not an issue presented before OSHA, nor was it listed as an issue in the parties' Joint Pre-trial Statement or litigated during the hearing. In fact, the parties stipulated that Complainant received notice of the suspension on January 18, 2012, which is timely under the Act. Joint Pre-Trial Stmt 3. Therefore, such a defense is not properly before me.

Even if I were to consider the merits of Respondent's argument, I find the complaint to be timely. Employees have 180 days from the date of the adverse action to file a FRSA complaint with OSHA. 49 U.S.C. § 20109(d)(2)(ii). The Complainant filed his OSHA complaint on July 16, 2012, exactly 180 days from the date of the formal notice of discipline on January 18, 2012. Respondent argues Complainant was aware of the discipline prior to receiving the formal notice, citing to hearing transcript pages 235-36, where Complainant testified that Robert Patsey showed him a screenshot of his discipline and "it could have been a couple of days before [January 18, 2012]." TR 236. Complainant's testimony is far from definitive on the date of notice, and the record is contrary to any suggestion that Complainant knew of his suspension prior January 18, 2012. Complainant's discipline was not even approved until January 17, 2012, and the paperwork was not prepared until January 18, 2012. JX 23; JX 24. Thus, if Mr. Patsey showed a screenshot of the discipline, it could not have been before January 18, 2012.

²⁰ The "[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ

defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont’l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); see also 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. § 42121(b)(2)(B)(iv). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011) (quoting *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

Accordingly, I must consider all the evidence presented and determine whether Complainant has established that he engaged in protected activity, and that protected activity was a contributing factor to the adverse action taken against him. If Complainant meets his burden, then I must determine whether the Respondent has established that it would have taken the same adverse action absent the protected activity.

A. Protected Activity

Protected activity under the FRSA encompasses “notify[ing], or attempt[ing] to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.” 49 U.S.C. § 20109(a)(4). The parties stipulated to the fact that Complainant filed with GTW a report of injury on December 14, 2011. JX 2; Joint Pre-Trial Stmt. 3. Despite this stipulation, the Respondent alleges there was no protected activity because it was aware of the injury before Complainant filed his report. Er. Br. 60. Specifically, the Respondent argues that it was first notified of Complainant’s injury by Mr. Kerns and it was his notification that triggered the reenactment of the injury and the disciplinary process, thus making Complainant’s report no longer protected under the statute. Er. Br. 60. Respondent’s argument is nonsensical. The protected activity under the FRSA is the Complainant’s report of a work injury. The fact that the railroad may learn of an injury from an injured employee’s working foreman or project supervisor prior to the employee “reporting” it either verbally or by completing a form, does not remove the employee from the protection of the FRSA. There is no requirement that the Complainant be the first to report an injury in order for the activity to be protected under the FRSA. In fact, the statute protects not only notifying an employer of an injury, but also *attempting* to notify an employer of an injury. 49 U.S.C. § 20109(a)(4). To read into the statute a requirement that a complainant be the first to report an injury would go against the purpose of the Act, to encourage employees to report injuries without the fear of possible retaliation from

No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (quoting *Black’s Law Dictionary* 1201 (7th ed. 1999)).

employers. *Araujo*, 708 F.3d at 156 n.3, 160. Under Respondent’s construction of the statute, a seriously injured employee physically incapable of reporting an injury prior to a supervisor learning of the injury, would be denied protection under the FRSA, for any discipline a railroad later imposes as a consequence of the injury. Such a reading of the statute is contrary to the intent of the FRSA and cannot stand.

Furthermore, the two cases cited by the Respondent in support of its position, *Pelant v. Pinnacle Airlines*, No. 05-1173, 2006 WL 2286381, at *12 (D. Minn. Aug. 8, 2006) and *Cokley v. City of Otsego*, 623 N.W.2d 625, 632 (Minn. Ct. App. 2001), are distinguishable on the facts and arise under the Minnesota Whistleblower statute, and therefore have no relevance to this claim under the FRSA, which involves different standards and burdens of proof.²¹

Complainant notified his foreman, Mr. Kerns, of the injury and informed him that he needed medical treatment. TR 90, 146, 222, 234. At the reenactment later that day, Complainant provided information to GTW on how the injury occurred and why he did not wear gloves. TR 187-88. He also filed a report of injury at that time. TR 225. Under the Act, the Complainant clearly engaged in protected activity, and the fact that Mr. Kerns reported the injury to Mr. Craine does not prevent a finding of protected activity.²²

²¹ The Minnesota Whistleblower Statute applies the *McDonnell Douglas* burden-shifting framework.

²² Complainant additionally alleged in his brief that invoking his right to an internal investigatory hearing (rather than waiving the investigation) constituted protected activity under 49 U.S.C. § 20109(a)(1)(c). Section 20109(a)(1)(c) protects employees who provide information regarding what an employee “reasonably believes constitutes a violation of any Federal law, rule, or regulations relating to railroad safety or security.” Here, Complainant did not report any information about a reasonably-believed safety violation; in fact Complainant was contending that there were *not* any safety violations. Accordingly, proceeding with a disciplinary hearing in this case did not constitute protected activity under the Act.

B. Adverse Action

Following an investigative hearing, the Complainant was given a 20 day suspension as discipline for safety rule violations, and served 15 days of the suspension. Under the Act, a suspension constitutes an adverse action by an employer. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012). Accordingly, Complainant has established an unfavorable personnel action.²³

C. Contributing Factor

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams*, ARB No. 09-092 at 5). In establishing the contributing factor element, a complainant need not “prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action” but only that his protected activity “tends to affect in any way the outcome of the [employer’s] decision.” *Araujo*, 708 F.3d at 158 (*quoting Marana v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)). A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer’s adverse action. *DeFrancesco*, ARB No. 10-114, PDF at 6; *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, PDF at 7 (ARB May 31, 2013).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams*, ARB No. 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7. Direct evidence “conclusively links the protected activity and the adverse action and does not rely upon inference.” *Williams*, ARB No. 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer’s suspension of employee who reported job-related injury “violated the direct language of the FRSA”). A complainant may also rely upon circumstantial evidence, which:

may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward a complainant after he or she engages in protected activity.

²³ In the original complaint filed with OSHA, Complainant alleged that he was additionally subjected to more scrutiny in his performance reviews and increased efficiency testing than other employees. OSHA found that there was no evidence of these additional retaliatory acts, and Complainant did not pursue this argument before the OALJ. In fact, Complainant testified at the hearing that he has not had any difficulties at work as a result of the injury on December 14, 2011, and other than the 15 day suspension, he did not believe the Respondent has done anything to retaliate against him. TR 209, 239, 246.

DeFrancesco, ARB No. 10-114, PDF at 7; *see also Bechtel*, ARB No. 09-052 at 13 n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (*quoting Sylvester v. SOS Children’s Vills. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

Recent Administrative Review Board “ARB” decisions have found that if the protected activity and the adverse action are “inextricably intertwined,” there exists a presumptive inference of causation. *See Henderson*, ARB No. 11-013 at 13 (finding a presumptive inference of causation where complainant’s investigation and discipline directly stemmed from his report of injury); *DeFrancesco*, ARB No. 10-114 at 7 (finding because complainant’s report of injury triggered the employer’s review of his personnel records and led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, PDF at 8 (ARB June 20, 2012) (holding because complainant’s protected disclosures prompted the employer’s investigation that led to complainant’s discharge, the complainant’s disclosures were “inextricably intertwined” with the investigations that resulted in his discharge and complainant established the “contributing factor” element of his claim). The protected activity and adverse action are inextricably intertwined if the basis for the adverse action cannot be explained without discussing the protected activity. *See Hutton*, ARB No. 11-091 at 15 (Corchado, J., concurring).²⁴

Respondent argues that the “inextricably intertwined” line of cases are distinguishable from the instant matter because Mr. Kerns was the one who first reported Complainant’s injury to management, triggering the sequence of events that led to his ultimate suspension and severing any “but-for” causal connection between Complainant’s protected activity and his suspension. Er. Br. 61, 67. I do not find Respondent’s argument to be persuasive. It was not until *after* Complainant participated in the reenactment and filed a report of injury, that management determined that a formal investigation was warranted. *See JX 59* (email from Mr. Anderson at 5:29 pm on December 14, 2011 stating that investigation was warranted *based on reenactment*). Mr. Craine testified that it was not until after the reenactment, reviewing Complainant’s record, and discussing the incident with Mr. Scola, that management decided to formally investigate the incident. TR 269-70, 362. The only information Mr. Kerns provided was that Complainant had injured himself and gone to the hospital; Mr. Craine did not know any details of the injury until the reenactment. JX 22 at 116; TR 137-39, 259, 360. Therefore, it cannot be said that it was Mr. Kerns’ call that triggered the investigation and ultimate discipline, as it was not until after Complainant’s protected activity, including providing a description of how the injury occurred and filing a report of injury, that management decided to conduct an

²⁴ The Respondent contends in its brief that *DeFransesco* and its progeny were wrongly decided by the ARB. *See* Er. Br. 67-73. However, I am bound by the Board’s decisions.

investigation.²⁵ *Marano*, 2 F.3d at 1143 (“[An] employee only needs to demonstrate by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action.”). In addition, if Complainant had not sustained an injury, there would not have been a reenactment, or an investigation and discipline. Accordingly, I find that the protected activity and adverse action are “inextricably intertwined,” and there exists a presumptive inference of causation between the protected activity and the adverse action taken.

There is also additional circumstantial evidence that Wagner’s protected activity contributed to Respondent’s decision to discipline him. Joint Exhibit 53 contains screenshots from the company’s “Dashboard” – a compilation application that compiles personnel documents into one location for managers to look at an employee’s work history. Er. Br. 20; TR 335. The Dashboard screenshots in JX 53 contain Complainant’s disciplinary and injury history and identifies the reason for Complainant’s 20 day suspension as “allegedly sustained a personal injury.” JX 53.²⁶ Complainant also credibly testified that his supervisor told him that his 2011 EPS stated “needs improvement” because of his injury. TR 173, 251-52.

Respondent argues that it was Complainant’s safety rule violations, and not his injury, that led to his discipline. Er. Br. 62-63. However, a safety rule violation does not prevent protected activity as being a contributory factor. *See Araujo*, 708 F.3d at 163; *Henderson*, ARB No. 11-013 at 11 (stating that the “legitimate business reason” burden of proof analysis does not apply to FRSA whistleblower cases).

The rules Complainant was charged with violating and which the Railroad relies upon to defend the discipline also support a finding that his injury influenced the discipline received. The Complainant was charged with violating seven separate rules, the majority of which are general, vague, repetitive and tied to not injuring oneself. For example, U.S. Operating Rules (“USOR”), General Rule C – Alert and Attentive, requires that employees be “alert and attentive when performing their duties, *taking care to prevent injury* to themselves or others”; Core Safety Rule 13 states “Protect against *unsafe* conditions in work area before and during job activity”; and Rule 100 requires employees to “obey all rules, regulations and instructions.” JX 22 at 125 (emphasis added); JX 22 at 125, 126, 129 (emphasis added); *see also* JX 12. GTW witnesses

²⁵ Mr. Kerns did not witness the injury and therefore could not provide management with details on how the injury occurred; only Complainant could provide such information. Additionally, Mr. Kerns testified that if Complainant had not wanted to report the injury, he would have “let it go” and would not have notified GTW managers. TR 104. Consequently, if Complainant had not informed Mr. Kerns of his injury no re-enactment or investigation would have occurred and GTW would not have assessed any discipline as a result of the injury.

²⁶ The Respondent argues that the Dashboard screenshots are unreliable evidence, relying on the testimony of Mr. Craine. Er. Br. 20, 64. Mr. Craine testified that the Dashboard is not always reliable because there have been times where information was omitted or duplicated. TR 337. Although Mr. Craine testified that he is not aware of any underlying document that says Complainant was disciplined for sustaining a personal injury, he stated that the phrase would have been pulled from an underlying record. TR 336-38. Furthermore, in an Injury Summary report for another employee, Eric Barnette, the same language was used under past discipline: “6/15/2005: 5 days actual suspension and 10 days held in abeyance for 1 year *for personal injury*.” JX 49 at 3 (emphasis added). Respondent’s attempt to explain away the dashboard screenshots as unreliable evidence linking the discipline to injury fails.

acknowledged that the crux of the matter involved Complainant's failure to wear personal protective equipment ("PPE"), specifically gloves, yet GTW relied on these additional, vague rules that are intrinsically linked with the fact that Complainant suffered an injury. TR 257, 285.

Even the rules regarding PPE left some judgment to the employee as to whether gloves were required under the circumstances here. TR 258, 285-86; JX 16. Mr. Scola admitted that the number of rule violations found in the investigation influenced the amount of discipline he assessed. TR 280-81. And Mr. Craine admitted the Respondent charged the four non PPE rule violations to have a better chance that some rule violation would withstand the CBA's appeal process. TR 260, 281, 305. This fact undercuts Respondent's assertion that it disciplined Complainant for the rule violation and the injury played no part in the discipline. In citing Complainant with violating numerous overlapping, vague, general and repetitive rules, in addition to the specific rule regarding the use of gloves, it is apparent that Respondent sought to ensure Complainant was found to have violated safety rules in connection with his work injury.

Lastly, there is temporal proximity in this matter. *Araujo*, 708 F.3d at 160. Complainant's injury occurred on December 14, 2011, the notice of investigation was sent to Complainant on December 21, 2011, and the discipline occurred on January 18, 2012, just over a month after the injury.

Considering the totality of the circumstances, I find that the Complainant has proven by a preponderance of the evidence that his protected activity of reporting a work injury was a contributing factor in his ultimate suspension. Accordingly, the burden shifts to GTW to establish that it would have taken the same action absent the protected activity.

D. Respondent's Affirmative Defense

Once a complainant has shown that his protected activity was a contributing factor to 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. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); *see also* 49 U.S.C. § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco*, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. A respondent's burden to prove the affirmative defense under the FRSA is purposely a high one. *Hutton*, ARB No. 11-091 at 13; *see also Araujo*, 708 F.3d at 159-60 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a "tough standard" for employers to meet).

GTW argues that it disciplined Complainant because of safety rule violations, specifically Complainant's failure to wear PPE when handling the metal barn siding, and did not discipline Complainant because of his injury or his report of injury.

The question remains whether GTW would have charged Complainant with safety rule violations and issued a 20 day suspension absent his protected activity of reporting a work injury.

The Respondent has presented substantial evidence to establish that it would have taken the same adverse employment action absent Complainant's protected activity.

GTW has provided evidence demonstrating that it disciplines employees for safety rule violations absent activity protected by the FRSA. Complainant himself was disciplined two times previously for safety rule violations, absent a work-related injury. JX 22 at 134-35; RX 2; RX 3. In 2009, he was given five days deferred suspension for descending stairs facing away from equipment. TR 167. In March 2009, he was given a 3 day suspension, plus the five deferred days, for backing a vehicle into his supervisor's truck. TR 170.

Mr. Scola testified that other employees have been disciplined for violating the company's PPE requirements, without sustaining an injury. TR 281. Specifically, Juwan Harrison was observed using a chainsaw without his chaps and he received an efficiency test failure. TR 281. He admitted he violated the safety rule regarding proper PPE, waived an investigation and was given 5 days deferred suspension. TR 281.²⁷ Complainant acknowledged there are other occasions when discipline was assessed with no injury. TR 171.

Respondent also presented evidence that there were a total of 14 work injuries that occurred in Complainant's department from 2009 to 2013, and of those 14 injuries, only two employees were disciplined for safety rule violations following the injuries— the Complainant and John Burns. TR 282; JX 50. Mr. Burns suffered second and third degree burns to his face after using gasoline as an accelerant to start a fire. JX 41; TR 284. Mr. Burns waived an investigation and was given 10 days suspension for failing to comply with a company rule prohibiting the use of accelerants. JX 41; JX 51. Mr. Burns was again injured in 2012, when he stepped into a hole, and was not disciplined for that injury. TR 291; JX 50; JX 42. This evidence establishes that GTW does not routinely discipline an employee following a report of injury, rather it shows that in the majority of cases, no discipline is assessed following an injury.

Lastly, Mr. Craine testified that if he had seen Complainant pick up the piece of metal, absent an injury, he would have submitted an efficiency test failure, and after looking at Complainant's work history, most likely would have initiated the disciplinary process. TR 362-63. This testimony is consistent with the evidence of discipline for safety violations absent injuries.²⁸

²⁷ Although Mr. Harrison's discipline does show that Employer has disciplined employees for PPE violations absent injuries, I note that the incident involving Mr. Harrison is not the same as that with the Complainant. Mr. Scola acknowledged that there is no leeway, or subjective decision-making by an employee, in the rule requiring employees to wear chaps when using a chainsaw, whereas the requirement of wearing gloves leaves some room for interpretation on the part of the employee. TR 281-82.

²⁸ The Complainant's brief did not address the affirmative defense and therefore did not provide any counter argument or evidence that Respondent failed to meet its burden of establishing it would have taken the same adverse action absent the protected activity.

Based on the foregoing evidence, I find that the Respondent has established that it would have taken the same adverse action absent Complainant's protected activity of filing an injury report.²⁹

ORDER

For the foregoing reasons, I find that the Complainant has established that his protected activity was a contributing factor in GTW's decision to discipline him. I further find that GTW has met its burden of establishing an affirmative defense, namely that it would have taken the same adverse action absent the protected activity.³⁰ Accordingly, the complaint is hereby **DISMISSED**.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

²⁹ I am compelled to comment upon and caution against the condescending and disrespectful tone of portions of the Respondent's brief that go beyond zealous advocacy. (See suggestion that Court go out and obtain some 12x3 foot long razor sharp steel siding and carry it around for a few hours prior to deciding this case). Resp. Br. at 76.

³⁰ Although I find the Respondent has established an affirmative defense in this matter, I find it very disconcerting that managers' bonuses continue to be tied, in part, to the FRA reportable injuries ratio. Congress specifically identified such a practice as one that places pressure on railroad employees not to report injuries, and is part and parcel of why Congress enacted the FRSA. *See Araujo* 708 F.3d at 159. Furthermore, the evidence shows that GTW has not changed its policy since the enactment of the FRS, nor has it provided any significant training on the Act to ensure that managers do not violate its provisions. The fact that GTW has not changed its practices since the enactment of the FRSA raises some serious concerns.

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 for Occupational Safety and Health. *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).