

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

Issue Date: 22 August 2018

CASE NO.: 2015-FRS-00036

In the Matter of:

LEONARD ANSINK,
Complainant,

v.

METRO-NORTH COMMUTER RAILROAD COMPANY,
Respondent.

Before:

Timothy J. McGrath, Administrative Law Judge

Appearances:

Charles C. Goetsch, Esq., Charles Goetsch Law Offices, LLC, New Haven, Connecticut, for the Complainant

Rebecca M. Harris, Esq., Crumbie Law Group, LLC, Hartford, Connecticut, for the Respondent

DECISION AND ORDER DISMISSING COMPLAINT

I. STATEMENT OF THE CASE

This matter arises from a complaint filed by Leonard Ansink (“Ansink” or “Complainant”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Metro-North Commuter Railroad Company (“Metro-North” or “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 Metro-North unlawfully retaliated against Ansink for his participation in an FRSA complaint investigation. On February 23, 2015, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found Ansink’s

alleged protected activity was not a contributing factor in Respondent's decision regarding its adverse actions. The Secretary dismissed the complaint and Complainant objected to the Secretary's findings and requested a *de novo* hearing before the Office of Administrative Law Judges ("OALJ").

Respondent filed a Motion for Summary Decision on September 8, 2015, and Complainant filed a response on September 23, 2015. On April 22, 2016, I issued an Order denying Respondent's Motion for Summary Decision. Complainant filed a Motion regarding the applicability of punitive damages on October 18, 2016, and Respondent filed a response on October 21, 2016. On January 10, 2017, I issued a preliminary opinion on the applicability of punitive damages.

A hearing was held before me in New Haven, Connecticut, over two trial days: January 31, 2017, and February 1, 2017. At the hearing, the parties were afforded the opportunity to present evidence and arguments. The Hearing Transcript is referred to herein as "TR." Formal papers were admitted into evidence as Administrative Law Judge Exhibits ("ALJX") 1-14. TR 6-8. The parties' documentary evidence was admitted as Complainant's Exhibits ("CX") 8, 24, 33, Respondent's Exhibits ("RX") 5, 35, and Joint Exhibits ("JX") 1, 2-5, 7, 9-15, 18-22, 25, 27-30, 32, as identified in the Complainant's list of trial exhibits. TR 6, 8-9, 225, 258, 308, 311. Testimony was heard from Complainant, David DiStasio, James Gillies, and James Pepitone. The record is now closed, and the parties have submitted post-hearing briefs ("Compl. Br." and "Resp. Br.," respectively).

II. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated to the following facts in this matter:

1. Metro-North is a railroad within the meaning of the FRSA;
2. At all relevant times Ansink was an employee of Metro-North;
3. On March 16, 2011, the Metro-North Legal Department received Kevin Schmidt's FRSA complaint from OSHA and distributed a copy of Kevin Schmidt's FRSA complaint to Director of Power Department James Gillies;
4. Prior to June 3, 2011, Power Department Director James Gillies had received a copy of the Kevin Schmidt March 2, 2011 FRSA Complaint, and was aware of its contents;
5. Kevin Mulligan of Rizzo Electric was not present on the site of the Devon Substation construction project on June 3, 2011 between 2:00 and 3:15pm;

6. Prior to July 28, 2011, Power Department Assistant Director James Pepitone was aware of the contents of the Kevin Schmidt March 2, 2011 FRSA Complaint;
7. Power Department Director Gillies initiated disciplinary charges against Ansink on June 6, 2011;
8. Metropolitan Transportation Authority (“MTA”) was created by New York Statute and is “a body corporate and public constituting a public benefit corporation;”
9. MTA created Metro-North as a wholly owned subsidiary corporation, to which MTA delegated its authority to operate certain of its commuter rail services in New York and Connecticut;
10. As a wholly owned subsidiary of the MTA, Metro-North shares “all of the privileges, immunities, tax exemptions and other exemptions of the authority . . .” except the power to contract indebtedness;
11. Railroad service, including the services of Metro-North is exempt from both Connecticut and New York state and local taxes; and
12. Metro-North is a public benefit corporation.

JX-1 at 1-2.

The remaining issues for adjudication are: (1) whether Complainant engaged in protected activity; (2) whether Complainant suffered adverse action; (3) whether Complainant’s protected activity was a contributing factor in the adverse action; and (4) whether Respondent would have taken the same adverse action against Complainant absent any protected activity.

Based on the record as a whole, I find Complainant fails to demonstrate he engaged in protected activity, as defined under § 20109(a)(3). If Complainant had proved he engaged in protected activity, I nevertheless find he fails to demonstrate the protected activity contributed to the adverse employment action taken against him. Finally, even assuming Complainant was able to demonstrate all elements of his retaliation claim, his claim would still fail because Respondent has established by clear and convincing evidence it would have taken the same adverse action absent the protected activity.

III. BACKGROUND

A. Complainant’s Background

Leonard Ansink began working for Metro-North in 1997 after graduating from high school and serving in the U.S. Army. TR 234-235. At all relevant times, Ansink was an employee of Metro-North. JX-1 at 1. Ansink worked as an apprentice alongside “linemen” during his first two-and-a-half years at Metro-North. TR 235. He then passed a written exam, which allowed him to become a “Class A lineman” for Metro-North’s Power Department. TR 235. As of June 2011, Ansink had 14 years of experience as a lineman and a “clear” disciplinary record. TR 234-235. On July 28, 2011, Ansink was notified of a ten-day suspension imposed against him. JX-20.

B. Respondent’s Background

Respondent is a “railroad carrier” and an employer, as defined under the FRSA. JX-1 at 1. More specifically, Respondent is a wholly owned subsidiary corporation of Metropolitan Transportation Authority (“MTA”), and operates certain commuter rail services in New York and Connecticut. JX-1 at 2. In 2011, Respondent employed approximately 5,000 employees, and about 350 were working in its Power Department. TR 81, 192, 312.

The Respondent’s Power Department is responsible for the maintenance and operations of all the electrical components of its New Haven rail line, including the line’s catenary system. TR 13, 81. The catenary system is a high-voltage electrical system made up of the poles, towers, structures, and overhead wires which are used to provide the energy necessary for trains to run on the line. TR 13, 123; JX-2 at 20-21. The catenary system wires are energized to 13,000 volts;¹ if an employee comes into contact with a live catenary wire, the electrical system can be damaged and/or the employee could be killed or maimed. TR 16-17, 123-124; JX-2 at 7.

1. Respondent’s Power Department Management Structure

In 2011, James Gillies (“Gillies”) worked as the Director of the Power Department at Metro-North. TR 80, 120. Gillies oversaw nearly all aspects of the Power Department, and he typically held a staff meeting every Monday morning with members of the department’s upper management. TR 25, 102-103 121, 179. These meetings were generally attended by Metro-North’s management level personnel, including James Pepitone and David DiStasio. TR 25, 102-103, 153.

¹ In comparison, the electric outlets in a home or an office are generally only 120 volts. See TR 124.

During the same time, James Pepitone (“Pepitone”) worked as the Deputy Director of the Power Department and reported directly to Gillies. TR 113, 176, 185. Pepitone oversaw about 350 employees and was responsible for much of the department’s operations and training. TR 175-176, 192. David DiStasio (“DiStasio”) also worked under Gillies in 2011, and served as the Assistant Director of the Power Department. TR 13, 43. As Assistant Director, DiStasio was responsible for training and supervising the employees who work on catenary systems. TR 43-44. Generally, managers are not on the work sites because supervision at the sites is done at a lower level. TR 119. In 2011, Ansink’s immediate boss or “agreement supervisor” was Robert Duty. TR 103-104, 121.

2. Respondent’s Safety Rules and Required Procedures

To ensure the safety of its employees, property, and train operations, Respondent maintains electrical operating instructions set out in a document known as the “MN-290.” TR 47-48, 125, 178; JX-2 at 1-2. The MN-290 applies to all of Metro-North’s employees and sets forth the general rules and procedures for them to follow in the course of their duties. *See* TR 47-48, 125, 143, 178; JX-2 at 2. It also reiterates the importance of safety to Respondent, noting “[s]afety is of first importance in the discharge of duty. Obedience to these instructions is essential to safety.” *See* JX-2 at 2. Gillies and Pepitone explained Metro-North took safety serious and it was “absolutely” a top priority for the company in 2011. TR 124-125, 195.

All new Metro-North employees are given a copy of the MN-290 before they are eligible to be assigned to duty. JX-2 at 2. All employees “whose duties are in any way affected by these instructions” are required to have a copy of the MN-290 with them while on duty. JX-2 at 2. All of Respondent’s employees are trained on the MN-290; if employees have any questions about the rules or procedures, they are expected to consult with their supervisors. TR 47-48, 56, 73, 143, 223; JX-2 at 2. The MN-290 provides specific rules pertaining solely to Power Department employees. *See* JX-2 at 32-48. The MN-290 further delineates duties and responsibilities specific to a select group of Power Department employees known as Class A employees. TR 17-18, 44-45, 84; *see* JX-2 at 36-38; JX-3 at 2-9.

The MN-290 does not specifically define who a Class A employee is; however, Class A employees are known as “qualified” employees who are able to provide protection for workers at work-sites where electrical work is performed. *See* TR 17-18, 44-45, 75-76, 84, 128-129, 220.

The MN-290 provides protection duties for “Qualified Class ‘A’ Employees.” *See* JX-3 at 6-9. Specifically, the MN-290 provides:

Metro-North Power Department qualified employees who have been instructed and certified on electrical hazards and are qualified to erect, repair, and maintain electrical apparatus, catenary and third rail, and to supervise, receive and record Clearance on the Form MP-260, and protect other persons performing work in electrified territory, and perform system inspections on daily outages.

JX-3 at 6.

A “Class A lineman” is a Metro-North employee who is qualified to protect people from the potential dangers of working with electrically charged instruments and systems. TR 19, 128-129. They are required to place themselves at a work-site in a position to allow them to best observe all locations within the proximity of energized wires, and the movements of all people towards such locations. TR 19, 128-129. “Class A linemen” are entitled to use their discretion in selecting a location in a work-site to do their job. TR 86, 238-239. It is common for two “Class A linemen” to be at one work-site. TR 45, 86, 133. Having more than one “Class A lineman” at a site allows more work to be done in less time, and also promotes safety by ensuring a qualified lineman could provide assistance to another qualified lineman, if necessary. *See* TR 86, 133-134. For example, if one “Class A lineman” climbs up a pole and becomes incapacitated while on the pole, only another qualified “Class A lineman” who knew the limits of clearance would be able to rescue him. *See* TR 133.

When two or more “Class A linemen” are assigned to work at a single work-site, they have the discretion to determine who amongst themselves would serve as the “lineman in charge,” and who will serve as the “second ‘Class A lineman.’” TR 86, 134-135, 282-283. Notwithstanding their specific roles, all “Class A linemen” are required to know the limits of clearance at their assigned work-site. TR 52, 283. The “Class A lineman” who is “in charge” does not have any supervisory authority over the second “Class A lineman” at a given site. TR 135. For example, if one “Class A lineman” left a worksite to take a break, the “Class A lineman” in charge could not discipline or order the other “Class A lineman” to return. TR 135. However, a “Class A lineman” should not leave another “Class A lineman” alone at a worksite for longer than forty-five minutes. TR 198, 143, 54-55. If no linemen are suspected to be present at a given worksite, any employee may immediately shut down the worksite. TR 68, 88.

As a general matter, Metro-North considers all overhead wires to be energized at all times, except when a wire is known to have been properly de-energized and grounded. TR 130;

JX-3 at 8. A “clearance” is the written permission from the Power Department given to a qualified Metro-North employee to test, de-energize, and ground a live wire or piece of equipment in order to allow maintenance work to be done on it, or to allow someone to get closer than the minimum allowed distance. TR 16, 84, 135; JX-2 at 8, 43. Essentially, the clearance serves the purpose of informing all workers that the correct power lines are de-energized and are safe to be worked on. *See* TR 135-136.

All clearances must be recorded on Metro-North’s Form MP-260, more commonly known as a clearance sheet (“clearance sheet”). TR 22, 155, 136-137. The clearance sheet lists the name of the qualified employee who obtained the clearance, recites the limits of the clearance obtained, and is used to document the signatures of all members of the work gang at the site to show they are aware of the limits of the clearance. TR 19, 66, 137-138, 285; JX-2 at 43; JX-3 at 10. The work gang² is a group of Metro-North employees and/or outside contractors performing work at a given worksite. *See* TR 19.

The Metro-North “Class A lineman” in charge is responsible for informing the work gang of the limits of the clearance, and he or she must also obtain all required signatures on the clearance sheet. TR 19, 22-23, 55-56, 85, 155, 177, 196; JX-3 at 10-11. In a revised version of the MN-290, rule 5.10, titled “**Obtain signatures**” states:

The Class “A” employee will obtain, on the standard clearance form (MP-260), the signature of the designated supervisory person indicating that he/she and all employees of the gang have been instructed, and will confine their work within the **Limits of the Clearance** defined to them by the Class “A” employee. . . .

JX-3 at 10.

Respondent does not appear to have implemented any regular practice of reviewing the clearance sheets. *See* TR 41, 91, 171, 242. In fact, there is no written rule in the MN-290 requiring a second “Class A lineman” to sign off on the clearance sheet. TR 66, 90-91, 138-139, 170-171, 227, 240; JX-2 at 43; JX-3 at 10. Nevertheless, it is implicitly understood that a second “Class A lineman,” and all employees working near a de-energized wire or piece of equipment, are required to comprehend and be aware of the limits of the clearance. TR 91, 138-139.

C. Metro-North’s Disciplinary Process

² As discussed below, “Class A linemen” are not considered members of the work gang. TR 191, 232.

Metro-North's disciplinary process is governed by the collective bargaining agreement ("CBA") it has with its employees' union. TR 44, 157, 204, 224-225. The CBA does not provide any specific disciplines associated with certain rule violations. *See* RX-35. Nevertheless, assessing discipline is part of maintaining safety standards at Metro-North; when safety rules are not followed, corrective action is necessary and discipline is one such form of corrective action. TR 125. Although Metro-North does not maintain a central database to record what discipline, if any, was imposed in other cases, it maintains its "disciplinary tracking system" ("DTS"). *See* TR 111, 166-167, 221; JX-18. Metro-North's DTS is an automated computerized system used to keep track of on-going disciplinary matters and "it link[s] the hearing officer with the department head." TR 111-112.

The first step in the disciplinary process set forth in the CBA requires Metro-North to provide an accused employee with "reasonable prompt advance notice, in writing, of the exact offense for which he is to be tried."³ RX-35 at 8. If the "general foreman or equivalent officer has had actual knowledge" of the offense for more than thirty days before the employee has been charged, then the employee shall not be charged with the offense. TR 157, 226; RX-35 at 8. Within seven days of receiving notice of the offense, the employee may, along with a "duly accredited representative," meet with a Metro-North representative at a "pre-trial meeting" for the purpose of resolving the matter. TR 205-206; RX-35 at 9.

The pre-trial meeting is informal, and it provides the parties an opportunity to agree in writing as to the discipline to be assessed, if any. TR 44, 205; RX-35 at 9. If the parties reach an agreement at the pre-trial meeting, the employee may sign a waiver,⁴ which recites the agreed upon discipline and marks the end of the disciplinary process. TR 44; RX-35 at 9. Alternatively, if an agreement cannot be reached, an internal disciplinary trial will be scheduled to begin no later than fifteen days after the pre-trial meeting. RX-35 at 9.

At the internal trial, the employee is permitted to be accompanied by a union representative, and either the employee or the representative can question "pertinent" witnesses. RX-35 at 9. Metro-North will request pertinent witnesses to attend the trial, but the employee is responsible for arranging witnesses to appear on his behalf and the associated costs. RX-35 at 9. After the trial concludes, a reviewing officer examines the hearing transcripts and determines

³ The notice given to an employee is known as a "charge letter." *See* TR 205-206; RX-35 at 9.

⁴ A waiver is comparable to a plea bargain before a criminal trial or a settlement before a civil trial. RX-35 at 9.

whether the facts of the case were proved, and whether to impose discipline. *See* TR 167-168, 185, 187. There is no provision in the CBA setting out who can be the reviewing officer in any given case; however, the reviewing officer is generally a Metro-North department officer or manager. *See* TR 187-188; RX-35 at 1-11. If the reviewing officer determines discipline is appropriate, the employee must be notified in writing no later than thirty days after the internal trial ends, and no less than fifteen days before the discipline is to become effective. RX-35 at 9.

If dissatisfied with the reviewing officer's decision, the employee, or his representative, may appeal the decision "by filing a written request for a hearing within ten (10) calendar days from receipt of the decision to the highest designated officer of the Company to whom appeals may be made." RX-35 at 10. If the discipline imposed is a suspension, "the request for a hearing shall act as a stay, except in the case of a major offense, until after a decision is rendered on the appeal." RX-35 at 10. "A decision on the appeal shall be rendered within thirty (30) calendar days of the date of the hearing." RX-35 at 10. The decision on appeal is considered final and binding, unless a "written request for arbitration is submitted to the Impartial Arbitrator or the National Railroad Adjustment Board" within sixty days of receiving notice of the decision on appeal. RX-35 at 10.

After the employee and Metro-North have been afforded an opportunity to be heard and submit evidence, "the decision, in writing" of the arbitrator or board is final and binding on both parties. RX-35 at 10. If the final decision "decrees that the charges against the employee were not sustained," then "the record shall be cleared of the charge." RX-35 at 10. If the discipline imposed on an employee is a reprimand, it will be removed from his or her record as long as the employee can maintain an unblemished record for one year after the notice of discipline was issued. RX-35 at 11. Likewise, if the discipline assessed is a sixty day suspension or less, it will be removed from his or her record if the employee can maintain an unblemished record for two years after notice of discipline was issued. RX-35 at 11.

D. Timeline of Relevant Events

1. *Kevin Schmidt's OSHA Complaint*

In 2011, Ansink worked with Kevin Schmidt ("Schmidt"), a fellow lineman at Metro-North. TR 242. On March 16, 2011, Respondent was notified Schmidt filed a complaint with the Occupational Safety and Health Administration ("OSHA"). JX-1 at 1; JX-5 at 1. In his

three-page complaint, Schmidt alleged Respondent retaliated against him for engaging in protected activities under the FRSA. *See* JX-5 at 3-5. Schmidt provided detailed examples of instances where he was disciplined shortly after notifying Metro-North of safety concerns. *See* JX-5 at 3-4. Relevant to this case, Schmidt also referenced Ansink's claim that Gillies knew about, but did not discipline anyone for, an explosion—which did not result in any reported injury—caused by a catenary wire grounding incident on July 10, 2010. *See* JX-5 at 4-5, 11.

Ansink's claim about the incident was detailed in an unsigned statement attached as an exhibit to Schmidt's FRSA complaint to OSHA. *See* JX-5 at 5, 11. Ansink admits he was not under oath when he made this written statement, and he prepared it in consultation with Attorney Goetsch, who was representing Schmidt at the time. TR 276-277. In his statement, Ansink wrote:

On July 10, 2010, I was ordered to report to wire damage in Greenwich C.T. I was working on the CMV (catenary maintenance vehicle). . . At Greenwich, we traveled East on the rail with the panograph up into an energized section of wire causing a ground arc explosion. No (sic) was flashed or hurt by the explosion and no personal injuries were reported. . . Hours later after the incident I had asked General Supervisor of the power Dept. Robert Doody (sic) if management that was on scene had known about the ground. I was told that Metro North Director of power James Gillies had commented about and did know about the ground. To my knowledge there was no investigation or follow up and no person disciplined for that incident.

JX-5 at 11.⁵

At some point before June 3, 2011, Gillies was provided a copy of Schmidt's OSHA complaint with attached exhibits, including Ansink's statement. *See* TR 93-94; JX-1 at 1. DiStasio and Pepitone were also generally aware of Schmidt's complaint, and they discussed it with Gillies shortly after OSHA notified Respondent of the complaint. TR 178-179; JX-1 at 3. Robert Duty, Ansink's agreement supervisor, was not aware of Ansink's involvement in the Schmidt matter. *See* TR 312-313, 314-315. Aside from his written statement, Ansink had no further involvement in the Schmidt matter; he did not provide any additional testimony or speak to the OSHA investigator assigned to the case. TR 278.

When questioned about how his supervisors treated him after submitting the statement in support of Schmidt's complaint, Ansink testified “[g]enerally, after some time, I would imagine

⁵ Ansink admits he was not present for the conversation between Gillies and Robert Duty about the July 10, 2010 explosion. TR 277.

when this was made aware to them, everybody became pretty formal in their relations to me. They were not cordial as usual. Yeah, it was awkward.” TR 244. Ansink, however, did not refer to any specific instances exemplifying why he believed his supervisors became “pretty formal.” See TR 244. Ansink admits he was not approached by any of his supervisors about the Schmidt complaint or his participation in the Schmidt matter. See TR 278, 280-281.

2. *June 3, 2011: The Devon Site*

On June 3, 2011, Ansink punched into work on a Kronos time-clock machine at Respondent’s Bridgeport, Connecticut location at exactly 6:59 AM. TR 225, 45; CX-33. Ansink then drove a Metro-North company van to the Devon substation⁶ construction site (“Devon site” or “Devon”). TR 244, 246. As of June 3, 2011, the substation was not yet completely constructed. TR 144. The poles being erected along both sides of the railroad tracks at the Devon site would ultimately carry the wires from the substation to the catenary system. TR 144. In order to erect the poles, contractors from the Cherokee Drilling Company were hired to drill large holes in the ground, fill them with concrete, and reinforce the metal rods to ensure adequate support for the poles. TR 144-145.

Ansink was assigned as the second “Class A lineman” at Devon on the south side of the tracks, between the railroad and the interstate highway. TR 146-148, 245. Mike Buonaiuto (“Buonaiuto”) was the “Class A lineman” in charge on June 3, 2011 at Devon. TR 155, 235, 245. As required by Metro-North, Buonaiuto obtained clearance for the power outage and he ensured all contractors working at the Devon site signed the MP-260 clearance form. TR 155-156, 247-248, 258-259; JX-7. The MP-260 clearance form indicates Buonaiuto obtained the clearance at 9:04am. JX-7. As the second “Class A lineman,” Ansink was responsible for observing and providing backup support for Buonaiuto. TR 253, 295. Ansink explained he did not sign the clearance sheet because he “did not do any grounding that day.” TR 258-259.

Around 2:25pm, Gillies arrived on the north side of the tracks at Devon. TR 94, 144, 147, 254; JX-15 at 33. He was wearing a white hard hat, which is typically worn by Metro-North managers, supervisors, and foreman, as well as a reflective Metro-North vest. TR 97, 147, 255, 283. Upon arriving, Gillies noticed a Metro-North employee, William McNeil (“McNeil”), the Conductor Flagman, positioned on the south side of the tracks near the drill rig the

⁶ A “substation” is “the point where the power from the utility company is connected to the railroad.” TR 145. Metro-North purchases high-voltage electrical power from a utility company, reduce the voltage, and connect the power to the “various railroad feeder wires” via the substation. See TR 145.

contractors were working on. TR 95-96, 148. McNeil was standing about 20 to 30 feet away from the drill to ensure workers stay a safe distance from the train tracks. TR 96, 148-149, 236. Gillies testified that when he approached McNeil, he did not identify himself by name or title, nor did Gillies know McNeil's name. TR 96.

During most of his time at Devon, Gillies remained within 20 to 30 feet of where McNeil was positioned on the south side of the tracks. TR 96-97. After noticing two contractor employees working on the drill rig, which extended up near the wires, Gillies asked McNeil if there was a power outage there. TR 96, 149-150. McNeil told Gillies the power was de-energized and then proceeded to recite for him the limits of clearance. TR 96-97, 150-151. At the point, Gillies was not able to see any "Class A linemen" at the Devon site from where he was standing. TR 97. When Gillies questioned McNeil about whether any "Class A linemen" were at Devon, McNeil responded by saying they were "around." TR 97, 151. Around 3:00 p.m., Gillies observed a white van enter the Devon site and park somewhere out of his vision. TR 98-99. He never approached the van to learn who, if anyone, from Metro-North was inside. TR 98-99.

Shortly thereafter, Buonaiuto appeared near where Gillies and McNeil were standing, but Gillies does not know exactly where Buonaiuto came from. TR 98-99, 152, 255-256. Gillies spoke to Buonaiuto for about fifteen minutes in a seemingly joking manner. *See* TR 98, 152, 256. During this conversation, Gillies never asked if there was a second "Class A lineman" at Devon, if Buonaiuto was in charge, or to see the clearance form. TR 99-100, 152. Gillies explained he did not shut down the Devon site because it appeared "secured," and because Buonaiuto appeared shortly after Gillies spoke to McNeil. TR 101. Gillies left Devon around 3:15 p.m., and he never saw Ansink during the time he was there. TR 97-98, 101.

At the hearing, Ansink testified he was at Devon for the entire day on June 3, 2011. TR 251-252, 281. Ansink testified he aware of the extent of the clearance, which was part of his job duties, because he discussed the limits of clearance with the workers at the site during the "tailgate" before work began on June 3rd. TR 283, 294-295. Around the time Gillies arrived at Devon, Ansink said he "would have been in the [Metro-North] van," which was located on the south side of the tracks. TR 252, 281, 285. The van was approximately 35 to 50 feet away from the drilling site, and there were other vehicles in front of him and behind him. TR 252, 287. While in the van, Ansink explained he positioned himself to face the drill operator to watch the

job site and, if necessary, he would have been able to get out of the van. TR 253, 291-292. He said it was normal to yell and wave his arms as a means of communication with contractors because the site was loud and he must avoid engaging in more conversation than necessary. TR 253-254, 285-287.

While at Devon around 2:30 p.m., Ansink recalls seeing a person he did not recognize approach flagman McNeil. TR 254-255. Although this person was actually Gillies, Ansink thought “he might be somebody in transportation checking in on McNeil” based on the white hard hat the person was wearing. TR 255, 284. At no point did Ansink suspect it was his manager looking for the linemen. TR 255. Ansink testified he did not see Gillies leave the area near where McNeil was positioned until Gillies left Devon. TR 256.

After Gillies left, Buonaiuto approached Ansink in the van and told him Gillies had come and left. TR 256-257. Ansink testified that had he recognized Gillies, he would have gone over to him. TR 256-257. Instead, Ansink claims he stayed in the van in order to ensure somebody was paying attention to the contractors and the job. TR 256. Ansink ultimately finished his shift when he punched out on a time-clock at 5:31pm. *See* CX-33.

3. Charges Brought Against Ansink and Buonaiuto

At the weekly management meeting with DiStasio and Pepitone on Monday, June 6, 2011, Gillies discussed what he had observed at the Devon site on Friday, June 3. TR 103, 154-154, 179, 200. Gillies testified that although he could not remember the name of the “Class A lineman” in charge, DiStasio was able to surmise it was Buonaiuto based on how Gillies described him. TR 154. Similarly, although Gillies did not see a second “Class A lineman” at the Devon site, DiStasio was able to determine Ansink was the second “Class A lineman” assigned there. TR 154. After learning the identities of the two “Class A lineman” assigned to Devon, Gillies, DiStasio, and Pepitone deliberated whether or not to bring disciplinary charges against them. TR 154-155. At no point was Metro-North’s legal or safety department contacted about the decision to initiate disciplinary charges against Ansink and Buonaiuto. TR 31, 83-84, 106.

After the weekly meeting ended, Gillies contacted James Walker (“Walker”), the disciplinary trial officer for Metro-North, responsible for conducting investigations into allegations of misconduct at Metro-North and overseeing disciplinary hearings. TR 27, 105, 156-157, 226. Gillies requested Walker start drafting disciplinary charges against Ansink and

Buonaiuto. TR 105, 156, 226; JX-1 at 2. On June 7, 2011, Walker sent an E-mail to Gillies, Pepitone, and DiStasio, asking for their review and comments to his first draft of the charge letters for Ansink and Buonaiuto. TR 157-158, 181-193; JX-9. Gillies' response provided Walker with information to clarify his recollection of the events on June 3, 2011. JX-10. After revising and updating the charge letters, Walker sent them to Gillies, Pepitone, and DiStasio seeking review and comments. *See* JX-11.

On June 14, 2011, Ansink received the notice of discipline from Metro-North, charging him with violating Metro-North's safety rules. *See* JX-12 at 1. Specifically, Ansink was charged with: (1) being "[a]bsent from duty and [his] work location without permission on Friday June 3, 2011 from approximately 2:25PM to 3:15PM . . ." and (2) "[f]ailure to properly perform Class 'A' Protection Duties . . . on Friday June 3, 2011 from approximately 2:25PM to 3:15PM . . ." for the contractor, Cherokee Drilling. JX-12 at 1.

On the same day, Buonaiuto also received a nearly identical notice of discipline charging him with the same two offenses as Ansink. JX-28 at 1. The only difference in the charging letters was that Buonaiuto was charged with "[f]ailure to properly perform Class 'A' Protection Duties . . . on Friday June 3, 2011 from approximately 2:00PM to 2:30PM . . ." for the contractor, Cherokee Drilling. *See* JX-12 at 1; *but see* JX-28 at 1.

4. Pre-Trial Hearings

On June 21, 2011, DiStasio conducted separate pre-trial meetings for Ansink and Buonaiuto. TR 30, 61, 68, 204, 288. Although Ansink attended the pre-trial meeting, he did not bring evidence with him and he refused to talk to DiStasio about what took place on June 3, 2011. TR 62, 288-289. According to Ansink, he refused to talk because DiStasio claimed he had the authority to drop the charges, but then stated he would need to check with Gillies first. *See* TR 62, 289-290. Ansink's pre-trial meeting lasted less than ten minutes. TR 288. DiStasio testified that he did not tell Ansink he would make a recommendation to reduce or withdraw the charges against him. TR 62.

DiStasio conducted Buonaiuto's pre-trial meeting after Ansink's ended. TR 61-62. When questioned, Buonaiuto explained he was present at the Devon site on June 3, and saw Gillies. TR 62-63. Additionally, DiStasio noted that Buonaiuto put his name on the clearance sheet, "so we know he was there." TR 63. DiStasio testified he recommended Gillies drop the charges against Buonaiuto. TR 62-63. DiStasio explained why he did not make the same

recommendation for Ansink. TR 63. Since Ansink had not signed the clearance form, and nobody at the Devon site, including Gillies, could confirm he was there at that time, the facts are very different. TR 63. Nevertheless, Gillies did not accept DiStasio's recommendation and the charges against Buonaiuto proceeded. TR 63, 70. DiStasio informed Pepitone neither Ansink nor Buonaiuto were able to come to a decision on a waiver⁷ and a trial would be necessary. TR 205-206.

5. Internal Disciplinary Hearings

On June 30, 2011, Walker conducted two separate disciplinary hearings; the first hearing was for Buonaiuto, and the second was for Ansink. TR 206; *see* JX-15 at 1; JX-29 at 1. In both cases, Al Russo served as the union representative, and Ansink and Buonaiuto were afforded the opportunity to present witnesses and evidence. JX-15 at 1, 5-6; JX-29 at 1, 5-6. Gillies and McNeil testified as witnesses in both hearings. *See* JX-15 at 7-26, 26-39; JX-29 at 7-39, 50-62.

6. Discipline Imposed

Gillies typically serves as the reviewing officer for any trial occurring in the Power Department. TR 166-167. Here, however, Gillies recused himself from the review role because he was the initiator and principal witness in the cases against Ansink and Buonaiuto. TR 107, 114, 166-167, 187. Hence, Pepitone served as the reviewing officer for both disciplinary hearings. TR 166-167, 184-186, 206. As the reviewing officer, Pepitone's role was to review the hearing transcripts and the other evidence provided in order to determine whether a case was proven, and, if so, whether or not to actually issue the discipline. TR 167, 185, 206. Pepitone testified Gillies did not assign him as the reviewing officer in these two cases, and decided instead that he would be the reviewing officer himself. TR 187. Gillies, however, claimed Pepitone was "the one who was assigned" to review Ansink's case. TR 166.

When Pepitone was asked why he did not recuse himself from the Ansink case when his boss, Gillies, was the only witness against Ansink, Pepitone stated he did not see any reason to do so. TR 187. He explained "it is protocol within the company that if one individual is a witness at the trial transcript, that another officer of the company would be the one to read the

⁷ I note Walker E-mailed DiStasio and Pepitone a draft of two nearly identical waivers prepared for Ansink and Buonaiuto. *See* JX-13 at 1-3. The waivers differ only in the period of time each employee was allegedly not present at the Devon site, but they contain identical terms and conditions of discipline. *See* JX-13 at 2-3. If the employees had signed the waivers, which they did not, then they would have each been assessed a twenty-day suspension with "Five (5) days Served and Fifteen (15) days deferred for six (6) months." JX-13 at 2-3.

testimony to determine whether or not the case was made.” TR 187. Pepitone further stated the reviewing officer “would have to be a manager who understood the operations of the [P]ower [D]epartment” and explained he had the requisite knowledge to do so. TR 188. Gillies was similarly questioned about Pepitone’s decision not to recuse himself as the reviewing officer in the Ansink case. *See* TR 114. He testified as follows:

Q: So why didn’t Pepitone recuse himself from deciding the case where his boss was the only witness against the employee?

A: We are not a typically top-heavy organization. There is me as the director. I report to the chief engineer who reports to the vice president. Beneath me is Pepitone and beneath him is DiStasio. In the power department, there were three managers in the chain. It’s not like I have a whole lot of other choices.

Q: Well, sir, why didn’t you make sure that some manager other than your subordinate decide the merits of Ansink’s discipline case?

A: I didn’t.

Q: I know you didn’t do that, but I’m asking you why, why didn’t you do that?

A: I didn’t see it was necessary.

TR 114.

Pepitone testified that he reviewed the hearing transcripts and exhibits from each case. TR 185, 206-207. Pepitone identified what he believed to be important aspects of the internal disciplinary hearing. *See* TR 207-208, 219. Pepitone took into consideration Gillies’ testimony that he had never seen Ansink while he was at Devon, and that Buonaiuto did not appear until after Gillies had been speaking to McNeil for some time. TR 207-208. It was also important to Pepitone that McNeil told Gillies the “Class A linemen” were “around” but did not specifically point out where they were. TR 208-209. Pepitone also placed weight on the fact that neither McNeil nor Buonaiuto were able to confirm they could physically see Ansink while Gillies was present at Devon. *See* TR 210-212, 219.

Pepitone also considered Ansink’s testimony at the internal disciplinary hearing. *See* TR 212. Specifically, he noted Ansink admitted he was in a van thirty to forty feet away from the work being performed, but never presented himself to Gillies. TR 212. When asked specifically why he found Ansink guilty of the charges, Pepitone responded “[b]ecause there were three individuals: Mr. Gillies, Mr. Buonaiuto, and Conductor McNeil, who all verified that Mr. Ansink was not at the rigging location performing his Class A duties, but yet over somewhere by a van.” TR 219. According to Pepitone, even if Ansink was in the van as he claims, he would not have

been performing his Class A duties because being inside the van would prevent him from providing the necessary protection and performing those duties. *See* TR 219-220.

Pepitone determined Metro-North proved both charges against Ansink and imposed a ten-day suspension.⁸ TR 188-189, 219; JX-20. Likewise, Buonaiuto was found guilty of both charges, but Pepitone gave him a lesser suspension of five days. TR 189, 220; JX-30. Pepitone testified his decision to discipline Ansink and Buonaiuto was based on the hearing transcripts and the exhibits from the disciplinary hearing. TR 186, 189, 220. He explained he gave a lesser discipline to Buonaiuto because:

Mr. Buonaiuto, after a period of time of not performing his Class A duties, did present himself as a power department employee. . . He approached Mr. Gillies at the scene and had a conversation with him, whereas Mr. Ansink did not. In addition, Mr. Buonaiuto ultimately conveyed information about the outage to Mr. Gillies, whereas Mr. Ansink did not.

TR 220-221.

Pepitone believed the punishment in this case was similar to what had been done in the past. TR 221. Pepitone further testified he did not consider Ansink's involvement in the Schmidt OSHA complaint, and claimed not to recall that Ansink submitted a letter in that case. TR 221-22. When asked whether he suspended Ansink and Buonaiuto with the "knowledge and agreement" of Gillies, Pepitone stated he "may have discussed it with [Gillies], but it was my reading of the transcript." TR 189. I note, however, Pepitone admitted he had previously testified he decided to impose the suspensions on Ansink and Buonaiuto "with the knowledge and agreement of [DiStasio] and [Gillies]." *See* TR 189-190. Gillies testified he did not think he discussed disciplining Ansink with Pepitone after the internal disciplinary hearing, and testified he did not "in any manner try and influence" Pepitone's decision. *See* TR 167-168.

IV. CREDIBILITY DETERMINATIONS

As the finder of fact, I am entitled to determine the credibility of witnesses, weigh evidence, draw my own inferences from evidence, and I am not bound to accept the opinion or theory of any particular witness. *See, e.g. Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the

⁸ Ansink did not serve any part of his ten-day suspension after it was reduced at arbitration. TR 303; CX-24 at 1.

proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). Additionally, the Administrative Review Board (ARB) has stated ALJs may "delineate the specific credibility determinations for each witness," although such delineation is not required. *See Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009).

Four witnesses testified at the hearing and I was able to observe their demeanor, bearing, manner and appearance, and judge their credibility. My findings set forth in this Decision and Order are based on my review and consideration of the entire record in this case, including my findings as to the overall credibility and demeanor of the witnesses, and the rationality or internal consistency of their testimony in relation to the evidence as a whole.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FRSA Legal Framework

In 2007, Congress substantially amended the FRSA, expanding the scope of the anti-retaliation protections and providing enforcement authority to the Department of Labor. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156-157 (3d Cir. 2013). Under the FRSA "[a] railroad carrier engaged in interstate or foreign commerce ... may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activity. 49 U.S.C. § 20109. The protected activities are set forth in the statute, and relevant here, it is a protected activity "to file a complaint, or directly cause to be brought a proceeding related to . . . railroad safety or security . . . or to testify in that proceeding." *See* 49 U.S.C. § 20109(a)(3). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). 49 U.S.C. § 20109(d)(2)(A)(i).

The ARB recently articulated a "two-step burden-of-proof framework" that must be applied to actions not only arising under AIR-21, but also the FRSA and related whistleblower

provisions with the same burden-of-proof framework. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15-16 (ARB Sept. 30, 2016), *reissued* Jan. 4, 2017 (en banc); 49 U.S.C. §§ 42121(b)(2)(B)(iii), (iv). Under the first step, an FRSA complainant must demonstrate: (1) he or she engaged in a protected activity, as statutorily defined; (2) he or she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.⁹ See *Palmer*, ARB No. 16-035, slip op. at 16, n. 74; see also *Johnson v. BNSF Ry. Co.*, ARB No. 14-083, ALJ No. 2013-FRS-059, slip op. at 3 (ARB June 1, 2016) (acknowledging the same three essential elements); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014); *Araujo*, 708 F.3d at 157.

The term “demonstrate” as used in AIR-21, means to “prove by a preponderance of the evidence.” *Palmer*, ARB No. 16-035, slip op. at 17; *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006). Therefore, Complainant has the burden of proving his case by a preponderance of the evidence; however, the evidence need not be “overwhelming” to satisfy the requirements set forth in 49 U.S.C. § 42121(b)(2)(B)(iii).¹⁰ Circumstantial evidence is sufficient to meet this burden. See *Araujo*, 708 F.3d at 157. Moreover, when the ALJ considers whether a complainant has proven a fact by a preponderance of the evidence, it “necessarily means to consider all the relevant, admissible evidence and . . . determine whether the party with the burden has proven that the fact is more likely than not.” *Palmer*, ARB No. 16-035, slip op. at 17-18.

If Complainant demonstrates Respondent violated the FRSA, the burden then shifts to Respondent (step-two of the burden-shifting framework). See *Palmer*, ARB No. 16-035, slip op. at 22; *Araujo*, 708 F.3d at 157 (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)). At step-two, Respondent may avoid liability only if it can prove by clear and convincing evidence it would

⁹ In *Hamilton v. CSX Transp. Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013) the ARB found the ALJ’s legal analysis and conclusions of law on the three essential elements of an FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with the applicable law, but noted a fourth element, employer’s knowledge of the protected activity, was cited by the ALJ and the parties. *Id.* slip op. at 3. The ARB acknowledged the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis; they are not always determinative factors. *Id.* (citing *Staub v. Proctor*, 562 U.S. 411 (2011)); see *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-00003 (ARB Jul. 17, 2015) (explaining knowledge is not a separate element but instead forms part of the causation analysis).

¹⁰ In *Palmer*, the ARB instructed ALJs not to use the phrase or concept of “prima facie” when analyzing a complainant’s burden under step one of the AIR-21 test because § 42121(b)(2)(B)(iii) does not apply this term, and therefore, the term “demonstrate” in clause (iii), which means “proves,” is not equivalent to establishing a “prima facie” case. *Palmer*, ARB No. 16-035, slip op. at 20, n. 87.

have taken the same unfavorable personnel action in the absence of Complainant's protected activity.¹¹ *Palmer*, ARB No. 16-035, slip op. at 52-53, 56-57. "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)). When the ALJ considers whether an employer has proven it would have otherwise taken the same adverse action against the employee, the ALJ must consider all relevant, admissible evidence. See *Palmer*, ARB No. 16-035, slip op. at 57 (citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-009, slip op. at 11 (ARB Apr. 25, 2014)).

B. Ansink's Case for Retaliation

As discussed above, actions brought under the FRSA are governed by the burden of proof structure set forth in the employee protection provisions of AIR-21. See 49 U.S.C. § 20109(d)(2)(A)(i). In addition to demonstrating the complainant and employer are covered under the act,¹² Complainant must also demonstrate by a preponderance of the evidence that (1) he engaged in protected activity, as statutorily defined, (2) he suffered an adverse employment action, and (3) his protected activity was a contributing factor in the adverse action. See *Palmer*, ARB No. 16-035, slip op. at 16, n. 74; *Kuduk v. BNSF Ry. Co.*, 768 F.3d at 789; *Araujo*, 708 F.3d at 157.

1. Whether Complainant Engaged in Protected Activity

The parties dispute whether Complainant engaged in protected activity. TR 10-11. Complainant argues he engaged in protected activity as defined under § 20109(a)(3) of the FRSA when he submitted a statement to OSHA in support of co-worker Schmidt's FRSA complaint. See Compl. Br. at 12-14. Respondent acknowledges Complainant submitted the supporting

¹¹ In *Palmer*, the ARB characterized step-two as the "same-action defense" rather than the "clear and convincing" defense, noting the ARB, courts, and ALJs have commonly referred to step one as the "contributing factor" step, and step two as the "clear and convincing" step. In doing so, the ARB explained "the phrase 'same action defense' makes clear that step two asks a different factual question from step one—namely, would the employer have taken the same adverse action?—and is not simply the same question [as step one] with the heavier 'clear and convincing' burden imposed upon employer." *Palmer*, ARB No. 16-035, slip op. at 22.

¹² The parties agree Respondent is a "railroad carrier" and Complainant is a covered "employee" within the meaning of 49 U.S.C. § 20109(a). JX-1 at 1; TR 10-11.

statement, but refuses to concede such an act constitutes protected activity under the FRSA.¹³ TR 10-11; Resp. Br. at 4-7, 43-46. Therefore, before considering whether Complainant has demonstrated he engaged in a protected activity, I must first determine whether Complainant correctly interprets § 20109(a)(3). Compl. Br. at 14.

On any question of statutory interpretation, one must begin with the text of the relevant statute to determine whether the language at issue has a plain and unambiguous meaning. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The ARB has directed that whistleblower provisions are meant to be interpreted expansively, and they have “consistently been recognized as remedial statutes warranting broad interpretation and application.” *Mendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). However, if the statute is found to be plain and unambiguous, then my inquiry shall end and the plain meaning of the statute will control its interpretation. *See Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *see also Dodd v. United States*, 545 U.S. 353, 357 (2005). It is well-established that the plain meaning of statutory language “is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. at 341; *see United States v. Epskamp*, 832 F.3d 154, 162 (2d Cir. 2016) (explaining the plain meaning of a statute “can be best understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.”).

In relevant part, § 20109(a)(3) of the FRSA provides:

A railroad carrier . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done . . . to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, *or to testify in that proceeding.*

49 U.S.C. § 20109(a)(3) (emphasis added).

¹³ Respondent offers no direct argument as to whether Complainant’s activity is considered protected under § 20109(a)(3). Instead, Respondent argues the alleged protected activity is not a contributing factor to the adverse action taken against Complainant. *See* Resp. Br. at 43-44.

Complainant argues “[t]he phrase ‘or to testify in that proceeding’ is plain and unambiguous, and covers [his] act of providing a statement to OSHA in support of his co-worker’s Section 20109 complaint.” Compl. Br. at 14. In his brief, Complainant contends the plain meaning of the phrase “to testify in that proceeding” can be determined by looking to the definitions of the terms “testify” and “proceedings,” and he uses three different dictionaries to do so. *See* Compl. Br. at 13-14. Specifically, Complainant asserts:

The American Heritage Dictionary defines the word “proceedings” in the legal context as: “The activities and hearings of a legal body or administrative agency.” The Merriam Webster Dictionary defines “testify” as: “to make a statement based on personal knowledge or belief.” Webster’s New World Law Dictionary defines “statement” as: “A declaration of fact or an allegation by a witness.”

Compl. Br. at 14.

Based on these definitions, Complainant claims “[a] U.S. DOL Section 20109 ‘proceeding’ commences upon the filing of a Section 20109 complaint with OSHA,” and “[a] railroad worker ‘testif[ies] in that proceeding’ when he or she provides a statement to OSHA in support of the proceeding’s Section 20109 complaint.” Compl. Br. at 14. This interpretation of § 20109(a)(3), according to Complainant, reflects “the broad unrestricted scope of the language Congress chose” and it is “consistent with the overriding remedial purpose” of the FRSA. Compl. Br. at 14. Furthermore, Complainant contends “Section 20109 quickly will become a dead letter” if co-workers are not protected for providing statements to OSHA. Compl. Br. at 14. As discussed below, however, I find Complainant fails to take into account the context in which the term “testify” is used in the statute. Accordingly, I reject Complainant’s proffered plain meaning interpretation of the phrase “to testify at that proceeding,” as it appears in § 20109(a)(3).

The term “testify” is not defined elsewhere in the FRSA. *See* 49 U.S.C. § 20109. Additionally, I have found no case law in which the phrase “to testify in that proceeding,” as it appears in § 20109(a)(3), has been interpreted. As a matter of statutory interpretation, the words not defined in the statute should be given their “ordinary meaning” in order to effectuate the intent of Congress in choosing this language. *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *see Perrin v. United States*, 444 U.S. 37, 42 (1979) (noting words not defined in a statute should be given their “ordinary, contemporary, common” meaning).

The terms “testify” and “proceedings” are most commonly used in legal contexts; thus, the “ordinary meaning” of these terms should reflect the legal context in which they are used.

See Am. Tobacco Co., 456 U.S. at 68; *Perrin*, 444 U.S. at 42. Complainant correctly looks to define the term “proceeding” as it is used “in the legal context.” Compl. Br. at 14. For whatever reason, however, Complainant did not look to define the term “testify” as it is used in the legal context. *See* Compl. Br. at 14. I find this particularly surprising because the first-listed definition of “testify” in the Merriam-Webster Dictionary, which Complainant uses to define “testify,” provides an explicit reference to the legal system. *See* Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/testify> (last visited Apr. 3, 2018). Under this definition, the term “testify” means “to make a solemn declaration under oath for the purpose of establishing a fact (as in a court).” *See* Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/testify> (last visited Apr. 3, 2018).

A similar interpretation of “testify” can also be construed based on the definitions provided by Black’s Law Dictionary. According to Black’s, the term “testify” means “[t]o give evidence as a witness.” Black’s Law Dictionary 752 (4th pocket ed. 2011). In this context, the term “witness” is defined by Black’s as “[o]ne who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit.” Black’s Law Dictionary 832 (4th pocket ed. 2011). Therefore, contrary to Complainant’s contention, I find “testify” does not mean to make a statement based on personal knowledge or belief; rather, the statement must have been made while under oath or affirmation.

If the term “testify” was defined as broadly as Complainant suggests, then § 20109(a)(3) would render § 20109(a)(1) of the FRSA superfluous. In *Connecticut Nat’l Bank v. Germain*, the Supreme Court explained “courts should disfavor interpretations of statutes that render language superfluous.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992). Under § 20109(a)(1), it is a protected activity for an employee to provide information or otherwise assist in an investigation to an agency, such as OSHA, only if the employee can prove he or she had a reasonable belief there was some violation of law or regulation related to railroad safety or security. *See* 49 U.S.C. § 20109(a)(1). However, under Complainant’s proffered interpretation of “testify” under §20109(a)(3), an employee would “testify” any time he or she provides information based on personal knowledge or belief to OSHA. This overly-broad interpretation of “testify” would effectively allow employees to circumvent the reasonable belief requirement set forth in § 20109(a)(1) by claiming they “testified” instead of claiming they provided information or assistance during an investigation. Therefore, in order to ensure § 20109(a)(1) is

not rendered superfluous, Complainant's proffered interpretation of § 20109(a)(3) should not be followed. *See Connecticut Nat'l Bank*, 503 U.S. at 253.

Accordingly, I reject Complainant's proffered plain meaning interpretation of the phrase "to testify in that proceeding," as it appears in § 20109(a)(3). I find the phrase "to testify in that proceeding," as it appears in § 20109(a)(3), plainly and unambiguously affords protection for employees who offer evidence in an FRSA proceeding as a witness *while under oath*. *See* 49 U.S.C. § 20109(a)(3). At this point, because I have found the language of the statute is unambiguous, my judicial inquiry is complete. *See Connecticut Nat'l Bank*, 503 U.S. at 253-254 (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Applying this plain meaning interpretation of § 20109(a)(3) to the present facts, I find Complainant did not engage in protected activity. Ansink admits he never spoke with Kristin Rubino, the OSHA investigator assigned to co-worker Schmidt's case. TR 278. He testified the only "testimony" he provided in that case was the written statement submitted to OSHA. TR 276-277. That statement, however, was unsigned, and Ansink admits he was not under oath or affirmation when he provided it. TR 276-277; JX-5 at 11. Therefore, I find and conclude Complainant failed to demonstrate by a preponderance of the evidence that he engaged in protected activity under the plain meaning of § 20109(a)(3).¹⁴

Accordingly, Complainant's complaint must be dismissed. However, for purposes of completeness, I will proceed with my analysis assuming, *arguendo*, Complainant has met his burden of showing he engaged in protected activity.

2. Adverse Action

Complainant must show by a preponderance of the evidence the Respondent took some adverse action against him. *See Palmer*, ARB No. 16-035, slip op. at 16, n. 74; *Kuduk v. BNSF Ry. Co.*, 768 F.3d at 789; *Araujo*, 708 F.3d at 157. Under the FRSA, a railroad carrier may not "discharge, demote, *suspend*, reprimand, or in any other way discriminate against an employee" on the basis of the employee's engagement in protected activity. 49 U.S.C. § 20109(a) (emphasis added); *see also* 29 C.F.R. § 1982.102(b)(1) (railroad "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to

¹⁴ It appears Complainant may be able to prove his claim under a different section of the FRSA, such as § 20109(a)(1), but Complainant made it abundantly clear he is bringing a claim under only § 20109(a)(3). *See* Compl. Br. at 14. Therefore, because my review is limited to the claims alleged by Complainant, I consider only whether Complainant engaged in protected activity under §20109(a)(3).

intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee”). Accordingly, a suspension certainly constitutes an adverse employment action under the FRSA. 49 U.S.C. § 20109(a); *see DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 4 (ARB Feb. 29, 2012).

The ARB has made clear that whistleblower standards are meant to be interpreted expansively, as they have “consistently been recognized as remedial statutes warranting broad interpretation and application.” *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011).¹⁵ The ARB has applied a broad definition of adverse action under the FRSA: a railroad engages in adverse action if it engages in “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7. Relevant here, a charging letter has also been found by the Board to constitute an adverse action in the form of an “unfavorable employment action.” *See Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, PDF at 2-3 (ARB Dec. 21, 2012); *see also Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010).

At the hearing before me, the parties agreed Complainant’s discipline constitutes adverse action within the meaning of the FRSA. TR 11-12. There is no question a charging letter was issued to Complainant on June 14, 2011. JX-12. Ansink testified he lost sleep and became anxious after receiving the charging letter, because he thought he would eventually be fired based on the way Metro-North’s progressive discipline works.¹⁶ TR 260. Under the terms of the CBA, the filing of charges against Complainant marks the first step in Metro-North’s progressive disciplinary process, which has the potential to culminate in a reprimand, suspension, or termination. *See RX-35* at 8-11. Given Metro-North’s progressive disciplinary process, I find

¹⁵ In *Menendez*, the Board explained that adverse action can also include an employment action that “would dissuade a reasonable employee from engaging in protected activity.” This factor was an additional consideration in *Menendez* where the unfavorable action (breach of confidentiality) differed from cases where discipline or threatened discipline was involved. Where termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question of whether the employment action will dissuade others.

¹⁶ According to Ansink, “[o]nce charges start sticking to you, it’s a very short walk until your career is over. And these were severe charges, so they would have had a very big head start on ending my career.” TR 260.

the filing of charges against an employee is not a “trivial” employment action; it is likely to have a chilling effect on reasonable employees, who may be dissuaded from participating in a co-workers’ FRSA proceeding for fear of being potentially disciplined.

The Board has held a written warning is presumptively adverse, not only where it is considered discipline, but also where it is routinely used as the first step in a progressive discipline policy or it implicitly or expressly references potential discipline. *See Vernace*, ARB No. 12-003 at 26-27; *Williams*, ARB No. 09-018 at 15. In this case, the charging letter is the first step in the progressive discipline process. Additionally, the letter says “[y]ou may, if you so desire, be accompanied by a representative as provided in the schedule agreement.” JX-12 at 1. This is an explicit reference to the established disciplinary process, and it implies the hearing may result in discipline. JX-12 at 1; RX-35 at 9. The letter also explicitly references “paragraph 6-A-3(c)” of the CBA, which is part of Metro-North’s established disciplinary process. JX-12 at 1; RX-35 at 9. Accordingly, I find the June 14, 2011, charge letter implicitly and explicitly references potential discipline, and it marks the first step in Metro-North’s progressive disciplinary process.

Although Complainant was not actually suspended for ten days until July 28, 2011, I find the disciplinary process started when Complainant received the charging letter on June 14, 2011. JX-12; JX-20. Therefore, I find the filing of charges against Complainant constitutes an adverse action prohibited by the FRSA. *See Vernace*, ARB No. 12-003 at 2-3; *Williams*, ARB No. 09-018 at 15.

3. Contributory Factor

The final element in a retaliation complaint under the FRSA is contribution. To establish this final element, Complainant must show by a preponderance of the evidence “[his] protected activity was a contributing factor in the unfavorable personnel action.” *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 18 (ARB Sept. 30, 2016), *reissued* Jan. 4, 2017 (en banc). “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.” *Palmer*, ARB No. 16-035, slip op. at 53 (emphasis in original) (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012)). The ARB held this is a “low ... standard ... for the employee to meet,” explaining “[a]ny factor really means *any* factor. It need not be significant,

motivating, substantial or predominant." *Palmer*, ARB No. 16-035, slip op. at 53 (internal quotation marks omitted). Essentially, "[t]he protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices." *Id.* (alteration in original). "Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity." *Id.*

Contribution is not meant to be a difficult or arduous showing. *See, e.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013). Thus, a complainant may establish the contributing factor element "by direct evidence or indirectly by circumstantial evidence." *DeFrancesco*, ARB No. 10-114, slip op. at 3; *see, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip. op at 27 (ARB May 25, 2011)). Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011) (citing *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at *4-5 (ARB Jan. 30, 2008)).

In the absence of any direct evidence, the contributing factor may be proven through 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 . . . and a change in the employer's attitude toward a complainant after he or she engages in protected activity.

DeFrancesco v. Union R.R. Co., ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012); *see also Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-00033, slip op. at 13 & n.69 (ARB Sept. 30, 2011) (citation omitted); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB Jun. 24, 2011).

"Standing alone, temporal proximity, pretext, or shifting defense may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his Respondent's adverse action." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067,

ALJ No. 2004-AIR-00011, slip op. at 6 (ARB May 26, 2010). The totality of the evidence, however, may still support a finding of causation. *Clemmons*, ARB No. 08-067, slip op. at 6. Where an employer suggests the only reasons for its adverse actions were nonretaliatory reasons, the ALJ must also take the proffered nonretaliatory reasons into consideration. *See Palmer*, ARB No. 16-035, slip op. at 53. The ARB further explained:

[T]he ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. As long as the employee's protected activity played some role, that is enough. But the *evidence* of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence in making that determination . . .

Palmer, ARB No. 16-035, slip op. at 55 (emphasis in original).

Accordingly, when considering direct or circumstantial evidence, the ALJ must make a factual determination based on all of the evidence and must be persuaded that it is more likely than not that the complainant's protected activity played some role in the adverse action. *See Palmer* ARB No. 16-035, slip op. at 55-56.

In the matter before me, Complainant does not suggest there is any direct evidence connecting his protected activity to the suspension imposed on him. *See Compl. Br.* at 18-19. Instead, Complainant relies upon circumstantial evidence to try to establish the existence of a contributory factor. *See Compl. Br.* at 18-19. Specifically, Complainant points to temporal proximity, inconsistent application of employer policies, indications of pretext, and disparate treatment as circumstantial evidence that his protected activity was a contributing factor to his adverse employment action. *See Compl. Br.* at 18-19. Respondent argues Complainant's participation in Schmidt's FRSA complaint was not a contributing factor in the decision to discipline Complainant, but rather claims it had alternative, non-retaliatory reasons for doing so. *Resp. Br.* at 46-49. I will consider each argument in turn.

a. Temporal Proximity

Temporal proximity is one form of acceptable circumstantial evidence in the contributory factor analysis. *See Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-00033, slip op. at 13 &n. 69 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 20008-ERA-003, slip op. at 13 (ARB Jun. 24, 2011). The AIR-21 framework does not contain a *per se* knowledge/timing rule, and the temporal proximity inference to contribution is permissive, not mandatory. *See Palmer*, ARB No. 16-035, slip op. at 55-56. The ARB has held that "[w]hile not always dispositive, the closer the temporal

proximity, the greater the causal connection there is to the alleged retaliation.” *See Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012). The ARB has explained the context surrounding a claim is a significant factor in determining whether a temporally proximate relationship exists between the protected activity and adverse action. *Franchini v. Argonne Nat’l. Lab.*, ARB No. 11-006, 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012).

As is relevant to this case, the U.S. Court of Appeals for the Second Circuit has not “define[d] the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship.” *See Barker v. UBS AG*, 888 F.Supp. 2d 291, 300 (D. Conn. 2012) (citing *Gorman-Bakos v. Cornell Coop of Schenectady Cnty.*, 252 F.3d 545, 554 (2d Cir. 2001)). However, a period of five months between the protected activity and the adverse action has been suggested as sufficient to support an inference of unlawful discrimination. *See Barker v. UBS AG*, 888 F.Supp. 2d 291, 301 (D. Conn. 2012) (citing *Gorman-Bakos v. Cornell Coop of Schenectady Cnty.*, 252 F.3d 545, 555 (2d Cir. 2001) (“We are particularly confident that five months is not too long to support such an allegation [of causal connection] where plaintiffs have provided evidence of exercises of free speech and subsequent retaliatory actions occurring between December 1997 and April 1998.”)).

The alleged protected activity in this case involves Ansink’s statement, attached to Schmidt’s OSHA complaint, submitted on March 2, 2011. TR 93, 243; JX-1 at 1; JX-5 at 1, 3. Respondent received a copy of the complaint and its contents on March 16, 2011. *Id.* On June 14, 2011, Complainant received a charging letter, which I have found constitutes an adverse action. JX-12 at 1. Therefore, I find there are approximately three months between the date of Ansink’s protected activity and the date of the adverse action taken against him. This amount of time is towards the outside limits of what has been suggested as a sufficient period of time to support an inference of unlawful discrimination. *Barker*, 888 F. Supp. 2d at 301. For the reasons discussed below, I find temporal proximity is not dispositive in this case.

Complainant asserts Respondent retaliated against him when charges were brought soon after he made a statement to OSHA. *See* TR 264-265. He testified he “would imagine when [his statement to OSHA] was made aware to [his supervisors], everybody became pretty formal in their relations with [him]. They were not cordial as usual. Yeah, it became awkward.” TR 244. Complainant could not provide any specific examples of the changes in the way his supervisors

treated him. *See* TR 244, 264-265. When asked if it was true that none of his supervisors ever approached him about his participation in the Schmidt matter, Complainant stated “[i]ndirectly, I would say, by their comments that – I wouldn’t say that was true.” TR 278. Complainant’s testimony was unclear and vague, and it directly contradicted his previous statements that his supervisors never approached him about his statement in support of Schmidt. *See* TR 279-280. I also note Ansink’s immediate boss, Robert Duty, had no knowledge about Ansink’s involvement in the Schmidt matter. *See* TR 312-313, 314-315. Thus, I have reservations about how credible Complainant’s recollection is about how his supervisors treated him.

Respondent alternatively contends Ansink’s involvement in the Schmidt matter did not contribute to his discipline, but rather Ansink’s suspension resulted from him violating company rules. Resp. Br. at 51. As part of his supervisory responsibilities, Gillies made an unannounced visit to the Devon site on June 3, 2011 to see how the construction at Devon was progressing. *See* TR 80-81, 94-95. While he was there, Gillies did not see any Metro-North employee who was working as the second “Class A lineman.” TR 97-99, 100-101. In fact, no witness, other than Ansink himself, could confirm his exact location during Gillies’ visit to the Devon site. *See* TR 97, 151, 161, 207-208, 211; JX-15 at 29-30, 33. Gillies did not initiate the disciplinary process until after DiStasio informed him Ansink was the second “Class A lineman” assigned to the Devon site, because he had no previous knowledge of who the second “Class A lineman” was. *See* TR 103-104, 154-155; JX-1 at 2.

Ansink was charged with being absent from his work location and failing to provide proper Class A protection duties. JX-12 at 1. Metro-North takes safety seriously, and Ansink testified the charges brought against him were so severe that Metro-North “would have had a very big head start on ending [his] career.” TR 124-125, 195, 260. Given the responsibilities pertaining specifically to Metro-North’s “Class A linemen,” Ansink is presumably held to a higher standard with respect to providing adequate protection. Therefore, I find Complainant’s alleged rules violation was a significant intervening event between his protected activity and discipline. Additionally, there are approximately three months between the date of Ansink’s alleged protected activity and the date he received the charge letter, whereas only about 11 days separate the date of Ansink’s alleged safety rule violation and the date he received the charge letter. Therefore, the difference in the amount of time that had passed before Complainant

suffered an adverse employment action supports Respondent's contention that Ansink was disciplined for the alleged safety rules violations rather than his alleged protected activity.

I find the temporal proximity between the protected activity and Respondent's adverse employment action is not sufficient on its own to establish contribution. More specifically, I find the timeline of relevant events here does not, on its own, suggest Respondent was motivated by Complainant's protected activity. Therefore, I will consider the other circumstantial evidence admitted in this case to determine whether the evidence as a whole supports a finding of contribution.

b. Employer's Knowledge of Protected Activity

Complainant must demonstrate Respondent had knowledge he engaged in protected activity. *See Araujo*, 708 F.3d at 158. Generally, it is not enough for a complainant to show his employer, as an entity, was aware of his protected activity; rather, the complainant must establish that the decision-makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan. 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Here, there is no legitimate dispute about the relevant decision-makers at Metro-North having knowledge about Ansink's protected activity. JX-1 at 1-2.

Metro-North concedes OSHA provided it with a copy of Schmidt's FRSA complaint along with the attached exhibits. Resp. Br. at 5; JX-1 at 1-2. The parties stipulated Gillies had previously been given a copy of the Schmidt complaint and its contents before initiating disciplinary charges against Ansink on June 6, 2011. *See* JX-1 at 1-2; TR 93-94. The parties further stipulated "[p]rior to July 28, 2011, Power Department Assistant Director James Pepitone was aware of the contents" of Schmidt's complaint, which included Ansink's statement to OSHA. *See* JX-1 at 2; JX-20. Pepitone testified that while "it is very possible" he discussed the Schmidt complaint with Gillies and DiStasio; he claimed he knew of Schmidt's complaint, but not about Ansink's statement attached to it. *See* TR 178-179; 229-231. In light of the parties' stipulations, I have doubts about the veracity of Pepitone's claim that he did not know about Ansink's statement. Based on the record before me, I find Respondent, and specifically Gillies and Pepitone, had knowledge of Ansink's protected activity, and that knowledge is imputed to Respondent.

Therefore, I find Complainant has demonstrated by a preponderance of the evidence that Respondent had knowledge of Complainant's protected activity.

c. Inconsistent Application of Employer's Policy

Complainant asserts contribution is shown in the form of an inconsistent application of Metro-North's recusal policy. Compl. Br. at 18-19. Upon review of the record as a whole, I find Complainant's assertion is not supported by the evidence.

There is no evidence in the record indicating Metro-North has an actual formal or written recusal policy. The CBA, which sets forth the agreed upon disciplinary process between Metro-North and its employees' union, does not include any provision or reference to such a recusal policy. *See* RX-35 at 1-11. The only information about a recusal policy comes from Gillies and Pepitone. *See* TR 107, 112, 114, 166-167. Thus, I find that Metro-North has no formal recusal policy in place. Nevertheless, Complainant contends the testimony of Gillies and Pepitone sufficiently demonstrates there is such a policy, but it was not consistently applied against Ansink. *See* Compl. Br. at 18-19. As discussed below, I find the recusal policy is at best an informal one, and it was not inconsistently applied against Ansink.

Gillies testified that in disciplinary cases arising within the Metro-North Power Department, he typically serves as the reviewing officer and would ultimately decide whether or not to impose discipline against an employee. TR 107, 166-167, 187-188. In this case against Ansink, however, Pepitone replaced Gillies as the reviewing officer in an effort to comply with company "protocol." *See* TR 107, 187-188. According to Pepitone, an individual who testifies as a witness against an employee is required to recuse himself from also serving as the reviewing officer in the same case. *See* TR 187-188. Here, Gillies said he had to recuse himself from being involved in the disciplinary process because he testified against Ansink. TR 107. Although he agreed he needed to remove himself from the disciplinary process in order to be recused from it, Gillies did not specify the point in time when he needed to do so. *See* TR 107, 111-112. Likewise, Pepitone did not specify the extent to which a person must recuse himself in order to adhere to the policy. *See* TR 187-188. The lack of a formal policy makes it difficult to determine when and to what extent a person must be recused. Consequently, it is difficult to determine if Gillies adhered to the informal policy.

In light of the limited information in the record, the recusal policy is at best an informal one, which prohibits a person from testifying as a witness in a disciplinary hearing and also

serving as the reviewing officer in the same case. Pepitone served as the reviewing officer in the case against Ansink, but Gillies appears to have remained involved in the disciplinary process to a certain extent. *See* TR 62-53, 107, 114, 166-168, 187-188, 189-190; JX-15 at 1. Pepitone admitted he might have had a discussion with Gillies about suspending Ansink after Gillies testified as a witness. *See* TR 167-168, 189-190. Pepitone also previously testified he decided to discipline Ansink with the “knowledge and agreement” of Gillies. TR 189-190. The apparent reason Gillies was “kept in the loop” about the Ansink case was because the DTS, by default, includes him, as director of the Power Department, on E-mail updates about the disciplinary cases arising within the Power Department. TR 111-112, 166. However, because Gillies testified as a witness against Ansink, Gillies recused himself from serving as the reviewing officer. *See* TR 107, 114, 166-167. Thus, by removing himself as the reviewing officer, I find Gillies adhered to the known requirements of the informal recusal policy.

Complainant appears to argue Pepitone should have similarly recused himself. Compl. Br. at 18-19. Since Gillies is his boss, it would be inherently unfair to Ansink if Pepitone, as the reviewing officer, had to choose between the testimony of his boss and an employee to see which was more credible. Compl. Br. at 18-19. The informal recusal policy, however, does not prohibit an individual from serving as the reviewing officer in a case where their superior officer is a testifying witness in a disciplinary hearing. Moreover, I find Pepitone met the criteria to serve as the reviewing officer because he worked at the management level within Metro-North’s Power Department. TR 114, 187-188. Based on the minimal information provided about the informal recusal policy, I find Pepitone was not under a duty to recuse himself from serving as the reviewing officer in the case against Ansink.

Even if the informal recusal policy was not followed, I find the evidence does not support the claim that the policy was inconsistently applied against Ansink. It is highly significant to note Buonaiuto was charged with the same safety violations as Ansink. JX-12 at 1; JX-28 at 1. Gillies initiated the charges against the two employees and testified in both cases. *See* TR 104-105, 109-110, 161, 164; JX-15 at 6-25; JX-29 at 7-39. Likewise, Gillies received Walker’s E-mail request and reviewed and edited the charge letters before being sent to Ansink and Buonaiuto. *See* TR 157-158; JX-9; JX-10; JX-11. He also appears to have retained the authority to accept or reject either employee’s waiver of discipline. *See* TR 63, 70. Pepitone admits he imposed discipline against both Ansink and Buonaiuto with the “knowledge and agreement” of

Gillies. TR 189-190. Therefore, I find the evidence demonstrates Gillies was equally involved in the disciplinary processes against Ansink and Buonaiuto. Accordingly, I find Complainant has failed to demonstrate Respondent inconsistently applied its informal recusal policy against Ansink.

In sum, I find Complainant has failed to demonstrate Respondent's informal recusal policy was inconsistently applied against Ansink. Therefore, I find and conclude the lack of preponderant evidence demonstrating an inconsistent application of policy does not support a finding of contribution between Complainant's protected activity and his suspension.

d. Indications of Pretext

When an employer has proffered nonretaliatory reasons for taking the adverse action, "the employee need not disprove the employer's stated reasons or show that those reasons were pretext;" however, "[s]howing that an employer's reasons are pretext can . . . be enough for the employee to show protected activity was a 'contributing factor' in the adverse personnel action." *Palmer*, ARB No. 16-035, slip op. at 52-53. An employee is not required to disprove the employer's reasons because "the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason." *Id.* at 53. As explained above, I must consider the evidence as a whole when determining whether a complainant's protected activity was a contributing factor to the employer's adverse action. *See Bobreski*, ARB No. 13-001, slip op. at 16-17; *Palmer*, ARB No. 16-035, slip op. at 14-15, 51-52.

Complainant argues Metro-North's proffered rationale for the adverse action was pretextual. Compl. Br. at 19. Specifically, Complainant refers to Gillies' claim that the lack of a signature on the clearance sheet shows Ansink was not present is "false" and therefore indicates pretext. *See* Compl. Br. at 19. Respondent proffered non-retaliatory reasons for its adverse employment action, specifically explaining that discipline was imposed because Ansink violated its safety rules when he was not present at his work location and failed to provide Class A protection while Gillies was visiting the Devon site on June 3, 2011. *See* Resp. Br. at 47-49. Thus, in light of Respondent's proffered theory in which the protected activity played no role in the adverse employment action, I will consider whether the evidence as a whole shows Respondent's proffered rationale was pretextual.

First, there is conflicting testimony about whether Ansink, as the second “Class A lineman” at the Devon site on June 3, 2011, was required to sign the clearance sheet. *See* TR 19, 23-24, 51, 53, 66, 90-92, 138-139, 170-171, 195-196, 199, 227, 240, 252. The MN-290 does not include a rule specifically requiring the second “Class A lineman” at a given site to sign the clearance sheet. TR 66, 90-91, 138-139, 170-171, 240; *see* JX-2 at 43; JX-3 at 10. Gillies, whose name is printed on the first page of the MN-290, testified he does not know of any rule requiring a second “Class A lineman” to sign the clearance sheet. TR 126, 138, 170-171, 173; *see* JX-2 at 2. The MN-290 only requires members of the work gang at a given site to sign the clearance sheet. JX-2 at 43; JX-3 at 10. However, the testimonial evidence shows “Class A linemen” are not considered members of the work gang. TR 41, 91, 171, 191, 232, 242. Therefore, I find Ansink, as the second “Class A lineman” at the Devon site, was not required to sign the clearance sheet on June 3, 2011.

Respondent suggests the lack of Ansink’s signature was but one piece of evidence used to determine he was absent from the Devon site when Gillies was there. *See* Resp. Br. at 50-51. Although Gillies knows of no rule requiring a second “Class A lineman’s” signature to be on the clearance sheet, he stated the lack of a signature was “certainly significant because I didn’t observe him on the scene.” TR 126, 138, 156, 170-171, 173. Gillies’ primary reason for bringing charges was because he did not see Ansink at the scene. TR 156, 173. Contrary to Complainant’s argument, Gillies did not claim the lack of a signature on the clearance sheet proves Ansink was not present. *See* Compl. Br. at 19. Instead, Gillies viewed the lack of a signature as significant because if Ansink had signed the clearance sheet, it would have taken away from the fact that he did not see Ansink at the Devon site. *See* TR 156, 173. Therefore, I find Gillies’ reasons for initiating the disciplinary process are not false or indicative of pretext.

In its brief, Respondent cites to *Gunderson v. BNSF Railway Co.*, 850 F.3d 962, 969-970 (8th Cir. 2017), and argues it is irrelevant whether Pepitone’s factual determination was correct because “[t]he key issue is whether the manager imposing discipline in good faith believed that the employee was guilty of the conduct justifying discipline.” Resp. Br. at 52. In *Gunderson*, the U.S. Court of Appeals for the Eighth Circuit made it clear the “critical inquiry in the pretext analysis ‘is not whether the employee actually engaged in the conduct for which he was [disciplined], but whether the employer in good faith believed that the employee was guilty of

the conduct justifying [the discipline].” *Gunderson*, 850 F.3d at 969 (internal quotations omitted) (internal citation omitted).

Metro-North has no written rule requiring the second “Class A linemen” to sign the clearance sheet, and those sheets are not uniformly reviewed by Respondent to ensure second “Class A linemen” actually sign it. TR 91, 138, 171, 240, 241-242; *see* JX-2 at 37-42; JX-3 at 3-11. Pepitone believed, however, the second “Class A lineman” was required to sign the clearance sheet. TR 196-197, 199, 232. Notably, Ansink and Buonaiuto admit the second “Class A lineman” would need to sign the clearance sheet in certain situations; however, Ansink did not believe he needed to do so on this specific occasion. *See* TR 66, 240-241, 248, 259; JX-15 at 48-49, 65-66. The conflicting testimony demonstrates an overall lack of guidance and uniform understanding at Metro-North as to whether, and if so, when, second “Class A linemen” are required to sign the clearance sheet. As a result, I find Pepitone had a good faith belief that Ansink’s failure to sign the clearance sheet was evidence of conduct justifying discipline. Thus, I find whether Ansink was disciplined because he did not sign the clearance sheet is irrelevant because Pepitone had a good faith belief Ansink was engaged in conduct that would justify the discipline. *See Gunderson*, 850 F.3d at 969.

Pepitone also considered other evidence that Complainant was not present at the Devon site and failed to properly perform Class A protection duties. *See* TR 207-208, 210-212, 215-218, 219-220. For example, Pepitone found Ansink’s own testimony that he was inside a van at the Devon site to be significant because he never presented himself to Gillies. *See* TR 208-209, 212-214. Although it was within Ansink’s discretion how to position himself on a work-site, Pepitone convincingly explained that Ansink could not have provided adequate protection while sitting inside a van forty feet from the contractors he was supposed to protect. *See* TR 219-220. Additionally, Pepitone took into account that neither McNeil nor Buonaiuto could testify they saw or knew exactly where Ansink was while Gillies was at the Devon site. TR 219. In fact, the only evidence presented at the internal hearing about Ansink’s location were statements from two witnesses who were not physically present at the Devon site while Gillies was there.¹⁷ *See*

¹⁷ The two referenced statements are from Kevin Mulligan, an employee of Rizzo Electric, and Jim Mahaul, an employee of Cherokee Enterprises—both contractor companies were hired to perform work at the Devon site. *See* JX-15 at 63-65, 91-92. The two statements were presented at Buonaiuto’s internal hearing, and were ultimately incorporated into Ansink’s internal hearing record as well. *See* JX-15 at 63-65; JX-29 at 41-48.

TR 165-166, 215-219; JX-15 at 63-65. Therefore, I find Respondent's proffered reasons for disciplining Complainant are legitimate and non-discriminatory.

Although not specifically identified by Complainant, other evidence in the record may suggest the decision to discipline Ansink was pretextual. Under the terms of the CBA, a reprimand must be removed from an employee's record if the employee is able to maintain an "unblemished record" for one year after being disciplined. See TR 41, 78-79, 190, 267-268; RX-35 at 11. Back in July of 2004, Ansink signed a waiver of discipline¹⁸ and agreed to accept a written reprimand for failing to perform "Class A linemen" duties a month earlier. See JX-27 at 1-2. That reprimand was never removed from Ansink's personnel file even though he did not receive any additional discipline the following year. TR 70-71, 119-120, 267-268; JX-27 at 2. Neither Respondent nor any of its testifying employees offered any explanation why Ansink's reprimand had not been removed from his record. See TR 42, 119-120, 190-191.

Although the reprimand had not been removed from Ansink's record, it does not prove the decision to discipline Ansink was pretextual. The record indicates Pepitone was not aware of the 2004 written reprimand and did not consider it when he decided discipline was appropriate against Ansink in 2011. Additionally, as discussed above, the evidence demonstrates Complainant was disciplined for legitimate reasons; namely, being absent from his work location and failing to properly provide Class A protection duties. See TR 207-208, 210-210; JX-15 at 63-65; JX-29 at 41-48; JX-12 at 1; JX-20. Accordingly, I find and conclude the existence of a seven-year old written reprimand in Complainant's personnel record does not evidence pretext.

Based on the above discussion, I find and conclude Respondent's proffered reasons for disciplining Complainant were not false or indicative of pretext. Specifically, I find being absent from a work location and failing to properly perform Class A protective duties are legitimate safety violations, and they constitute non-discriminatory reasons for disciplining Complainant. Accordingly, I find and conclude Complainant has failed to present any direct or circumstantial evidence to support his claim that Respondent's reasons for disciplining him were false or indicative of pretext.

e. Disparate Treatment

Complainant further argues there is circumstantial evidence of contribution in the form of disparate treatment. Compl. Br. at 19. Complainant asserts he is the only linemen who "has

¹⁸ DiStasio's signature also appears on the waiver. JX-27 at 2.

been charged or disciplined for not signing a clearance sheet.” Compl. Br. at 19. Additionally, he claims no other linemen have been disciplined “based solely on a manager’s testimony he did not see the lineman at a work site.” Compl. Br. at 19. I am not persuaded by Complainant’s arguments for two reasons: first, he misinterprets the facts of the case; and second, he ignores the fact that Buonaiuto was similarly disciplined based on Gillies’ testimony.

Contrary to Complainant’s belief, he was not charged for “not signing a clearance sheet.” Although the charge letter does not specifically identify a rule Ansink violated, he was charged with two offenses: (1) being absent from his work location without permission, and (2) failing to properly perform Class A protection duties. *See* JX-12 at 1-2. Additionally, Gillies stated the lack of a signature was “certainly significant because I didn’t observe him on the scene.” TR 156. He further explained the decision to initiate charges “started” because he did not see Ansink at the Devon site, and if Ansink had signed the clearance sheet, it would have indicated he was present at the site for at least some point during the day. TR 173. Thus, I find Gillies did not, as Complainant contends, claim the lack of a signature on the clearance sheet proved Ansink was not there. *See* Compl. Br. at 19. Rather, Gillies noted that a signature on the clearance sheet would have been *some evidence* proving he had been at the Devon site. *See* TR 156, 173. Moreover, the lack of a signature on the clearance sheet was merely one piece of evidence presented at Ansink’s hearing; Pepitone did not identify it as a “key portion” of evidence in determining whether to impose discipline against Ansink. *See* TR 207-208, 212-214.

Based on the foregoing, I find and conclude Complainant was not disciplined for “not signing a clearance sheet,” nor does his failure to sign demonstrate the existence of disparate treatment. Therefore, I find Complainant’s first argument fails to support a finding of contribution between his protected activity and the discipline imposed against him.

Complainant also errs in claiming no other lineman has been charged or disciplined “based solely” on a manager’s testimony that he did not see the lineman at a work site. First, the decision to discipline Complainant was based *primarily* on Gillies’ testimony, but it was not the *sole* basis. *See* TR 207-208, 210-212, 215-218, 219-220. Thus, I find Complainant was not disciplined “based solely” on Gillies’ testimony. Additionally, Complainant appears to overlook the reasoning behind Pepitone’s decision to discipline Buonaiuto. *See* TR 207-208, 219-220. JX-12 at 1-2; JX-27 at 1-2. After reviewing the transcript from Buonaiuto’s internal hearing, Pepitone placed a significant amount of weight on Gillies’ testimony. *See* TR 207-208, 220-221.

Pepitone imposed fewer days of suspension against Buonaiuto, as compared to Ansink, almost entirely because of Gillies' testimony that Buonaiuto was actually at the Devon site and conveyed information about the clearance limits. *See* TR 220-221. Thus, I find the evidence demonstrates Ansink was not the only lineman disciplined on the basis of a manager testifying he did not see the lineman at a work site.

Accordingly, I find there is insufficient evidence of disparate treatment in this case. Therefore, I find and conclude the lack of evidence demonstrating disparate treatment does not support finding Complainant's protected activity contributed to his suspension.

f. Whether the Evidence as a Whole Shows the Protected Activity was a Contributing Factor in the Adverse Action

Complainant must show by a preponderance of the evidence his protected activity was a contributing factor in the adverse employment action. *Palmer*, ARB No. 16-035, slip op. at 53. "The protected activity need only play some role," and the employee "prevails at step one if there was more than one reason and one of those reasons was the protected activity." *Palmer*, ARB No. 16-035, slip op. at 53.

As stated above, I found Complainant has not shown contribution by a preponderance of the evidence based on direct evidence or on the claim of a temporally proximate relationship between the protected activity to the adverse action, on the claim of an inconsistent application of policy, on the claim of pretext, or on the claim of disparate treatment. I further find the charge letter and ultimate discipline imposed against Complainant was based on his absence from Devon and his failure to properly perform Class A protection duties while Gillies was on location.

Considering the totality of the evidence, I find Complainant has failed to demonstrate by a preponderance of the evidence that his protected activity contributed, in any way, to his suspension. For purposes of completeness, however, I will continue my analysis assuming, *arguendo*, Complainant has met his burden of demonstrating each element in his case for retaliation, and to determine whether Respondent has proven by clear and convincing evidence it would have taken the same adverse action absent the protected activity.

C. Respondent's "Same-Action" Defense

As explained by the ARB in *Palmer*, the second step of the two-step test requires Respondent to prove by clear and convincing evidence it would have taken the same adverse

personnel action absent Complainant's protected activity. *See Palmer*, ARB No. 16-035, slip op. at 56-57; *see* 49 U.S.C. § 42121(b)(2)(B)(iv). Clear and convincing evidence that an employer would have disciplined an employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. *Palmer*, ARB No. 16-035, slip op. at 22. Respondent's burden of proof is purposely a high one. *See Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, slip op. at 13 (ARB May 31, 2013); *Araujo*, 708 F.3d at 159-160 (noting the burden shifting analysis is intended to be protective of employees and is a "tough standard" for employers to meet). The clear and convincing evidence standard is an intermediate standard of proof, falling between "a preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

In order to meet this burden, "[i]t is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Palmer*, ARB No. 16-035, slip op. at 57 (emphasis in original); *see Speegle*, ARB No. 13-074, slip op. at 11. In *Cain v. BNSF Railway Co.*, the ARB held:

As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend [the employee] was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it "highly probable" that BNSF "would have" suspended [the employee] for 30 days absent the protected activity.

ARB No. 13-006, slip op. at 7 (ARB Sept. 18, 2014). Thus, instead of looking to whether the suspension was "wise," I must consider all relevant, admissible evidence in determining whether the employer has proven it would have taken the same adverse action absent the protected activity. *See Cain*, ARB No. 13-006, slip op. at 7; *see also Palmer*, ARB No. 16-035, slip op. at 52, 57. This can be shown by direct or circumstantial evidence of what the employer "would have done." *See Speegle*, ARB No. 13-074, slip op. at 11. "The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions." *Speegle*, ARB No. 13-074, slip op. at 11; *see Palmer*, ARB No. 16-035, slip op. at 57 & n. 236.

Respondent asserts it would have imposed discipline against Ansink regardless of his participation in the Schmidt matter, and, in support thereof, references Buonaiuto's discipline. Resp. Br. at 53. As I have alluded to earlier, I find there is no employee more similarly situated to Ansink than Buonaiuto. Both employees were assigned to work as "Class A linemen" at the Devon site on June 3, 2011. TR 244-245. Both employees were charged with the same two offenses, and neither employee signed a waiver. *See* JX-12 at 1; JX-13 at 1-3; JX-28 at 1. Gillies initiated the charges against both employees and testified at both hearings. TR 104-105, 109-110, 161, 164; JX-15 at 6-25; JX-29 at 7-39. Buonaiuto, however, was suspended for a total of five days, whereas Ansink was suspended for ten days. JX-20 at 1; JX-30 at 1. It is important to acknowledge Ansink engaged in an alleged protected activity, whereas Buonaiuto did not. Based on this difference, Complainant argues he received a more severe suspension than Buonaiuto because, unlike Buonaiuto, Complainant engaged in protected activity by submitting a statement to OSHA in support of Schmidt's FRSA claim. *See* Compl. Br. at 18-20.

As already stated, Pepitone had a convincing explanation about why he imposed greater discipline against Ansink. The difference in discipline was not because of the alleged protected activity; it was because Pepitone did not find any credible evidence supporting Ansink's claim that he was actually present while Gillies was at the Devon site. *See* TR 199, 207-208, 210-212, 215-218, 219-220. The evidence demonstrably shows Buonaiuto was present for at least some period of time while Gillies was there. TR 98, 152-153, 161, 211-212. Additionally, Pepitone further explained that if Ansink was actually present in the van as he claims, then he still would not have been able to effectively communicate and provide proper Class A protection for the contractors. *See* TR 219-220. Based on these explanations, and the lack of evidence suggesting otherwise, I find Pepitone was justified to believe it was appropriate to impose different levels of discipline against Ansink and Buonaiuto.

It is also important here that even though Buonaiuto was actually present for some period of time, he was still charged with and found guilty of the same two offenses as Ansink. *See* JX-28 at 1; JX-30 at 1. Additionally, Respondent has presented evidence showing another lineman, Louis Provenzano, was charged on a separate occasion with failing to provide Class A protection and he was ultimately suspended for five days. TR 37-39, 117-118, 169; *see* JX-32. Thus, I find the evidence shows Respondent has and would issue a multi-day suspension to employees found to be absent from their work location and who fail to provide Class A protection. Likewise,

given the amount of discipline imposed against Buonaiuto and the justified reasoning for imposing against him a lesser suspension, I find Respondent would have suspended Ansink for more than five days.

While I recognize it may be arguable whether the length of Ansink's suspension was based on sufficient cause under Metro-North policies, the relevant inquiry is whether the evidence as a whole makes it highly probable that Metro-North *would* have suspended Ansink for ten days absent the alleged protected activity. *See Cain*, ARB No. 13-006, slip op. at 7. For the reasons above, I find the evidence as a whole demonstrates it is highly probable Metro-North would have suspended Ansink for ten days absent his alleged protected activity.

Accordingly, I find and conclude Respondent has demonstrated by clear and convincing evidence it would have taken the same adverse action absent Complainant's alleged protected activity.

VI. CONCLUSION

In summary, I find Complainant has failed to demonstrate by a preponderance of the evidence he engaged in a protected activity under the FRSA. Even assuming Complainant had engaged in a protected activity, I find Complainant failed to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to suspend him. I further find that had Complainant demonstrated all required elements of his retaliation claim, Respondent would be able to show by clear and convincing evidence it would have taken the same adverse action in the absence of Complainant's protected activity. Accordingly, Respondent is not liable under the FRSA, and Complainant's October 25, 2011 complaint must be dismissed.

VII. ORDER

For the reasons set forth above, it is hereby **ORDERED** that Complainant's October 25, 2011, complaint is **DISMISSED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law

Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed

notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).