U.S. Department of Labor

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Issue Date: 15 March 2018

Case Nos.: 2015-FRS-00073
2015-FRS-00074

In the Matters of

IVAN COHEN and
GREGORY WASHINGTON
Complainants

v.

METRO-NORTH RAILROAD
Respondent

Appearances: For the Complainant: Charles C. Goetsch, Esq.
For the Respondent: Sophia Ree, Esq.

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 ("FRSA" or "the Act"), 49 U.S.C. § 20109 (2012), and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1982. Ivan Cohen and Gregory Washington ("Complainants") allege that Metro-North Railroad ("Respondent") charged them with insubordination for their protected activity in violation of the FRSA. Complainants are represented by counsel.

I. PROCEDURAL HISTORY

On December 24, 2013, Complainants filed a complaint with the Occupational Safety and Health Administration ("OSHA") pursuant to 49 U.S.C. § 20109(b)(1)(A) which provides that an employee raising a safety hazard or concern constitutes protected activity and that such an action cannot form the basis for any adverse action against that employee. They alleged that

Respondent violated the FRSA by disciplining them for insubordination as a result of not performing a task because they felt in good faith that they could not perform it safely.[1]

By way of background, Respondent employs "splicers" who perform a job known as reattaching the bond. This task requires the splicer to cut the bond box cables, splice them, and then re-bond them to the third rail and it also requires certain materials, tools, and experience to execute the job safely. Here, Complainants stated that on June 15, 2013, while working on the third rail joints on the Harlem line in the area of 105th Street and Park Avenue, Respondent's foreman asked them to reattach a bond. Complainants responded to the foreman, Al Guadeloupe, that they did not have the tools, materials, or experience to perform the job safely, prompting them to put forth a good faith challenge under Rule 200.9 of Respondent's General Safety Instructions. Minutes later, their supervisors, Fred Hadden and Richard Ranallo, appeared at the work site and advised that they could not find any splicers to perform this task; thus, they directed Complainants to do it. Complainants again pointed out that they lacked the requisite tools, materials, and experience to execute the job safely. Their supervisors indicated that their "time would stop," and did not address or resolve Complainants' good faith challenge, according to Complainants. On July 3, 2013, Respondent mailed a certified letter to Complainants charging them with insubordination and ordering a disciplinary trial. The parties dispute whether Respondent had resolved the disciplinary charges at the time of this hearing.

On August 3, 2015, OSHA determined that "the evidence supports Respondent's defense that the work refusal is not protected and Complainant(s) failed to establish a *prima facie* case. Therefore, OSHA does not have reasonable cause to believe that Respondent violated FRSA by initially issuing Notice of Discipline to Complainant(s)." Consequently, OSHA dismissed the complaint.

Complainants objected to OSHA's findings and requested a hearing before an Administrative Law Judge ("ALJ") on August 26, 2015. Upon receiving the case, the undersigned issued an Initial Notice of Hearing and Pre-hearing Order on September 11, 2015, setting a hearing for March 7, 2016 in New York, New York. After repeated joint requests to delay the hearing, the undersigned rescheduled the hearing for November 21, 2016 by Order dated July 25, 2016.

Respondent filed a Motion for Summary Decision on April 5, 2016, and Complainants filed an untimely response on May 9, 2016. The undersigned denied Respondent's Motion for Summary Decision by Order dated November 17, 2016.

The hearing took place as scheduled on November 21, 2016. The undersigned admitted the following Complainants' exhibits at the hearing: CX 1-5 (Tr. at 28); CX 6(a)-6(b) (Tr. at 30); CX 8 (Tr. at 228); CX 9 (Tr. at 184); CX 10-11 (Tr. at 40-41); CX 12 (Tr. at 79); CX 13-18 (Tr. at 49-54); CX 19 (Tr. at 199); CX 20-21 (Tr. at 55-57); CX 22-23 (Tr. at 201-202); CX 33 (Tr. at

[1] As the alleged FRSA violation occurred in the state of New York, the law of the U.S. Court of Appeals for the Second Circuit applies. See 49 U.S.C. § 20109 (d)(4).

198); and CX 34 (Tr. at 670).[2] The undersigned also admitted Respondent's Exhibit (RX) 17 (Tr. 459).

The undersigned set the deadline for final briefs as March 6, 2017. (Tr. at 672.) Both parties submitted final briefs on March 7, 2017, which the undersigned has carefully considered in reaching her decision.

II. ISSUES

The following issues require adjudication under 49 U.S.C. § 20109:

1. Did Complainants engage in protected activity?
2. Did any demonstrated protected activity contribute to Respondent's adverse employment actions?
3. Assuming Complainants can meet their burden of demonstrating the above elements, would Respondent have disciplined Complainants in the absence of any protected activity?
4. Are Complainants entitled to any relief?

See Samson v. Soo Line R.R. Co., ARB No. 15-065, ALJ No. 2014-FRS-091, slip op. at 3 (ARB July 11, 2017.)

The parties stipulated that Respondent qualifies as a railroad carrier engaged in interstate commerce and is subject to the Act and that Complainants are covered under the Act as well. (Tr. at 6.)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Evidence

1. Documentary Evidence

In support of their case, Complainants submitted:

- CX 1: Respondent's General Safety Instructions, including Safety Statements and Rules 100, 200.2, 200.7, 200.9, and 2000.4.
- CX 2: Respondent's Electrical Operating Instructions
- CX 3: Respondent's Roadway Worker Safety Manual Training pages
- CX 4: Respondent's Roadway Worker Safety Manual (RW Good Faith Challenge)
- CX 5: Respondent's Operating Rules (Rule H)
- CX 6*: Respondent's Job Description Sheets
    - 6A- Third Rail Man

[2] This Decision and Order uses the following abbreviations: "CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits; and "Tr." refers to the transcript of the November 21-23, 2016 hearing.

        - 6B- Cable Splicer
    - CX 8*: Photographs of rail and bonds (8A, 8B, 8C, and 8D)
    - CX 9*: Respondent's June 15, 2013 Job Briefing Document
    - CX 10: Complainants' Good Faith Challenge Statement
    - CX 11*: Guadeloupe's June 15, 2013 Statement
    - CX 12*: Fred Hadden's June 15, 2013 Statement
    - CX 13: Ryan E. McLaine's June 28, 2013 Email to Danilo Ortiz and Joseph Abramo regarding draft charges
    - CX 14: Ellen Tedeschi's July 3, 2013 Emails to Ortiz and Abramo regarding discipline charges
        - CX 14A: Tesdeschi's July 3, 2013 Email to Ortiz and Abramo regarding amended discipline charges
    - CX 15: Complainant Cohen's July 3, 2013 Notice of Disciplinary Trial for Insubordination
    - CX 16: Complainant Washington's July 3, 2013 Notice of Disciplinary Trial for Insubordination
    - CX 17: McLaine's July 9, 2013 Email to Ortiz and Abramo
    - CX 18: Abramo's July 11, 2013 Email to Ortiz Regarding Postponement of Pre-trial
    - CX 19*: Guadeloupe's July 16, 2013 Statement that Complainants have Performed Bonding Under his Supervision
    - CX 20: James Walker's July 18, 2013 Email to Abramo with Complainant Cohen's Waiver and G-32 Notice of Discipline
    - CX 21: Walker's July 18, 2013 Email to Abramo with Complainant Washington's Waiver and G-32 Notice of Discipline
    - CX 22*: Herman Lopez's July 23, 2013 Statement Regarding Complainant Cohen's Thirteen-inch Bonding
    - CX 23: Guadeloupe's July 26, 2013 Statement Regarding Abramo's No Overtime Order
    - CX 32: FRSA Section 20109
    - CX 33: Affidavit of Arthur J. Davidson, IBEW General Chairman
    - CX 34: Various documents submitted on the issue of punitive damages

In support of its case, Respondent submitted:

- RX A,* B,* C,* and D*: Photographs of rail and bonds (8A, 8B, 8C, and 8D)
- RX 17: April 13, 2015 Letter from IBEW Local 817 President George Francis to Kelli Coughlin, Respondent's Labor Relations Representative

*Denotes joint exhibit

2. Hearing Testimony

The following witnesses appeared at the hearing and testified as follows.

Danilo Ortiz (Tr. at 15-114, 641-667)[3]

Respondent hired Danilo Ortiz in 2007 and he now works in a management position as senior engineer of the power department, a subgroup of Respondent's maintenance and way division. Ortiz shadowed Respondent's Assistant Director of Traction, Joseph Abramo, in June 2013. Abramo's position included overseeing and directly supervising the department's employees. At the time, James Pepitone served as the director above Ortiz and Freddy Hadden worked as the general supervisor below him. Supervisor Richard Ranallo worked below Hadden. (Tr. at 15-17.)

CXs 1 and 2 contain Respondent's general safety and electrical operation instructions. According to Ortiz, Respondent wants its employees to report safety hazards. When an employee makes a good faith challenge, it means the employee has reported and challenged what he believes to be a safety hazard. CX 3 explains RW-11 and Operating Rule H, the procedures employees follow to make a good faith challenge. RW-11 allows employees to challenge, in good faith, any directive they believe violates Respondent's General Safety Instructions. Once an employee makes the good faith challenge, he or she has a right to refuse to act on the directive until its resolution. (Tr. at 17-23.)

Rule 200.1 provides "In case of doubt or uncertainty, take the safe course" and directs workers to "Perform tasks only when authorized and capable to perform." EX 1. If an employee believes that he cannot safely perform a task, the safe course would be to make a good faith challenge. CX 4 provides that an employee should immediately inform his or her foreman when making a good faith determination that the directive violates a rule. Rule 200.9 does not require an employee to use any type of form or paper document to do so. Supervisors do not have discretion to ignore good faith challenges. (Tr. at 24-29.)

Within the power department, cable splicers fabricate and bond reactance lines. See EX 6A. A reactance bond is the same as an impedance bond. EX 1 contains Rule 2000.4 and a diagram of the third rail system. An impedance bond box has reactance leads running between them and the running rail, which is a part of the negative return system. The positive part of the third rail system is the third rail itself, and along with the negative return system, combines to create the circuit that enables the trains to run. The negative system and positive third rail must become energized at the same time and individuals working on it must act as if it was live, using their personal protection equipment ("PPE"). The power department can take the track out of service in two ways: electronically and via the track itself. Working on a positive or negative return system is considered live work until the system is de-energized. When a track is out of service and a train passes on an adjacent track, employees working on the out of service track are directed to stop, look, and wave at the train. The hazard of a crossing adjacent train is the potential for negative energization because the adjacent train on the other track can use the rail as a negative return due to the configuration that ties them together. (Tr. at 30-36.)

[3] Although Ortiz was technically Respondent's witness, Complainants called him first and examined him as if on cross-examination. Respondent then conducted its direct examination of the witness.

Workers on a de-energized third rail confront the same risks as those working on a negative return system. Proper PPE protects employees from electrocution and arc blast. The potential for an arc exists, but not for an arc blast, if the track is out of service and employees are working on negative cables. (Tr. at 35-36).

Ortiz is familiar with the training and essential functions of cable splicers. All new cable splicers come from the third rail group. They receive the same training as the third rail workers. However, cable splicers attend class at an outside agency to learn how to cut, skin, and splice high-voltage cable in the range of 15,000 to 30,000 volts. They also receive on-the-job training in which they work on reactance and impedance leads and bonds. Even as third rail men,[4] they learn on the job how to bond negative and positive cables. The third rail man job description at EX 6A does not include the phrase "fabricates and bonds reactance lines," but it does list installing bond wire as a job task. "Bonding" is the keyword, as third rail men learn to bond as part of their training. (Tr. at 36-39).

Although Ortiz was not present on June 15, 2013, he read Abramo's statements regarding the incident and thereafter performed an investigation. CX 10 contains statements written by Complainants and CX 11 consists of a statement made by Guadeloupe, both on June 15, 2013. Ortiz reviewed these statements. The rules set out a procedure for an employee seeking to make a good faith challenge. Initially, the employee brings the challenge to the attention of the first line supervisor. If the employee disagrees with the first reviewing officer's evaluation, a second reviewing officer enters the dispute. The employee has the right to refuse to act on the directive until resolution. (Tr. at 39-44.)

Based on Ortiz's recollection, he and Abramo had conversations with Hadden regarding Complainants' good faith challenge; however, they did not receive a good faith challenge form. Hadden brought the statements at CX 10 and 11 to Ortiz and Abramo. Ortiz based his investigation entirely on these statements, which indicated that Complainants made a good faith challenge to their direct supervisor Guadeloupe on June 15, 2013. Ortiz and Abramo met with Director Pepitone and the three then went to the safety department and the Department of Hearings and Investigations ("DHI"),[5] the latter of which conducts hearings and investigations. They then decided to bring up Complainants on charges of failing to comply with a directive. (Tr. at 46-48.)

Ortiz described the pretrial as a meeting presenting a charged employee with a waiver, (an admission of guilt in order to avoid trial and more severe penalty should the trial not find in his or her favor). Respondent's policy dictates that an employee can have suspensions of sixty days or fewer removed from the employee's file after two years of a clean record, but suspensions of sixty-one days or more remain on the employee's permanent record. CX 20 is a July 18, 2013 email from James Walker to Pepitone, Abramo, and Ortiz regarding Complainants'

[4] The undersigned recognizes the gendered nature of the job title "third rail man" (and also foreman). However, as those are the terms used by the railroad and by the witnesses in this case, the undersigned will use those terms in this decision.

[5] The transcript recorded the acronym of the department as VHI. However in context, this is clearly an error and should have been transcribed as DHI.

draft waiver and G-32 (a notice of discipline sent out after a pretrial or after an employee has lost his trial) with those documents attached for use on July 19, 2013. (Tr. at 54-56.)

The waiver and G-32, drafted for Complainant Cohen, sets forth his sixty-one day suspension reflected in his permanent record. CX 21 is identical to CX 20, but applied to Complainant Washington. While the waiver provides a sixty-one day suspension, if Complainants had gone to trial and lost, the penalty assessed would have been much greater, according to Ortiz. Therefore, whether or not Complainants signed the waiver, they would have each earned sixty-one day suspensions on their records. (Tr. at 57-60).

Had Complainants not issued a good faith challenge, the power department would not have charged them with insubordination since they otherwise would have complied with the directive. Ortiz could not recall whether Complainants filed a work scope grievance in connection with the June 15, 2013 incident nor whether the power department sent letters to Complainants advising them of the expungement of disciplinary documents. He also could not recall any instances of Respondent violating the FRSA. (Tr. at 60-63.)

On direct examination, Ortiz explained that a third rail man works for the power department and maintains, installs, and repairs the traction distribution—literally the third piece of steel that powers the train. Once hired, third rail men go through a nine-month training program on topics such as hazards of electricity, on-track detection, and roadway worker safety on their way to becoming Class "A" electricians. CX 2 provides the definition of a Class "A" electrician. Complainants fall under this classification. Ortiz described cable splicers as a small subgroup within the third rail department that splices high-voltage cable on wooden poles up and down Respondent's territory in manholes and substations. Cable splicers know the third rail man duties since they came from the third rail craft, but they become trained as high-voltage (15,000 to 30,000 volts) cable splicers. This training distinguishes a cable splicer from a third rail man. At one point in time, Respondent's rail lines were not electrified north of Virginia Road. The upper Harlem line ran on diesel, meaning no electrical trains traveled from North White Plains to Brewster or southeast. Respondent later electrified that section of the railroad. Thereafter, union and management agreed that north of Virginia Road, third rail men would do the cable splicing work and south of Virginia Road, a matrix would equally divide the work between cable splicers and third rail men. This division of labor is not based on safety concerns and both crafts are capable of doing the same type of job, except when it involves high-voltage splicing. (Tr. at 64-69.)

Had Complainants worked as third rail men north of Virginia Road, they would be qualified and expected to do cable splicer work, including work involving the impedance bond box. CX 1, Rule 2000.4 shows a picture of an impedance bond box, which Ortiz described as filtering out DC currents in order to gain clearer signal codes. It basically connects the running rail to isolate the DC voltage so as not to interfere with the signal code. The charge for the impedance bond box is -700 volts. Cable splicers south of Virginia Road do not work with impedance bond boxes, but not because of any safety concerns or special training. Based on the training, a third rail man or a cable splicer should be able to work on an impedance box, which includes cutting and attaching (or bonding) cables to the running rail. Splicers do not receive any additional training to work on impedance bond boxes. (Tr. at 69-73).

Third rail men also perform exothermic welding, a process in which a mold clamps onto the third rail or running rail via ignition of gunpowder. This creates a welding effect between the actual cable and the actual metal (the steel running rail or the steel third rail). To bond a piece of metal, employees need the proper PPE including a face shield, vest, FR (fire resistant) clothing, boots, leather gloves, and gauntlets. The same PPE is required to connect cables to an impedance bond box. To cut cables, third rail men regularly use a cutter, (a big set of pliers), to cut a heavy gauge cable and the same PPE equipment as described. (Tr. 74-75.)

Ortiz did not believe Complainants' refusal to work on June 15, 2013 due to an impedance bond box-related safety hazard to be valid. He based this belief on their training records, the amount of years they had worked for Respondent, their past work with the negative circuit, and their past work facing the same hazards presented by cables, web bonds, thirteen-inch fouling cables as existed on June 15, 2013. Cutting these cables posed no more risk than that faced by an electrician with PPE provided by the department. Every year, employees take a roadway worker safety class and every two years they attend a training class about the hazards involved with electrical work. Bonding positive and negative 700 volt cables present the same hazards. Complainants were qualified to do the work assigned that night as Class "A" electricians. Their refusal to do so formed the basis for the disciplinary charges. Although the job description for third rail men does not include the phrase "fabricates and bonds reactance lines" and the cable splicer job description does, the third rail man's listed task of installing bond wire is a similar job task. (Tr. at 76-79.)

Although he received the statements at CX 10, 11, and 12 the Monday after the incident, Ortiz did not receive a good faith challenge form for this incident. Because Complainants did not submit the form, Ortiz did not believe that they actually filed a good faith challenge. Complainants did not submit a form on site. They should have filed it at the job site and not made a statement at headquarters. The challenge must be honest and legitimate and concern a safety hazard, and not an instance where employees do not want to work or want to raise scope of work issues. On the night of the incident, Complainants acted insubordinately because, based on their statements, Hadden felt they could have complied with the directive. If they had a work scope dispute, they could have grieved it later. Respondent later dropped the charges. (Tr. at 80-87.)

On cross-examination, Ortiz clarified that CX 12 indicated that Hadden explained to Complainants on the night of the incident that they had to cut the negative return impedance cables and then bond them back in order to return Track 2 to service due to the unavailability of cable splicers. Ortiz never asked Complainants if they had ever cut and bond impedance cables. Based on their status as third rail men and having worked the third rail for years, Ortiz believed that at some point they had worked with negative fouling and thirteen-inch cables. None of the decision makers involved with the insubordination charge spoke to Complainants prior to filing the charge. Ortiz agreed that if an employee believes that he has been ordered to perform a task for which he has no training or experience or is unsure how to do it and makes a good faith challenge, management cannot discipline him for making the challenge. Ortiz assumed that Complainants received training on cutting and bonding negative return systems impedance cables when they took electrical hazards and roadway workers courses and also assumed that

they had actually performed these tasks before June 2013. He did not recall whether Complainants accepted a resolution to their challenge. (Tr. at 91-99.)

On redirect examination, Ortiz stated that Guadeloupe first reviewed the challenge, followed by Ranallo and Hadden. After the second review, Complainants were advised to comply with the directive to cut and bond the cable. Upon investigation, management determined that Complainants did not make their challenge in good faith. They based this conclusion on the absence of proper paperwork (Complainants filed paperwork at headquarters and not the job site), and on Complainants' failure to comply with the directive as reflected by Guadeloupe's and Hadden's statements. (Tr. at 99-101.)

Upon the undersigned's questioning, Ortiz explained that the procedure for a good faith challenge starts at the job site with the first and second supervisors present. If the first supervisor, usually the foreman, deems the work safe and the employee disagrees, the employee can appeal to the second reviewing supervisor. If the second reviewing officer deems it safe, the employee is supposed to comply with the directive. The challenge is put in writing as soon as it reaches the second reviewing officer. In 2013, scope of work challenges did not have a set process and management expected employees to comply with the directive and grieve it later. Regarding whistleblower training, as mandated by the state of New York, the company asked its employees to take online courses one year ago and Ortiz took them for the first time. The nine-month third rail training program is provided in-house, but the high voltage training for cable splicers occurs off site and is conducted by a third party. (Tr. at 103-108.)

On re-cross examination by Complainants' counsel, Ortiz stated that Complainants did not file a grievance as to the work scope issue. Before good faith challenges reach the second supervisor, the first supervisor can accept the challenge, the employee can accept the directive, or the two can reach a compromise. Rule 200.9 does not require an employee making a good faith challenge to file paperwork. On redirect examination, Ortiz indicated that the second supervisor may overrule the original supervisor, suggest an alternative acceptable to all parties, or order the employee to comply with the original directive. Complainants had to do the latter. Finally, on re-cross examination, Ortiz agreed that Rule 11 provides that an employee cannot be subject to discipline for violation of an instruction when ordered to comply by the second reviewing officer. (Tr. at 109-114.)

Ortiz testified again at the end of the final day of the hearing. He described Respondent's disciplinary process as first identifying the employees, gang, and foremen involved and taking their statements. The matter proceeds to DHI, which then contacts the union that represents the employees at issue. When the person or gang is removed from service, Respondent must announce whether it will charge the employee within seven days, but when the employee remains in service, it must do so in thirty days. Once issued, two dates are provided: one for a pretrial and one for a trial. At the pretrial, Respondent, the union, and the employee discuss the charges. The employee has the opportunity to give his or her side of the story. Respondent presents the employee with a waiver and he or she has the option to sign the waiver or move to trial. (Tr. at 642-647.)

As to Complainants, Ortiz received their statements along with those of Guadeloupe, Hadden, and foreman Herman Lopez. Management collectively charged Complainants with insubordination after Ortiz, Abramo, assistant chief engineer Steve Walsh, and the director of DHI reviewed statements and telephone conversations. Despite Complainants' statement at CX 10 that indicated that they put forth a good faith challenge, Hadden represented to management that Complainants did not submit a good faith challenge form. Based on the lack of paperwork, management deemed the good faith challenge bogus and charged Complainants with insubordination. Had Complainants reported a safety condition, they would not have been charged with insubordination. Although the parties did not hold a conference, Respondent eventually dropped the charges. (Tr. at 647-651.)

On cross-examination, Ortiz acknowledged nothing in Rule 200.9 or Rule 11 requires submission of a particular form. However, submission of a good faith challenge to the second reviewing officer requires some sort of written form pursuant to Rule 11. Management based its findings on their inability to verify that Complainants submitted the challenge to the second reviewing officer. The pretrial and trial process does not provide for discovery or rules of evidence, but does allow for submission of exhibits. Attorneys cannot represent employees at these disciplinary hearings. The hearing officer overseeing the trial, an employee of Respondent, determines which evidence to admit, and presents Respondent's case against the employee. The labor relations department receives the transcript of the hearing and other evidence. It then begins the disciplinary process. (Tr. at 651-658).

On redirect examination, Ortiz stated that the hearing process constitutes an agreement between Complainants' union and management. During this process, he may only speak to an employee during the pretrial conference when represented by the union. The union representative serves in a lawyer-like capacity, can interject at the pretrial conference, and can have phone and email conversations with the hearing officer. Management asked Lopez to prepare CX 22 to ensure they had a statement that Complainants had bonded before June 15, 2013 prior to the trial because a pretrial hearing did not take place. At no time did Hadden express to Ortiz that Complainants raised safety concerns. (Tr. at 658-662.)

On the undersigned's questioning, Ortiz explained that the pretrial hearing did not occur due to confusion on both the union side and management's side. There was no attempt to reschedule. Ortiz speculated that the director of DHI makes the decision whether to continue with the prehearing or hearing. Ortiz was not involved with this decision and he could not recall another such situation. (Tr. at 664-667.)

Lyn Hannah (Tr. at 117-166)

Lyn Hannah works for Respondent as its Director of Operating Rules. The Operating Department writes the rules based on federal regulations, operating practices, and industry practices. As the Director, Hannah interprets the rules and makes sure the operating book complies with these standards. Respondent's employees must comply with the safety instructions at CX 1. Respondent does not define "good faith" in its instructions or procedures, but does not want its employees to be reluctant to invoke good faith challenges. In order to start the Rule 11 process to make a good faith challenge, the employee has to inform his immediate

supervisor. Whenever possible, the employee should identify the rule or instruction at issue, but this is not mandatory. If the immediate supervisor cannot resolve the issue, the matter escalates to a second reviewing level; that supervisor can overrule the original supervisor, suggest an alternative acceptable to all parties, or order an employee to comply with the original supervisor's directive. Making a good faith challenge does not constitute an act of insubordination. (Tr. at 117-127.)

As part of annual training given to supervisors, Hannah's department instructs supervisors that they have to send a copy of the good faith challenge form to the rules department. Hannah receives the good faith challenges that the employee and supervisor cannot resolve on their own, but this happens rarely. An employee making such a challenge should not be disciplined for that action. Hannah has never read nor had any instruction as to Section 20109 of the FRSA and does not know the term "protected activity." Respondent has done nothing to inform her of violations of this regulation. (Tr. at 131-141.)

On direct examination, Hannah testified she understood the term "whistleblower" as an employee having the right to bring to the employer's attention a practice that they deem unsafe or unhealthy without retaliation. She cited Rule H by federal regulation, both Part 214 and 218, Subpart H, as a source of her knowledge of whistleblower rights, both of which are taught in Respondent's roadway protection class. She reiterated Respondent's desire for its employees to bring forward a good faith challenge in situations involving more than just the aforementioned rules or roadway protection. Rules like Rule 200 are taught in annual mandatory operating classes, conductor flag classes, rules qualification classes for the engineering department, and other computer-based training. Respondent's safety report also has a hotline to call in an unsafe condition or concern. Respondent distributes the rules books to employees, but not the good faith challenge form, which is available on the safety department's intranet system. (Tr. at 142-149.)

Hannah does not assess disciplinary actions. Respondent's good faith challenge is meant to allow an employee, when he or she sees something unsafe based on experience, the right to challenge that unsafe condition in good faith and not for cases where an employee does not want to do the work. Many good faith challenges reach resolution on site. The rules department only receives the good faith challenge if the employee did not agree with the second reviewing officer's findings. The employee or supervisor would then fill out a form and send it to the rules department. This procedure is taught in the classes taken by both employees and supervisors. (Tr. 149-154.)

Upon the undersigned's questioning, Hannah explained that the employee does not have to do the task at issue once the good faith challenge has been implemented. Another employee may perform that task, but that employee must be advised of the existing good faith challenge. Respondent cannot discipline the first employee who brought the challenge, even if the second employee performs the job safely. If the second employee knows about the first employee's good faith challenge and is then still willing to do the task, the second employee can proceed. If the first supervisor and employee cannot agree to a compromise, the second reviewing officer must know the operating rules and cannot be subordinate to the first officer. If the employee still wants to bring the challenge forward after the second officer reviews the task, he or she may fill

out the form. The matter then rises to the Operating Rules Department. The employee also has the right to send the form to whomever they wish to see it. Once the second supervisor has ruled the task to be safe, though, the employee needs to perform the task. Meanwhile, the Operating Rules Department makes a determination either in favor of the employee or the second reviewing officer. (Tr. at 161-164.)

On redirect examination, Hannah clarified that when the second reviewing supervisor makes a determination that the task is safe and the employee actually follows the instructions, but the Operating Rules Department determines that a violation occurred, the employee is not subject to discipline for following the order of the second reviewer. (Tr. at 164-166.)

Complainant Ivan Cohen (Tr. at 167-345)

Complainant Cohen has worked for Respondent for fifteen years. He has worked on the third rail since 2003, which runs on +700 volts. His training included changing the brackets and insulators that hold up the third rail, the thirteen-inch bonds, forty-inch bonds, third rail power bonds and third rail leads. He received classroom training on the operating rules and took other safety classes. On the third rail, Complainant Cohen works in a gang with a foreman. The negative return system, which runs on -700 volts, is a loop of energy used for signaling on the tracks; the third rail itself is positive. The power of a positive system can be isolated, meaning it can be unplugged and de-energized, whereas the negative system cannot be isolated. The negative energy system is unpredictable and live at all times. Complainant Cohen estimated that ninety percent of his training occurred on the job. (Tr. 167-171.)

Because they are looped together, trains that travel on the adjacent track to a track worked on by an employee pose risks of shock, electrocution, disruption of the passage of trains, and signal knockdowns. Complainant Cohen described an arc explosion as an explosion made by electricity that is hotter than lava. Workers on the negative return system face the same risk of arc explosions or flames as those on the third rail. When a train goes by an insulated joint, the voltage drops, changing the color of the signal. Once that signal is knocked out, the dispatcher will not know what is going on and the trains may lose control. It may also blow out the plastic insulation that helps the continuation of the circuit on the system. (Tr. 171-173.)

Respondent provided no training to Complainant Cohen on bonding negative return system impedance or reactance cables and he had never bonded them prior to June 15, 2013. Cable splicers, on the other hand, take classes to learn to splice different cables. Cable splicers also work in different gangs than the third rail workers. Complainant Cohen explained that ignoring Rule 200.7, the job safety briefing rule, is detrimental because it instructs the employee as to the task and provides the clearances. He described the definition that Respondent gave him as to the term "good faith challenge" as the right to, without discipline or retaliation, challenge a directive he believes to be unsafe or feels violates the rule. The employee facing the task is qualified to decide whether to make the challenge. Mere doubt, lack of experience, or improper tools and materials are sufficient bases to do so. Rule 200.9 does not require that challenges be made at the job site itself. Complainant Cohen did not believe that making a good faith challenge would expose him to a charge of insubordination. An employee shall immediately inform his or her supervisor when making a good faith challenge and in Complainant Cohen's

case that was Al Guadeloupe, the gang foreman. Complainant Cohen did not consider a good faith challenge an act of subordination because if he felt uncertainty about his safety or the safety of the passenger trains, he has the right to make a challenge. (Tr. 174-181.)

In the days leading up to June 15, 2013, Complainant Cohen worked at the Park Avenue viaduct at location marker CP 3, three miles from Grand Central Station near 105th Street with Complainant Washington and gang foreman Guadeloupe. The chain of command from Guadeloupe proceeded up to Hadden, then Abramo, then Pepitone. At that time, Complainants and Guadeloupe cut out thirteen-inch bonds and replaced them. A Sperry car had detected hairline cracks or defects in a certain section of the rail which necessitated the replacement. This required the cutting and bonding of negative return system impedance and reactance cables, tasks performed by the cable splicers. CX 9, the job briefing for that shift, directed Complainants to bond thirteen-inch bonds on the insulation running rail—typical work for third rail workers. The job briefing did not, however, direct Complainants to cut and bond negative return impedance cables. In the early morning hours of June 15, 2013, Complainant Cohen refused the directive to cut off the leads of the impedance box. Cutting the negative return impedance cables meant having to re-bond those cables, a task reserved for cable splicers and a task Complainant Cohen neither had experience doing nor the tools and materials to successfully complete the job. The job briefing he received that night did not reference the impedance negative return work and he did not receive an updated job briefing that mentioned this kind of work. Complainant Cohen had a lot of doubt as to whether he could safely perform the task and was not confident working on the negative return system because he had never done it, did not know whether he could do it properly, and did not know how it would affect him or the trains. He was concerned that he would suffer a shock, burn, or drop the signal. (Tr. at 182-188.)

In these kinds of instances, Respondent requires its employees to talk to their foremen and put in a good faith challenge. Complainant Cohen told Guadeloupe that he did not know how to perform this task and lacked the confidence to execute it; he put forth a good faith challenge. He did not have the good faith challenge form with him on the track. When Complainant Cohen advised Guadeloupe of the challenge, work stopped and Guadeloupe phoned Hadden. Hadden showed up to the site and Complainant Cohen re-explained his concern. After conferring with Abramo by phone, Hadden directed Complainant Cohen to write a statement. Complainant Cohen obtained the good faith challenge form in the back of the operating rules book upon walking down to street level. He filled it out and handed the form to Hadden. After giving Hadden the good faith challenge form, Hadden drove Complainants back to headquarters at the Mott Haven yard in his truck where they wrote out a statement. On their drive, even Hadden described the situation as "ridiculous." (Tr. at 188-191.)

Once they wrote their statements, Hadden instructed them to find their possessions and leave the property. At no point that evening did Hadden or Ranallo offer Complainants an alternative or have someone else perform the negative return impedance cutting and bonding. Guadeloupe did not offer an alternative either; he was just as confused as Complainants. The cable splicers had performed this work out there with Complainants all week. From what Complainant Cohen heard, Ranallo, a cable splicer for many years, ended up doing the impedance bonding work. However, at no point did anyone offer the alternative of Ranallo performing this work. (Tr. at 191-193.)

Prior to this incident, Complainant Cohen had a clean disciplinary record except for a 2004 attendance violation. Insubordination is a fire-able offense. The purpose of a pretrial waiver is to acknowledge one's guilt in exchange for a lesser charge rather than go to trial and risk a more serious offense. A sixty-one day suspension stays in one's permanent record, enabling Respondent to fire an employee without further explanation. Arthur J. Davidson served as the head of Complainant Cohen's former union and represented him. Complainant Cohen did not file a work scope violation claiming that the task ordered violated a CBA work scope provision. He has not received any written statements advising him of the expungement of these charges. Complainant Cohen has bonded thirteen-inch bonds, forty-inch bonds, third rail power bonds, third rail leads, and fouling cables, but not negative return system reactance cables. Third rail foreman Herman Lopez confirmed that Complainant Cohen bonded thirteen-inch bonds and power bonds. (Tr. 193-202.)

Guadeloupe told Complainant Cohen that Abramo ordered him not to pay Complainants the eight hours of time-and-a-half overtime wages owed to them for June 15, 2013, totaling $352.56. Complainant Cohen missed five work days because of the proceedings in this matter. With a daily pay rate of $43.48 per hour, he has lost $1,739.20 over that period. The emotional effect of the sixty-one day suspension has caused stress and anxiety in the form of restless nights, and rumors among co-workers. Co-workers treated him like dirt, as if he committed a crime. He felt very humiliated and embarrassed. It wreaked havoc on Complainant Cohen mentally in regards to supporting his family and the prospect of looking for another job in a struggling economy. The suspension has hung over his head because he has not received a notice of expungement. Supervisors constantly advised Complainant Cohen not to challenge the work assigned to him. They took him out of jobs and ordered him to sit in the truck for six hours while other employees worked. Such conduct has caused him to doubt himself. Respondent has provided a little training to Complainant Cohen on the topic of Section 20109; yet has done nothing to assure him that it will comply with the statute. (Tr. at 202-208.)

On cross examination, Complainant Cohen stated that before becoming a third rail man, he installed the rails including the wooden ties in between as part of the production gang. He now replaces the rails and works alongside cable splicers. The process of replacing a defective rail starts with a call from the power director. The gang de-energizes that section of the rail and tests it to make sure it has been de-energized. The track and third rail departments jointly sign off on a clearance to proceed. The length of the rail section in question is connected to a plate by four bolts, which the gang removes. After that, the third rail gang removes the fiberglass insulators. The track department then drops the rail section and removes the brackets. The cable splicers disconnect the cables. After the other departments finish their work, this entire process takes place in reverse order. (Tr. at 217-222.)

In the case of replacing a defective rail on the running rail, the bracket on the third rail stays intact. The third rail men first de-energize the rail, the splicers come and remove the reactance leads, the third rail men cut the bonds off, and then the track department removes that piece of the rail. The track department cuts its sections off the rail once the splicers have removed the leads. Then the signal department removes the cables connected to the running rail. (Tr. at 222-224.)

North of Virginia Road, the third rail men do the splicer work. Because Complainant Cohen is a Class "A" electrical worker, he is qualified to work up to 1,000 volts and received training on live energized tracks. Prior to 2013, Complainant Cohen worked on such tracks, but due to a new policy, he no longer does except in cases of emergency. There are only two ways to bond: via exothermic welding or mechanically involving no gunpowder or flames. Exothermic welding, which Complainant Cohen has performed, involves welding a piece of copper onto a piece of steel rail using gunpowder, a bonding agent, and a coin. He drops a coin into the mold and ignites the gunpowder with a striker so it melts, leaks through, and creates the weld. This welds the copper bond onto the rail. (Tr. at 224-227.)

Complainant Cohen described the photograph at CX 8(b) as a third rail lead and the components used to weld that lead onto the third rail in the exothermic welding process. After de-energization, the cables are inserted into the three slots of the mold. The mold used here is called a lead mold and used strictly for lead bonds. Duct seals are then used to plug holes that do not burn. Complainant Cohen has cut fouling cable using cutters resembling a bigger version of a tree pruner and wears safety equipment consisting of safety goggles, helmet, saw, long sleeve, and vest. He wears FR protection but does not need it for this task because of the de-energization. Complainant Cohen performs this type of bonding about five times per year. (Tr. at 232-236, 249.)

The photograph at CX 8(d) shows a thirteen-inch bond between two molds also used for exothermic welding on a smaller scale than described above. This sort of bonding requires less protective equipment because it does not involve as much powder. A third rail worker will use a forty-inch bond for longer distances between the two running rails. The process and equipment otherwise remains the same as for thirteen-inch bonds. Complainant has done forty-inch bonds once a week for ten years. He learned to perform this work on the job from the older people within his gang. (Tr. at 237-243.)

The photograph at CX 8(c) illustrates a power bond on the third rail, as opposed to the previous picture which does not take place on the third rail. Here, the procedure, materials, and equipment are the same and calls for the same PPE with only a minimal difference involving a chain mechanism that tightens the mold. The photograph at CX 8(a) shows the reactance leads and the web bond mold that attaches to the railway. The mold pictured is specific to the reactance leads cable and cannot be used for the thirteen-inch and forty-inch bonds. The exothermic process is otherwise the same here. (Tr. at 245-251.)

Complainant Cohen has never used a web bond before but if he had to, he could do so in theory because he has done other exothermic welding and the concept is the same. He has worked with thirteen- and forty-inch bonds and fouling cables, as well as third rail leads and fouling cables, the latter of which are used to continue the circuit of negative charge and connect one running rail to another. Bonding fouling cables requires a thirteen-inch bond with some adjustments. Complainant Cohen has cut fouling cables using a hammer or cable cutters, but only rarely. He uses the same safety equipment as discussed above. He has bonded fouling cables ten or fifteen times and learned it on the job, without classroom training. A wing bond is very similar to a fouling cable, but Complainant Cohen has bonded a wing bond maybe ten times in his career. He learned how to bond wing bonds on the job and uses the same equipment.

Jumper cables energize the third rail via a third rail lead. Complainant Cohen has cut these cables using a very powerful hydraulic cutting tool specifically for a jumping cable due to its thickness (Tr. at 252-258.)

In the early hours of June 15, 2013, Complainant Cohen knew he would be bonding on the running rail, which had no electrified current running through it, and had all the necessary equipment and PPE to do the job assigned, as well as his operating manual. He had a briefing at the viaduct upstairs with Complainant Washington and Guadeloupe, where Guadeloupe described which tracks needed removal, their exact location, and what the job would entail. At some point after that, track department foreman Morty Vaughn advised that an impedance bond box needed removal and the leads needed to be cut. Prior to hearing from Vaughn, the third rail men signed off on their sheets that the rail had zero charge running through it, which must be tested before the track department can start work. Here, the track department did not start work because it needed permission from the railroad traffic controller in order to move its trucks in place. Complainant Cohen could not recall whether a train had passed on the adjacent track, but acknowledged that they did this work in the middle of the night when fewer trains pass. In such cases, the third rail men are instructed to stop work and look to see if the train has all of its shoes, meaning whether it has been energized. They wait until the train passes and return to work. (Tr. at 259-265.)

When working with fouling cable, the impedance box connects to the substation, so it has a negative charge. The power source for an impedance reactance lead is the impedance box, which energizes every connected impedance box on every track on every rail in an interconnected loop at a charge of -700. When using fouling cable, the third rail men connect steel to steel. When a train passes, the impedance bond box can create an electrical current. This also can occur on the live third rail, on which Complainant Cohen has worked a few times. He did not recall being shocked on the negative system. He did recall a dropped circuit sometime prior to 2013. At the time, he worked with a thirteen-inch bond, which if defective, will not carry the signal correctly. He has never worked on the negative system where joints burned out. He has experienced a negative arc once or twice, but not an arc explosion. This happened when he cut away and removed the cables while working on the negative system with a thirteen-inch bond. (Tr. at 266-271.)

At the time of the incident, Vaughn returned to Complainant Cohen after their initial conversation and said that he did not have to remove the boxes, but he had to cut the leads. Complainants had the proper equipment for this task: cable cutters, hammers, and their PPE. Complainants expressed their concerns to Guadeloupe about cutting the leads. Once he learned that the cable splicers could not come that evening, Guadeloupe instructed Complainants to cut the leads and they refused. At the time, the only Class "A" electricians on site were Complainants and Guadeloupe and thus they were the most qualified to cut the leads. Complainant Cohen had cut charged cables before, but refused to work because he had never worked on impedance boxes; this was done by splicers. Had Complainant worked north of Virginia Road, his job duties would include cutting these leads. That night, Complainant had the proper equipment to cut the cables, but did not have the proper equipment to bond them. Because bonding may or may not be needed, someone usually brings the required equipment to the site. (Tr. at 271-282.)

Ranallo, who did not show up until way later, did not offer to perform the bonding work with Complainant Cohen that evening. Hadden evaluated the situation and ordered Complainant Cohen to do the bonding. In refusing, Complainant Cohen denied that he told Ranallo that he "would do the work, but I got to back [Complainant Washington]." (Tr. at 283-286.)

Complainant Cohen could not recall if he had done any work that night. His disciplinary charges for insubordination stated that he refused to do his work. Complainant Cohen received notice of a pre-hearing trial from Respondent. The union, which represented Complainant Cohen, sent him a letter indicating that management dropped the charges, but Respondent did not confirm this. Complainant Cohen did not follow up to clarify whether Respondent had dropped the charges. (Tr. at 293-300.)

Despite these charges, Ortiz and Ranallo, among others, recommended Complainant Cohen for promotion to foreman in April 2015. (Tr. at 307).

On redirect examination, Complainant Cohen reiterated that he had bonded zero impedance box reactance cables. Although he has done many types of bonds, he was never trained in that aspect of bonding and his lack of experience formed the basis of his good faith challenge. In addition, he did not have the necessary materials and tools to complete the job, nor did Guadeloupe issue a new job briefing form to discuss the new task. The directive to cut and bond impedance cables came down from Hadden to Guadeloupe. Complainant Cohen made a copy of his statement made at Mott Haven, but not his good faith challenge because he did not have access to a copy machine before he gave the form to Hadden. Respondent charged Complainant Cohen with insubordination and has done nothing to confirm that it has removed the charge from his record. He added that wearing PPE equipment does not alleviate concern of high voltage electric shock or arc flames. (Tr. at 309-314).

On re-cross examination, Complainant Cohen confirmed that Guadeloupe was the first person who directed him to cut the lead. He also stated that the risk of electric shock is part of his job and not specific to working on impedance bond box cables. (Tr. at 314-315.)

Upon the undersigned's questioning, Complainant Cohen explained that the negative return system consists of side leads, the impedance box, and the substation. Cable splicers are on the same pay grade as third rail men. The job briefing at the beginning of the night did not reference impedance boxes. He did not consider Guadeloupe's explanation that he would have to work on the impedance box a second job briefing. Usually Complainant Cohen signs off on an electrical clearance, but that night he did not do so because it was not available to them. The directive to deal with the impedance box came from Morty Vaughn and he relayed it to Guadeloupe. Hadden ordered Complainant Cohen to follow the directive after he became aware of the good faith challenge. (Tr. 316-319.)

In terms of the cutting process, the third rail men remove the bolts that connect the plate to the rail. They then remove the plates, unbolt the brackets, and drop the rail. Complainant Cohen only works on live energized tracks in emergency situations. He used to work on live energy tracks in general until a co-worker died on March 10, 2013. The co-worker was struck by a train just a block away from where they worked. The incident was fresh in the minds of the

third rail men. Complainants, along with the NTSB, de-energized the rail and observed the remains from the accident, which made an impact on them. (Tr. at 319-321.)

Although the process is the same to cut thirteen-inch, forty-inch bonds, and web bonds, impedance bond boxes present more of a risk than the others because the impedance bond box goes back into the substation, which has 13,500 volts of power coming in and 700 volts coming back out. All of the impedance boxes are connected in some way or another and it is difficult to isolate that power. In order to work on the impedance boxes, Complainant Cohen would have needed web bond molds, which he did not have the evening of the incident, nor did he have the proper cables. He did have all of the necessary PPE. (Tr. at 322-323.)

Abramo directed Hadden to instruct Complainants to write the statement at CX 10 (which Complainants handed in the following Monday) during the shift. The night of the incident, Guadeloupe contacted Hadden, his immediate supervisor, after Complainants raised their concerns. Ranallo showed up a while later and Complainants had words with him. During this argument, a second group of third rail men came to the job with the materials and relieved Complainants from the job. Complainant Cohen could not recall whether these workers came from north or south of Virginia Road. (Tr. at 324-326.)

From Complainant Cohen's understanding, an employee reduces the good faith challenge to writing between the first supervisor's review and the second supervisor's review. In this instance, he wrote up the form and gave it to Hadden, the second supervisor. Complainant Cohen noted that the good faith challenge form in the Roadway Worker Safety Manual (CX 4) includes only one copy of the form, so if an employee wants to put forth a second good faith challenge at a later time, he does not have a form to document it. According to CX 4, a supervisor cannot require a worker to comply with a directive until completion of the second review, meaning the worker can remove himself from the tracks until the matter's resolution and will not be disciplined for it. If the second reviewing officer deems the task safe, CX 4 does not contemplate further action. Finally, PPE does not eliminate all of the hazards and the job carries the risk of electrocution. (Tr. at 327-331.)

On redirect examination, Complainant Cohen indicated that, based on CX 4, the rules department has thirty days to review a good faith challenge and determine if it presented a serious safety concern. The night of the incident, the foreman did not present CX 9, the job safety briefing, upon directing Complainants to complete the task involving impedance bonds. Although the second group of third rail men approached when Complainants refused to do the impedance bond job, someone other than the third rail men completed the task. (Tr. at 332-334.)

On re-cross examination, Complainant Cohen explained that he thought that Guadeloupe did not give him a second briefing because he merely instructed Complainants to cut the cable, which he interpreted as more of an order than a briefing. Complainant Cohen knew what he had to do and was able to express his concerns, however. Complainant Cohen has never had an incident where he was required to give a written statement and as a foreman, he has never had to direct a third rail man to do so. On June 15, 2013, Complainant Cohen did not give the good faith challenge form to the rules department, nor did he follow up with them. Despite having

only one copy of the good faith challenge form in the manual, another copy is also available on the internet. (Tr. at 334- 339.)

Complainant Cohen, on redirect examination, clarified his testimony to indicate that he indeed did his job that night of June 15, 2013 when he performed electrical testing. At no time did Complainant Cohen sign off on a new job task involving impedance cables on a job safety briefing form. When he submitted his good faith challenge, he expected Hadden to comply with procedure and come to a resolution, not send him home. (Tr. at 340.)

On re-cross examination, Complainant Cohen clarified that he tested the third rail and that he was not qualified to test the impedance box. Per procedure, he tested the third rail to give Vaughn clearance to make a call to de-energize the power. Clearance is given by giving Vaughn a visual test with a tester that reads zero amps. Complainant Cohen signed Vaughn's clearance form and Complainant Cohen was supposed to sign a second clearance form, but he did not receive the form for his signature. (Tr. at 342-344.)

Complainant Gregory Washington (Tr. at 346-494)

Complainant Washington has also worked for Respondent for about fifteen years, one year in the track department and the rest on third rail, which runs on 700+ volts. Prior to June 2013, Complainant Washington's only training consisted of following the senior third rail men and doing as they did; he did not receive training on impedance boxes. He had never bonded impedance box reactance cables before June 15, 2013. The negative return system, which also runs on 700 volts, is the opposite of the positive and it runs through the running rail into the side leads then into the impedance box and back into the substation. One can suffer a blast just as likely on the negative system as the positive system. The running rails and negative system are always energized because they cannot be de-energized. Removing side leads and impedance boxes can isolate the negative return system so as to take out a length of track. The negative return system is unpredictable and poses the risk of electrocution and arc flashes. Safe passage of the train depends on the functionality of the negative return system because the dispatcher could not otherwise pick up the signals. (Tr. at 346-350.)

Prior to this incident, Complainant Washington has never had to refuse a foreman's directive. When the foreman orders a new task, the work stops, the working site is cleared, and the employee completes an additional job briefing indicating that the job has changed. Respondent did not supply the definition of "good faith," but Complainant Washington interpreted the term to mean that a challenge can be brought in good faith if the individual has doubt or uncertainty about the task, lacks the experience or tools to do it, or if the task is not referenced in the job briefing. After the good faith challenge escalates to the second supervisor and if the parties do not come to a resolution, Complainant Washington assumes he would be taken off of the job site until the parties come to a resolution. (Tr. at 353-357.)

On June 15, 2013, his assigned work consisted of changing brackets and bonding. A Sperry train X-rayed the rail to check for defaults; sections with a default would be removed and replaced. Third rail men perform this work; however, the cable splicers do the work involving an impedance box on an insulated joint. A similar circumstance arose in the days leading up to

June 15, 2013 and the splicers came out and took care of the work. The original briefing by Guadeloupe provided that the third rail men would bond the third rail, give a visual indicating that the rail was dead to Morty Vaughn, and cut off the thirteen-inch bonds on either side of the insulated joint. Vaughn thereafter told the gang that it needed to remove an insulated joint, which requires removal of the leads inside the impedance box. Vaughn and Guadeloupe conferred and Guadeloupe informed Complainants that they had to cut off the impedance leads. Complainant Washington asked Guadeloupe to request that Hadden contact the splicers, but he could not reach them. Guadeloupe told Complainants they had to cut off the cables, but they refused because once cut off, the track would have to be bonded back. Once a length of rail is cut out, the job needs to be completed and here that involved bonding. Guadeloupe relayed to Complainants that Hadden told Guadeloupe that due to the lack of available cable splicers, the third rail men had to do the bonding. (Tr. at 357-362.)

Cable splicers carry Cembre, a kind of mechanical bonding, that third rail men do not carry. Third rail men generally just use thirteen-inch molds and few other types of molds. Complainant Washington has seen workers who knew what they were doing cutting and re-bonding impedance box cables and it arced or burned on them. He did not want to go out and field-test or fumble through this process. He told Guadeloupe that he thought it better to leave it to persons who know what they are doing. Because no cable splicers were available, it fell to the third rail men to do the job, but Guadeloupe did not produce a new job briefing to discuss the new task. Complainant Washington doubted that he could perform this job because he had seen somebody cut the wrong cable and had seen someone inside the substation press the wrong button, resulting in an interlocking. He did not want to risk a blemish on his record or do anything to hurt anybody or stop the trains from safely operating. When in doubt, he will sit back and let someone else figure it out. (Tr. at 362-364.)

When Guadeloupe informed Hadden of Complainants' good faith challenge, Hadden insisted that they do the job but Complainants reiterated that they did not feel safe bonding the track because they did not have the web bonds or powder necessary to execute the job. Guadeloupe directed Complainants off the job site and to wait for Hadden to arrive. When Hadden showed up, Complainants consulted the operation manual in the truck, signed the good faith challenge sheet, and Complainant Cohen handed it to Hadden. Ranallo showed up and informed Complainants that third rail men north of Virginia Road do this bonding work. Complainant Washington pointed out that he did not know what they do north of Virginia Road and also that he did not have the proper molds. Complainants then left the track and Hadden took them to Mott Haven, where they wrote up another statement to give to Hadden (CX 10) and were told they would settle the issue the following Monday. Complainants punched out and went home. At no point on June 15, 2013 did Hadden or Ranallo or Guadeloupe offer the alternative of letting someone else do the impedance bonding. Foreman Paul Caccomo brought his gang intending to perform the work, but Ranallo ended up doing the full job. (Tr. at 364-371.)

Respondent charged Complainant Washington with insubordination in connection to this incident and ordered a disciplinary trial. An insubordination charge is a step below termination and a suspension of sixty-one days does not provide for a reprieve for further instances of discipline. A suspension of this length renders a subsequent infraction as minor as forgetting a

piece of PPE a fire-able offense. Complainant Washington had the choice of signing the pre-trial waiver and accepting the suspension or going to trial and risking the same result. Respondent never sent him notice of the expungement of the insubordination charge. (Tr. at 372-374).

Abramo ordered that Complainants not receive their overtime wages for the eight hours of work that evening, which totaled $352.56. Complainant Washington cited the stresses in life associated with the weight of this suspension. The effect of the insubordination charge has deterred Complainant Washington from making a good faith challenge based on the treatment he received from his superiors and co-workers. Respondent has not provided him with Section 20109 training and has taken no steps to assure him supervisors and managers have had such training. (Tr. 375-383.)

On cross examination, Complainant Washington indicated that cable splicers worked alongside him in jobs involving insulated joints or impedance band boxes. In the course of replacing the defective rail involving an impedance box, the cable coming off the box onto the running rail, also known as the lead, must be removed. Every single impedance box is connected to the substation by a cable underground. As a Class "A" electrical worker, Complainant Washington can work with up to 1,000 volts and the voltage on the running rail ranges from -700 to +700 volts. Although he tries not to work on live tracks, he is trained to do so. (Tr. at 384-389.)

Prior to the day of the incident, Complainant Washington did not know about the demarcation between north and south of Virginia Road. He believed that cable splicers took care of impedance boxes no matter the location, even if they have to be recalled when off duty. North of Virginia Road, the third rail men perform the cable splicer work. Ever since becoming a third rail man in June 2002, he has performed exothermic welding of thirteen-inch bonds by attaching two molds on either side of it. Then, he places a coin to stop whatever gunpowder may leak out, closes the lid, and shoots it off with a striker. That creates the bond that attaches the cable to the rail. He works with thirteen-inch bonds, forty-inch bonds, power bonds, third rail leads, and wing bonds. He has done fouling cables two or three times. His work also involves cutting these bonds. (Tr. at 389-394.)

The third photograph at CX 8(b) illustrates the exothermic welding process of lead bonding, where the leads have been shot onto the energized third rail. It shows three lead cables with a gauge of 500,000 bonded onto the rail. To bond a third rail lead, a third rail man grinds the point of contact on the third rail and lines up a new set of leads to go straight into three holes below the handle on the lead mold. The third rail man cuts back the cable and inserts the leads into the three holes, making contact with the rail; and then applies the gunpowder, which attaches the leads to the third rail. To cut the cables, Complainant Washington uses a saw or hydraulic cutter and wears PPE including goggles, facemask, gloves, vest, and a helmet. On this particular bond, the three leads went to a thimble head, which unlike an impedance bond box, runs positive at +700 volts from the substation to the third rail. He does not have to cut the end of the cable connected to the thimble; it is reusable and connected by nuts and bolts. He has done this kind of bonding over three hundred times since he started working for Respondent. (Tr. at 395-402.)

CX 8(d) shows a thirteen-inch bond and thirteen-inch single mold bond used on the running rail. When doing this type of bonding, he can knock off the cable using a hammer and cutter, instead of cutting it. He has performed this job once a week on average. He may perform as many as twenty-three switch bonds in one shift. When working with forty-inch bonds on the running rail, he uses the same molds as thirteen-inch bonds because the ends are the same and he has to double up, which forces him to do four bonds total. The process is the same for the exothermic welding for a thirteen-inch bond and he does this bonding about ten times per year (Tr. at 404-412.)

CX 8(c) shows a completed power bond. To attach a power bond, one puts the eye of the bond in between the two rails, fastens the bond on either side of the bond, and tightens the chain onto the running rail. This better secures to the third rail. Then the third rail man, wearing his regular PPE and welder gloves to restrict the heat, applies the coin and powder as described above. Complainant Washington has never come across a situation where he has had to cut the wing bond and he has performed about twenty-five wing bonds in his career. Likewise, he has had to cut fouling cables, which are bonded by web bonds, using a hammer or hydraulic cutters. To cut fouling cable, a worker needs glasses, a helmet, and gloves whereas bonding fouling cable requires all proper PPE. Though Complainant Washington has not bonded fouling cables, he explained that Respondent has moved away from using web bonds to using Cembre. Cembre involves drilling straight through the running rail and putting mechanicals on either side; this makes removal easier. (Tr. at 412-421.)

CX 8(a) shows a web bond bonded onto the running rail. Complainant Washington has not done this type of bonding before, but has cut the cables pictured using a regular hand saw while wearing all proper PPE. The process of welding a web bond is the same as welding a thirteen-inch bond. Because Complainant Washington has used a thirteen-inch bond, he agreed that he could figure out how to use a web bond. (Tr. at 421-424.)

Consistent with his prior testimony, Complainant Washington stated that he has cut fouling cables and jumper cables before. He has bonded thirteens, forties, wing bonds, and fouling cables on the negative system. On June 15, 2013, he was assigned to do work on the running rail. He arrived in the truck fully equipped and with all of his PPE. Upon arrival, Complainants had their full briefing for the initial job. Vaughn then informed Complainants that the splicers needed to disconnect the leads. Complainants, then located at 125th street, proceeded to the hit site at 105th street. On reaching the track, Complainants tested the track and found that Vaughn hit on an insulated joint. To correct the issue, the leads had to be taken off the impedance box. Guadeloupe conveyed to Complainant Washington that the cable splicers were unavailable and that he had to cut the leads. Complainant Washington refused to cut the leads because cutting the leads meant later reattaching them, which he did not know how to do, and because he did not have the proper equipment to do it. If he had cut off the leads, he would have been responsible for reattaching them. Guadeloupe briefed Complainants that the job had changed such that they had to cut and reattach impedance box bonds. While Complainant Washington agreed that they had a job briefing, he was supposed to leave the job site and wait for another job briefing form to be filled out. (Tr. at 426-439.)

At that point in time, Complainants and Guadeloupe, as Class "A" electricians, were the most qualified persons present to cut the leads, which are not usually charged when cut. Complainant Washington has only done this once or twice in his career. Respondent has a flash arc policy, which instructs employees on which PPE to wear depending on the circumstances. Complainant Washington has experienced a negative arc while working on the negative system once or twice while putting on a thirteen-inch bond. He has also experienced an interlocking of tracks when a foreman dug out of a substation and tapped on the cables, which led to an arc, during on-the-job training, but this did not happen during the cutting or bonding process. However, he has never experienced an arc flash or been electrocuted. Complainant Washington conceded that even when one prepares and executes tasks correctly, accidents can happen. The risks are part of the job. Complainant Washington was unaware of any increased risk of working on impedance boxes as compared to other assignments. (Tr. at 439-445.)

Complainant Cohen completed their good faith challenge form and gave it to Hadden, but neither Complainant retained a copy of it. Complainants wrote a second statement at Mott Haven upon leaving the job site. Ranallo retrieved the tools necessary to bond the impedance cables from Mott Haven and brought them to the job site. Once cut, the track department begins its work, which can take up to three hours. Often, as here, the job changes such that the crew needs different materials not then on site, which extends the time of completion. Even with the correct equipment, Complainant Washington refused to do the work due to his concern that a signal would go down or lose power and because he had never performed this task asked of him. Complainant Washington had never worked on a negative system when the signal went down or lost power; he had heard horror stories about shooting thirteen-inch bonds on and receiving notification that one fell off. Nothing in Complainant Cohen's statement at CX 10 references Complainant Washington's safety concerns. Ranallo did not offer Complainants his assistance in doing the work. Complainant Washington understood the term "good faith" to mean that if he had valid, legitimate, and honest doubts about the safety of performing work, to step back and voice his concern as to why he had doubts. He distinguished this from the complaints of those who objected to doing the work because it was not within their scope of duties. Thus, the act of putting forth a good faith challenge does not necessarily make it an actual good faith challenge if not done for its intended purpose. Respondent emphasizes safety as its number one concern, as reflected by the mandatory safety courses its employees have to take. (Tr. at 452-458.)

On June 15, 2013, Complainant Washington tested the rail and, because of his refusal to cut and bond the impedance box, drew disciplinary charges. Based on letters from the union, Respondent dropped the charges. Complainant Washington had seen RX 17, a statement from Respondent to the union that it had dropped the charges against him. As a result of reading this letter, he agreed that he felt nothing hanging over his head in terms of discipline. (Tr. at 458-461.)

Complainant Washington understood the term "whistleblower" to mean someone who sees something and makes a complaint without retaliation. He learned of this definition only after the disciplinary process began, and not through a class. Respondent encourages its employees to report safety conditions. (Tr. at 468-469.)

On redirect examination, Complainant Washington stated that prior to June 15, 2013 he had never cut and bonded impedance boxes. On that evening, he feared what would happen if he reattached a bond incorrectly and it came off due to his inexperience, lack of training, and lack of materials. As a professional, he expected to go out and know what to do. Even had he worked North of Virginia Road at the time, he would have stopped work and issued a good faith challenge. In one instance, someone asked Complainant Washington to cut fouling cables while attached to the running rail. He did as asked and it arced. He learned from this experience that doing something he was unsure how to do potentially could hurt him. At no time after being ordered to cut and bond the impedance box cables did anyone give him the opportunity to sign or not sign a job briefing confirming that he understood the tasks, safety concerns, and responsibilities of the job. To date, no one from the power department had given Complainant verbal or written confirmation of the expungement of his insubordination charge. (Tr. at 469-472.)

Upon the undersigned's questioning, Complainant Washington explained that insulated joints are always connected to the impedance bond box. When he signed the original job briefing form, however, he did not know that he would be working on an impedance box. In one area, about eight impedance boxes connect to a single substation. That evening Hadden relayed to Complainants that Abramo wanted them off the track once they refused to cut and re-bond the impedance cables. Complainant missed five days of work due to this incident. (Tr. at 477-480.)

Respondent had moved away from exothermic welding before 2013 because web bonds supposedly ruin the integrity of the rail, whereas a Cembre drills into the rail with nut and bolt. Although they no longer use web bonds unless in an emergency, they still use thirteen and forty-inch bonds. (Tr. at 481.)

On June 15, 2013, Complainant Washington did not have the equipment he needed to reattach the leads. Foreman Paul Caccomo told him that Ranallo retrieved the equipment from Mott Haven after Complainants left the job site. Guadeloupe did not tell them until the following Monday or Tuesday that Ranallo went back to pick up the material. In situations where the job changes unexpectedly, he might sign three different job briefings with the foreman he worked under at the time of the hearing. When he worked under Guadeloupe, he sometimes signed subsequent briefings when the job changed and sometimes did not. (Tr. at 487-489.)

On redirect examination, Complainant Washington confirmed that he signed the job briefing at CX 9 at 12:30 a.m. instructing him to "bond 13-inch bonds on IJ running rail CP 3 interlock on Track 2." This was a typical job for him. Guadeloupe's statement at CX 11 indicates that the track department found a bad insulation joint at CP 3 around 1:08 a.m. At 1:13 a.m., Hadden called Complainants and told them that they had to cut the bonds off and reattach them due to the unavailability of splicers. Thus, when Complainant Washington signed the job briefing at 12:30 a.m., he did not know that the job would involve cable splicer or impedance box work. His shift had only begun thirty minutes earlier and he would not have known of a hit so early in the shift. Not every insulation joint repair or replacement involves an impedance box cable. (Tr. at 490-491.)

On re-cross examination, Complainant Washington testified that he did not know whether Ranallo used exothermic welding to reattach the impedance box cables on June 15, 2013. (Tr. 492-494.)

Richard Ranallo (Tr. at 501-594)

Richard Ranallo, a general supervisor in traction distribution of the power department, has worked for Respondent since 1986 in roles including apprentice cable splicer, cable splicer, substation electrician, cable splicer foreman, and supervisor. As general supervisor, he serves as the go-between management and the field. In June 2013, Fred Hadden served as general supervisor, who reported to general engineer Joe Abramo, who in turn reported to James Pepitone, the director of the power department. He is familiar with the general safety instructions at CX 1 and CX 2. It is up to the employee's judgment to determine whether he or she has a good faith basis to challenge a task. Once the employee refuses to perform the job and identifies the violation, he or she has the right not to do so until resolution of the challenge. A good faith challenge is not an act of insubordination and an employee cannot be ordered off the property without pay. When a challenge escalates to the second level, managers from the safety department and rules department must fill out another form. The ultimate resolution of a good faith challenge lay in the hands of these departments. (Tr. at 501-511.)

In 2013, Ranallo managed seven cable splicers. Including apprenticeship, Ranallo has worked as a cable splicer for twenty-six years. Cable splicers and third rail men construct and fabricate impedance bonds and reactance leads. Impedance bonds and reactance leads, part of the negative bond system operating at less than 1,000 volts, are one and the same. The third rail is positive. The energy comes back through the negative system to a substation to create a circuit through the bond box. The negative system must be considered energized all of the time. Safety risks presented to workers on the negative system include arc flash, a shot of electric energy expressing itself in the air, as well as shock. Ranallo conceded that the words "impedance" or "reactance leads" do not appear in the third rail job description. (Tr. at 511-517.)

Cable splicers and third rail men have separate gangs. Ranallo worked alongside Complainants in the past, but has never seen them bond impedance bonds or reactance leads. He has never read the text of Section 20109 before or during his March 2016 deposition. Though he does not have an understanding of protected activity, Respondent has instructed him that if he sees something, to say something and put in a good faith challenge. (Tr. at 519-523.)

Normally on CP 3 on the Park Avenue viaduct, cable splicers perform the bonding of reactance leads and impedance bonds. If they do not appear at the job site, someone will call them to perform this work. On June 15, 2013, Guadeloupe called Ranallo to tell him that a Sperry car detected a default at CP 3 track 2. In the case of a default, the track department has to cut out that section of the track and replace it, which requires cutting and bonding of impedance cables if an impedance box has been affected. During this shift, Ranallo was located at CP 109 with Hadden when he learned of the default. Hadden instructed Ranallo to call the cable splicers but Ranallo could not reach them. At that point, Hadden told him to retrieve the materials needed to bond from Mott Haven and go to CP 3. Ranallo arrived at CP 3 at street level with the tools. Hadden arrived there later in his truck and he spoke to Complainants. Hadden advised Ranallo that he planned to take Complainants back to Mott Haven so they could give statements

about their good faith challenge. Ranallo, still at the job site, explained to Paul Caccomo and his crew what they needed to do and asked them if they were willing to do it. They all agreed. He gathered the tools and he and Caccomo's crew performed the work together. (Tr. at 524-530.)

When Ranallo had reached CP 3, Guadeloupe had already cut the impedance box bonds. Ranallo did not know whether Hadden proposed to Complainants that Ranallo do the bonding work with their assistance. On the Monday following the incident, Ranallo told Abramo and Ortiz that he had offered to perform the reactance bonding with the assistance of the third rail crew and that he completed the job without incident. (Tr. at 530-532.)

On direct examination, Ranallo testified that third rail men and cable splicers work under his supervision. A third rail man is a Class "A" electrician who works with up to 1,000 volts live, bonds the track, puts brackets up, hangs the rail, digs holes, pulls cable, connects negatives, and bonds fouling cables, and thirteen-inch bonds. Some of these tasks overlap with those that cable splicers perform, including bonding, cutting, exothermic welding, Cembre connections, cable work, pulling the cable, tunnel lighting, and assisting each other with the tunnel alarm. They work together and a lot of their work goes hand in hand. Although the job description for third rail man in CX 6(A) does not reference the phrase "fabricates and bonds reactance lines," it does reference a similar job task known as "installing bonds wiring." (Tr. at 532-535.)

At any given time, there are seven cable splicers on duty, all of whom work on impedance boxes south of Virginia Road and none of whom work north of Virginia Road. The third rail men perform the cable splicer work north of Virginia. Cable splicers do not receive additional training relating to impedance bond boxes or cables. Thus, if Complainants were transferred from south of Virginia Road to north of Virginia Road, their duties would include working on impedance bond boxes and cables. Exothermic welding connects cables together with gun powder and some kind of mix so that when ignited, the cable melts to the steel to create a bonding effect. Different types of exothermic welding include thirteen-inch bonds, forty-inch bonds, power bonds, web bonds, and cable-to-cable bonds. Third rail men and cable splicers employ the same method to bond the cable. Cable splicers do not receive additional exothermic welding training. Proper PPE worn by both cable splicers and third rail men for exothermic welding includes proper pants, shirt, long sleeves, gloves, helmet, vest, and eye protection. Both groups of employees cut cables using a cable cutter, a big pruning tool like one used to cut branches on a tree. (Tr. at 536-541.)

An impedance box is a box in the gauge of the track at insulated joint locations and return locations for substations with a voltage of zero to less than 1,000 located on the negative return system, which sends a direct current return back to the substation. The impedance bond box blocks the alternative current that the signal department uses for the cab signal control. It does not let the alternative current through, but allows the direct current to bypass the insulated joints to get the return back to the substations. This sort of information is common knowledge among third rail men and is part of the Class "A" electrical training class. Third rail men cut cables connected to the third rail, fouling cables, basket bonds, forty-inch bonds, thirteen-inch bonds, wing bonds, and side leads for thimbles, which are all similar to an impedance bond box cable in gauge. (Tr. at 541-545.)

Upon seeing CX 8(c), Ranallo identified the picture as side leads for the third rail, similar to the cables from the web bond. CX 8(b) shows a 500 MCM (500,000 gauge) cable. Third rail men use both types of cable to bond, cut, make up leads, and for fouling cables and wing bonds. Third rail men use the cables pictured at CX 8(c) to bond and cut forty-inch bonds, wing bonds, and bonds for fouling cables. They use 500 MCM cable regularly to bond and cut. A web bond is a copper bond that exothermically welds to the web of the running rail. Third rail men use web bonds on wing bonds, fouling cables, and side leads at impedance locations. Forty-inch bonds can also be used to attach a wing bond to the running rail. Web bonds, thirteen-inch bonds, and forty-inch bonds can be used on an impedance bond box. Most third rail men and cable splicers learn to do exothermic welding on the job, meaning a senior employee passes down his or her knowledge to the junior employee by working alongside them. When a worker does not know how to perform a task, he or she can just as easily ask a supervisor for help while on the job. (Tr. at 546-550.)

Based on their skills and training as third rail men, Complainants are qualified to work on impedance bond boxes, particularly because of their experience using fouling cables, forty-inch bonds, and wing bonds for more than ten years. They also work alongside splicers every time they replace an insulated joint. An insulated joint is a piece of fiber or plastic at a signal location in between the two steel rails and is molded with other steel components that insulate one side of the rail from the other side so that the voltage does not go through the rail. It attaches to the end post adjacent to the track. If there is AC voltage on one side of the insulated joint and a train rolls over the insulated joint at the end posts, it would make contact with the other side and indicate to the rail traffic controller the location of the train. Not all insulated joints connect to impedance bond boxes. The role of third rail men during an insulated joint replacement includes ensuring the de-energization of the track and cutting thirteen-inch bonds, as well as reapplying the thirteen-inch bonds after replacement. (Tr. at 550-553.)

At the time of the incident, a rail involving an insulated joint needed replacing and no cable splicers were available. Normally, this situation would require the track department, third rail men, signal department, and cable splicers, if the location was south of Virginia Road. Ideally, the track department finds the defect, notifies the third rail foreman, and the foreman dispatches the third rail men and cable splicers. The third rail men test the rail on an out-of-service track and fill out the paperwork confirming that the track is out of service and safely protected. The track department cuts the running rail and cable splicers then disconnect the impedance cables, while the signal department disconnects the number 6 wire so that the rail is 100 percent disconnected. Then, the track department takes the piece of rail out and substitutes it with a new piece. The cable splicers reattach the impedance cables, the signal department reattaches the number 6 wire, and the track department drills the rail and puts plates on to bolt the rail back together where it made its two cuts. Finally, the third rail men put thirteen-inch bonds around those joints to complete the negative circuit. (Tr. at 553-555.)

A job briefing, either verbally or in writing, details the job task for that shift and the hazards that pertain to the job. Sometimes circumstances change once the job has started, which necessitates another job briefing. This job briefing can be done verbally and without written forms. (Tr. at 558-559.)

On June 15, 2013 at CP 3, the impedance bond was not connected to the substation. The situation did not present unsafe or hazardous conditions in terms of the work that evening. The Sperry car found the defective rail. Hadden called in the cable splicers, but none were available, so Hadden called Ranallo. If Ranallo had been north of Virginia Road, a call would not have gone out to the cable splicer. Ranallo spoke to Complainants when he arrived at CP 3 on street level and before Hadden arrived. He told Complainants that he tried to summon cable splicers. Ranallo told Complainants that he had the materials to do the job and directed them to help him do the work. Complainant Washington walked away and Complainant Cohen told Ranallo that he "would help [Ranallo] do the work, but I got to back my boy [Complainant Washington]." At no point did either Complainant cite safety concerns or their discomfort about the task. They did not cite any fears of an arc blast, signal drop, or burn. If they had done so, Ranallo would have taken the same action he took that night: offer to work with them. However, Complainants refused because they termed the task as cable splicer work. Therefore, Complainants refused to do the work based on a scope of work issue, not a safety or hazardous condition. (Tr. at 555-561.)

Circumstances change all of the time during a job, which may necessitate a call to someone offsite to bring equipment or to provide extra help needed to complete the task. This occurred on that evening when Hadden instructed Ranallo, at CP 169, to bring the bonding material and third rail men to CP 3. There was no reason why the cables could not have been cut, which would have allowed the track department to do its work. Once the cables are cut, it takes the track department twenty minutes to an hour to remove and replace the rails, but it can take longer depending on whether the rail is cut to fit pursuant to Federal Railroad Administration rules. Prior to reaching the site, Hadden did not tell Ranallo that Abramo planned to clock out Complainants. (Tr. at 562-564.)

Ranallo did not believe the situation presented unsafe or hazardous conditions for Complainants in terms of cutting and re-bonding the cables or assisting Ranallo, which is a normal occurrence. Instead, Ranallo believed Complainants were being insubordinate because they refused a directive. Good faith challenges are reserved for honestly hazardous conditions, not for work scope issues. If an employee does not agree with a first reviewing officer's determination of a good faith challenge, that employee can appeal to a second reviewing officer. Once the second reviewing officer makes a determination, the employee must document the challenge after doing the work and wait for a written response from the rules department. Here, Hadden ordered Complainants to do the work and they refused both this directive and Ranallo's offer to help. (Tr. at 564-571.)

Regarding the incident that happened at Mount Vernon around 2012, an insulated joint had failed and the third rail men and splicers went to help the track department replace the insulated joint by cutting the cables. While waiting for the track department to remove the bad insulated joint, a train went from an adjacent track across the interlocking switches to the track with the bad insulated joint, which had no cables attached. Instead of the negative return going into the bond box or impedance box, it went to the defective insulated joint and blew out. This happens rarely. Whereas the 2012 incident occurred at midday, the incident at issue here took place at one or two in the morning. Ranallo could not recall whether any trains had passed him that evening. (Tr. at 571-573.)

Hadden instructed Ranallo to do the re-bonding and when Ranallo arrived upstairs, Guadeloupe showed him that the cables had already been cut off of the insulated joint. Cutting the rails when the impedance box is not connected to a substation does not present any hazards. When Guadeloupe cut the cables, he did not suffer a shock or electrocution. The third rail gang assisted in hooking the impedance cables back up to the running rail using web bonds without incident. (Tr. at 574-576.)

Ranallo confirmed that Complainant Cohen became a foreman a year before the hearing. He, along with Danilo Ortiz and Andrew Puglishi, promoted Complainant Cohen based on his technical and acceptable answers in an interview for the position. He learned about Respondent's "see something, say something" credo in the "book of rules" and "roadway worker" classes. To him, the term "whistleblower" means if you say something, you cannot get in trouble for it, but he did not learn this through Respondent. Employees approached Ranallo to ask about the incident and he explained that the insulated joint happened that night and Complainants refused to do the work. Ranallo advised these employees that if instructed to do a job that is not theirs, they should do it under protest. (Tr. at 577-579.)

On re-cross examination, Ranallo confirmed that the job briefing affords employees the chance to discuss the task at hand and resolve any questions or uncertainties they may have. Signing the form acknowledges that the employee understands the task and safety concerns. Ranallo did not know whether Complainants had ever worked north of Virginia Road, had cut any impedance box reactance leads, or received any such training before the night of the incident. Ranallo left for CP 3 well before Hadden and retrieved the necessary materials. Ranallo never told Hadden, his direct supervisor, that he could do the impedance box bonding with the assistance of Complainants. After Hadden spoke with Complainants, he told Ranallo that Abramo ordered him to drive Complainants to Mott Haven to write a statement and to send them home without pay. No one asked Ranallo to prepare a written statement about the incident. (Tr. at 580-583.)

Upon the undersigned's questioning, Ranallo explained that if the second reviewing supervisor determines that the employee needs to go ahead with the work and that employee still feels uncomfortable about doing so based on a safety concern, the employee's only option under the good faith policy is to do the work. For a cable splicer, according to the job description, one needs five years of experience to adequately perform high tension cable splicing. Ranallo explained that the third rail men north of Virginia Road, like those south of Virginia Road, receive on the job training and learn as they go along. They will basically watch someone with more experience do the job and then they will do the same. Job briefings are always written on the form at the start of a shift, many times at headquarters. As work changes, the briefing will not be rewritten so subsequent changes are made verbally. (Tr. at 584-590.)

On re-cross examination, Ranallo stated that if the second reviewing officer does not present an offer of alternative work acceptable to the employee, the second reviewing officer may order the employee to comply. The rules department issues a ruling even after the employee has already been forced to do the job. (Tr. at 593-594.)

<u>Al Guadeloupe (Tr. 596-639)</u>

Al Guadeloupe has worked for Respondent for thirty-two years as a ground man, third rail man, and third rail man foreman. As foreman of the third rail gang, he maintains the third rail and ensures that the workers perform their tasks the right way. As of June 2013, he reported to Fred Hadden who reported to Joe Abramo who in return reported to Jim Pepitone. (Tr. at 596-597.)

The negative return system differs from the positive system in that the former cannot be turned off and is considered live at all times. The risks to the personal safety for workers on the negative return high voltage system include electrical arc and shock. Although Complainants have helped splicers perform their job, Guadeloupe has never seen them perform impedance box bonding or impedance box leads bonding. Cable splicers normally perform the work assigned on June 15, 2013 involving impedance bond box cables, not third rail men. Guadeloupe provided the job briefing on that day to Complainants, which read "Bond 13 inch bonds on IJ running rail, CP 3 interlocking track 2." See CX 9. Later that evening, Guadeloupe ordered Complainants to cut the negative return system impedance cables. Hadden directed Guadeloupe to give this order due to the unavailability of cable splicers to cut and bond impedance cables, so Complainants would have to cut the cables and put the web bonds back on the rail. Complainants put forth a good faith challenge in that they refused to cut the cables without the splicers there to re-bond them. (Tr. 599-605.)

At the time Complainants expressed their intention to put forth a good faith challenge, Complainants and Guadeloupe did not have the equipment necessary to bond splicer cables to the rail. Guadeloupe told Hadden that he needed to return to Mott Haven to retrieve the equipment. Hadden showed up on street level of the work site and took Complainants back to Mott Haven in his truck. After that, Ranallo, himself a cable splicer, performed the cable splicer work on the impedance bond leads with assistance from three individuals from another crew. Once Ranallo completed that work, the track department performed their function and put the rail back into service. All work was performed in a safe manner. Complainants did not receive their overtime pay for June 15, 2013. (Tr. at 605-609.)

On direct examination, Guadeloupe stated that he cut a cable connected to an impedance bond box as a third rail man prior to June 15, 2013. He used a cable cutter used by third rail men and wore PPE worn by third rail men without issue. Third rail men work with 500,000 gauge cable similar to bond box cable, including wing bonds, fouling cables, and transposition cables. Third rail men do not cut these cables unless the track department is doing work on the track, in which case the third rail men would have to remove the cables and put them off to the side until the track department finishes its task. Then the third rail men bond it back to the running rail. (Tr. at 610-612.)

For exothermic welding, third rail men use a web mold. Complainant Cohen has likely welded thirteen and forty-inch bonds, but not web bonds. For fouling cables and wing bonds, third rail men can use the thirteen-inch molds or the web molds. Exothermic welding consists of putting the bond inside the web of the mold and shooting off gunpowder to create a bond. This is the same process for impedance bond box cables and one can use either web molds or thirteen-inch molds; third rail men use the latter. (Tr. at 612-614.)

Guadeloupe and Complainants normally do maintenance every one or two days at CP 3 and thus are familiar with the area. On June 15, 2013, Guadeloupe had thirteen-inch bonds on site at CP 3, but not web bonds. Guadeloupe filled out the job briefing form, but then the track foreman found a defect and told Guadeloupe that he needed the cable splicers to cut the leads off of an insulated joint. Once Hadden directed Guadeloupe to order Complainants to cut the cables, Guadeloupe conducted another job briefing about cutting the cables in which he advised that they needed to cut the cables and explained what material they would need to do so. Complainants responded that they did not have the molds or web bonds necessary for the task and Guadeloupe relayed this message to Hadden. At that moment, the only instruction Complainants had received was to cut the cables and they had the cable cutters and PPE to accomplish this task. Hadden directed Guadeloupe to have Complainants cut the cable and indicated that he would bring the rest of the material and a couple of other individuals from Mott Haven to bond the leads. Ranallo and two other individuals came to the site. Complainants refused to cut the cables because they said it was splicer work, but did not raise safety concerns at that time. They had tested the de-energized third rail just prior, however, and a form had been completed for that task. Guadeloupe prepared the statement at CX 11 and it does not invoke any safety concerns, but does reflect that Complainants put forth a good faith challenge. They did not cite to any violated rules, however. Guadeloupe did not know whether they filled out a good faith challenge form. There was nothing unsafe or hazardous about Complainants cutting the cable because the track department had already cut the two ends of the bad part of the running rail. The impedance box was not connected to the substation at the time. Thus, Complainants' assigned task of bonding the cables to the rail did not present a hazard. While they have not done so on bond boxes, Complainants have performed this function before when they welded other types of bonds onto the running rail. (Tr. at 615-624.)

Had Complainants raised any safety concerns or issues, Guadeloupe would have brought this to Hadden's attention, but this was something they had done before, just not onto a bond box. They could have performed the task. Guadeloupe ended up cutting the cables and the bonding was eventually done with no issues or complications. At the time, Guadeloupe and Complainants had the proper PPE to do the bonding work. He could not recall if trains had passed them that night, but believed that the trains still ran during their shift that ran from 12:30 a.m. to 8 a.m. He cut the cable after 1:00 a.m. Because Complainants did not cut the cables as instructed, they were being insubordinate. (Tr. at 624-627.)

Third rail men learn their work on the job while following a more senior employee who explains the task. Guadeloupe has provided such training. (Tr. at 622)

On cross-examination, Guadeloupe confirmed that Complainants' good faith challenge involved not just cutting the cables, but re-bonding them. Neither Guadeloupe nor Complainants signed a job briefing form setting out the new task of cutting and bonding impedance bond box cables. Guadeloupe wrote his statement at CX 11 not long after the events had transpired. While Guadeloupe did not include in his written statement that he offered Complainants the alternative that he cut the cables, he did mention it to them that evening and acknowledged Complainants' uneasiness with the task. (Tr. at 628-631.)

On redirect examination, Guadeloupe stated that the third rail men, including Complainants, were supposed to cut the cables that evening. Based on those circumstances, Complainants could have done so at the time as Class "A" third rail men. Complainants did not express their lack of confidence or comfort in cutting the cables that evening, so Guadeloupe had no reason to offer to cut the cables for them. They only told Guadeloupe that this was splicer work. Guadeloupe spoke to Hadden three or four times that evening. Hadden directed Guadeloupe to instruct Complainants to cut the cables and Guadeloupe responded that they put in a good faith challenge, but he did not speak to Hadden after that. Hadden told Guadeloupe in their last conversation that Hadden would bring the materials and other workers to the job site. (Tr. at 631-634.)

On re-cross examination, Guadeloupe clarified that Complainants submitted a good faith challenge, not a work scope grievance. Neither Complainants nor Guadeloupe offered an alternative. On redirect examination, Guadeloupe said he had no reason to offer an alternative. They had to cut the cables and they had done it before; it was not new to them. (Tr. at 635-637.)

On the undersigned's questioning, Guadeloupe indicated that he has worked north of Virginia Road, but did not perform cable splicer work in that area because there already was a gang of cable splicers. He had never received a good faith challenge or work scope grievance. Although other workers worked in his gang, Complainants were the only ones on this overtime shift. Although Guadeloupe had cut cables connected to impedance boxes, he has never reattached them. If Guadeloupe had been asked to do so, he would have. (Tr. at 637-639.)

B. Legal Standard

The purpose of the FRSA is "to promote safety in every area of railroad operations." 49 U.S.C. § 20101. Under the 2007 amendments to the FRSA, 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 engagement in one of numerous protected activities. 49 U.S.C. § 20109(a).

The FRSA incorporates the rules and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21") whistleblower cases. 49 U.S.C. § 20109(d)(2)(A). To demonstrate unlawful activity under the FRSA, a complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity was a contributing factor in the adverse employment action. Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 157 (3d Cir. 2013); Samson v. Soo Line R.R. Co., ARB No. 15-065, ALJ No. 2014-FRS-091, slip op. at 3 (ARB July 11, 2017). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Araujo, 708 F.3d at 158 (quoting Ameristar Airways Inc. v. Admin. Rev. Bd., 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action—any amount of causation will satisfy this standard. Palmer v. Canadian Nat'l Ry., ARB No. 16-036, ALJ No. 2014-FRS-154, slip op. at 14–15, 51–55 (ARB Jan. 4, 2016). An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. Id.

Should the Complainant succeed, the burden then shifts to the respondent-employer to demonstrate by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); Araujo, 708 F.3d at 157. Clear and convincing evidence shows "that the thing to be proved is highly probable or reasonably certain." DeFrancesco v. Union R.R. Co., ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof for clear and convincing evidence resides in between "preponderance of the evidence" and "proof beyond a reasonable doubt." See Araujo, 708 F.3d at 159 (citing Colorado v. New Mexico, 467 U.S. 310, 316 (1984); Addington v. Texas, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. DeFrancesco, ARB No. 13-057 at 7–8.

C. Analysis

Complainants allege that Respondent suspended them for their protected activity in violation of the FRSA. The undersigned disagrees. For the reasons explained below, the undersigned finds that Complainants did not engage in protected activity. Further, even if Complainants had established that their actions constituted protected activity, the evidence fails to show that such protected activity was a contributing factor in Respondent's decision to take an adverse employment action against Complainants.

1. Protected Activity

Complainants' post-hearing brief alleges that their good faith challenge and refusal to work on June 15, 2013 constituted protected activity under 49 U.S.C. §§ 20109(b)(1)(A) and 20109(b)(1)(B).[6] This decision analyzes each of these subsections separately.

a) 49 U.S.C. § 20109(b)(1)(A)

Complainants cannot establish protected activity under § 20109(b)(1)(A). This section states that protected activity includes, "reporting, in good faith, a hazardous safety or security condition." § 20109(b)(1)(A). Although, as several witnesses attested to, the term "good faith" is inherently ambiguous, Second Circuit case law has employed a standard requiring that an FRSA complainant both subjectively and objectively believe that the circumstances at issue presented a hazardous safety condition in order to prove protected activity. The Court defined the subjective and objective components respectively when it cited the standard it previously applied in other whistleblower statutes: "A plaintiff must 'show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation.'" Hernandez v. Metro-North Commuter R.R.,

[6] In their brief, Complainants argue that the plain language of § 20109 makes clear that subsection (b)(1)(A) is not dependent on or limited by subsection (b)(1)(B) as evidenced by the preposition "or" included in the list of protected activities at (b)(1), as well as the broader language contained in (b)(1)(A) as compared to the limiting language of (b)(1)(B). See Compl. Br. at 5-6.

74 F. Supp. 3d 576, 580 (2nd Cir. 2015). "Objective reasonableness in such a case is 'based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" Id. (internal citations omitted.)

i. Subjective Reasonableness

As to the subjective part of this standard, Complainants aver that they warned their supervisor that they did not feel confident that they could safely complete the negative return system bonding because they had not previously performed this task or received training on it. Citing to Worcester v. Springfield Terminal Ry. Co., Complainants argue that an employee taking on a task he cannot safely complete amounts to a hazardous safety condition and that warning a supervisor of such a condition can constitute reporting. 827 F.3d 179 (1st Cir. 2016). Subjective belief focuses on what Complainants actually perceived in the moment of the alleged protected activity. Complainants described the negative system as live and unpredictable and asserted their belief that the negative return system posed a risk of electrical shock and arcing flames; they considered Respondent's policy of staying the safe course when confronted with doubt on a job; and they disputed that they received a job briefing for the changed assignment. See Complainants' Brief ("Compl. Br.") at 20-21.

Respondent challenges the notion that Complainants reasonably perceived the safety risks that rendered their assignment hazardous that evening. From a subjective standpoint, Respondent described Complainants' fears of electrocution as unfounded because the particular impedance cables at issue were not connected to live electricity. Instead, the track department had already cut the piece of rail that needed replacing. Respondent also notes that the impedance box was not connected to the substation and that neither Complainant had ever suffered a shock. As such, impedance boxes do not present increased risks of electrocution as compared to Complainants' other assignments. In fact, Complainant Cohen admitted that such risks were inherent in the work they do, according to Respondent. The same goes for the risk of arc explosion as neither Complainant had ever experienced an arc explosion. While Respondent acknowledges that Complainant Cohen experienced a signal knockdown once, it occurred while he worked with a thirteen-inch bond, not an impedance box, and it happened once out of one thousand similar instances. See Respondent's Brief ("Resp. Br.") at 22-23.

Respondent also downplayed the risk of a safety hazard resulting from a train passing, stating that such a risk that evening did not present a greater risk than in other instances. Even in the event of a train passing, protocol instructs Complainants to stop work, observe the train, let it pass, and resume their work. The incident in question occurred overnight for the very reason that fewer trains pass during that time of day and no evidence suggests that a train passed through an area near the work site during the shift. Complainant Washington also raised concerns over interlocking and losing power, neither of which he has ever experienced firsthand. See Resp. Br. at 24.

Given the parties' arguments and supporting evidence, the undersigned finds that Complainants credibly articulated a reasonable subjective belief that impedance bonding posed a safety hazard during their shift on June 15, 2013. At the hearing, Complainant Cohen testified that he had "a lot of doubt" and "wasn't confident at all" about safely cutting and re-bonding the

negative return impedance cables. (Tr. at 187.) Complainant Cohen elaborated on why he felt this way by distinguishing impedance bonds from the various other types of bonds he had routinely bonded. Although the procedure of cutting thirteen-inch bonds, forty-inch-bonds, and web bonds is the same as that of impedance bonds, "the impedance bond box is going back into the substation…. The substation is 13,500 volts of power coming in, being brought down to 700 volts …and all those impedance boxes are connected together in some way or form going back into that box. And it's very hard to isolate that power." (Tr. at 322-323.) Ranallo's account of what actually transpired on the evening of June 15, 2013 would seem to dispute the concern articulated by Complainant Cohen. According to Ranallo, the impedance bond box was not connected to the substation that particular night. He knew this because a cable connecting two impedance boxes, as well as a separate cable connected to that cable with a two- to three-foot section of copper attached, signals a connection to the substation. That evening, the cables were not arranged that way. (Tr. at 555-556.)

Notwithstanding what Ranallo did or did not know that evening, the issue is whether Complainants reasonably believed that cutting and re-bonding the impedance bond box presented a hazard at the time of the incident. Similar to Ranallo's testimony, Complainant Washington testified that he can tell that an impedance box is connected to the substation by the existence of a cable between the running rail and impedance bond box. However, Complainant Washington added, because the cable runs underground, the cable is not visible. (Tr. at 387-388.) As Complainants worked aboveground that evening, they could not have visually observed whether a cable located underground ran between the running rail and impedance box, indicating a connection to the substation. For all they knew that evening, the cable did run to the substation, which would have exceeded the voltage they believe they are qualified to work on as Class "A" electrical workers. According to Complainants, as Class "A" electrical workers, they are qualified to work up to 1,000 volts. (Tr. at 224, 389.) As it was possible that voltage could have exceeded the 1,000 volts they are trained to work on, reporting this condition constituted a subjectively reasonable course for Complainants. Respondent's documented policy directive of taking the safer course in cases of doubt or uncertainty pursuant to Rule 200.1 further reinforces the reasonableness of Complainants' actions. See CX 1.

Similarly, Complainant Washington expressed doubt that he could perform the impedance bonding safely. He remembered seeing other knowledgeable workers suffer burns performing this task, shaking his confidence in his ability. At the time, Complainant Washington said he did not want to field-test and fumble through this process. He thought it better to leave the work to somebody else who knew what he or she was doing. (Tr. at 363.)

Complainants' written statement buttresses their subjective belief that cutting and re-bonding impedance boxes constituted a hazardous activity based on their understanding of their job duties. According to the challenge form, Complainants asserted that they "…refused to do splicer work which [Complainants] had no experience doing." CX 10. The statement also recounted that Ranallo "explained we did [splicer work] north of Virginia Road. [Complainants] explained 105th and Park wasn't exactly north of Virginia Road and [Complainants] still refused." CX 10. North of Virginia Road refers to an arrangement between union and management that requires all third rail workers located north of Virginia Road to work on impedance bond boxes, but leaves all impedance bond box work south of Virginia Road to cable

splicers. Ortiz testified that if Complainants, who work south of Virginia Road, transferred to north of Virginia Road, they would be expected to work on impedance bond boxes. (Tr. at 68-69.) Complainant Cohen conceded that third rail men do splicer work north of Virginia Road. (Tr. at 224.) However, Complainant Washington testified that he did not know this at the time of the incident because he had worked south of Virginia Road for his entire career. (Tr. at 367-368.)

Strictly from a subjective standpoint and in that moment in time, Complainant Washington's ignorance as to the job duties of third rail men in a location in which he has never worked is plausibly reasonable. His lack of awareness of what occurs north of Virginia Road should not be held against him in determining the reasonableness of his subjective belief. In fact when asked if, upon transfer to north of Virginia Road, he would be expected to cut the leads on impedance boxes, Respondent Washington maintained that he would have put forth a good faith challenge just as he had in the early hours of June 15, 2013. (Tr. at 277.) Complainant Washington could only evaluate his ability to do the job with the information he possessed at the time.

Ranallo had many years of experience as a cable splicer. (Tr. at 451, 503.) Recollecting the evening of the incident, Ranallo testified that once he relayed to Complainants that he could not reach any cable splicers, he then requested their help to execute the bonding and advised that he had the required materials. According to Ranallo, Complainants did not express to him any reservations based on safety concerns and Ranallo offered his assistance to them. Complainants still refused because it was "splicer work," according to Ranallo. (Tr. at 559-561.) Complainants dispute this version of the events. Both Complainants testified that Ranallo did not offer to help them with the impedance bond box. (Tr. at 283, 452-453.) Ranallo did concede that he did not tell Hadden that he could perform the impedance box bonding himself with the assistance of Complainants. (Tr. at 582-83.) Nor did Ranallo know whether Hadden informed Complainants that Ranallo offered to perform the bonding work with their assistance. (Tr. at 531.) Guadeloupe, meanwhile, testified that while he did not notate his offer to help Complainants with the task, he did so verbally. (Tr. at 630.) Based on these competing testimonies, it remains in dispute whether Ranallo actually offered his assistance as a veteran cable splicer to Complainants.

Evaluating the totality of the circumstances, working on an impedance bond box for the first time, with what they perceived as a lack of oversight from a supervisor who had experience working with impedance bond boxes, represented a hazardous condition in Complainants' estimation. In particular, Complainant Washington indicated that he did not want to go out and "field-test" this for the first time and just fumble through the process, so he thought it best to leave the task to somebody who knew what he was doing. (Tr. at 363.) Coupled with the uncertainty as to whether the impedance bond box was connected to the substation and the potential resultant risk of electrocution and Respondent's directive to err on the side of caution, the undersigned finds that Complainants had a subjectively reasonable belief that working with impedance bond constituted a hazardous safety condition.

ii. Objective Reasonableness

From an objectively reasonable standpoint, Complainants argue that according to Worcester, an employee can satisfy the objective test when he or she lacks the experience to perform the task and therefore lacks the confidence to perform it safely. As applied here, Complainants contend that they had never worked on the negative system; had not received either classroom or on-the-job training to work on impedance box leads; did not have the proper equipment to execute the job; had never cut and re-bonded negative system impedance cables; and recalled that a co-worker had died on the Park Avenue Viaduct three months prior, which reinforced the imperative to follow the company policy to err on the side of caution. See Compl. Br. at 20-21.

Respondent disputes the idea that Complainant had an objectively reasonable belief that they confronted a hazardous safety condition. Respondent described the process of cutting and bonding cables to the running rail as routinely performed by third rail men. As of the date of the incident, Complainants each had worked for Respondent as third rail men for over a decade and were certified Class "A" electricians with extensive experience cutting and bonding fouling cables, which are similar to impedance bond cables. They have experience performing exothermic welding, which entails the same process and requires the same materials as cutting and re-bonding impedance box bonds. The only difference is the mold Complainants use. Additionally, although cable splicers cut and bond these cables, third rail men north of Virginia Road perform the same function and receive the same training to do so. As third rail men south of Virginia Road, Complainants do not have responsibility for this due to a union scope of work issue, not a safety issue. Splicer work is not reserved exclusively for cable splicers, even though the cable splicer job description lists cutting and bonding impedance box bonds and the third rail job description does not. Moreover, Respondent argues that Guadeloupe instructed Complainants to cut the cables only, a responsibility squarely within their job descriptions and for which they had the required materials on site: a hammer, cutter, and saw. This contradicts Complainants' account and Guadeloupe's testimony that they were asked to both cut and bond the cables based on his conversation with Hadden, who subsequently summoned a different crew to bring the materials and to reattach the bonds. See Resp. Br. at 19, 21.

Complainants must show that a reasonable person in their position would have reported the directive to cut and re-bond impedance box bonds as a hazardous activity. In evaluating the protected activity at issue, the fact-finder must determine whether, among other things, a complainant's belief that a hazardous condition existed was objectively reasonable; that is, whether a person in the same circumstances with the complainant's knowledge, training, and experience would have made the same decision. Subjective belief, by itself, will not suffice. See Jacek v. Samson, ALJ No. 2014-FRS-091, slip op. at 4 (May 29, 2015); aff'd ARB No. 15-065 (July 11, 2017).

Among the reasons asserted in their argument, Complainants aver that they had never worked on the negative system before. Without such experience, Respondent could not have expected them to cut and re-bond impedance cables, they contend. See Compl. Brief at 20. At the hearing, Complainant Cohen was consistent in his testimony that he never bonded negative

return system impedance cables. At no point during the hearing, however, did Complainant Cohen assert that he never worked on the negative system at all, as Complainants argue in their brief. To wit, Complainant Cohen testified:

> Q. And so you've worked on the negative system?
> A. Correct.
> Q. Okay. And it's something that you're familiar with?
> A. Correct.

Tr. at 259.

Asked how many times he has worked on the negative system, Complainant Cohen could not provide a number, but he estimated that he had done so once or twice with thirteen-inch bonds. (Tr. at 270-71). As discussed above, Complainant Cohen attempted to distinguish between the hazards associated with working on an impedance bond on the negative system versus other types of bonds by pointing out that the impedance bond box connects to the substation, which carries 13,500 volts of power.

Despite this testimony, the record contains evidence that undermines the veracity of Complainant Cohen's concern as to the voltage associated with the substation. Upon review of Respondent's handbook, Complainants, as Class "A" electricians, are equipped to work with a sufficient amount of voltage such that the impedance bonding should not have objectively posed an unsafe hazard. According to Complainants, they can work with up to 1,000 volts. (Tr. at 224, 389.) However, Employer's MN-290 Electrical Operating Instructions (CX 2) indicates otherwise, in that Class "A" electrical workers can work with up to 30,000 volts. As confirmed by Ortiz at the hearing (Tr. at 66-67), CX 2 describes the capabilities of a qualified Class "A" employee as follows:

> "Class A": Power Department Employees listed below 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 and protect other persons performing work in electrified territory. These employees are also qualified to use hot line tools and work on **circuits energized to 30,000 V**.
>
> - Overhead Lines **Substations**
> - Traction Distribution Electric Test

CX 2 at 00022. (Emphasis added.)

Complainants acknowledge that they qualify as Class "A" electrical workers. According to the excerpt from the manual above, Class "A" electrical workers can work on circuits up to 30,000 volts, so it logically follows that Complainants, with Class "A" electrical certification, can work on up to 30,000 volts. This certification description, as confirmed by Ortiz, weakens the credibility of Complainant Cohen's testimony that attempted to distinguish between impedance bonds and other types of bonds in terms of safety hazards. Although he indicated that impedance bond boxes connect to the substation, unlike other bonds, and hold 13,500 volts of

power, CX 2 indicates that Complainants were qualified to work with voltage in excess of 13,500, as well as on substations.

Other than the amount of voltage and substation connection, Complainant Cohen did not otherwise articulate why impedance cables posed any more of a threat than other bonding he has performed over his more than ten years working for Respondent. Indeed, Complainant Cohen acknowledged that when a train creates an electrical current, a threat exists not only when working with an impedance bond box, but with a live third rail. (Tr. at 267.) He testified that he had worked on a live third rail in the past and that the risk of arc explosions or flames on the negative system is the same as the risk when working on the third rail. (Tr. 172, 267.) Given that Complainant Cohen has worked in circumstances that pose the same risk as impedance cables, it follows that a third rail worker with the same experience would not feel the need to refuse the assignment given to Complainant Cohen on June 15, 2013. Complainant Cohen also testified that he never experienced a shock while working on the negative system. (Tr. at 268.) Although he has seen a signal knockdown, this occurred while he performed a thirteen-inch bond, not an impedance bond. Moreover, the knockdown occurred one time out of thousands of such instances. (Tr. at 269.) Such enormously remote odds of a knockdown on the negative system should not objectively deter a third rail man from conducting this task on the negative system.

Likewise, Complainant Washington stated that lead bonding, a process he has executed over 300 times in his career, runs positive to the substation through a thimble at 700 volts. (Tr. at 401-402.) This testimony reinforces the dubiousness of Complainant Washington's concern over exposure to excessive voltage, for he had extensive experience with this type of bonding that connects to the substation. Because connection to the substation is not unique to impedance bonds and due to Complainants' capability of working with over 30,000 volts as Class "A" electricians, the substation is not an objectively valid basis for a reasonable Class "A" electrician in Complainants' position, with the same certification and experience, to refuse to perform the task for safety reasons.

Complainant Washington also testified to having worked on the running rail on the negative system when he bonded thirteen-inch bonds, forty-inch bonds, wing bonds, and fouling cables. (Tr. at 426-427.) Like Complainant Cohen, Complainant Washington did not articulate an appreciable difference in safety between working on these bonds as opposed to impedance bonds at the hearing. Complainant Washington did attribute his hesitation to cut and re-bond the impedance cables to having seen other third rail men do this work and suffer burns. (Tr. at 363.) At the same time, the undersigned notes that although Complainant Washington speculated that working on impedance box cable may pose a greater risk than other types of bonding, he acknowledged that he was not actually aware of such risks. (Tr. at 445.) In the same vein, Complainant Cohen confirmed that the risk of electric shock is inherent in his work and that the risk is not specifically related to working on an impedance bond box cable. (Tr. at 315.) This testimony underscores the unreasonableness of Complainants' claims that impedance bonding posed a greater danger than other types of bonding.

Given the foregoing, neither Complainant convincingly articulated an objectively reasonable belief that a similarly situated Class "A" electrician with over a decade as third rail

men and practiced in the same sort of bonding as Complainants during that time would have refused to work on the negative system or perform impedance bonding on safety grounds.

In addition to their alleged lack of experience working on the negative system and with impedance bonds, Complainants also assert that Respondent did not provide them with sufficient training that would have enabled them to perform the impedance bond work safely. At the hearing, various representatives from Respondent testified to the informal nature of the training process. They described on-the-job training as an informal process where a trainee first observes a more experienced employee perform the work. Ranallo, for example, said that third rail men and cable splicers learn to do exothermic welding in the field, where the senior employees impart their knowledge to the junior employees. (Tr. at 549). Likewise, according to Guadeloupe, third rail men learn their work on the job while following a more senior employee who explains the tasks. (Tr. at 622) Complainant Washington's understanding of the training process comports with the methods explained by Ranallo and Guadeloupe, as he explained that the training he received consisted of following senior third rail men and foremen and to "do as they did." (Tr. at 347). Complainant Cohen also testified that he learned to do forty-inch bonds on-the-job from more experienced members in his gang; he also learned to do fouling cables on-the-job and not in the classroom. (Tr. at 243, 258.) He estimated that ninety percent of his training took place on the job. (Tr. at 169.)

This testimony establishes that Respondent trained its third rail men on-the-job. Complainants did not cite instances where other third rail men found this training insufficient such that they felt unsafe performing impedance bonding. Given this well-established training process, the undersigned finds that, assuming no other similarly-situated third rail men who received this training raised a safety issue about working on impedance bonds, third rail men with the same training as Complainants would have no reason to object to doing the work for safety reasons based on a lack of preparation.

Ortiz testified that cable splicers receive the same training as third rail men with one difference. When third rail men transition to become cable splicers, they take a course at an outside agency to learn how to cut, skin, and splice 15,000 to 30,000 volt cable. (Tr. at 37.) Although Complainants did not learn these skills as third rail men, nothing in the record suggests that this cable splicer training was a prerequisite to working on impedance bonds. Indeed, Ortiz's testimony echoed that of Ranallo, Guadeloupe, and Complainants in that impedance bond training takes place primarily in the field:

> Q. And then they have on-the-job training and that would include working on reactance or impedance leads and bonds and so forth?
> A. Yes, but even as a third rail men…they demonstrate, they show you and they teach you, because it's part of the on-the-job training, they teach you how to bond and it could be a negative cable, a positive cable, but you're taught to bond.

Tr. at 38.

Ortiz confirmed that, based on their training, both a third rail man and a cable splicer should be able to do work on an impedance bond box. (Tr. at 70.) Much of the hearing

testimony centered on a labor agreement that called for third rail men to perform the splicer work north of Virginia Road and divided the splicer work between third rail men and cable splicers south of Virginia Road. Complainants operated south of Virginia Road. According to Ortiz, this distinction does not stem from safety concerns and only came about as an agreement between labor and management on scope of work. Both third rail men and cable splicers are capable of doing the same type of job, except when it comes to high-voltage splicing. (Tr. at 68-69.) The record does not indicate, and neither party argues, that impedance bonding requires high-voltage splicing.

Though Complainant Cohen stated that if he transferred north of Virginia Road, he would have refused to cut the leads as he did on June 15, 2013, he ultimately acknowledged that his duties and responsibilities as a third rail man north of Virginia would include cutting those leads. (Tr. at 277.) Complainant Washington too maintained that had he transferred north of Virginia Road, he would have stopped work and voiced his objection. (Tr. at 479.) Complainant Washington only learned of the north/south demarcation the day of the incident, but also conceded at the hearing that Respondent would expect him to do cable splicer work had he operated north of Virginia Road. (Tr. at 389-390.) Here, the divergence between Complainants' own hypothetical actions and their knowledge of third rail men responsibilities north of Virginia Road highlight the distinction between a subjective and an objective belief. That Complainants would have put forth a good faith challenge north of Virginia Road indicates what they, as two unique individuals, would have done in this hypothetical scenario—in other words, their subjective belief. In contrast, a third rail man, imbued with the knowledge that a third rail man north of Virginia Road and one south of Virginia Road have the same expectations and training, would not have reasonably raised the same objection as Complainants raised. From an objective standpoint, therefore, Complainants have not convincingly demonstrated that their training did not sufficiently prepare them to carry out their assignment on June 15, 2013.

Complainants also contend that they did not possess the required tools to cut and re-bond the impedance cables. As their shift began on June 15, 2013, Complainants were charged with cutting the impedance cables and had the materials required to do so, specifically a hammer and cable cutters. (Tr. 273-274.) When it became evident that the cable splicers were unavailable to re-bond the cables that Complainants had cut, Hadden and Guadeloupe directed Complainants to re-bond the cables. Because Complainants did not foresee having to re-bond the cables, they did not have the appropriate mold used to bond the cables, a material known as Cembre. Third rail men carry the molds fit for thirteen-inch bonds and other kinds of bonds, but not Cembre. Splicers, on the other hand, carry Cembre. (Tr. at 362.)

At that moment in time, Complainants unquestionably did not have the specific mold needed to re-bond the impedance cables. However, not having the proper materials on hand did not prevent them from completing the new task of re-bonding the cables. At the hearing, both Complainants testified that job assignments commonly change, often requiring them to obtain tools needed to perform the new job that the crew did not bring at the beginning of the shift. (Tr. at 280, 449.) In keeping with this protocol, Hadden instructed Ranallo to retrieve the material needed to re-bond the impedance cables, which Ranallo did when he returned to the Mott Haven yard. Complainant Washington confirmed that Ranallo brought the materials to the job site. (Tr. at 447.) Ranallo proceeded to the job site location at CP 3. Once there, Hadden relayed to

Ranallo that Hadden would take Complainants to Mott Haven to make a written statement about their good faith challenge and directed Ranallo and another crew of third rail men to complete the job. (Tr. at 526-527.)

Complainants knew that not all required tools or equipment appear on time and at the beginning of the shift. Had Complainants not left the job site with Hadden to go to Mott Haven, they would have eventually possessed the material needed to bond the cables. Complainants could argue that they were merely following Hadden's directive by leaving with him for Mott Haven, instead of waiting for the bonding material to arrive. While this may be true, Complainants cannot use the absence of the tools as a justification for their refusal to work. They, as well as likely all third rail men, know that the plan can change at a moment's notice, requiring different tools. Therefore, the initial lack of bonding material does not credibly support their refusal to perform the work assigned during their shift.

Finally, the undersigned notes Complainants' lack of firsthand knowledge of hazardous incidents involving impedance bonds on the negative system. Complainant Cohen testified that he had never been shocked or experienced an arc explosion or burned out joints on the negative system. While he has experienced an arc and a signal knockdown once or twice, he acknowledged that it occurred when he was working on a thirteen-inch bond, not an impedance bond. (Tr. at 268-271.) Likewise, Complainant Washington indicated that he had experienced an arc on the negative system while working on thirteen-inch bonds once or twice, but he had never been electrocuted on the negative system. (Tr. at 441-442.) It was only upon working with fouling cables, not impedance bonds, that Complainant Washington learned about the potential for injury. (Tr. at 471.) The undersigned finds it noteworthy that these prior incidents did not involve impedance bonds, and Complainants never clearly articulated the potential hazards when working with impedance bonds. Complainants failed to present a single example where they or another employee suffered an injury while working on an impedance bond. Thus, a similarly experienced third rail man would not have had concerns about re-bonding impedance cables.

Contrary to their assertions otherwise, Complainants had experience working on the negative system. They received the same training as other third rail men and were qualified to work up to a voltage of 30,000, an amount in excess of the voltage of the live negative system and substation. A third rail man with this experience and these qualifications would not have refused this assignment, especially given that third rail men north of Virginia Road perform impedance bonding as part of their job description. Moreover, a third rail man in like circumstances on the evening of June 15, 2013, despite not having the material required to bond impedance cables, would have remained on the premises knowing that somebody would have eventually supplied them with the proper materials. Based on the foregoing, the undersigned finds that Complainants did not hold an objectively reasonable belief that cutting and bonding impedance cables posed a safety hazard.

iii. Conclusion: (b)(1)(A) Protected Activity

To establish protected activity, the fact-finder must determine whether, among other things, a complainant's belief that a hazardous condition existed was objectively reasonable; that

is, whether a person in the same circumstances with the complainant's knowledge, training, and experience would have made the same decision. Subjective belief, by itself, will not suffice. See Jacek, ALJ No. 2014-FRS-091, slip op. at 4. Although Complainants established that they subjectively believed they had engaged in protected activity on June 15, 2013, they did not meet their burden of showing that their belief was objectively reasonable. Because they must demonstrate both a subjective and objective belief and failed to show the latter, the undersigned finds that Complainants did not engage in protected activity as defined by 49 U.S.C. § 20109(b)(1)(A).

b) 49 U.S.C. § 20109(b)(1)(B)

Finally, Complainant's refusal to work does not constitute protected activity under § 20109(b)(1)(B). Employee refusals to work must meet the conditions of § 20109(b)(2) to receive protection under the FRSA. § 20109(b)(1)(B). Section 20109(b)(2) states:

> (2) A refusal is protected under paragraph (1)(B) and (C) if—
>
> (A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;
>
> (B) a reasonable individual in the circumstances then confronting the employee would conclude that—
>
> (i) the hazardous condition presents an imminent danger of death or serious injury; and
>
> (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and
>
> (C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

§ 20109(b)(2).

Here, Complainants have failed to meet their burden to show a reasonable apprehension of imminent danger of death or serious injury.

Complainants aver that the risk of death and serious injury existed in working on high voltage electrical systems and that the possibility of workers touching it presented an imminent danger of electrocution or arcing flames given their lack of necessary training, experience, and equipment. See Compl. Br. at 23. While Complainants may have demonstrated a subjectively reasonable apprehension of potential danger of death or serious injury, they have certainly not shown that such danger was imminent. As discussed above, Complainants had experience working on the negative system and their training did not deviate from that which Employer provided to other third rail men. In addition, Complainant Cohen testified that he had been trained to work on energized tracks and had done so prior to the night of his incident. Although he no longer regularly works on energized tracks, he still does occasionally in emergency situations. (Tr. at 224-225.) Likewise, Complainant Washington testified that he has received training to work on the live track. (Tr. at 389.) Moreover, Complainant Cohen recounted at the

hearing that prior to performing any work, he knew the running rail on the negative system had been de-energized. (Tr. at 259-260.)

This testimony in particular suggests that Complainants knew that any hazard, if it existed at all, was not imminent and plainly contradicts Complainant's argument that the "always live and unpredictable" negative system presented an imminent danger of electrocution and arcing flames. In addition, Ranallo testified that the impedance bond box, in fact, was not connected to the substation at the time of the assignment. (Tr. at 623.) Complainants did not rebut this testimony. Based on the foregoing, no imminent threat of electrocution existed at the time because the rail was not live.

Complainants also acknowledged that they had donned their personal protective equipment ("PPE"). Ortiz confirmed that third rail men use the same PPE for impedance bonding as they do for other types of bonding. (Tr. at 74.) This implies that the PPE sufficient for impedance bonding is sufficient for other types of bonding. Complainant Cohen, on the other hand, remarked that while the PPE eliminates some of the hazards, it does not eliminate all of them. (Tr. at 331-332.) At the same time, however, the undersigned asked Complainant Cohen whether, on June 15, 2013, he had all the necessary PPE to perform impedance bonding, and he answered affirmatively. (Tr. at 323.) Given that the running rail had been de-energized, Complainants were sufficiently prepared to bond on a dead track. Even if the track were energized, (which Complainants are to assume at all times), they had the proper PPE and did not face an imminent danger of death or serious injury. What remains, then, is only the danger inherent in Complainants' line of work, to which Complainant Cohen testified at the hearing.

The undersigned also notes that Complainant Cohen invoked the story of a co-worker who passed away when a train struck him not far from Complainants' work location. He testified that his co-worker's death had an impact on him and described its aftereffects on him as "still fresh from those wounds." (Tr. 320.) Despite the tragic nature of this incident, Complainants did not explain the context of the incident (*i.e.*, time of day, adherence to safety rules, etc.) and whether the circumstances of the co-worker's death resembled any of the circumstances present the night of the incident. Due to the lack of detail surrounding the co-worker's work-related death, Complainants have not shown its relationship to the potential hazards faced on June 15, 2013.

In summation, given the circumstances confronted by Complainants in the early morning hours of June 15, 2013, a reasonable individual would have concluded that Complainants' work assignment did not present an imminent danger of death or serious injury. Accordingly, their refusal to work did not constitute protected activity under § 20109(b)(1)(B).

Since Complainants are unable to establish that any part of their conduct was protected activity under the FRSA, their claims must be dismissed. However, even if they had established the existence of some protected activity, Complainants cannot demonstrate that the protected activity contributed to Respondent's decision to suspend them. Accordingly, this decision also discusses the elements of adverse action and contributing factor.

2. Adverse Action

The FRSA includes "reprimand" and "suspension" as types of adverse employment actions. See 49 U.S.C. §§ 20109(a), (b). Respondent concedes that it issued disciplinary charges, a form of reprimand, against Complainants. See Emp. Br. at 29. Thus, Respondent committed an adverse employment action under the FRSA.

3. Contributing Factor

To succeed on their FRSA claim, Complainants must also prove that their protected activity was a contributing factor to the adverse employment action. 49 U.S.C. §§ 20109(a), (b); Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 157 (3d Cir. 2013). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Id. at 158 (quoting Ameristar Airways Inc. v. Admin. Rev. Bd., 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action; any amount of causation will satisfy this standard. Palmer, ARB No. 16-036 at 14–15, 51–55. An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. Id.

As explained above, Complainants have failed to establish protected activity and their complaint must therefore be dismissed. However, even if Complainants' filing of a good faith challenge would have constituted protected activity under 49 U.S.C. § 20109(b)(1)(A), the evidence fails to demonstrate that Respondent suspended Complainants for the mere act of filing a challenge. Respondent's good faith challenge policy under RW 11 provides that, as an initial step, the employee must inform his or her supervisor upon making a good faith determination that he or she has received an order that violates a rule. Once alerted, the supervisor can accept the employee's challenge and work with the employee to determine safe procedures to complete the task, the employee can accept the supervisor's directive, or the two can reach a compromise acceptable to both parties. If the parties reach none of these outcomes, the employee can escalate the matter to a second level with another supervisor who can overrule the original supervisor, suggest an alternative acceptable to both parties, or order the employee to comply with the original directive. Respondent cannot require an employee to comply with the directive until completion of the second review. See CX 4 at 00038.

The parties' interpretation of the following excerpt of RW 11 varied: "The employee will not be required to comply with the directive until completion of a second review. An employee who adheres to these procedures when making a Good Faith Challenge, will not be subjected to discipline for violation of a rule or instruction when being ordered to comply by a second reviewing supervisor." CX 4 at 00039. Lyn Hannah, Employer's Director of Operating Rules, testified that when the second reviewing officer agrees with the first reviewing officer and deems the task safe, the appealing employee must perform the task. (Tr. at 163.) Likewise, according to Ranallo, once the second reviewing officer makes his or her determination that the employee must comply with the directive, the employee must do the work and then document the challenge after the fact. In this instance, Complainants refused to perform the work. (Tr. at 571.) Ranallo made clear his view that in a situation where the second reviewing officer deems the task safe

and the employee still feels uncomfortable about executing the task from a safety perspective, the employee's refusal constitutes insubordination. (Tr. at 585-586.)

On the other hand, Complainant Cohen understood this provision to mean that if an employee cannot come to a resolution with the second reviewing officer, the employee is taken offsite, completes a written form, and the safety department becomes involved such that the employee can avoid performing the task until resolution of the matter and without risking discipline. (Tr. at 327, 330.) Complainant Washington pointed to Rule 200.9, which states in part, that the employee has "the right to remain clear of the work area until the challenge is resolved", as allowing him to leave the worksite until resolution of the good faith challenge. (Tr. at 355); see also CX 1.

The parties' divergence essentially stems from their differing beliefs as to when a good faith challenge ends. Although the testimonial evidence is equivocal, the documentary evidence weighs in favor of a finding that Respondent suspended Complainants for refusing to engage in their assigned task, not for making a good faith challenge.

For example, the waiver letters that Complainants signed state that Respondent suspended Complainants for their refusal to cut away web bonds as directed—not for filing a good faith challenge. See CX 21. In addition, a review of the statements made that evening by both parties emphasizes Complainants' refusal to perform the task for reasons unrelated to safety. In Complainants' joint statement, they recounted that when Hadden ordered them to perform the bonding he "explained we did it North of Virginia Road," to which Complainants "explained 105th and Park [the location of the worksite] wasn't exactly North of Virginia Road and [Complainants] still refused." CX 10. This quote does not invoke a safety concern, but rather a scope of work issue. In fact, in their joint statement, Complainants did not articulate a specific safety hazard presented by the assignment aside from a vague allusion to their lack of experience. A lack of experience, without more, does not constitute a safety hazard. Complainants needed to convey why their lack of experience would present a safety hazard and did not do so satisfactorily. Also in their statement, Complainants acknowledged that Hadden informed them that their refusal would stop their time and that they would have to see Abramo the next morning. This demonstrates that Respondent informed Complainants that consequences would follow for refusing to work.

Guadeloupe's written statement also suggests that scope of work issues dominated Complainants' thoughts at the time. When he asked Complainants to start removing the bond rail, Guadeloupe recalled that Complainants "said if they cut the cable, they would have to replace it if the splicers are not here, so they refused to do the job." CX 11. Guadeloupe also stated that Hadden "told me if they refuse what the consequence will be. [Complainants] agreed with the consequence." Hadden likewise wrote in his statement that Complainants "refused to cut away web bonds, saying it was splicer's work." CX 12. Neither Guadeloupe nor Hadden referenced any safety concerns related to bonding articulated by Complainants.

Because they gave these statements in the early hours of June 15, 2013 just after Complainants refused their assignment, the undersigned weighs this documentary evidence heavily. The parties' memories were clearest at this point, especially in comparison to their

testimony at the hearing three years later. The statements more accurately capture the parties' states of mind that night. Of these statements, the undersigned finds most telling the absence of a specified safety concern in Complainants' statement. Along with Complainants' more pronounced scope of work objection, the undersigned finds that Respondent's discipline of Complainants did not stem from their good faith challenge to unsafe working conditions, but from their refusal to work based on their belief that cable splicer work did not come under their purview.

For these reasons, the evidence does not show that, even assuming Complainants engaged in protected activity under § 20109(b)(1)(A) and (B), it causally contributed in any way to Respondent's decision to discipline Complainants and ultimately to suspend them from service for the events that transpired on June 15, 2013.

IV. CONCLUSION

For the reasons explained above, Complainants have failed to demonstrate that Respondent violated the FRSA by taking adverse employment action against them on the basis of their protected activity.

V. ORDER

Complainants are not entitled to relief under the FRSA.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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).