



Issue Date: 12 October 2017

Case No.: 2015-FRS-00076

In the Matter of

RUDYS SANTANA

Complainant

v.

NEW JERSEY TRANSIT RAIL OPERATION

Respondent

Appearances

James M. Duckworth, Esq.
For Complainant

Ramiro A. Perez, Esq.
For Respondent:

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This case arises under the employee protections of the Federal Rail Safety Act of 1982 (“FRSA”), 49 U.S.C. § 20109 (2012), and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1982. Rudys Santana (“Complainant”) alleges that New Jersey Rail Operation (“Respondent”) suspended him for his protected activity in violation of the FRSA. Complainant is represented by counsel.

I. PROCEDURAL HISTORY

On March 12, 2012, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”). He alleged that New Jersey Transit violated the FRSA by disciplining him for challenging an unsafe working condition.¹ Specifically, Complainant stated

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

that on February 16, 2012, he was part of a track gang assigned to replace and install wooden ties on Waldwick track number two. He alleged that it was lightly raining that morning. According to Complainant, New Jersey Transit did not secure a track outage for his job and relied primarily upon line of sight for protection. When the drizzle became a heavy rain in the afternoon, Complainant alleged that he challenged the working conditions and refused to work because of his concern over severely limited visibility and unstable footing. Complainant averred that Respondent rejected his challenge, removed him from service for his continued refusal to work, and charged him with insubordination. On August 11, 2015, OSHA determined that “the evidence supports Respondent’s defense: Complainant engaged in an unreasonable work refusal, therefore Complainant did not engage in protected activity.” Consequently, OSHA dismissed the complaint.

Complainant objected to OSHA’s findings and requested a hearing before an Administrative Law Judge (“ALJ”) on September 8, 2015. He asserted that his challenge and refusal to work on February 16, 2012 are protected activities under 49 U.S.C. §§ 20109(a)(2), 20109(b)(1)(A), and 20109(b)(1)(B). Respondent filed a Motion for Summary Decision on December 21, 2015, and Complainant filed a response on January 4, 2016.

The undersigned conducted a hearing on January 21, 2016, where she denied the Respondent’s Motion for Summary Decision. (Tr. at 4–5.)² This tribunal admitted the following evidence into the record: CX 5, 6, and 7A–7F; RX A, B, E–H, and O. (Tr. *passim*.)

The undersigned set the deadline for final briefs as March 31, 2016. Both parties submitted final briefs on April 4, 2016, 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 Complainant engage in protected activity?
2. Did any demonstrated protected activity contribute to Respondent’s adverse employment actions?
3. Assuming Complainant can meet his burden of demonstrating the above elements, would Respondent have discharged Complainant in the absence of any protected activity?
4. Is Complainant 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).

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 January 21, 2016 hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Evidence

1. Documentary Evidence³

In support of his case, Complainant submitted:

- CX 5: Complainant's good faith challenge form dated February 16, 2012 at 12:59 p.m. Complainant indicated that the reason for his challenge was "rain hard unsafety cond[sic]: Note Dan Garcia said if I challenge he will take me out of service."
- CX 6: A letter from Daniel Smith to Complainant dated February 16, 2012, indicating that he had been removed from work for insubordination following his refusal to work that day. The letter further states that a hearing and investigation will be scheduled as soon as possible.
- CX 7A-7F: A series of pictures, taken by Complainant on February 17, 2012, of the work site where the February 16, 2012 incident occurred. (Tr. at 53-57.)

In support of its case, Respondent submitted:

- RX A: Selections from the Rail Employee Safety Rules and On-Track Safety Procedures Manual, 2007, TRO-5.
- RX B: The Collective Bargaining Agreement between New Jersey Rail Operations, Inc. and The Brotherhood of Maintenance of Way Employees.
- RX E: A statement composed by Daniel Garcia on February 16, 2012 concerning the incident with Complainant. (See Tr. at 173-74.)
- RX F: An On-Track Protection Job Briefing dated February 16, 2012 and signed by Complainant.
- RX G: New Jersey Transit's Supplemental Bulletin Order for February 15-16, 2012.
- RX H: A weather report from Weather Underground for Teterboro, NJ on February 16, 2012, showing light rain beginning shortly before noon and continuing throughout the afternoon for a total of 0.14 inches.⁴
- RX O: A New Jersey Transit Waiver Letter dated March 6, 2012 and signed by Complainant. Therein, Complainant waived his right to a disciplinary hearing for the events of February 16, 2012, and admitted to being insubordinate by refusing to get out of his truck and work in the rain with his co-workers. The letter states that Complainant cited safety concerns for his refusal to work, and that he was

³ As the witnesses explained the relevance and import of these documents during their testimonies, this decision only briefly summarizes the documentary evidence submitted by both parties.

⁴ Available at Weather Underground, Teterboro, NJ February 16, 2012 https://www.wunderground.com/history/airport/KTEB/2012/2/16/DailyHistory.html?req_city=&req_state=&req_statename=&reqdb.zip=&reqdb.magic=&reqdb.wmo= (last accessed October 11, 2017).

advised that the consequence of his continued refusal to work would be removal from service. The letter also specifies that Respondent disciplined Complainant by administering a thirty-day suspension and restricting him from assignments under Wood-ridge territory for one year.

2. Hearing Testimony

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

Rudys Santana

Mr. Santana testified that he started working as a trackman for New Jersey Transit in 1995. (Tr. at 49.) At the time of the hearing, Mr. Santana had worked for New Jersey Transit for about twenty years. (Tr. at 67.) For about five to seven years he held the position of a trackman, occasionally working in the rain. (Tr. at 68–69.) He eventually transitioned to a vehicle operator position, which he held at the time of the February 16, 2012 incident. (Tr. at 49.) In 2012, Mr. Santana worked out of New Jersey Transit’s headquarters in Wood-ridge, New Jersey. (Tr. at 49.) Donny Berger was the supervisor at the Wood-ridge facility and Danny Garcia was the assistant supervisor. (Tr. at 49.)

On the morning of February 16, 2012, Mr. Santana reported to the Wood-ridge facility to drive a dump truck. (Tr. at 50.) Mr. Berger instructed him to take a company truck to maintenance to replace a flat tire, and Mr. Santana reported back to Wood-ridge when he had completed that task. (Tr. at 50, 91.) Mr. Berger then directed Mr. Santana to take the section truck to Ho-Ho-Kus and help the gang working there. (Tr. at 50, 93.) Mr. Santana arrived at Ho-Ho-Kus at around 11:15 a.m. and reported to employee foreman Ramon Roman, who was in charge of the job. (Tr. at 51–52.) At that time, Mr. Santana recalled that it was drizzling. (Tr. at 52.) Mr. Roman gave Mr. Santana a job briefing and told him to work with the rest of the gang. (Tr. at 52.) Mr. Santana asserted that the job briefing specified that the track protection that day included an obstructed track and two gang watchmen. (Tr. at 98–102, 127; RX F.) He acknowledged that he signed the job briefing, which stated that the track had been scheduled to be out of service from 9:40 a.m. to 2:45 p.m. (Tr. at 102–103; RX F.)

Mr. Santana’s gang was assigned to replace wooden railroad ties, and he stated that they were performing this task safely. (Tr. at 104.) By the time he started working at 11:30, most of the ties had already been replaced. (Tr. at 105.) Mr. Santana worked at setting the clips, which hold the rail and blade to the tie. (Tr. at 104.) It was raining lightly off and on at this time. (Tr. at 105.)

At 12:00, the gang took a break for lunch. Mr. Santana had a lunch with him, so he ate in his truck. (Tr. at 52.) Around 12:30, Mr. Santana testified that it began to rain heavily. (Tr. at 52, 57, 106.) He alleged that he became concerned because the rain was getting through his safety goggles and hindering his vision. (Tr. at 57–58.) He needed clear vision to be able to see if any trains were coming and to be able to perform physical labor like swinging a hammer. (Tr. at 58.) In addition, Mr. Santana was concerned that the rain would make the ground and his tools slippery. (Tr. at 58.) He stated that he did not have any time to express this concern to

anyone. (Tr. at 58.) Specifically, Mr. Santana alleged that the rain made the visibility “really, really bad” and at least once he had experienced slippery conditions while climbing a mound of dirt to get to the tracks. (Tr. at 65.) He stated that the only work that was left to do after lunch was putting the ballast (crushed stones) together and cleaning up. (Tr. at 131.)

Mr. Santana testified that Danny Garcia was walking west on the tracks when he called everybody back to work from lunch. (Tr. at 58.) Mr. Santana hesitated, mentioning to Mr. Garcia how hard it was raining. Mr. Garcia told Mr. Santana to “come on,” and then walked a few steps away. When Mr. Santana did not follow, Mr. Garcia returned and asked Mr. Santana if he wanted to work or not. Mr. Santana implored Mr. Garcia to consider how hard it was raining, then got out of the truck and walked to Mr. Roman to try to explain the situation. (Tr. at 58–59, 128.) Mr. Roman told Mr. Santana that he understood, but they⁵ were giving him a hard time too. (Tr. at 59.)

At this point, Mr. Santana felt the only way he could resolve the situation was to submit a challenge form. (Tr. at 59.) He received a challenge form from Mr. Roman and filled it out in his truck because the heavy rain was getting them wet even under the bridge. (Tr. at 60.) Mr. Santana averred that while he was still with Mr. Roman, Mr. Garcia hollered at him that if he filled out the challenge form, Mr. Garcia would take him out of service. (Tr. at 60, 128–29.) Mr. Santana completed the challenge form, writing that his reason for issuing the challenge was: “Rain hard, unsafety condition. Note: Dan Garcia said if I challenge he will take me out of service.” (Tr. at 65; CX 5.) He stated that he was attempting to comply with rule 2003 (EX A), which permits an employee to challenge instructions when he believes that the on-track protection does not comply with regulations governing on-track safety. (Tr. at 119–20.) While he was filling out the form, the other workers in the gang went back to work. (Tr. at 130.)

After Mr. Santana filled out the challenge form, Donny Berger came over and told Mr. Santana that he could not challenge rainy conditions. Mr. Santana then asked if Mr. Berger wanted him to go back to work, and Mr. Garcia said that Mr. Santana was out of service. (Tr. at 60.) Mr. Garcia then drove Mr. Santana back to Wood-ridge. After about two hours, Mr. Smith met Mr. Santana and handed him a disciplinary form (CX 6) which specified that he had been removed from service that day due to insubordination. (Tr. at 61.) The letter also stated that a hearing and investigation would be scheduled as soon as possible. (CX 6.)

About three weeks later, Mr. Santana met with a hearing officer, Shawn Gary, and Danny Smith. He told Mr. Gary that he wanted to transfer out of the Wood-ridge facility because Mr. Berger (and sometimes Mr. Garcia) had been complaining constantly about his work and progress. (Tr. at 62.) He stated that this had affected his health and family because he was “taking the job home every day.” (Tr. at 62.) Mr. Santana signed a waiver form so he did not have to go forward with a disciplinary hearing, which is permitted by the collective bargaining agreement. (Tr. at 82.) Mr. Santana subsequently transferred to a lower paying trackman position at New Jersey Transit’s Hoboken headquarters. (Tr. at 64.) He has worked quite a few times in minor rain since his transfer. (Tr. at 70.)

⁵ Mr. Santana did not specify who “they” were. (Tr. at 59.)

Mr. Santana admitted that he has never been injured while working in the rain. (Tr. at 70.) He also acknowledged that New Jersey Transit issued him rain gear in case the crew needed to work in the rain. (Tr. at 70.) Mr. Santana stated that he understood “fouling the track” to mean being within four feet of the tracks, and that workers were not supposed to foul the track without proper protection. (Tr. at 71.) He maintained that he was eight to ten feet away from the track when he took the pictures at CX 5, and that he felt safe the few minutes he was taking the pictures because he was not near the tracks. (Tr. at 72–73.) Later at the hearing, he stated that he was about three to four feet away from the track when he took the picture in CX 7C, but alleged that he did not foul the track. (Tr. at 121.)

Mr. Santana also agreed that the on-track protections in place on February 16, 2012 were an out-of-service track and at least one flagman watching the tracks ahead of the worksite. (Tr. at 75–77.) He acknowledged that he did not specify on his challenge form the specific reasons for his refusal to work—poor visibility and slippery conditions—but maintained that he informed foreman Roman about his concerns. (Tr. at 78–79.) Mr. Santana took about five to ten minutes to fill out the form in his truck, and no one rushed him to finish it. (Tr. at 79.)

Mr. Santana acknowledged that he signed a waiver letter (EX O) on March 6, 2012, which waived his right to a hearing and stated that he admitted to being insubordinate when he refused to work on February 16, 2012. (Tr. at 87.) He agreed that a union representative was present when he signed the letter and that no one forced him to sign it. (Tr. at 88.)

Michael Barrett

Mr. Barrett testified that since December 2014 he has served as the General Chairman of the Commuter Railroad System Division, which represents members of SEPTA and New Jersey Transit for the Brotherhood of Maintenance of Way Employees. (Tr. at 11, 18.) He started working for SEPTA in 1992 as a trackman. (Tr. at 11–12.) In 1995, he became a track inspector, which required him to inspect the tracks for dangerous conditions. (Tr. at 11.) Mr. Barrett stated that the trackman and track inspector positions at SEPTA are no different from those at New Jersey Transit, and the same FRA rules applied to both. (Tr. at 12–13.)

Mr. Barrett averred that members at New Jersey Transit receive training in the Roadway Protection Act, which teaches safety rules and procedures. (Tr. at 13.) He explained that the “fifteen-second rule” means that everyone should be clear from the track fifteen seconds in advance of a train passage. (Tr. at 14.) He stated that the application of the rule can vary based on the weather conditions because it might take longer to clear the track. (Tr. at 14–15.) Mr. Barrett testified that having a track outage and watchmen in place did not obviate the need for working gangs to have visibility, because workers still need visibility to ensure their safety from oncoming trains. (Tr. at 16.) The ultimate responsibility for the gang’s safety while working on the tracks rests with the employee in charge; however, employees are required to be aware of their surroundings and are responsible for their own safety and the safety of their coworkers. (Tr. at 17, 35; RX A.) Each employee also retains the responsibility to make sure that all the protection given to him is correct, and has a right to know their protection before going onto the track. (Tr. at 17.)

Mr. Barrett stated that the purpose of the challenge form was to make the job as safe as possible in terms of on-track safety and to allow workers to challenge the adequacy of the on-track protections. (Tr. at 24, 40.) He did not believe that a good faith challenge needed to be about the specific protections listed in the job briefings. (Tr. at 25, 42.) Mr. Barrett asserted that the job briefings are intended to inform the employees of on-track safety procedures that are in place for a specific job. (Tr. at 24.) Before any job starts, the supervisor needs to specify the on-track protections, and every person on the crew needs to sign the job briefing. (Tr. at 26.) A worker who signs off on a job briefing is affirming that the on-track safety protections have been put in place. (Tr. at 28.) However, Mr. Barrett stated that signing the job briefing did not obviate an employee's responsibility to be aware of his surroundings. (Tr. at 37.)

When an employee makes a good faith challenge, Mr. Barrett testified that Respondent goes through a series of steps to resolve the issue. (Tr. at 46.) First, the employee will take the challenge to their supervisor in charge. If the supervisor can resolve the problem, then no further action is needed. However, if the employee is not satisfied, the next step is to bring in the head of the department. (Tr. at 46.) The head of the department hears from the employee and the supervisor and makes a determination. If the employee is still unsatisfied, he can take the issue to the rules department or system safety, and they will make the final determination. (Tr. at 46.) Mr. Barrett stated that while the challenge is being resolved, the employee should remain clear of the track. (Tr. at 46.) He alleged that these steps are outlined in Respondent's rulebook, and that they ultimately come from the federal rules. (Tr. at 47.)

Mr. Barrett testified that the job briefing form for Complainant's February 16, 2012 job (EX F) specified that the on-track protections included the number two track being taken out of service and the posting of a gang watchman on the west curve. (Tr. at 26–27.) The track being "out of service" meant that no train was authorized to enter that area without the permission of the employee in charge. (Tr. at 27.) The watchman served as a lookout to warn the gang if any trains were coming on their track or an adjacent track. (Tr. at 28.) The track outage and gang watchman served as two layers of protection to prevent employees from being hit by trains. (Tr. at 33.)

Mr. Barrett testified that he had worked in the rain during his career. (Tr. at 28.) He stated that different types of rain could implicate different safety concerns: a light rain could create slick walking conditions when walking on the tracks, whereas a heavy rain could decrease visibility. (Tr. at 29.) He affirmed that the job supervisor makes the ultimate determination whether it is safe to work. (Tr. at 29.)

Daniel C. Garcia

Mr. Garcia testified that he has worked for New Jersey Transit since 2001, holding the positions of trackman, track foreman, assistant supervisor, and supervisor. (Tr. at 136.) On February 16, 2012, Mr. Garcia was working as an assistant supervisor and had done so for three years. (Tr. at 136, 139.) Donny Berger was Mr. Garcia's supervisor, and Ramon Roman and Billy Keen worked as foremen below him. (Tr. at 139–40.) Mr. Garcia testified that Complainant had worked every day under his supervision since 2009. (Tr. at 140.) As an assistant supervisor, Mr. Garcia oversaw construction and maintenance of the track and

supervised a crew of about twelve to fifteen people. (Tr. at 136–37.) Mr. Garcia was also a member of the union, and believed that he was sensitive to workers’ rights. (Tr. at 137.)

Mr. Garcia stated that safety was of primary importance at New Jersey Rail Operations. (Tr. at 137, 178.) As a supervisor, he received training in TRO-5 and NORAC, which are the federal safety rules and regulations for moving on-track equipment such as locomotives and track cars. (Tr. at 137–39.) Mr. Garcia also received roadway worker training, continuous welded rail (CRW) training, track compliance (MW4) training, and gang watchman training. (Tr. at 138–39, 213.)

Mr. Garcia alleged that the good faith challenge form relates strictly to on-track protections, such as the protections explained in the job briefings. (Tr. at 168, 190.) For an employee to make a good faith challenge, he needs to fear for his life or limb. (Tr. at 204.) There is another form that employees could use to express safety concerns about other matters, but employees are expected to complete the job and discuss those concerns after the job is completed. (Tr. at 168.)

On the morning of February 16, 2012, Mr. Garcia received instructions to take his gang and replace ties on the mainline track number two at Waldwick, milepost twenty-three. (Tr. at 142.) Mr. Garcia recalled that because of the weather forecast for that afternoon, he and Mr. Roman decided not to do as many ties as they would normally do in a full day. (Tr. at 143.) They planned to do seven ties initially, and would continue doing more if the rain subsided or did not come at all. (Tr. at 143, 158.) Mr. Garcia testified that his crew could replace seven ties in about an hour. (Tr. at 143.) He asserted that they had completed that kind of work in the rain before, and that he participated in the work even though he was an assistant supervisor. (Tr. at 143–44.)

Mr. Garcia discussed the job briefing (EX F) that Mr. Roman had given to the workers that morning. (Tr. at 147–55.) It indicated that the track under construction was “controlled,” meaning that this track was controlled by dispatchers with signal systems and switches to interlockings[sic]. (Tr. at 148.) The protections noted by the job briefing included an out of service track and two gang watchmen. (Tr. at 150.) Specifically, there were three sets of tracks at this location—one was taken out of service, and two watchmen were assigned to watch the other two. (Tr. at 182.) Mr. Garcia estimated that the out-of-service track was shut down for a stretch of about four or five miles from where the crew was working, meaning that no trains could use that track. (Tr. at 150.) The out-of-service timeframe was from 9:40 a.m. to 2:45 p.m. (Tr. at 152.) Mr. Garcia noted that New Jersey Transit’s Supplemental Bulletin Order for February 16, 2012 (RX G) also showed that the track was out of service. (Tr. at 157.) He alleged that this was the most stringent plan that New Jersey Transit could put in place to keep its workers safe. (Tr. at 151.) Mr. Garcia also testified that the job briefing noted that two watchmen were used: one within visible proximity to the workers and one further down the track. (Tr. at 152–53.) The job briefing specified that the required sight distance for the gang watchman was 1,520 feet, which would allow the gang fifteen seconds to clear the track prior to the approach of any train. (Tr. at 148, 181.)

When the crew started working around 10:00 a.m., Mr. Garcia recalled that it was not raining. (Tr. at 158–59.) Complainant was not with the crew when they started, but joined them just before lunch. (Tr. at 159.) Mr. Roman gave Complainant the job briefing when he arrived. (Tr. at 159.) Complainant then began working with the crew, and they replaced all seven ties by lunch. (Tr. at 161.) All that remained was lagging the ties down and installing the clips. (Tr. at 161.) This work needed to be completed so that the track could return to service; it was not an option to leave the track disassembled. (Tr. at 162.) Mr. Garcia did not remember it raining at all before the crew took lunch. (Tr. at 160–61.)

After lunch, at around 12:30 to 12:40, Mr. Garcia called the men back to work. (Tr. at 162.) He recalled that it was lightly raining, and he told the crew to finish the job so they could get out of the rain. (Tr. at 162–63.) Mr. Garcia averred that he began working in the rain with his men, noticing after a few minutes that someone was missing. (Tr. at 163.) Upon realizing that Complainant was still in his truck, Mr. Garcia walked over to talk to him. (Tr. at 163–64.) Mr. Garcia asked him if he was coming out to work, and Complainant responded “after the rain” and rolled his window up. (Tr. at 164–65.) Mr. Garcia testified that Complainant did not explain why he did not want to work in the rain or mention any safety concerns. (Tr. at 165.) Mr. Garcia averred that no one else on the crew expressed any concern about unstable footing, poor visibility, or unsafe conditions. (Tr. at 165.) At that point, Mr. Garcia walked away and called Mr. Berger to explain the situation. (Tr. at 164.) He stated that he did not yell at Complainant or try to intimidate him. (Tr. at 164–65.)

Mr. Garcia stated that Complainant did not get out of his truck after lunch until he went to get the challenge form from Mr. Roman. (Tr. at 166.) Mr. Garcia alleged that he did not have a problem with Complainant filling out a good faith challenge form, since that was his right, and that he did not holler at Complainant about the challenge form. (Tr. at 169.) When Complainant finished the challenge form, he gave it to Mr. Roman, who shared and looked over it with Mr. Garcia. (Tr. at 170.) Mr. Garcia then informed Complainant that his complaint was not a valid good faith challenge under company policy (see RX A, pp. 191–93), because it had nothing to do with on-track safety procedures. (Tr. at 171.) Mr. Garcia testified that he informed his supervisor of the situation, who told him to go back to the truck and give Complainant another chance to get to work. (Tr. at 172.) When Mr. Garcia so informed Complainant, he merely mumbled something to Mr. Garcia through the open truck window. Mr. Garcia then walked away and called Mr. Berger, who stated that he would call Mr. Garcia back. (Tr. at 172.) When Mr. Berger returned the call, he directed Mr. Garcia to take Complainant out of service. (Tr. at 172, 198.) Mr. Garcia testified that during this process, his other men were working and it was raining lightly to moderately. (Tr. at 173.) The work took them about fifteen to twenty minutes to complete, and then the crew got out of the rain. (Tr. at 218.) Mr. Garcia then drove Complainant from the jobsite back to Wood-ridge and told him to wait for Mr. Smith. (Tr. at 198, 219–20.)

Mr. Garcia alleged that Complainant was removed from service after his second or third refusal to work. (Tr. at 173.) He maintained that Complainant’s removal from service related solely to his refusal to work—it had nothing to do with his filing of a good faith challenge. (Tr. at 173.) Mr. Garcia reviewed Complainant’s pictures of milepost twenty-three in Waldwick and stated that it was a span of three-track territory in a curve. (Tr. at 146.) He noted that there was

a slope on either side of the tracks, elevating the tracks to approximately one foot in height. (Tr. at 146.) In summary, Mr. Garcia asserted that New Jersey Transit gave Complainant proper protection (track out-of-service, gang watchmen) to perform his work safely on February 16, 2012. (Tr. at 177–78.)

Mr. Garcia agreed that each employee has responsibility for their safety on the job, and that employees need to be aware that trains can come from any direction. (Tr. at 178–79, 182.) When he is planning out a job, Mr. Garcia takes the weather—such as heavy rain—into consideration because it can reduce visibility. (Tr. at 179–80.) Given the speeds of the tracks, 1,520 feet was the distance needed to notify the work crew and move them to the designated area. (Tr. at 180–81.) After reviewing his prior written statement from February 16, 2012 (RX E), Mr. Garcia agreed that Complainant did tell him that he did not feel safe when Mr. Garcia confronted him for not getting out of the truck to work. (Tr. at 188.) He did not recall asking Complainant why he felt unsafe at that time or when he read Complainant’s good faith challenge that stated “rain hard, unsafety condition,” but he stated that he did not recall much of the conversation between himself and Complainant. (Tr. at 189, 193.) Mr. Garcia also stated that he felt that Complainant’s safety concern was simply that it was raining hard. (Tr. at 196.) Mr. Garcia acknowledged that slippery conditions could implicate safety concerns, but also stated that his crew still works in snow, rain, and ice. (Tr. at 197.) He asserted that the crew does not usually work in conditions where their visibility is compromised. (Tr. at 197.) He reiterated his understanding of the New Jersey Transit rule for employees who have safety concerns unrelated to on-track safety: they should complete the job and file their grievance later. (Tr. at 198.)

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) that 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

Complainant alleges that Respondent suspended him for his protected activity in violation of the FRSA. The undersigned disagrees. For the reasons explained below, this tribunal finds that Complainant did not engage in protected activity. Further, even if Complainant had established that his actions constituted protected activity, the evidence fails to show that such protected activity was a contributing factor in Respondent's decision to take adverse employment actions against Complainant.

1. Protected Activity

In his preliminary submissions to this tribunal, Complainant alleged that his challenge and refusal to work on February 16, 2012 constituted protected activity under 49 U.S.C. §§ 20109(a)(2), 20109(b)(1)(A), and 20109(b)(1)(B).⁶ This decision analyzes each of these subsections separately.

a) 49 U.S.C. § 20109(a)(2)

Under § 20109(a)(2), protected activity includes an employee's refusal to "violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security." Despite alleging that his actions constituted protected activity under this subsection, Complainant fails to identify any specific Federal law, rule, or regulation implicated by his refusal to work in the rain alongside his fellow employees.⁷

⁶ Complainant did not specify in his post-hearing brief under which FRSA provisions his actions could be considered protected activity; rather, his argument attempts to show that his challenge met the "good faith" requirement of the statute. Therefore, he concludes, his challenge to the rainy working conditions was protected activity.

⁷ Complainant generally alleges that Respondent failed to thoroughly investigate the basis for his good faith challenge before presumptively rejecting it, but does not specify what, if any, Federal rule or regulation Respondent violated. No violation appears to this tribunal, as the regulations merely direct employers to establish procedures for the prompt and equitable resolution of good faith challenges. See 49 C.F.R. § 214.311(c). However, even if Complainant could show such a violation, this would not

However, Complainant does argue that the impeded visibility and slippery conditions could have created a possible violation of the “fifteen-second rule.” (See Complainant’s Br. at 3.) This tribunal recognizes that 49 C.F.R. §214.329 codifies the fifteen-second rule, which requires advanced warning of incoming trains to be given to employees who are fouling the track such that they could reach the designated place of safety not less than fifteen seconds prior to the train’s passage. Mr. Barrett also credibly testified that rainy conditions could alter the application of the fifteen second rule due to increased time needed to clear the employees from the track. (Tr. at 14–15.) Thus, that afternoon’s increased precipitation could have caused a need to reevaluate the kind of advanced warning that Complainant’s gang needed to clear the track within fifteen seconds.

Nevertheless, Complainant has failed to demonstrate the existence of a violation of the fifteen-second rule at 49 C.F.R. § 214.329. The evidence shows that Respondent utilized two watchmen that day to meet the required sight distance of 1,520 feet. (RX F.) Mr. Garcia testified that 1,520 feet was calculated to allow the crew enough time to reach their safety zone and that this distance was based on the speed of the trains on the tracks under construction. (Tr. at 180–181.) The undersigned finds this testimony credible, and Complainant has failed to offer any evidence demonstrating that the rainy conditions on February 16, 2012 rendered this protection inadequate to satisfy the fifteen-second rule. Moreover, based on the worksite pictures taken by the Complainant (CX 7A–7F), it appears that a moderate to heavy rain would likely not have delayed the crew from evacuating the relatively flat track area and walking to the designated safety zone of an adjacent field. Therefore, Mr. Garcia’s order to complete the rail work in the rain did not implicate a violation of the 49 C.F.R. § 214.329 fifteen-second rule.

Since returning to work alongside his gang in the rain would not have violated 49 C.F.R. § 214.329, nor any other Federal regulation, Complainant’s refusal was not protected activity under of § 20109(a)(2).

b) 49 U.S.C. § 20109(b)(1)(A)

Complainant is also unable to establish protected activity under § 20109(b)(1)(A). This section states that protected activity includes the “reporting, in good faith, a hazardous safety or security condition.” § 20109(b)(1)(A). Here, Complainant’s filing of a good faith challenge form in connection with his refusal to work does not constitute protected activity under § 20109(b)(1)(A).

The evidence shows that Complainant refused to work in the rain, citing unspecified safety concerns. (Tr. at 58–59, 188; RX E.) When Mr. Garcia declined to wait for the rain to dissipate before having the gang complete their work, Complainant approached Mr. Roman and filled out a challenge form to indicate his reasons for refusing to work. (Tr. at 59, 166; RX E, CX 5.) He testified that he felt the only way he could resolve the situation was by submitting a challenge form. (Tr. at 59.) Complainant’s filing of the good faith challenge did not report a hazardous safety or security condition that afternoon; rather, Complainant’s good faith challenge form simply attempted to explain the basis for his refusal to work. While the FRSA does not

automatically establish protected activity under § 20109(a)(2). This section only defines protected activity as the *Complainant’s* refusal to violate or assist in the violation of some federal rule or regulation.

foreclose the possibility that an employee could refuse to work under § 20109(b)(1)(B) and also file a report under § 20109(b)(1)(A), the facts of this case do not warrant such a finding.⁸

Here, Complainant's filing of a good faith challenge form was part and parcel of his refusal to work. Accordingly, his actions do not constitute protected activity under § 20109(b)(1)(A).

c) 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, Complainant has failed to meet his burden to show a reasonable apprehension of imminent danger of death or serious injury at § 20109(b)(2)(B)(i). Complainant testified that the rain concerned him primarily because it hindered his vision and made the ground and his tools slippery. (Tr. at 57–58.) He stated that the rain was getting through his safety goggles, and that he needed clear vision to see approaching trains and swing a hammer. (Tr. at 57–58.) At least at one point during the morning shift, Complainant claimed to have experienced slippery conditions while climbing a mound of dirt to get to the tracks. (Tr. at 65.) Complainant also stated that the only work left to do after lunch was putting the ballast (red crushed stone—see photos at CX 7)

⁸ The undersigned notes that the FRSA explicitly governs refusals to work under § 20109(b)(1)(B), which, due to the extreme nature of employee refusals to work vis-à-vis filing a report, subjects refusals to additional standards before they can be considered protected activity. See §§ 20109(b)(1)(B), 20109(b)(2)(B). To find that an employee's contemporaneous explanation for his refusal to work under § 20109(b)(1)(B) always constitutes a separate instance of protected activity under § 20109(b)(1)(A) would eliminate the additional limitations that Congress intended to govern whether an employee's refusal to work is protected under the Act. However, notwithstanding this tribunal's findings of the absence of protected activity at § 20109(b)(1)(A), this decision will discuss the element of contributing factor in connection with Complainant's alleged protected activity under § 20109(b)(1)(A).

together and cleaning up, while Mr. Garcia recalled that the crew still needed to lag the ties down and install the clips. (Tr. at 131, 161.)

Based on these assertions, this tribunal finds that Complainant's work in the rain did not present an imminent danger of death or serious injury. While being struck by a train could certainly cause serious injury, the protections in place were adequate to alleviate Complainant's concern of reduced visibility. The gang had secured out of service status for the track under repair, and had two advance watchmen guarding the other tracks around the curve. (Tr. at 150, RX F.) Complainant received and signed the job briefing on these protections, and had worked on the track prior to lunch when he alleged it was raining lightly. (Tr. at 98–103, 127; RX F.) Complainant points to no evidence that these on-track protections would have been rendered less effective by a marginally increased rate of precipitation. The rest of Complainant's coworkers did not refuse to return to work, which tends to support a finding that a reasonable rail worker would have found the working conditions to be safe. Accordingly, while this tribunal recognizes that rail workers retained personal responsibility to be aware of incoming trains from any direction (Tr. at 16–17; RX A), the circumstances on February 16, 2012 did not justify a refusal to work for fear of being struck by a train.

Complainant's additional safety concerns—slippery footing and tools—also do not warrant a reasonable fear of imminent serious injury. Falling down on the tracks or being struck by a runaway hand tool could certainly cause injury, but the likelihood of death or serious injury arising from these occurrences is remote at best. This holds particularly true in light of the fact that Respondent equipped Complainant's crew to work in inclement weather and slippery conditions, and they often did so. (Tr. at 28, 70, 197.) Complainant admitted that he has worked in rain a number of times and has never been injured while working in rainy conditions. (Tr. at 70.) Again, Complainant signed the job briefing and testified to working in light rain before lunch. Even assuming that the rain became heavy that afternoon as Complainant alleges, none of Complainant's coworkers refused to work in the increased precipitation, strongly suggesting that Complainant's alleged safety concerns were not reasonable. In light of all these facts, Complainant has failed to demonstrate the likelihood of serious injuries stemming from heavy precipitation on February 16, 2012.⁹

In summation, a reasonable individual would not have concluded that Complainant's work in the rainy conditions of February 16, 2012 presented an imminent danger of death or serious injury. Accordingly, his refusal to work did not constitute protected activity under § 20109(b)(1)(B).

Since Claimant is unable to establish that any part of his conduct was protected activity under the FRSA, his claim must be dismissed. However, even if he had established the existence of some protected activity, Complainant is unable to demonstrate that it was a contributing factor

⁹ The undersigned notes that a weather report from Weather Underground on February 16, 2012 shows that there was only light rain in Teterboro, New Jersey at the time Complainant refused to work. (RX H.) However, as Teterboro is around twenty miles south of Complainant's worksite at Ho-ho-kus (Tr. at 111), the undersigned give this exhibit little probative weight towards establishing the precise weather conditions at Ho-ho-kus during the afternoon of February 16, 2012.

in Respondent's decision to suspend him. Accordingly, this decision also discusses the elements of adverse action and contributing factor.

2. Adverse Action

The FRSA includes “suspension” as a type of adverse employment action. See 49 U.S.C. §§ 20109(a), (b). Here, Respondent does not dispute that its suspension of Complainant constitutes adverse employment action within the meaning of the FRSA.

3. Contributing Factor

To succeed on his FRSA claim, Complainant must also prove that his protected activity was a contributing factor in 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, Complainant has failed to establish protected activity. His complaint must therefore be dismissed. However, even if Complainant’s 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 Complainant for the mere act of filing a challenge. Mr. Barrett explained that company policy is to escalate a good faith challenge through three levels of supervisors in an attempt to resolve an employee’s concern. (Tr. at 46.) Mr. Garcia’s credible testimony of his actions that day accorded with that policy, including his receipt of authorization from Mr. Berger to take Complainant out of service when he continued to refuse to work. (Tr. at 160–73.) Furthermore, the waiver letter that Complainant signed indicates that Respondent suspended Complainant for insubordination—his continued refusal to work—not for filing a good faith challenge. (RX O.)

The undersigned recognizes that Complainant has alleged that Mr. Garcia threatened to remove him from service simply for filing a good faith challenge. (Tr. at 60, 128–29; CX 5.) However, the evidence better supports a finding that Respondent removed Complainant from service and suspended him because he persistently refused to work even after his supervisors properly rejected his challenge to rainy conditions. Mr. Garcia’s testimony, his written report of the day’s events, and Complainant’s signed waiver letter each attest to this. In addition, this tribunal views Complainant’s version of the events with some suspicion because it lacked key internal consistency. Complainant alleged that he did not have time to express his specific safety concerns to anyone (Tr. at 58), but later acknowledged that he failed to list these few concerns on

his good faith challenge form (CX 5) despite filling out the form in his truck while under no pressure to complete it quickly (Tr. at 79).¹⁰

Moreover, the circumstances surrounding Mr. Garcia's purported "threat" do not show that Complainant's mere act of filing a good faith challenge causally contributed to his suspension. The waiver letter that Complainant signed states that Complainant continued to refuse to work even after being "advised that the consequence of refusal would be removal from service." (RX O.) Thus, even if Mr. Garcia told Complainant that his filing risked removal of service, it appears to be related to the inappropriate nature of Complainant's challenge and concurrent refusal to work, not the filing of the challenge itself. As such, Complainant's account, if true, would not show that Respondent suspended him merely for filing a good faith challenge. In addition, the record does not show that Mr. Garcia would have had the authority to suspend Complainant, thereby rendering his "threat" inert. Mr. Garcia testified that he was not part of the disciplinary process, though he would write employees up for violations and document what they did. (Tr. at 210.) Upon Complainant's recounting, Mr. Garcia did not inform Complainant that he had been removed from service until Mr. Berger—Mr. Garcia's supervisor—had reviewed Complainant's challenge and joined the group. (Tr. at 60.) Thus, Mr. Garcia's alleged threat, if true, would not prove that Respondent suspended Complainant due to his act of filing a challenge.

For these reasons, the evidence does not show that Complainant's protected activity under § 20109(b)(1)(A) causally contributed in any way to Respondent's decision to suspend Complainant from service on February 16, 2012.¹¹

IV. CONCLUSION

For the reasons explained above, the Complainant has failed to demonstrate that Respondents violated the FRSA by taking adverse employment action against him on the basis of his protected activity.

V. ORDER

Complainant is not entitled to relief under the FRSA.

¹⁰ Mr. Garcia's testimony also demonstrated a lack of consistency in some areas; however, he corrected his testimony when he reviewed his prior written statement of that day's events and explained that he did not recall many of the details of his brief encounter with Complainant. (Tr. at 188–89, 193.)

¹¹ Respondent clearly suspended Complainant for his refusal to work. Thus, if Complainant's refusal to work had constituted protected activity under 49 U.S.C. §§ 20109(a)(2) or 20109(b)(1)(B), then he could have established that such activity was a contributing factor in Respondent's suspension.

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).