



Case Nos. 2015-FRS-22
2015-FRS-26

In the Matter of:

WILLIAM SUBER,

and

BRYAN JAMES,
Complainants,

v.

CSX TRANSPORTATION,
Respondent.

**ORDER DENYING COMPLAINANTS' MOTION FOR PARTIAL SUMMARY
DECISION AND GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, and the applicable regulations contained at Part 1982 of Title 20 of the Code of Federal Regulations. Complainants, William Suber and Bryan James ("Complainants") allege that Respondent, CSX Transportation ("Respondent" and/or "Company"), violated the FRSA when it retaliated against them for reporting that the Trip Optimizer system, in the train they were operating, malfunctioned when the train entered a 25 MPH speed restriction. Both parties moved for summary decision. The Complainants contend that there is no issue of liability in this matter. The Respondent moved for summary decision pursuant to 29 C.F.R. § 18.40, and contends that there is no genuine issue of material fact to decide. Respondent asserts that it did not retaliate against Complainants and instead, disciplined them for speeding consistent with Company policy and the FRSA. For the reasons set forth below, I find that Respondent is entitled to summary decision on all claims.

Background

Drawing all inferences in favor of Complainants, I will summarize the events underlying this case and the undisputed evidence.¹ For the most part, the underlying facts are not in dispute in this matter.²

¹ For the same reasons that Respondent's motion is granted, Complainants' is denied. Therefore, I have referred to Complainants as the nonmoving party throughout.

Complainants William Suber and Bryan James are both employed by Respondent CSXT.³ CSXT is a Class I railroad operating in 23 states.⁴ Suber is an engineer and James is a conductor for Respondent.⁵ Engineers are responsible for the operating functions of the locomotive.⁶ Conductors are responsible for supervising the operation and administration of the locomotive to ensure the safety and timeliness of the train.⁷ CSXT's operating rules and FRA regulations prohibit speeding and allow for termination in the event a crew is found speeding more than 10 MPH over the speed limit.⁸

On January 14, 2014, Complainants were operating train Q12414, equipped with a Trip Optimizer.⁹ A Trip Optimizer is a computer system that controls the throttle, speed, and dynamic brakes on a train.¹⁰ It is a fuel-saving system similar to a cruise control system.¹¹ When using a Trip Optimizer, all speed restrictions are pre-programmed into the system and it controls the train by slowing it down when it enters a speed restriction.¹² Complainants were traveling from Jacksonville, Florida to Manchester, Georgia.¹³ Prior to entering Rupert, Georgia, James saw a warning board located along the track indicating they were approaching a temporary speed restriction of 25 MPH.¹⁴ James reminded Suber of the restriction and he confirmed it.¹⁵ When the train entered the speed restriction, however, the Trip Optimizer malfunctioned and deleted the temporary speed restriction.¹⁶ The Trip Optimizer failed to slow the train.¹⁷ The train entered the speed restriction going 17 MPH over the speed limit at 42.45 MPH.¹⁸ When James realized they were speeding, he instructed Suber "to get the brakes."¹⁹ The train traveled over a mile in the speed restriction before they manually reduced the speed.²⁰

It is undisputed that the Trip Optimizer failed and that the train entered the speed restriction at 17 MPH over the speed limit.²¹ After the incident, Suber stopped the train and called the Road Foreman of Engines, Ronald Brumfield.²² Suber reported that the Trip

² Although not specifically summarized, I have taken into consideration all pleadings of the parties, exhibits, and depositions when ruling on the parties' motions herein.

³ Suber Depo. at 11-12, located at Respondent's Exhibit C; James Depo. at 6-7, located at Respondent's Exhibit D.

⁴ Suber Depo. at 17.

⁵ Suber Depo. at 17-18; James Depo. at 10.

⁶ *Id.*

⁷ *Id.*

⁸ 49 C.F.R. §§ 240.117(c)(1),(e)(2); 49 C.F.R. §§ 242.403(c)(1),(e)(2); Suber Depo. at 21-24, 35-36; James Depo. at 11-13.

⁹ Suber Depo. at 88-89; James Depo. at 40.

¹⁰ Edelbroich Depo. at 9 located at Respondent's Exhibit E; Suber Depo. at 34, 87-88.

¹¹ Suber Depo. at 87-88; Edelbroich Depo. at 9.

¹² *Id.*

¹³ Suber Depo. at 88-89; James Depo. at 40.

¹⁴ James Depo. at 26-29; Suber Depo. at 105-06.

¹⁵ *Id.*

¹⁶ Suber Depo. at 91-93; James Depo. at 30.

¹⁷ *Id.*

¹⁸ Suber Depo. at 91-93; James Depo. at 25-26.

¹⁹ Suber Depo. at 91-93; James Depo. at 30.

²⁰ *Id.*

²¹ *Id.*

²² Suber Depo. at 99-100.

Optimizer had failed and the train entered the speed restriction speeding.²³ Senior Road Foreman of Engines (“SRFE”) Joe Edelbroich then received notice of the incident.²⁴ Edelbroich contacted Chris Dubois, Manager of Train Operations to alert him of the situation.²⁵ Dubois manages the ERAD system that flags when a train is improperly handled.²⁶ The ERAD received an alert when Suber applied the brakes quickly.²⁷ Edelbroich informed Dubois that an investigation into the incident had already started.²⁸ Respondent analyzed the speed data and learned that the train entered the speed restriction at 17 MPH over the speed limit²⁹.

Respondent notified the Complainants on January 24, 2014, that Respondent had opened a formal investigation and that they were out of service pending the outcome of the investigation into their speeding in a speed restriction.³⁰ Respondent held an investigatory hearing on February 20, 2014.³¹ Complainants attended the hearing with representation.³² After the hearing, Respondent issued Complainants a time served, 65-day, suspension.³³ Respondent reasoned that Complainants violated the operating and safety rules by failing to properly monitor and control the speed of the train, and that they exceeded the authorized speed by more than 17 MPH.³⁴ Respondent asserts that speeding over 10 MPH is a terminable offense, but it showed leniency to Complainants.³⁵ Thereafter, Complainants filed FRSA complaints with the Occupational Safety and Health Administration (“OSHA”).

Procedural History

The Complainants filed complaints with OSHA on February 21, 2014, claiming that Respondent retaliated against them because of their protected activity by pulling them out of service, issuing letters charging Complainants with over speeding violations, requiring Complainants to attend a disciplinary investigation, and by imposing discipline upon them. OSHA consolidated the complaints. OSHA issued its findings on December 9, 2014, and dismissed the complaints. Complainants filed their objections to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges on January 27, 2015. The claim was thereafter forwarded to the Office of Administrative Law Judges. I issued a Notice of Hearing and Pre-Hearing Order for a hearing scheduled on November 3, 2015, in Atlanta, Georgia. Respondent filed a Motion to extend the hearing and prehearing deadlines on August 18, 2015. Complainants agreed to extend the prehearing deadlines but not the hearing date. I held a telephone conference with the parties on August 24, 2015. I agreed to extend the discovery deadline to September 25, 2015. Thereafter, Respondent, again, requested to postpone the

²³ Suber Depo. at 100.

²⁴ Edelbroich Depo. at 24-25.

²⁵ Chris Dubois Depo. at 26-27, located at Respondent’s Exhibit F.

²⁶ Dubois Depo. at 9-10; 15-16, 29-30.

²⁷ *Id.*

²⁸ Dubois at 26-27.

²⁹ Edelbroich Depo. at 24-25.

³⁰ Suber Depo. at Ex. 23; James Depo. at Ex. 4.

³¹ Transcript of hearing attached to Jones Declaration located at Respondent’s Exhibit B.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

hearing date. I denied the request on October 2, 2015.³⁶ Complainants filed their Motion for Partial Summary Judgment on September 22, 2015. Respondent filed its Motion for Summary Decision and a response to Complainants' motion on October 5, 2015. Complainants filed their Response on October 13, 2015. Both parties filed supplemental responses and filings thereafter.

Summary Decision Standard

The standard for summary decision under the Rules of Practice and Procedure for administrative hearings is essentially the same as that contained in Federal Rule of Civil Procedure 56, the rule governing summary judgment in federal courts.³⁷ Summary decision is appropriate where “the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”³⁸ A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if the evidence is such that a reasonable fact-finder could return a verdict for either party.³⁹ The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact.⁴⁰ Once the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial.⁴¹ The party opposing the motion “may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue of fact for the hearing.”⁴² When ruling on the motions, I must view the evidence in the light most favorable to the non-moving party.⁴³

Applicable Law

The FRSA prohibits a railroad carrier from retaliating against an employee for, among other things, reporting an unsafe condition.⁴⁴ The relevant language of the FRSA states as follows:

- (A) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or

³⁶ Complainants thereafter filed a motion to take the deposition of Cindy Sanborn, senior executive, after the close of discovery. Complainants noticed the deposition the week discovery closed for a date after the discovery deadline. Complainants did not attempt to take the deposition of Ms. Sanborn earlier during discovery despite the prior discovery extensions. Respondent filed a motion for a protective order. These motions are now moot due to this Order's dismissal of all claims. However, even if the proceedings continued I would agree with the Respondent that this request was untimely and no evidence has been presented to excuse the untimely request. Complainants also filed a supplemental response to their original summary decision response stating that Respondent failed to respond to various requests for admissions and requesting an order deeming them admitted. This request is now also moot. Furthermore, the requests for admissions were untimely as the responses were due after the close of discovery. Respondent responded to the requests but with objections. Discovery and the time for all discovery motions is now closed and ripe for summary decision.

³⁷ *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 6 (Feb. 28, 2006) (CAA).

³⁸ 29 C.F.R. § 18.40(d); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986).

³⁹ *Saporito*, ARB No. 05-004, slip op. at 5 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁴⁰ *Celotex*, 477 U.S. at 323.

⁴¹ *Anderson*, 477 U.S. at 250.

⁴² 29 C.F.R. § 18.40(c).

⁴³ *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, slip op. at 2 (Aug. 23, 2003) (STA).

⁴⁴ 29 CFR §1982.102; 49 U.S.C. § 20109.

employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done⁴⁵ -

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security. . . .

(B) Hazardous Safety or Security Conditions.

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for-

a. reporting, in good faith, a hazardous safety or security condition.⁴⁶

To prevail, the Complainants must establish by a preponderance of the evidence that: (a) they engaged in a statutorily protected activity; (b) they suffered an unfavorable personnel action; and (c) the protected activity was a contributing factor in the Respondent's decision to take the unfavorable personnel action.⁴⁷ If the Complainants sustain their burden of proof, the Respondent may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the unfavorable personnel action regardless of the protected activity.⁴⁸

The Parties' Arguments

Respondent contends it is entitled to summary decision for several reasons. First, Respondent asserts that the complaint filed by James should be dismissed because he did not engage in protected activity because Suber, not James, reported that the Trip Optimizer malfunctioned.⁴⁹ Alternatively, Respondent contends that clear and convincing evidence establishes that it would have taken the same actions against Complainants absent protected activity.⁵⁰ Respondent asserts that it would have learned about the speeding and disciplined the Complainants for going more than 10 MPH over the speed limit even if they had not reported the malfunction of the Trip Optimizer.⁵¹ Respondent presents evidence that it has taken similar

⁴⁵ 49 U.S.C. § 20109(A)(1).

⁴⁶ 49 U.S.C. § 20109(B)(1)(a).

⁴⁷ 49 U.S.C. § 42121(b)(2)(B)(iii); *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, slip op. at 5 (Feb. 29, 2012) (FRSA).

⁴⁸ 49 U.S.C. § 42121(b)(iv); *DeFrancesco*, ARB No. 10-114, slip op. at 5.

⁴⁹ Respondent's Motion for Summary Decision at 10.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 15.

action against other employees committing similar offenses.⁵² Respondent also maintains that Suber has asserted adverse actions that he did not present to OSHA and that they are therefore, time barred as he failed to exhaust his administrative remedies.⁵³

Complainants respond that they both engaged in a protected activity by reporting the failure of the Trip Optimizer.⁵⁴ Thereafter, they assert that Respondent retaliated against them by decertifying them and suspending them. Suber also asserts that Respondents continued to retaliate against him by taking additional adverse actions against him.⁵⁵ Complainants assert that the other individuals terminated and suspended for speeding are not similarly situated because they did not report a malfunction of the Trip Optimizer, while two other individuals in another division did not receive discipline when they reported a malfunction.⁵⁶

Analysis of Claims

A. Complainants Have Proven A *Prima Facie* Case Under The FRSA.

a. Protected Activity

To prevail on a retaliation claim under the FRSA, a complainant must “establish by a preponderance of the evidence that he engaged in a protected activity.”⁵⁷ The FRSA protects employees when they report safety concerns to their employers.⁵⁸ It is uncontested that Complainant Suber engaged in protected activity when he called to report the malfunction of the Trip Optimizer. Respondent contends, however, that Complainant James did not engage in protected activity because Suber, not James, called to report the malfunction.⁵⁹ Respondent argues that the FRSA does not allow for third party or associational protected activity and that James cannot rely on Suber’s complaint to prove protected activity.⁶⁰ In Complainants Motion for Summary Decision and Response to Respondent’s Motion, Complainants assert that they are not alleging third party or associational protected activity.⁶¹ Instead, Complainants contend, first, that they discussed the malfunction and agreed that Suber would call to report the incident on their behalf.⁶² Second, James states that he later reported the issue personally to Road Foreman Brumfield.⁶³ Complainants then participated in a conference call with Senior Road Foreman Joe Edelbroich where they discussed the incident.⁶⁴ There is no evidence in the record to refute this evidence. I must view the evidence in the light most favorable to the non-moving

⁵² *Id.* at 15-16.

⁵³ Respondent’s Motion at p. 21.

⁵⁴ See Complainants’ Motion for Summary Judgment and Response to Respondent’s Motion.

⁵⁵ Complainants’ Response at 11-12.

⁵⁶ Complainants’ Response at 9.

⁵⁷ *Henderson v. Wheeling & Lake Erie Ry.*, ARB Case No. 11-013, ALJ Case No. 2010-FRS-012, Slip Op. at 5-6 (Oct. 26, 2012).

⁵⁸ 49 U.S.C. § 20109(A), (B).

⁵⁹ Respondent’s Motion at 10.

⁶⁰ *Id.*

⁶¹ Complainants’ Response at 4.

⁶² James Depo. at 30-32, 39.

⁶³ Complainant’s Exhibit 7.

⁶⁴ Suber Affidavit; James Affidavit.

party.⁶⁵ Therefore, I find that both Complainant's engaged in protected activity in accordance with the FRSA.

b. Adverse Actions

The second prong of a *prima facie* case of retaliation under the FRSA requires that the complainant suffered an adverse action. The FRSA provides that an employer may not “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole in or in part,” to the employee’s protected activity.⁶⁶ The regulations implementing the FRSA provide that “discrimination” due to protected activity includes, but is not limited to, “intimidating, threatening, restraining, coercing, blacklisting, or disciplining.”⁶⁷ In *Williams v. American Airlines*, the ARB interpreted similar regulatory language under AIR 21⁶⁸ and held that the prohibitory language was “quite broad” and referred to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”⁶⁹ Here, it is undisputed that Complainants’ decertifications and suspensions are adverse actions.⁷⁰ Therefore, I find that Complainants suffered an unfavorable personal action.

i. Suber Failed To Exhaust His Administrative Remedies In Relation To The Other Alleged Adverse Actions.

An employee who seeks relief for a violation of the FRSA must start by “filing a complaint with the Secretary of Labor.”⁷¹ Any claim must be investigated by OSHA before a complainant can access a hearing or subsequent appeals.⁷² To show that a complainant has exhausted administrative remedies with OSHA, OSHA must have been given the opportunity to investigate the claim.⁷³ In this case, Suber asserted during his deposition additional adverse actions that were not included in his OSHA Complaint.⁷⁴ The additional adverse actions include: 1) Respondent delayed Suber’s return to work until August 2014; 2) Respondent’s then Road Foreman of Engines, John Swinehart, threatened Suber in or around August 2014, when he asked Complainant to let him know whether Suber would be joining the Jacksonville Division; 3) Respondent deactivated Complainant’s bid card so he could not bid on available work in late August 2014; 4) Respondent randomly drug tested Suber three times in a 12-day period in November and December 2014; and, 5) Suber was pulled out of service (suspended without pay)

⁶⁵ *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, slip op. at 2 (Aug. 23, 2003) (STA).

⁶⁶ 49 U.S.C. § 20109(a).

⁶⁷ 29 C.F.R. § 1982.102(b)(1).

⁶⁸ Compare 29 C.F.R. § 1979.102(b) (“It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee”) with 29 C.F.R. § 1982.102(b) (“A railroad carrier engaged in interstate or foreign commerce . . . may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining”).

⁶⁹ ARB Case No. 09-018, slip op. at 15 (Dec. 29, 2010) (AIR).

⁷⁰ *Id.* at 15 n. 75.

⁷¹ 49 U.S.C. § 20109(d)(1).

⁷² *Coates v. Southeast Milk, Inc.*, ARB Case No. 05-050, ALJ Case No. 2004-STA-60, Slip Op. at 8, n.3 (July 31, 2007).

⁷³ *Id.*

⁷⁴ OSHA Complaint; Suber Depo. at 123-48.

in December 2014.⁷⁵ OSHA did not get the chance to investigate these additional allegations. Complainants filed their initial complaints on February 21, 2014. Although Suber later amended his complaint with OSHA, he never amended the complaint to include these additional alleged adverse actions. OSHA did not issue its final decision until December 2014. Suber could have amended his complaint to include the additional allegations but he did not do so. As Suber failed to exhaust his administrative remedies these additional adverse actions must be dismissed.⁷⁶

c. Contributing Factor

The third prong of a *prima facie* case of retaliation under the FRSA requires a showing that the protected activity was a contributing factor to the adverse action. The ARB defines “contributing factor” as “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”⁷⁷ A complainant may satisfy the contributing factor element by direct or circumstantial evidence.⁷⁸ “Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent applications of employer’s policies, shifting explanations for its action, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.”⁷⁹ The Respondent has asserted that it decertified and suspended Complainants for speeding, not for reporting the malfunction of the Trip Optimizer. Respondent, however, does not contest that Complainants can meet the contributing factor analysis in its motion.⁸⁰ Accordingly, I find the protected activity was a contributing factor to the suspension and decertification.

B. Clear and Convincing Evidence Establishes Respondent Would Have Taken the Same Actions Absent Protected Activity.

a. Legal Standard.

Under the FRSA, even if a complainant proves a *prima facie* case of retaliation by a preponderance of the evidence, “relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.”⁸¹ “Clear and convincing evidence is evidence

⁷⁵ *Id.* An argument could also be made, but not presented by Respondent, that some, if not all, of these additional alleged incidents are not actually “adverse actions” under the FRSA.

⁷⁶ 49 U.S.C. § 20109(d)(2)(A)(ii); *Wallace v. Tesoro Corp.*, No. 13-51010 (5th Cir. 2015); *Williams v. National Railroad Passenger Corp.*, ARB No. 12-068 (December 19, 2013). Even if Suber had exhausted his administrative remedies regarding these issues, he has failed to meet his burden of proof that his protected activity was a contributing factor in the newly alleged adverse actions. Respondent presented evidence on each of these alleged adverse actions in great length illustrating that the protected activity (i.e. reporting the failure of the Trip Optimizer) was not a contributing factor. (Respondent’s MSD pp. 23-30). As the nonmoving party, Complainants had the burden to present specific facts illustrating a genuine issue of fact on this issue. Complainants cannot rely on mere allegations or denials. Complainants presented no evidence on this issue in their Response. (Complainants’ Response p. 11).

⁷⁷ *DeFrancesco*, ARB No. 10-114, slip op. at 6.

⁷⁸ *Id.* at 6-7.

⁷⁹ *Id.* at 7.

⁸⁰ Respondent’s Motion at 14; Respondent’s Supplemental Filing at 2.

⁸¹ 49 U.S.C. § 20109(d)(2)(A), incorporating 49 U.S.C. § 42121(b)(2)(B)(iv).

indicating that the thing to be proved is highly probable or reasonably certain.”⁸² Since Complainants have proven their *prima facie* case, it is now the Respondent’s burden to prove by clear and convincing evidence that it would have taken the same action against Complainants despite their protected activity. Respondent asserts that it suspended and decertified Complainants because they operated a train at 42 MPH in a 25 MPH zone. Respondent contends that it would have taken this action even if Complainant’s never reported the Trip Optimizer malfunctioned.⁸³

On September 30, 2015, just after Complainants filed their motion and prior to the filing of Respondent’s motion, the Administrative Review Board issued a decision in *DeFrancesco v. Union Railroad*, ARB Case No. 13-057.⁸⁴ In *DeFrancesco*, the ARB decided a similar matter involving an employee who an employer terminated after he reported a workplace injury. Although Complainants did not report a workplace injury, their matter is still analogous to *DeFrancesco*, as they complained of a safety issue (i.e. Trip Optimizer malfunction) and were subsequently disciplined.

In *DeFrancesco*, the ARB held that it must be determined whether there is “evidence that an employer would have learned of an employee’s misconduct through channels other than the employee’s protected activity.”⁸⁵ If such evidence exists, a five part test must be analyzed to determine whether the adverse action would have occurred in absence of the protected activity.⁸⁶ The Board held that the Administrative Law Judge should carefully consider the following factors:

- (1) Whether the railroad monitors for compliance the work rules the complainant is charged with violating?
- (2) Whether the railroad consistently imposes equivalent discipline against employees who violate the work rules the complainant violated, but who are not injured as a result of the violation.
- (3) Whether the work rules the complainant is charged with violating are routinely applied?
- (4) Whether the work rules the complainant is charged with violating are vague and subject to manipulation and use as a pretext for unlawful discrimination? How has the railroad applied these rules in cases that do not involve protected activity?
- (5) Whether the evidence suggests that the railroad was genuinely concerned about rooting out safety problems when conducting its investigation? Or does the evidence

⁸² *Domino’s Pizza*, ARB No. 09-092, slip op. at 6.

⁸³ Respondent’s Motion at 2.

⁸⁴ Due to the timing of this decision each party filed supplemental pleadings regarding their motions for summary decision and responses. As a result, due to the nature of the events, I will take into consideration these supplemental filings.

⁸⁵ *DeFrancesco v. Union Railroad*, ARB Case No. 13-057, at 9 (Sept. 30, 2015).

⁸⁶ *Id.* at 11.

suggest the investigation was a pretext designed to unearth some plausible basis on which to punish the complainants for protected activity.⁸⁷

b. Respondent Has Met Its Burden That It Would Have Learned About Complainants' Speeding Without The Protected Activity.

It is undisputed that Respondent first learned about Complainants' speeding when Suber called to report the malfunction of the Trip Optimizer.⁸⁸ Respondent, however, presents evidence that even if Complainants hadn't reported the incident, it would have learned about the speeding incident. Respondent uses an Event Record Automatic Download ("ERAD") system that automatically generates a report whenever a train is improperly handled.⁸⁹ The system is managed by Chris Dubois, Manager of Train Operations.⁹⁰ When a report is generated Dubois receives it through the Respondent's Engineer Evaluation Portal.⁹¹ He then provides the report to the Manager of Train Operations, who investigates why the train was not handled properly.⁹² The Manager of Train Operations then provides the Senior Road Foreman of Engines ("SRFE") with the information so that he can conduct his own investigation into the incident.⁹³

Dubois testified that when Suber rapidly applied the train's dynamic brakes, the incident was automatically flagged in the ERAD system.⁹⁴ However, directly after the incident and before Dubois received the ERAD report, Suber called RFE Ronald Brumfield and reported the Trip Optimizer's failure.⁹⁵ The incident was then reported to SRFE Joe Edelbroich who contacted Dubois about the incident and obtained the speed data.⁹⁶ Dubois testified that Edelbroich essentially told him, "we're aware of it and when you see it in ERAD, you don't need to produce a data package for us to investigate because we – we already are aware of the event."⁹⁷ Therefore, unlike in other instances of speeding, Dubois had no reason to perform his own investigation into the events, or notify Edelbroich with the results.⁹⁸ Edelbroich removed the necessity of the additional steps Dubois would have normally taken.⁹⁹ Dubois testified during his deposition that it was common for Edelbroich to call him in events like this so they can alleviate unnecessary work.¹⁰⁰

⁸⁷ *Id.* at 11-12.

⁸⁸ Suber Depo. at 99-100.

⁸⁹ Dubois Depo. at 9-10, 15-16, 29-30.

⁹⁰ *Id.*

⁹¹ Dubois Depo. at 11.

⁹² Dubois Depo. at 14-18.

⁹³ Dubois Depo. at 14-19, 27-29; Edelbroich Depo. at 24.

⁹⁴ Dubois Depo. at 27.

⁹⁵ Suber Depo. at 99-100.

⁹⁶ Edelbroich Depo. at 24-25; Dubois Depo. at 26-27, 29-30.

⁹⁷ Dubois Depo. at 26-27.

⁹⁸ Dubois Depo. at 29-30.

⁹⁹ *Id.*

¹⁰⁰ Dubois Depo. at 28.

Therefore, clear and convincing evidence supports that Respondent would have learned about the incident of speeding and investigated the incident even if Complainants did not report the Trip Optimizer's malfunction. Complainants presented no evidence to the contrary.¹⁰¹

c. Respondent Established Through Clear And Convincing Evidence The Other *DeFrancesco* Prongs.

First, as already discussed in more detail above, Respondent uses the ERAD system to monitor speeding and other hazardous conditions. The system monitors the activity of all trains regardless of whether the conductors and engineers have participated in protected activity. In 2014, the ERAD system alerted Respondent to 14 incidents of exceeding the speed limit by 10 MPH in the Jacksonville Division.¹⁰² Of these fourteen incidents, the Respondent removed all conductors and engineers from service pending an investigation and ultimately terminated their employment.¹⁰³ Therefore, Respondent has proven the first factor – that it monitors for compliance the work rules the complainants are charged with violating.

Next, to illustrate that the work rules are routinely applied and that it consistently imposes equivalent discipline against employees who violate the work rules but who have not engaged in protected activity, Respondent identifies 50 employees in its Jacksonville Division who operated a train more than 10 MPH over the speed limit between 2013 and 2014.¹⁰⁴ All of the employees listed were removed from service pending an investigation and were either terminated or issued a “time served” suspension, like Complainants.¹⁰⁵ Complainants argue that this list of employees is irrelevant because none of the employees complained about a Trip Optimizer malfunction. Complainants, however, miss the point. Respondent has the burden to show that it treated similarly situated employees who did not engage in protected activity the same as the Complainants.¹⁰⁶ Respondent has met this burden. There is no evidence in the record to show that an employee, who did not engage in protected activity, was caught speeding 10 MPH over the speed limit and was not disciplined. To the contrary, the evidence establishes that Respondent routinely applies the policies against speeding and imposed equivalent discipline when speeding occurred.¹⁰⁷ Furthermore, the evidence includes a chart of 25 instances where the Trip Optimizer failed where Respondent did not impose discipline.¹⁰⁸ However, unlike in the Complainants' instance, the trains' speeds did not go over the speed restriction by

¹⁰¹ Complainants did not contest or present counter evidence that the ERAD system generated a report when they hit the brakes after entering the restricted speed zone. Complainants have also failed to present evidence that Respondent wouldn't have investigated the incident but for their complaint. Instead, Complainants rely on Dubois' testimony stating that the system generally does not monitor temporary speed restriction zones. (Complainants' Response p. 10). However, Dubois testified that the system did generate a report regarding the incident and it was one where he would have normally investigated the incident, but for Edelbroich's call informing him that it was unnecessary. (Dubois dep. pp. 29-30). The system generated a “dynamic brake rapid application” that would have been investigated. (Dubois dep. p. 30).

¹⁰² Dubois Declaration and attached Exhibits at Respondent's Exhibit A.

¹⁰³ Dubois Declaration at ¶ 4.

¹⁰⁴ Jones Declaration and attached Exhibits at Respondent's Exhibit B.

¹⁰⁵ *Id.*

¹⁰⁶ *DeFrancesco*, at 11.

¹⁰⁷ Respondent's Exhibit B.

¹⁰⁸ Complainant's Exhibit 5.

10 MPH or more in the instances where discipline was not issued.¹⁰⁹ This chart further bolsters the Respondent's argument.

To refute Respondent's arguments, Complainants rely on an incident involving two employees operating a train out of the Atlanta Division.¹¹⁰ In June 2014, employees Martin Hester and Jeff Wittig were operating a train when the Trip Optimizer malfunctioned.¹¹¹ The men entered a temporary speed restriction at 13 MPH over the speed limit.¹¹² Respondent placed the men out of commission pending the outcome of an investigation.¹¹³ At the close of the investigation, Respondent decided not to discipline the men.¹¹⁴ Complainants seem to insinuate that Respondent decided not to take disciplinary action against Hester and Wittig because this matter was pending before OSHA.¹¹⁵ There is no evidence in the record to support this allegation, other than Complainants' mere assertion. There is no evidence in the record that Respondent took Suber's and James' OSHA complaints into consideration when handling the Hester/Wittig investigation. Only the affidavits of Hester and Wittig are in the record.

Furthermore, the action involving Hester and Wittig is irrelevant to this matter. Hester and Wittig are not similarly situated to Suber and James. A similarly situated employee is a comparable employee who has dealt with the same supervisor, was subject to the same standards, and engaged in similar conduct without additional circumstances that would differentiate the two.¹¹⁶ Hester and Wittig are in a completely different Division from the Complainants.¹¹⁷ Hester and Wittig work out of the Atlanta Division, while Complainants work out of the Jacksonville Division.¹¹⁸ The two groups of men have different supervisors and different individuals investigated their incidents. Complainants presented little evidence on the facts surrounding the decision not to discipline Hester and Wittig. Furthermore, Hester and Wittig received superior treatment despite their protected activity, further aiding Respondent's argument that they did not retaliate against Complainants based on their protected activity.¹¹⁹

Respondent, next, asserts that the work rules imposing discipline against employees who operate a train at 10 MPH or more over the speed limit are not vague or subject to manipulation.¹²⁰ Respondent asserts that the rule is based on the speed of the train, not a

¹⁰⁹ *Id.*

¹¹⁰ Complainant's Exhibits 18, 19.

¹¹¹ Complainant's Exhibits 18, 19.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Complainant's Response at 6.

¹¹⁶ See *Anderson v. WBMG-42*, 253 F.3d 561, 565-66 (11th Cir.); See also *Weaver v. Tech Data Corp.*, 66 F.Supp.2d 1258, 1262 (M.D. Fla. 1999); *Ortiz v. Grand Trunk Western R.R. Co.*, 2014 U.S. Dist. LEXIS 132666 (E.D. Mich. 2014); *Cyrus v. Union Pac. R.R. Co.*, 2015 U.S. Dist. LEXIS 128092 (N. D. Illinois).

¹¹⁷ Complainant's Exhibits 18, 19.

¹¹⁸ *Id.*

¹¹⁹ Complainants also identify an incident report where the Trip Optimizer failed on April 24, 2014, and resulted in an over speed more than 10 MPH. (Complainants' Ex. 20). Complainants assert that no discipline resulted from this incident. However, the incident report is the only evidence in the record regarding this incident. Complainants identify no other facts surrounding this incident. To overcome summary judgment, Complainants must bring forth specific facts and cannot rely on mere conjecture. Therefore, this report does not create an issue of fact.

¹²⁰ Respondent's Supplemental Response at 7.

subjective rule or test. It is undisputed that Complainants had a duty to follow all speed restrictions. Company policy and FRA regulations prohibit speeding.¹²¹ The FRA provides a conductor or engineer “shall have his or her certification revoked” for operating a locomotive at 10 MPH or more over the speed limit.¹²² Complainants assert that they should be excused from liability because the Trip Optimizer failed and suggest that their discipline is too harsh based on the circumstances. Complainants’ further base this argument on the decision of the Locomotive Engineer Review Board (“LERB), which remanded the matter back to the Respondent.¹²³ However, the ruling of the LERB does not apply here. The LERB has a completely different standard of review. Whether the Respondent was “required” to discipline Complainants and whether the discipline was too harsh are not the issues in this matter. I must determine only whether the discipline was retaliatory and whether the policy breached by the Complaints was applied in a retaliatory manner under the FRSA. There is no evidence to suggest that the policy to discipline employees for speeding was applied to the Complainants based on their protected activity. The evidence establishes that the policy is applied to those who have not participated in protected activity the same as it was applied to Complainants.

Lastly, Respondent has proven that it conducted its investigation out of genuine concern to root out safety problems and not as a pretext to establish a basis on which to punish Complainants for reporting the failure of the Trip Optimizer. The evidence establishes that Respondent would have investigated the speeding allegations whether Complainants reported the malfunction or not. Respondent established that it investigates all issues of speeding over 10 MPH due to the seriousness of the infraction. Furthermore, the evidence establishes that Respondent also investigated the safety issues related to the Trip Optimizer.¹²⁴

Accordingly, Respondent has established by clear and convincing evidence that it would have taken the same actions against the Complainants even if they had not reported that the Trip Optimizer malfunctioned.

Conclusion

In sum, there are no issues of material fact outstanding. The evidence establishes that Complainants engaged in protected activity, suffered an adverse employment action, and that the protected activity was a contributing factor in their decertifications and suspensions. Additionally, Respondent has established through clear and convincing evidence that it would have suspended and decertified Complainants even if they had not complained about the malfunctioning Trip Optimizer.¹²⁵ Although Complainants believe their speeding violation should be excused because of the failure of the Trip Optimizer, that is not the issue before this court. Furthermore, to suggest that Respondent cannot investigate an incident of speeding and thereafter discipline an employee for speeding because the employee reported the incident to the employer, first, is a mischaracterization of the rule. While the FRSA protects employees who

¹²¹ Suber Depo. at 22; James Depo. at 11-13.

¹²² 49 C.F.R. § 240.117(c)(1),(e)(2); 49 C.F.R. § 242.403(c)(1),(e)(2).

¹²³ Complainant’s Exhibit 4.

¹²⁴ Complainant’s Exhibit 10, 11.

¹²⁵ Both parties also addressed Complainants’ request for punitive damages. As Complainants’ claims are dismissed, this claim is now moot.

engage in protected activity, it does not prohibit employers from disciplining employees for infractions simply because the employees participated in protected activity. Accordingly, Respondent is entitled to summary decision on all claims.

Order

It is **HEREBY ORDERED** that Complainants' Motion for Partial Summary Decision is **DENIED** and Respondent's Motion for Summary Decision is **GRANTED**. The hearing scheduled for November 3, 2015, in Atlanta, Georgia, is hereby **CANCELED** and all outstanding motions are **DENIED** as moot. The Complaints of William Suber and Bryan James are hereby **DISMISSED**.

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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).