

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 July 2016

CASE NO.: 2015-FRS-00023

In the Matter of:

THOMAS TRUSCHKA,
DONALD TRUSCHKA, and
ERIC BERG,
Complainants,

v.

INDIANA HARBOR BELT RAILROAD COMPANY, INC.,
JOE SPANO,
DAMEON SCHNEIDER,
STEVE DUNN,
LARRY CASCHETTA, and
BRIAN GIDNEY, *Respondents.*

Appearances: William J. McMahon, Esq.
Hoey & Farina, PC
For Complainants

Mary Louise Kandyba, Esq.
Wilson Elser Moskowitz Edelman & Dicker LLP¹
Sean M. Sullivan, Esq.
Daley Mohan Groble, PC
For Respondents

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by the Rail Safety Improvement Act of 2008, Pub. L. 110-432 (2008), and its implementing regulations at 29 C.F.R. Part 1982 ("FRSA" or "the Act"). To prevail on a claim of discrimination under the FRSA, Complainants Thomas Truschka, Donald

¹ At the time of the hearing, counsel for Respondent was with the firm of Daley Mohan Groble, PC, but entered a change of firm on November 2, 2015.

Truschka, and Eric Berg each must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action²; and (3) the protected activity was a contributing factor in the unfavorable personnel action.³ If any Complainant satisfies his burden, Respondents Indiana Harbor Belt Railroad Company, Inc. (“IHB”) and the named individual Respondents⁴ may escape liability only if it can show by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

After full consideration of all testimony and other evidence admitted in this matter, as well as the arguments of the parties, I find that Respondent did not violate the FRSA when it removed Complainants from service, conducted investigative proceedings, and/or terminated the employment of Complainants Thomas Truschka and Eric Berg. The complaints of all three Complainants will be denied.

Procedural History

On September 23, 2013, Respondents filed a complaint with the Occupational Safety and Health Administration alleging that they had been subjected to adverse employment action beginning on August 7, 2013 because they had reported hazardous safety or security conditions to Respondent. After investigating, the OSHA Regional Supervisory Investigator issued the Secretary’s findings that there was no reasonable cause to conclude that Respondent had violated FRSA. Complainants filed a timely objection and request for a hearing, and the matter was referred to the Office of Administrative Law Judges on January 16, 2015.

After denying a motion for summary decision, I presided over a formal hearing on August 10-11, 2015 in Chicago, Illinois. Joint Exhibits (“JX”) 1-40, ALJ Exhibit (“ALJX”) 1, and Respondents’ Exhibits (“RX”) 1-5, 11, 12A-12E, 13, 14A-14B, and 16-18 were received.

Under cover letter dated November 30, 2015, the parties submitted their Stipulated Hearing Transcript Corrections, which I have reviewed and accept as JX 41, as well as the deposition transcripts of Michael Carter, II and Dameon Schneider. The transcript of Mr. Carter’s deposition is admitted as JX 42, and the transcript of Mr. Schneider’s deposition is admitted as JX 43.

² The terms “unfavorable personnel action,” “adverse employment action,” and “adverse action” appear in the FRSA, in the incorporated provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the regulations implementing both statutes. They terms are used interchangeably in this Decision and Order.

³ 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013).

⁴ Indiana Harbor Belt Railroad Company, Inc., sometimes referred to in testimony as “the Harbor,” will be referred to as “IHB”; the Respondents, including IHB and the individual Respondents, will be referred to as “Respondents” except when necessary to refer to one of them specifically; Complainant Thomas Truschka will be referred to as “T. Truschka”; Complainant Donald Truschka will be referred to as “D. Truschka”; and Complainant Eric Berg will be referred to as “Mr. Berg.”

After the hearing, the parties submitted their Joint Stipulation of Transcripts for JX 4-6, 8(a), 8(b), 9-12, and 22 and RX 18A-18K, which I have reviewed and accept, but will not mark as an exhibit. Additionally, the parties submitted a DVD with all audio and video evidence that was admitted into the record, specifically JX 2 (video, two parts), and JX 4-6, 8(a), 8(b), 9-12 and 22 and RX 18A-18K (audio). I have listened to the audio recordings, and find that the stipulated transcripts are accurate with minor exceptions as noted below. I have viewed the video recordings and find that are duplicates of the video recordings played at the hearing.

On May 26, 2016, Complainants submitted a copy of the awards of the Public Law Board reinstating Complainants T. Truschka and Mr. Berg. On the same day, I issued an Order informing the parties that I intended to admit the documents as Complainant's Exhibit ("CX") 1, and would consider it solely on the issue of damages. I offered the parties the opportunity to object to that proposal, and both parties submitted notices of non-objection. Accordingly, the Public Law Board awards are admitted as CX 1.

The parties submitted timely post-hearing briefs, and the matter is now ripe for decision.

Stipulations

The parties submitted their joint statement of facts (ALJX 1) stipulating to certain matters; upon review, I accept them and find the following:

1. Respondent IHB is a freight rail carrier operating in Illinois and Indiana and is subject to the provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109 ("FRSA").
2. At the time of the incidents that are the subject of this proceeding, Complainant Thomas Truschka worked for IHB as a switchman/conductor, and as such was covered by the provisions of the FRSA.
3. At the time of the incidents that are the subject of this proceeding, Complainant Eric Berg worked for IHB as a switchman/conductor, and as such was covered by the provisions of the FRSA.
4. At the time of the incidents that are the subject of this proceeding, Complainant Donald Truschka worked for IHB as a locomotive engineer, and as such was covered by the provisions of the FRSA.
5. At the time of the incidents that are the subject of this proceeding, Thomas Truschka and Eric Berg were members of the United Transportation Union ("UTU"). Therefore, the terms and conditions of their employment were governed by various collective bargaining agreements between IHB and the UTU. These collective bargaining agreements were governed by the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*
6. At the time of the incidents that are the subject of this proceeding, Donald Truschka was a member of the Brotherhood of Locomotive Engineers and Trainmen ("BLET"). The terms and conditions of his employment were governed by various collective bargaining agreements between IHB and BLET.
7. At the time of the incidents that are the subject of this proceeding, the Complainants were working for IHB out of its rail yard in Blue Island, Illinois. In accordance with the seniority system in effect, Complainants would "mark up" for a job with a certain

- start time and, as long as no senior employee elected to work that job, the job would be worked by the Complainants. However, as to yard jobs, under the applicable collective bargaining agreements, railroad management had the right to assign train crews to any tasks it wished.
8. Complainants usually marked up for the 526 job, which was a Yard Job.
 9. At the time of the incidents that are the subject of this proceeding, Respondent Joseph Spano was the General Superintendent of the IHB. As such he was generally responsible for monitoring the railroad's operations at all locations, including the Blue Island Yard.
 10. At the time of the incidents that are the subject of this proceeding, Respondent Dameon Schneider was the Assistant Superintendent of Terminal Operations. He was responsible for supervising IHB's railroad operations in Illinois, and more particularly, the operations at IHB's Blue Island Yard.
 11. At the time of the incidents that are the subject of this proceeding, Respondent Steve Dunn was a Trainmaster at IHB's Blue Island Yard, working the day shift from 6:00 a.m. to 6:00 p.m. He was generally responsible for assigning work and supervising train crews working at and out of Blue Island Yard, and for running the yard operation on a daily basis in terms of what trains were made up, what cars were moved, and which crews handled which work.
 12. At the time of the incidents that are the subject of this proceeding, Respondent Brian Gidney was a Trainmaster at IHB's Blue Island Yard, working the night shift from 6:00 p.m. to 6:00 a.m. He was generally responsible for assigning work and supervising train crews working at and out of Blue Island Yard, and for running the yard operation on a nightly basis in terms of what trains were made up, what cars were moved, and which crews handled which work.
 13. At the time of the incidents that are the subject of this proceeding, Respondent Larry Caschetta was a Yardmaster at IHB's Blue Island Yard, and was also working from time to time as a Special Assignment Trainmaster, depending on the needs of the carrier.
 14. At the time of the incidents that are the subject of this proceeding, Michael Carter was the Road Foreman and was responsible for supervising the locomotive engineers employed by IHB, including those employed at IHB's Blue Island Yard.
 15. At the time of the incidents that are the subject of this proceeding, IHB and the UTU were governed by a Caboose Removal Agreement. [JX 1.]
 16. At the time of the incidents that are the subject of this proceeding, IHB's Blue Island Yard was equipped with video cameras placed at various locations and which allowed IHB management employees, including the Trainmaster on duty, to view activities within the yard from an office location. These video cameras also had recording capabilities. A true and correct copy of the video recording showing various activities of the Complainants on August 7, 2013 is marked as Joint Exhibit 2.
 17. At the time of the incidents that are the subject of this proceeding, certain telephone lines at IHB were recorded lines, including the Yardmaster's line and the Trainmaster's line.
 18. On August 4, 2013, the 526 Train Crew working at Blue Island Yard, which came on duty at 3:15 p.m., consisted of Donald Truschka as the engineer, Eric Berg as the Foreman/Conductor, and Thomas Truschka as the Switchman/Helper. [JX 3.]

19. On August 4, 2013, at 3:55:43 p.m., a recording was made of a call from the IHB Special Agent/Police Officer who supervised the administration of a drug test to Eric Berg to the Yardmaster advising the Yardmaster that the drug testing had been completed. [JX 4.]
20. On August 4, 2013, at 3:55:57 p.m., a recording was made of a call from the Yardmaster to the 526 Train Crew, looking for Eric Berg. [JX 5.]
21. On August 4, 2013, at 4:13:10 p.m., a recording was made of a telephone call from Eric Berg to the IHB Yardmaster, wherein the 526 Train Crew was given its job assignment. [JX 6.]
22. On August 4, 2013, IHB Special Agent D. Dowling completed certain paperwork relative to a drug test that was performed on Eric Berg. [JX 7.]
23. On August 5 and August 6, 2013, Thomas Truschka made telephone calls to the IHB Safety Hot Line, which is maintained by IHB for employees to report safety hazards they encounter in the course of their duties. In these calls, Truschka reported rock-throwing incidents that had occurred outside of IHB's Blue Island Yard while he was working the 526 Job. [JX 8A and 8B.]
24. On August 7, 2013, Complainants marked up for the 526 Job, as they normally did. When they arrived at Blue Island Yard for their 3:15 p.m. start time, they were told by the Yardmaster on duty to check with Steve Dunn, the Trainmaster, because they were being assigned to the West Yard to switch railcars used to carry automobiles, a job commonly referred to as "switching autos."
25. On August 7, 2013, Complainants Donald Truschka and Thomas Truschka reported to Trainmaster Steve Dunn's office. While he was in Dunn's office, at 3:19:55 p.m. Thomas Truschka picked up a recorded phone line to make a call. [JX 9.]
26. On August 7, 2013 at 5:20:37 p.m., two hours after the 526 Job went on duty, Thomas Truschka called the Yardmaster on duty to request ear plugs. [JX 10.]
27. On August 7, 2013 at 5:21:04 p.m., Trainmaster Steve Dunn called Thomas Truschka regarding his request for ear plugs. [JX 11.]
28. At the time of the incidents that are the subject of this proceeding, IHB contracted with Renzenberger to provide cab service to transport train crews to and from job sites on the railroad. The vehicles operated by Renzenberger were equipped with GPS devices that recorded the movements that were made by these vehicles. It was the responsibility of train crews working at Blue Island to contact the Renzenberger driver if a ride was necessary.
29. On August 7, 2013 at 4:23:16 p.m., the Complainants placed a call to Renzenberger requesting a pick up at the office in Blue Island. [JX 12.]
30. A record of the GPS movement of the Renzenberger vehicle that picked up Complainants on August 7, 2013 was retrieved from Renzenberger. JX 13 is a true and correct copy of the GPS readings for that vehicle on August 7, 2013 following the telephone call from Complainants.
31. On August 7, 2013 IHB removed Thomas Truschka, Donald Truschka, and Eric Berg from service.
32. On August 13, 2013, in accordance with the Collective Bargaining Agreement between IHB and the UTU, a letter was issued to Thomas Truschka advising him that a hearing would be held to determine whether or not he had violated certain of the carrier's rules on August 7, 2013. [JX 14.]

33. On August 13, 2013, in accordance with the Collective Bargaining Agreement between IHB and the UTU, a letter was issued to Eric Berg advising him that a hearing would be held to determine whether or not he had violated certain of the carrier's rules on August 7, 2013. [JX 15.]
34. On August 13, 2013, in accordance with the Collective Bargaining Agreement between IHB and the BLET, a letter was issued to Donald Truschka advising him that a hearing would be held to determine whether or not he had violated certain of the carrier's rules on August 7, 2013. [JX 16.]
35. At the time of the incidents that are the subject of this proceeding, Dan Kelley was the Superintendent Transportation and Mechanical Operations of IHB. He was designated as the company official to determine whether the Complainants had violated the carrier's rules based on the evidence adduced at an investigation hearing.
36. Following the investigation hearing, IHB Manager Kelley issued letters dated August 30, 2013 to Thomas Truschka and Eric Berg terminating their employment on the basis of the evidence adduced at the hearing and their prior disciplinary records. [JX 17A and 17B.]
37. The termination of Thomas Truschka and Eric Berg constituted an adverse employment action under the FRSA.
38. Following the investigation hearing, IHB Manager Kelley determined based on the evidence adduced at the hearing that Donald Truschka had not violated any rules of the carrier with regard to the performance of his duties on August 7, 2013. Thereafter, on September 7, 2013, Donald Truschka was returned to the service of the carrier.
39. IHB paid Donald Truschka for the period of time he was held out of service. Donald Truschka is not claiming any loss of wages from this period as part of his damages in this proceeding.
40. The UTU appealed Thomas Truschka's dismissal and Eric Berg's dismissal pursuant to the provisions of the Collective Bargaining Agreement that applied to them. That appeal remains pending.
41. IHB has not reinstated Thomas Truschka or Eric Berg to the service of the carrier.
42. Thomas Truschka, Donald Truschka, and Eric Berg filed a timely complaint with OSHA alleging that IHB's conduct violated the FRSA. [JX 18.]
43. Respondents answered that Complaint. [JX 19.]
44. JX 20 is the disciplinary history of Thomas Truschka during the course of his employment with IHB.
45. JX 21 is the disciplinary history of Eric Berg during the course of his employment with IHB.
46. On August 7, 2013 at 5:25:43 p.m., Trainmaster Steve Dunn telephoned Thomas Truschka while Truschka was at the Ashland Avenue Yard. [JX 22.]
47. Mary Kay Conley is the IHB's Director of Labor Relations and Human Resources. As such, she is familiar with IHB's disciplinary policies and procedures. If called to testify, she would testify in accordance with JX 23.
48. Car Department employees are employed by IHB at the West Yard in Blue Island, where Complainants were working on August 7, 2013. As part of their duties, carmen are required to complete an inbound inspection which includes the bleeding of the service portion of the air system which is used in the braking system from railcars that are waiting in the Yard for further switching and transport. Upon completing

- these activities, carmen are required to fill out a form verifying the work that they performed. If called to testify, Carman Stewart would testify that although he has no independent recollection of the work he performed on August 7, 2013 at Blue Island Yard, JX 24 is a true and correct copy of the form he completed regarding his work on that day. Further, he would testify that he would not have completed the form had he not bled the air from the cars as part of his duties.
49. In 2012, Thomas Truschka's W-2 earnings from the railroad were \$93,133.00. In 2013 from January to August 7, 2013, Thomas Truschka's W-2 earnings from the railroad were \$54,693.51. On June 21, 2015, Thomas Truschka obtained employment earning \$699.05 per week, or \$2,798 per month, or \$33,756 per year.
 50. In 2012, Eric Berg was earning from the railroad \$2,084.55 per week, \$8,338.20 per month. Since August 2013, Mr. Berg has held two jobs: In June 2014 for one month of employment he earned \$882.75; (2) in October 13, 2014 he worked for 3 ½ months until January 30, 2015 where he earned \$4,805.94 (October 13 to December 31 – 2012 W-2) and another \$1,922.38 in January of 2015. Mr. Berg's total earnings since August 2013 are \$7,611.07.
 51. On May 29, 2013, Complainants Thomas Truschka and Eric Berg reported a gapped switch at Stewart Avenue. IHB Trainmaster Brian Gidney came out to Stewart Avenue and spiked the switch, thereby removing the switch from service. The train crew in which Truschka and Berg were working that day was instructed to return to work. Later, the crew was informed that they were being removed from service and drug tested because IHB thought the crew had run through the switch.
 52. On May 30, 2013 Brian Gidney informed the crew that IHB management had reviewed the videotapes from the previous day at Stewart Avenue and determined that the crew had not run through the switch.
 53. At the time of the occurrence, (a) a run-through switch required mandatory drug testing of the entire train crew; (b) that once tested, the employees had to be held out of service until the drug test results came back clear; (c) there was a problem with the testing service getting the results back which accounted for the crew being held out of service longer than expected; (d) Complainants Thomas Truschka and Eric Berg suffered no economic damages as a result of being held out of service for this incident; (e) Donald Truschka was not involved in this incident, although a different locomotive engineer was removed from service and drug tested; and (f) Complainants were exonerated from any responsibility for the switch.

Testimony

Unless otherwise indicated, the witnesses testified in person at the hearing on August 10-11, 2015. The substance of each witness' testimony is summarized below.⁵

1. *Scott Lucken* [Transcript of hearing ("Tr.") 8-21.]

Mr. Lucken is retired after 41 years of service with IHB. He was hired as a trainman, also known as a conductor. On an assignment to a yard job, while the locomotive engineer was inspecting the train, he would either accompany the engineer on the engine or would be going over necessary paperwork relating to the job assignment. The length of the engineer's inspection depended on how up to date the card was. If the engine was up to date, it would take less time, but if it was out of date or close to running out of date for a total inspection, it could take over an hour. While the inspection was taking place, the conductor could not work on the rail cars due to safety issues; it would violate the rules to go between the cars or to have to foul any equipment with a locomotive attached or having the track locked out. Fouling the equipment means going between two pieces of equipment.

Mr. Lucken had occasion to work the auto switching job, and other yard jobs in the West Yard. It would take about 15 minutes to go from the main office to the West Yard, if there were no interruptions. After arriving at the West Yard, there was a shanty, and there is a possibility that the trainman would be in the shanty for up to 40 minutes if the engineer was doing an inspection. There is a fax machine in the shanty to receive information. Obtaining clearance from the dispatcher for the tracks needed to switch the cars could take time; if there were trains coming, it could take that long to get clearance. If there were no trains that required clearance, and the engineer took 20-25 minutes for an inspection, the trainman would only be in the shanty for 40 minutes if there were supplies needed at the engine. The supplies would not be personal protective equipment, but supplies to deal with a safety issue such as ice on the engine or to fix a missing air hose. Theoretically the trainman could inspect tracks of cars on other tracks, but it would be counterproductive because the car department had already done the inspections and prepared the cars to be switched.

Safety was a big issue at IHB, from management all the way to the train crews. It was continuously emphasized, and reporting safety complaints was encouraged.

Mr. Lucken is familiar with the caboose removal agreement between IHB and the UTU. The agreement allowed trainmen to request cabooses and, if the request could not be fulfilled, to submit time claims for a certain number of hours. Mr. Lucken did ask for a caboose, was not provided one, and filed a time claim. He was never discriminated against or harassed for filing a time claim because he couldn't get a caboose.

The Blue Island Yard is located in Riverdale, Illinois, on the south side of Chicago, and is divided into different starting locations. The starting location on the west end is called the hump,

⁵ For the reasons more fully discussed below, I find and conclude that Respondents did not violate the employee protection provisions of the FRSA, and Complainants are therefore not entitled to damages. Accordingly, I will not summarize testimony or other evidence relating to damages.

and on the east end is called the East Yard. The third location is the West Yard, where they switched cars as opposed to the main yard, where they humped cars into the yard. The West Yard is shown on RX 13 as the topmost set of tracks on the north side.

2. *Respondent Joseph Spano* [Tr. 22-66.]

Mr. Spano is the general superintendent for IHB, in charge of day-to-day operations. He reports to the general manager, and has six to seven direct reports working for him. He is the number two person at IHB. Mr. Spano began working for IHB in March of 2012, after working for 35 years for the Belt Railway Company of Chicago and six years for the Canadian National. At Belt Railway, he worked in the clerical department, as assistant supervisor of operations, assistant to the general superintendent, assistant trainmaster, trainmaster, assistant superintendent, superintendent, and general superintendent. At the IC⁶ he worked as assistant superintendent assigned to the Markham territory. The Markham Yard is a big yard in the south suburban area near where IHB operates. It was part of Mr. Spano's job at IC to be familiar with the Highlawn Interchange between IHB and IC from both the IHB and the IC side of the interchange.

An interchange is when one railroad delivers cars to another, and there are written agreements between railroads that relate to interchange of cars. The cars are interchanged for further transportation by the receiving railroad. As between IHB and IC, somebody delivers cars to IHB, when then delivers them to IC; IC then takes them and delivers them to other locations in the United States. IC has a much larger geographic area than IHB does, and may take train cars full of automobiles out of state. The interchange agreements specify where the interchange must occur. In this case, the delivery is made at the Highlawn Interchange, which is on an elevated right-of-way that belongs to the IC. IC controls the rail traffic on that interchange, and IHB has no authority to do so.

Exhibit 14-A is a photo of the Blue Island Yard, where the IC delivery would originate. To make the IC delivery, IHB would put a locomotive on the front of a train and pull it eastward to CP-107. After a switch is thrown, the IHB crew would then shove the train back, with the locomotive now on the end of the train, westward a little bit and then south onto the IC at Highlawn. The IC tracks are shown between the yellow pegs on the exhibit. The east-west track belongs to IHB, and the north-south track onto which the train is shoved belongs to IC. The IHB crew would separate the locomotive from the train at the spot designated as the old signal mast, and the train cars would be left on the IC track south of that point. After the delivery was made, the IC would attach a locomotive to the south end of the rail cars and pull them south into Markham Yard, for later delivery somewhere else. Most cars, including those delivered by IHB to IC, have time constraints on them.

Mr. Spano is the person who decided to pull Complainants from service on August 7, 2013. He had received information from Mr. Dunn and Mr. Carter that the crew had performed no service after having been on duty for over two hours. He went to the Blue Island Yard office

⁶ Canadian National and Illinois Central are referred to as "CN" and "IC"; those references are to a single entity, the Illinois Central Canadian National. That entity will be referred to as IC.

and listened to a telephone conversation that Mr. Truschka⁷ had with a crew caller in the presence of the trainmaster. In addition to Mr. Dunn and Mr. Carter, Mr. Caschetta and Brian Gidney were in the office. Mr. Dunn told Mr. Spano that the crew had been instructed to switch autos in the West Yard rather than make a delivery to the IC, and that T. Truschka had an issue with the assignment. Mr. Spano learned this information about 2½ hours after the crew had gone to work. Mr. Carter told Mr. Spano that Mr. Berg was not ready to for service; he was walking around the crew room in tennis shoes.

Mr. Spano had the crew report to the office, and decided that the best course of action was to pull the crew from service and conduct a formal investigation. This was the first time that Mr. Spano had pulled a crew from service while working at IHB. Before receiving the information about the crew having performed no work, and Mr. Berg being unprepared for service, Mr. Spano did not know that the crew had made a series of safety-related complaints to Mr. Dunn and Mr. Caschetta. Shortly afterward – probably the next day – he was informed that there was a complaint about not having a caboose. At the time he pulled the crew from service, Mr. Spano did not know that T. Truschka had made two hotline safety calls regarding an incident on the IC delivery. He learned, probably the next day after removing them from service, that the crew had reported rock-throwing on the IC delivery. He would consider that report to be a safety complaint, and any time such a report was made, the IHB police would be informed. Mr. Spano doesn't know how the trainmasters responded to the caboose request or to the hotline calls.

Mr. Spano spoke with Dan Kelley and Dale Packard about caboose requests, and was informed that in most instances the delivery to the Illinois Central is made without a caboose. One reason is that it is very difficult to get the caboose back from the IC because of the way the move is made. Mr. Spano was told that there were occasions when a caboose was used, and that another option would be for the crew to use a van, which would put the foreman in a position to watch the shove.

Mr. Spano was not involved in the formal charging of the crew with rule violations. He did have occasion to review the charges and took no exception to them. Eventually there was an investigation, which Dan Kelley conducted, and Mr. Kelley made the final determination. At the time, he was a superintendent, reporting to Mr. Spano, and discipline was included among his duties. Mr. Spano reviewed the transcript, and agreed with Mr. Kelley's decision to terminate T. Truschka and Mr. Berg. Mr. Kelley informed Mr. Spano that D. Truschka had no provable culpability in the train delay.

Mr. Spano has not heard the phrase “fucking and failing me” in relation to railroad operations; if a manager used that phrase, he would find it to be normal because the railroad industry is a little bit more crass than other professions. He is unaware of any training on the FRSA's anti-retaliation provisions at IHB.

Mr. Spano has taken exception to the work performance of trainmasters. Sometimes he doesn't agree with a decision that was made; in that case, he would work one-on-one with the trainmaster to try to understand why he made that decision. At IHB, the trainmasters work for the

⁷ Mr. Spano did not specify whether it was T. Truschka or D. Truschka who had the telephone conversation; other evidence confirms, and the parties do not dispute, that it was T. Truschka.

superintendent and the train crews work for the trainmasters. A productive relationship between trainmasters and the train crews would be one with dialogue and communication. Mr. Spano would have no issue with the same process he uses with trainmasters being used between trainmasters and their crews. He doesn't know whether that process was used on August 7, 2013; all he knows is what Mr. Dunn and Mr. Carter told him.

Before pulling the crew out of service, Mr. Spano had very limited communication with them. He had the crew brought to the Blue Island Yard office, and felt that T. Truschka was agitated and argumentative. When Mr. Spano pulled the crew from service, he had not reviewed any video or any radio transmissions, but had listened to the recording of a phone conversation. At that time he decided that the best course of action would be to remove the crew from service and find the facts in an investigation. His opinion that T. Truschka was agitated was based on T. Truschka's demeanor. At that time, he was not aware that T. Truschka had been hit by rocks while riding the side of a train car and reported it two days earlier. He did not know that Mr. Schneider and the trainmasters told the crew that they were being put on a diet when they were assigned to yard service. Being "put on a diet" means, in that context, that overtime would be limited and the crew would earn less money.

Mr. Spano did not know that when the crew reported to work, they were required to meet with Mr. Dunn about the change in assignment from the IC delivery job to the yard assignment. Mr. Dunn had told Mr. Spano that Mr. Schneider was the one who wanted to crew to change assignments because Mr. Schneider was not happy with the crew's performance on previous days. Mr. Spano also did not know that after the crew's meeting with Mr. Dunn, there was another between the crew members and Road Foreman of Engines Mike Carter and Mr. Dunn. Neither the trainmasters nor Mr. Carter told Mr. Spano that after that second meeting, Mr. Martin told the crew that he would do what he could do get them a caboose for use on the IC delivery. Mr. Spano does not recall Mr. Dunn telling him that he told the crew that he was going to try to implement at least partial use of a caboose on the IC delivery.

The IHB requires a crew to fill out a form and report unsafe conditions encountered in the course of employment. Another alternative is to call the hotline.

In the past year, Mr. Spano has not reviewed yard surveillance video in order to evaluate employee performance. He does not use yard video surveillance for employee performance evaluation.

The recorded version of JX-9 is the telephone call that Mr. Spano listened to before he pulled the crew from service. In that call, T. Truschka asked Mr. Dunn if Mr. Dunn was going to work the next day; if so he would "take care of this" then, inviting Mr. Dunn to put on his boots and glasses and come out to the hump and watch the show. Mr. Spano's understanding of that comment was that T. Truschka was going to go out to the hump the next day and delay the job. It was a highly inappropriate threat for a conductor to make to a trainmaster if he was unhappy about his job assignment.

Mr. Spano's decision to pull the crew from service on August 7 was solely his decision, without a vote from the other lower-level supervisors who had information about the crew's

performance. His decision was based only on what he learned had occurred on August 7, 2013 involving that crew, and had nothing to do with any information he learned afterward.

Before the events of August 7, 2013, Mr. Spano had decided to return Mr. Berg to service after a previous termination for two violations of “Rule G,” the rule regarding drugs and alcohol. Mr. Drennan, general chairman of the “train organization,”⁸ came to Mr. Spano with Mr. Berg to beg Mr. Spano to return Mr. Berg to service. Mr. Spano didn’t know Mr. Berg at that time. Mr. Drennan told Mr. Spano that Mr. Berg was a changed person, that he would be a model employee, and that he would never hear from Mr. Berg again. Mr. Spano took them at their word and returned Mr. Berg to service. When he agreed to take Mr. Berg back, Mr. Spano did not have any tolerance in mind for additional violations of major rules, such as Rule G, by Mr. Berg. He considered Mr. Berg’s conduct on August 7, 2013 to be a major violation and, when he pulled Mr. Berg from service, told him that he should have known better. By that, he meant that since he had just shown leniency and returned Mr. Berg to service, not being ready to perform service at 3:15 p.m. was a little bit insulting. JX-2 is a letter to Mr. Drennan from Mary Kay Conley, IHB’s director of labor relations and human resources, confirming the conference among Mr. Spano, Mr. Drennan, and Mr. Berg. It is dated about four months before the events of August 7.

The first knowledge that Mr. Spano had of the crew’s behavior on August 7 came in a phone call from Chief Dispatcher Katterman, who called at 5:30 or 5:40 p.m. on an unrelated matter. During the conversation, Mr. Katterman, Mr. Katterman asked in an off-the-cuff matter if Mr. Spano knew what was going on at Blue Island, and told Mr. Spano that there was some kind of issue going on. Mr. Spano had Mr. Katterman patch him in with Mr. Dunn. Mr. Dunn did not call Mr. Spano to report any inappropriate behavior. At the time Mr. Spano spoke with Mr. Katterman, the crew had been on duty for about 2½ hours. Mr. Dunn told Mr. Spano that the crew had not switched any cars, and Mr. Spano was upset at having a crew on duty for that long without having done anything. It is absolutely not normal for any crew to come on duty at 3:15 p.m. and not to switch a single car by 5:40 or 5:45 p.m. Based on the information that the crew had not switched any cars, Mr. Spano decided to go to Blue Island Yard. He arrived about an hour later, and it was at that point that he heard from Mr. Carter about Mr. Carter’s earlier encounter with Mr. Berg wearing gym shoes after the start of his shift.

Railroad employees are union members, and are covered by collective bargaining agreements. Under the CBAs, Mr. Spano did not have the authority to fire any of the crew members on the spot. The CBAs require that the railroad hold an investigation and, following the investigation, that another railroad officer unrelated to the controversy determine the appropriate discipline. It is not unusual for employees to be taken out of service pending investigation. If the investigation shows that an employee is not at fault for the charged offense, the employee is compensated for all time lost. That is what happened with D. Truschka in this case.

In the course of his 44 years in the railroad industry, Mr. Spano has become aware that sometimes crews are “doggin’ it.” That phrase means that the crew is not performing service as required. Putting a crew “on a diet” might mean getting a crew to stop dogging it and work for eight hours a day.

⁸ This reference is interpreted to be to the UTU.

The caboose claims, requests for a caboose on the IC delivery, and reports of any other safety complaints had no involvement whatsoever in Mr. Spano's decision to pull the crew out of service.

There are cameras throughout the railroad, and the trainmasters have the ability to view the video. There are a number of purposes for the surveillance, including security, safety, looking for derailments, and looking at crew performance. For the most part, they are used for operational reasons such as identifying car numbers. There are also federal rules that require the railroad to observe employees without their knowledge to be sure they are complying with rules, and the cameras assist in doing so. Mr. Spano does not personally conduct safety observations of train crews in the yard.

If the yard video shows that the crew arrived in the yard at 5:02 p.m., it is still Mr. Spano's opinion that they should have switched cars by the time of his phone call with Mr. Dunn at 5:30 or 5:40, because the crew came on duty at 3:15. The inspection should have been done by 3:30. He does not take exception to 30 minutes for an inspection, but he does take exception to the amount of time after they went on duty, specifically the period from 3:15 until the crew was dropped off at the yard.

3. *Respondent Larry Caschetta* [Tr. 67-79.]

Mr. Caschetta is a trainmaster for IHB, and has worked for IHB for 39 years. As a trainmaster, he supervises the duties of yardmasters and crews in the yard. He has served previously as a trainmaster, then went back to switching and yardmastering, and started doing trainmaster work on a part-time basis in March of 2013. It became full time in January of 2014. As trainmaster, he does not necessarily assign work to the train crews; he talks to the yardmasters about what they are going to do and the yardmasters usually assign the work. The goal is to work with the yardmasters and the train crews to make the freight move as efficiently as possible.

CX 4⁹ is a complaint given to Mr. Caschetta by T. Truschka. Mr. Caschetta does not recall the exact date, but the document is dated August 5. Mr. Caschetta forwarded it to Mr. Schneider. He does not recall saying anything when he received the document, but does not deny asking, "What the fuck am I supposed to do with this?"

Mr. Caschetta is familiar with requests for cabooses. He believes a crew would request a caboose because it's easier to stand on a caboose during the shoving movement in the IC delivery than to stand on the side of a car. If there is no caboose, the conductors have to hang onto whatever car is at the point of the cut, as they are required to be there by rule. Mr. Caschetta does not remember specific caboose requests by this crew, but believes they very well could have made one. He believes that they were not granted the use of a caboose. He does not remember why not, but there is a limited number of cabooses. Most are used in injury jobs, but it could have been that they were being worked on or that Mr. Caschetta just didn't think the crew needed one. He doesn't recall whether the crew requested a caboose for safety reasons.

⁹ This exhibit is identical to Exhibit A to JX 18, and was not separately admitted. It was referred to as CX 4 during Mr. Caschetta's testimony.

On the night that CX 4 was delivered to Mr. Caschetta, he believes that there was a report of trespassers on the territory of the IC delivery. As the report came at the end of the tour of duty, he did nothing about it; if he had received the report at the time it happened, he would have called the IHB police to investigate. The crew did report that rocks were thrown at them while they were on the IC delivery, and included that report on CX 4.

Mr. Caschetta was present on August 7, 2013¹⁰ when the crew was pulled from service. He had no role in the assignment of job duties to the crew on that date, and during that day he did not receive any information about how the crew was performing its job. Before Mr. Spano pulled the crew from service, Mr. Caschetta learned that there was an issue with the crew, but did not know what the issue was. After the crew was pulled from service, Mr. Caschetta was not involved in any meetings or discussions about the discipline imposed on T. Truschka or on Mr. Berg, and was not consulted on the decision not to discipline D. Truschka. Mr. Caschetta did not inform Mr. Spano of the report he received from the crew regarding trespassers and rock-throwing, because he had already passed the report on to his immediate supervisor, Mr. Schneider.

After D. Truschka was returned to work, he came to Mr. Caschetta's office and accused him of getting his brother fired. Mr. Caschetta became agitated and asked him to leave his office and go back to work. He did not view D. Truschka's coming to his office and making the accusation as being insubordinate, and did not report it to any supervisor.

IHB employees and train crews have a duty to report unsafe conditions to trainmasters. An employee or crew that fails to do so could be disciplined for their failure if, for example, there were a derailment because an unsafe condition was not reported.

4. *Complainant Thomas Truschka* [Tr. 79-200]

Direct Examination

T. Truschka is married with four children. He hired out with IHB in July of 2004, after having worked four years as a switchman/trainman with CSX Transportation. Between 2004 and 2013, he worked off the extra board initially, meaning that he worked at IHB's discretion. Toward the end of his career, he had enough seniority to mark up on jobs, meaning that he could select where he wanted to work.

At the beginning of 2013, T. Truschka was working the 520 job, which was the auto switching job. When Mr. Berg returned to work, he asked T. Truschka if he wanted to work the 526 job, and he agreed and marked up for the 526 job after that. On his first day on the 526 job, he had an issue with the switch, and reported it. About four hours later, he was accused of running the switch, and was pulled from the job and subjected to drug testing. The next day, trainmaster Brian Gidney called him and told him that a review of the video showed that he had not run the switch, but he had to wait for the results of the drug testing before he could return to work. He lost 11 days of work; his union worked out an agreement that he would be paid for nine of those days, but he actually was paid only for seven days.

¹⁰ Although the transcript reads "August 6," there is no dispute that the events occurred on August 7.

When T. Truschka worked the 526 job with Mr. Berg, D. Truschka was usually the engineer on the 526 job. The crew carpooled to work together. T. Truschka had worked the 526 job earlier in his career, when he was trained to do that job; he had to be trained before he was qualified to work it.

When he first started the 526 job, T. Truschka was instructed to shove the train out with a caboose on the point, which is the rear end of the train, so the conductor would be in the caboose to control the train. The engine would then pull up onto the IC, come back around, and pick up the caboose and return to the yard. Using a caboose would allow the conductor to use a whistle to alert people on public crossings, to use an emergency brake valve if necessary, and to provide shelter from rock throwing. In the summer of 2013, beginning on May 29, T. Truschka requested a caboose every time he worked the IC delivery job. He was told that he would not get a caboose, and that he should submit time claims. He continued to ask for a caboose, because he had been trained on the job using a caboose, and he thought it was safer to use one. He liked the 526 job, and wanted a safer way to do it.

CX 4 is a two-sided document, showing two statements that T. Truschka submitted to trainmaster Hillegonds. The statement reported two incidents: the first, with an on-duty date of August 4, 2013, reported that T. Truschka had been struck by rocks thrown by a trespasser while he was hanging onto the side of a train. The second, with an on-duty date of August 5, 2013, reported an additional rock-throwing incident; T. Truschka was in the locomotive at that time. T. Truschka considered the first incident to be a threat to his personal safety; he was hanging outside of a car, holding on the best that he could, and being hit by rocks. He was concerned that he could be knocked off the car and end up under the train, leaving his wife to raise their four children. When he turned in his written report of that incident, Mr. Caschetta looked at him and asked, "What the fuck am I supposed to do with this?" T. Truschka replied that he didn't care what Mr. Caschetta did with it, and told him that he had also made a complaint on the safety hotline about the incident, so it was "on [Mr. Caschetta]." Mr. Caschetta said that T. Truschka was "really pushing it," and T. Truschka replied that he was "not getting into it" with Mr. Caschetta.

When T. Truschka reported the second incident, he gave the report to trainmaster Hillegonds, who responded more civilly. He signed the report, and went out to observe the 526 job that day to see the place where the rocks were thrown. He offered to get a gumshoe out there if any were available.

T. Truschka made the hotline calls because he wanted to be sure that it was documented. He had spoken to his legislative representative about his trouble getting cabooses; the legislative representative told him to document everything. During the summer of 2013, he requested cabooses from every manager that was on duty. When he requested one from Steve Dunn, Mr. Dunn replied that he was not giving him a caboose, saying with an obscenity that he thought the crew, if given a caboose, would "screw off" and not get the job done. T. Truschka did not understand why Mr. Dunn said that, because he had worked for the railroad 13 years and never had an issue like this.

On another occasion, T. Truschka asked Brian Gidney if Mr. Gidney had been watching the IC delivery crew, and Mr. Gidney replied that he had not. T. Truschka then told him that somebody was on the track watching them, and Mr. Gidney started snickering and accusing T. Truschka of seeing ghosts. T. Truschka walked out of the office, and Mr. Gidney followed him out and sat down with him in the lunch room. Mr. Berg came in and supported T. Truschka, who told Mr. Berg not to waste his time because Mr. Gidney wasn't going to do anything. Mr. Gidney lost his temper, jumped up on the table, and told T. Truschka that he knew "damn well" that if he was getting off at 9:00 the train would already be delivered. Mr. Gidney said that he was the boss, the crew was going to do the job without a caboose, and he didn't want to hear another word about it. T. Truschka said it wasn't about overtime or money, and Mr. Gidney said he would see what he could do. Mr. Gidney texted Mr. Schneider about the crew's concerns and told him that they wanted a caboose for the job. Mr. Schneider responded that they were not getting a caboose, and told Mr. Gidney to send the crew home.

On August 7, 2013, T. Truschka went to work expecting a normal day; that the crew would do some yard work, then make the IC delivery, then go home. When he arrived, however, the yardmaster told him to go see the trainmaster. When T. Truschka asked why, the yardmaster told him that the crew was going to switch autos, and T. Truschka questioned that because it was unusual. T. Truschka asked his brother to come with him to the trainmaster's office, and they went up there right after reporting to work. When they arrived, Mr. Dunn told them that the crew was going to switch autos, and T. Truschka asked what that was about. Mr. Dunn said that he had heard from his supervisor that the crew was "fucking me and failing me" every day. T. Truschka understood that to mean that he was not doing his job, but didn't understand where it was coming from because he delivered a train every day. No manager had ever asked him about his work performance since May 30, 2013. He questioned the statement, and Mr. Dunn replied that he was instructed to put them on a diet. At that point, T. Truschka made the phone call when he said he was going to the hump, because he couldn't be taken off that job. T. Truschka then took the assignment, left the office, and went downstairs.

Sometimes a trainmaster will do observation testing of employees. It is part of the trainmaster's duties to evaluate performance. After they do so, there is immediate feedback called a "set fail," which tells the employee whether they passed or failed the observation. During the summer of 2013, T. Truschka received one "set fail" where he was observed not to be wearing safety glasses. Other than that, he did not get any criticism from management during the summer of 2013.

When Mr. Dunn told him he was putting the crew on a diet, T. Truschka understood that to mean that they were going to be sent home at the end of an eight-hour day, with no overtime.

After T. Truschka left the trainmaster's office on August 7, he went downstairs and walked into the shanty. Mr. Carter was there and asked T. Truschka what was wrong, and T. Truschka informed him of the conversation with Mr. Dunn. Mr. Carter told T. Truschka that they would go to the trainmaster's office and discuss it, and T. Truschka and Mr. Carter went to the trainmaster's office between 3:30 and 3:45. Mr. Berg also went up, and remained in the hallway with Mr. Dunn. Mr. Carter asked T. Truschka what was going on, and T. Truschka recounted the conversation with Mr. Dunn. Mr. Carter started going on a "rant" about boots, and T. Truschka

said he didn't know what was going on while he was in the office with Mr. Dunn. Mr. Dunn and T. Truschka talked about the requests for cabooses on the IC delivery, and Mr. Dunn said he would look into it and see what he could find out. T. Truschka was grateful that somebody was listening to him, told Mr. Carter that everything was okay, went downstairs and got a radio from his locker, called a cab, went to the West Yard and started to work. He estimates that he retrieved his radio between 4:15 and 4:30. The cab eventually came and took the crew to the yard, and T. Truschka does not dispute that they arrived at the yard at 5:02 p.m., as shown on a video.

After the crew arrived at the yard at 5:02 p.m., T. Truschka and Mr. Berg reviewed their work for the day while D. Truschka went to inspect the engine. T. Truschka called the trainmaster with a request for earplugs, and also called the dispatcher for authority to occupy the main when they started switching. He and Mr. Berg then waited for the inspection to be completed. The crew cannot switch cars or perform any substantive duties while D. Truschka is performing an inspection, because the job requires the use of the locomotive.

T. Truschka had worked the 520 job, switching autos, for 1½ to 2 years before changing to the 526 job in May of 2013. On August 7, 2013, he did nothing different from what he had done during that period of time. During that period of time, no manager had taken exception to when T. Truschka called a cab, or to his performance of duties in the shanty while the engineer performed his inspection.

On August 7, the locomotive inspection took about 30 minutes, which was pretty typical, and T. Truschka didn't question it. After the inspection was finished, Mr. Berg went out to align the switches so that D. Truschka could bring up the engine. After D. Truschka brought the engine up, the crew went outside and went to work. As T. Truschka was walking out of the shanty, D. Truschka called him and asked for help in adjusting his seat. After adjusting the seat, the B-12 train with Mike Pikorz was coming in, and Mr. Pikorz told him that he was going to be doubling up, meaning that he would be occupying the same lead track as the 520 crew. T. Truschka told him that with everything going on, he was going to keep working, and would not stay in the clear unless someone told him to. T. Truschka then went to operate the 8 West switch and noticed a potential problem that could lead to derailment. He asked Mr. Berg to come look at it, and reported it to the yardmaster, who did not respond. T. Truschka made the judgment call that the switch was operable and went to the locomotive. The issue with the switch added about a minute to the usual process of throwing a switch. The drawbar was skewed, and it had to be moved manually with a Knucklemate to line it up with the engine. T. Truschka asked Mr. Berg to send the Knucklemate over, and Mr. Berg brought it over personally and helped line up the drawbar. T. Truschka then started to take the handbrakes off and, as he expected air in the brakes, he started walking the length of the train cut bleeding air as he went along. If there was no air, it would take about five minutes to knock off all the handbrakes, and bleeding air added about another five minutes to the process. While he was walking along the train cut, which consisted of 12-17 cars, he received a call from Mr. Berg saying that the trainmaster was there, and had told the crew to stay in the clear while B-12 was doubled up. T. Truschka acknowledged the order and waited on the engine and "watched B-12 do their thing." As B-12 was pulling out, T. Truschka called the dispatcher for authority to use the main behind B-12, and received authority. As B-12 was clearing out, Mr. Gidney was standing on the lead waving at T. Truschka. Mr. Gidney came up and told T. Truschka to tie the train down and go back to the

office. The crew rode back with Mr. Gidney. When they arrived, Mr. Spano was there and pulled them out of service.

When T. Truschka went to the office, he thought Mr. Spano wanted to discuss the rock-throwing. After putting his gear in the locker, Mr. Spano told him to go upstairs and wait. He did so, along with D. Truschka, and Mr. Spano came in with Mr. Schneider, Mr. Caschetta, and Mr. Dunn, along with other people. Mr. Spano identified himself and asked who the foreman was, and T. Truschka responded that he was the foreman. Mr. Spano asked him what was going on, and Mr. Truschka related the events of the day. Mr. Spano said “I’ll make this very simple for you,” and pointed to each member of the crew in turn, saying “You’re out of service” to each of them. T. Truschka asked why, and Mr. Spano told him he would find out in the investigation.

On August 13, 2013, T. Truschka received CX 5, the charge letter, in the mail. He thought the charges were ridiculous. He was charged with insubordination, and had not been insubordinate. He was charged with delaying a train, which he didn’t understand, and with violating conductor responsibilities, but he did everything he was told to do. He did not believe he had violated any of the rules listed in the charge letter. When he left the meetings with Mr. Dunn and Mr. Carter, the atmosphere was not heated or agitated. When he left Mr. Dunn’s office, they had a mutual understanding that he would go to work, get through the day, and start over tomorrow. When he left the meeting with Mr. Carter, he was happy that Mr. Carter was listening to him and acknowledging his concerns.

While in Mr. Dunn’s office, T. Truschka said that he felt that he was going to call OSHA, because the only reason he could think of that Mr. Dunn would say he was “fucking and failing” him was because of the reports he had made to the trainmasters and on the safety hotline. T. Truschka accused Mr. Dunn of punishing him by taking him off the job he was bidding on based on seniority and by putting him on a diet, and Mr. Dunn told him that he was going to switch orders because those were Mr. Dunn’s orders. T. Truschka then picked up the phone and said he was going to the hump to get away from this, and said “you want to watch me? Come over here and watch me.” When he told Mr. Dunn to come and watch the show, he meant to that Mr. Dunn could come and see him doing his job.

At no point on August 7, 2013 did T. Truschka “dog it.” He did not plan on dogging it the next day at the hump. The only reason he mentioned the hump was that it was the one job from which he could not be moved without disrupting the entire operation. He didn’t want to work the hump, but he knew if he did he would be left alone.

After T. Truschka received the charge letter, there was an investigation, and on August 30, 2013 he received a termination letter.¹¹

Cross-Examination

May 29, 2013 was the first day that T. Truschka worked the 526 job in 2013. On that day, he was pulled from service because of a gap switch. The engineer on that job was also pulled

¹¹ The remainder of T. Truschka’s direct examination will not be summarized, as it relates to damages. As I conclude that Respondents are not liable for any damages, evidence relating thereto will be omitted.

from service, and both were drug tested. Although the parties have stipulated that T. Truschka and Mr. Berg did not lose any wages as a result, T. Truschka did suffer loss. He does not know whether the May 29 incident had anything to do with any safety complaints, but it may have; he asked for a caboose and was denied one on that day, and four hours after the incident with the switch, he was removed from service. At the time he made his request, his safety concerns were not as heightened as they were toward the end, but he was still concerned. He made the request for a caboose to Mr. Gidney, who told him to just put in a claim for it. T. Truschka agrees that caboose claims are not unusual on the railroad. RX 3, a list of caboose claims at the IHB, shows that 50-70 employees made caboose claims in the year before August 7, 2013. T. Truschka is not aware of any other employees contending that they were disciplined in violation of the OSHA whistleblower laws.

Between May 29 and August 7, T. Truschka and Mr. Berg alternated the conductor position between them. On the days that they did not work in the conductor position, they worked as conductor's helpers. D. Truschka was sometimes, but not always, the engineer in the crew for the 526 job. On August 7, it was T. Truschka's turn to be the conductor.

The rock-throwing incident occurred on August 4. The shift rolled into the next day, so the report that T. Truschka gave to Mr. Caschetta is dated August 5. The incident occurred as the crew was returning to the IHB yard. They were on IHB property; T. Truschka was riding on the side of an auto rack, which was at that point just west of Indiana Avenue, while the locomotive was still east of Indiana Avenue. Somebody jumped the fence, screamed obscenities at T. Truschka, and started throwing rocks at him. T. Truschka tried to call the yardmaster. The train continued to the yard, and after he put the train away, T. Truschka wrote out his statement and then called the safety hotline. He then brought the statement to Mr. Caschetta. On the next day, the crew was going to Blue Island on a locomotive to pick up cars, and the crew was riding in the locomotive. As they crossed Indiana Avenue, somebody threw something at the locomotive. T. Truschka wrote his statement about that incident when they reached the yard.

T. Truschka spoke with his labor representatives, Greg Faucault and Ryan Northrop, about the incidents of August 4 and 5.

Normally the yardmaster gave the work assignments when T. Truschka was working the 526. In an affidavit signed under penalty of perjury and submitted in opposition to Respondents' motion for summary decision, T. Truschka stated that "Mr. Gidney provided me my job assignments including the IC transfer job on a near daily basis that summer." Those were not his words, but he signed it although the clarity is not there. Trainmasters basically worked 6 p.m. to 6 a.m., and unless he was working the auto switching job, T. Truschka got his assignments from the yardmaster. He would report to work, do what the yardmaster told him to do, and at some point would be told to make the IC delivery. There was other yardwork that he would have to do, so the IC delivery was only part of the job that the 526 did on a daily basis. When he was working the auto switching job, T. Truschka was under the supervision of the trainmaster. Although the trainmaster made the job assignment, the trainmaster would only fax the instructions to the shanty; if things came up during the job, communications would be with the yardmaster.

It was unusual for T. Truschka to be told to see the trainmaster on August 7 to find out his work assignment, because the 526 usually did not switch autos. Essentially, what Mr. Dunn told him was that he had been directed by Mr. Schneider to keep the crew in the yard because there had been concerns over whether the crew had been productive while making the 526 delivery. The words he used were that T. Truschka was “fucking and failing” and that he was being put on a diet. T. Truschka agrees that the language was a pretty direct indictment of his performance. When he was in the West Yard, he told Mr. Pikorz that the heat was on; this was in reference to the meeting he had had with Mr. Dunn. He thought the heat was over, but didn’t want to make any more waves. Perhaps the phone call he made to the crew dispatcher made waves, although T. Truschka thinks it shouldn’t have. JX 9 is the recording of the phone call he made, and in that phone call, he invited the trainmaster and Mr. Schneider, the trainmaster’s boss, to put on their boots and glasses and come out to the hump and watch the show. It was not his intent to convey that he would give them something to watch. It is not correct to say that he wanted to make sure that they were wearing proper safety equipment when they came to watch him work.

Before making the phone call, T. Truschka had told the trainmaster that he might call OSHA, but he did not know about OSHA whistleblower cases at the time. He knew he had some rights with OSHA, but didn’t know anything about whistleblower cases. The only union representative who ever mentioned OSHA to him was Bob Guy, who didn’t mention whistleblowing, but only recommended that he seek legal counsel. He also recommended that T. Truschka document his complaints, in order to let the railroad know what was happening so they could do something about it. He does not recall telling Mr. Dunn that the crew was being discriminated against; he thinks he said they were being harassed.

T. Truschka knew that if he went to the hump and was not productive, the Blue Island Yard would become a huge problem. It was the most critical place for productivity, and he would go there because he knew he would be left alone. If he was unproductive at the hump, he would adversely affect every other job in the Blue Island Yard, because the hump feeds all the other jobs. He would not argue the point that delays at the hump would have a much greater effect on the entirety of Blue Island Yard than other delays would.

After leaving Mr. Dunn’s office, T. Truschka ran into Mr. Carter, and Mr. Berg and he went back upstairs. T. Truschka did not notice whether Mr. Berg was not properly dressed for work. While T. Truschka was speaking with Mr. Carter, Mr. Berg was speaking with Mr. Dunn. Mr. Carter told T. Truschka that Mr. Berg still didn’t have his boots on, and that Mr. Carter could have sent Mr. Berg home for that. T. Truschka replied that that was up to Mr. Berg. Mr. Carter did not say that Mr. Berg was ranting and raving because he was upset about being put on the auto switching job; he told T. Truschka that he was tired of all the whining and complaining and wanted to find out what was going on. He did not like the fact that the helper was downstairs without his boots on. That was when Mr. Carter started asking T. Truschka what his issues were, and then he asked T. Truschka if it would be okay for him to look into it and take care of it. T. Truschka did not hear Mr. Berg say that he was going to put his boots on. T. Truschka estimates that it was 4:15 or 4:30 when he left Mr. Dunn’s office the second time with Mr. Carter. He does not remember what he said at the investigation about the time that he left the office the second time.

When Mr. Spano asked T. Truschka what he had been doing all day, he told Mr. Spano that he had had an extensive job briefing with the trainmaster. He did not think he was defending himself; he thought Mr. Spano wanted to talk about the rock-throwing incident. Mr. Spano asked who the foreman was; T. Truschka identified himself; and Mr. Spano asked what went on that day. He did not know he was being interrogated, or that he was in any kind of trouble. When he told Mr. Pikorz that the heat was on, he intended it to mean that he wanted things to go smoothly, and if he had to get out of Mr. Pikorz' way, somebody would have to tell him to do so. T. Truschka considered the phone call to the crew dispatcher to switch jobs to be part of his job briefing with the trainmaster. Mr. Dunn was confrontational in the discussion with T. Truschka, and T. Truschka was defensive; he didn't like the idea that he was being punished, having his overtime cut after 2½ years of working 12-hour days. Mr. Dunn wouldn't give him a straight answer about why he was doing so, saying only that his boss told him to. So T. Truschka figured that he would go somewhere that Mr. Dunn couldn't touch him without disrupting the operation.

At the investigation, T. Truschka testified that as soon as he left Mr. Dunn's office the second time, he went downstairs and called a cab. JX 12 is the conversation he had with the Renzenberger van. T. Truschka remembers that the driver said she was in Alsip, and it would take a while; that was his testimony at the investigation. T. Truschka doesn't remember whether he told D. Truschka on August 7 that the van was in Alsip and it was going to take a while for the driver to get there. He must have heard something different when he spoke to the driver.¹²

The cab driver came and took the crew to the West Yard, where they arrived at 5:02 p.m., and all three crew members went into the shanty. The crew was in the shanty for about 10 minutes; T. Truschka had a phone call, and the crew had a little job briefing, discussing what they were going to do that day. Once they got to the yard, the crew found where the locomotive was and saw the physical layout of the yard, and had a few little job briefings about that. They could not have had that job briefing at the office while waiting for the cab, because they couldn't see where the locomotive was, couldn't see the track clearances, or whether the tracks were in the clear or not. These briefings took a few minutes; although it is true, as he told Mr. Pikorz later, that T. Truschka knew they were being watched, the crew was not in a big hurry to get out and start working, but did everything they way they normally did.

Sometime after D. Truschka went out to inspect the locomotive, T. Truschka realized that he had only one set of earplugs, which was of concern because he usually had a backpack with a supply in it. He called the yardmaster requesting that he be supplied with earplugs; JX 10 is a recording of that call to the yardmaster. T. Truschka does not dispute that the call was made at "5:20-something." Shortly thereafter, Mr. Dunn called back, and T. Truschka perceived that Mr. Dunn was yelling at him. JX 11 is a recording of Mr. Dunn's call to T. Truschka. T. Truschka perceived the call as confrontational, and felt that his response to Mr. Dunn's question about why he needed earplugs – because he might drop the pair he had in the dirt, and Mr. Dunn wouldn't want him using dirty earplugs – was not confrontational, but was a fair response to the question.

Shortly thereafter, Mr. Dunn called again to say that he was coming out with earplugs; JX 22 is a recording of that phone call. In that call, T. Truschka again asked Mr. Dunn why he was

¹² As set forth below, JX 12, the agreed transcript of T. Truschka's call for a van, does not include any reference to Alsip, and does not show that the driver said it would take a while to get to the yard.

“still out here switching autos.” He did not care about switching autos, because he had done it for 2½ years, but he considered the change in duties to be a punishment.

Respondent’s Exhibit 14-A generally depicts the area of the IC delivery. “7 Pocket” is located roughly by the yellow pin next to “old signal mast.”¹³ That is where the crew would be required to leave the caboose, then shove to the south. T. Truschka was happy that they were moving in the right direction. It still bothered him that he would have to ride the shove up on the Highlawn, but he didn’t communicate that to Mr. Dunn because he was happy that they were working on the caboose issue.

By 5:25,¹⁴ T. Truschka and Mr. Berg were not doing much in the shanty. They were waiting for D. Truschka to tell them that he was ready to mount the engine, so T. Truschka could call the dispatcher to get authority to go out on the main. D. Truschka took 20-30 minutes to do his inspection, and there really wasn’t anything Mr. Berg and T. Truschka could do in the meantime. It wouldn’t have been appropriate to check the tracks, as suggested by Mr. Lucken, and as far as T. Truschka knew, Mr. Berg had already lined the switches because the engine came up without anybody having to get a switch. If it’s true that the video shows that between 5:02 and 5:42 nobody but D. Truschka left the shanty, then that means that it was lined up already and there would be no switches to go out and get. T. Truschka does not know where the Knucklemate was at the time; it was on a lead somewhere. It wouldn’t be appropriate to place the Knucklemate in the area where they were working, because there are 20 tracks they could switch into, and if they put it in one location, it would be out of place the next time. It would not be better to keep the Knucklemate on the locomotive because there might be 15 auto racks between the engine and the location where T. Truschka is going to tie down the track. In this case, T. Truschka decided to initiate three-step protection to allow him to foul the equipment to try to straighten out the drawbar. Rather than asking Mr. Berg to bring him the Knucklemate, he released three-step protection and sent the locomotive to Mr. Berg so that the Knucklemate could be sent back to T. Truschka. Mr. Berg decided to come along, to help T. Truschka. Mr. Berg would have had to walk across four or five sets of rail carrying the Knucklemate, and sending the locomotive made an easier transition.

After the drawbar was straightened, T. Truschka was able to make the coupling; he then went to stretch the cars and started taking the handbrakes off. Halfway down the track, he realized that the air had not been bled, or had not been bled properly, by the car department. Although he knew at that point people were saying he was taking too long to do his job, he did not call Mr. Dunn or the yardmaster to report that the air had not been bled; he thought it would be the opposite of delaying to try to get the job done by bleeding the air. It would have taken longer and delayed the operation to call and make a report. He could have reported the issue, and said that he thought he could bleed the cars faster than waiting for someone from the car department to come out to do so. Another option would have been to report it after the fact, but he did not get the opportunity to do so. He has worked the auto switching job many times, and has encountered cars with errors many times, and did what he did any of those days.

¹³ Although the transcript is not clear on this point, JX 22 shows that Mr. Dunn told T. Truschka that if a caboose was available, the crew would be given one, but it could go no further than “seven pocket.”

¹⁴ The time of the phone call transcribed in JX 22.

T. Truschka estimates it took about five minutes to bleed the cars off; he may have testified at the investigation that it took about 15 minutes, but that was two years ago and he doesn't recall. It does not take long to bleed off 12 cars.

Before that, T. Truschka had called to report a defective switch. There was an issue with a latch that keeps the handle in position and prevents the switch from throwing over. It was not a defect that would keep it from being used. He does not believe he said it was "bad order," because that terminology usually refers to a defective car. He doesn't know of a rule that says he couldn't use the switch; as long as he was able to use it without incident, then he could, as long as he reported it.

At about 6:10-6:15 p.m., Mr. Dunn came out with the supplies that T. Truschka had requested. Mr. Berg had a conversation with Mr. Dunn and they went over and looked at the switch. He was not there when it was fixed. It may have loosened up when he pushed it with his foot, but he didn't feel that he fixed anything, because he was able to use the switch.

Mr. Berg told T. Truschka that they were to stay clear because BP-12 was going to double up. Outbound trains take priority over the switching job. He doesn't recall what time that happened, but it was later in the evening while he was on the track bleeding the cars off. At that point, three hours into the job, he had done no more than to get his locomotive in. After BP-12 went through, Mr. Gidney came and got the crew, and they went in his van back to the Blue Island Yard to meet with Mr. Spano. When they met with Mr. Spano at 6:50 or 7:00, the crew still had not moved a car.

The incident when Mr. Gidney jumped up on the table was the only time that he yelled at T. Truschka. There were other times that T. Truschka thought he did things that were inappropriate, but they did not involve yelling.

When he was in Mr. Dunn's office and made the call to the crew dispatcher that he was going to the hump, he meant that although Mr. Dunn could move him from any job he wanted to, if he moved T. Truschka from the hump it would disrupt his operation so severely that he thought Mr. Dunn would leave him alone. He had made the decision in Mr. Dunn's office that he was going to the hump, but he never called from the crew shanty at the West Yard to mark up to the hump job on the next day. He did not want to go to the hump, but he figured that it would be the safest place to go and be left alone. He didn't like working the hump, because it was an eight-hour job, and he liked to work overtime. The auto switching job was an overtime job, and he earned overtime on that job while he was working it. T. Truschka was not upset at the assignment to the auto switching job, until Mr. Dunn informed him that he "fucking and failing" him, and was putting him on a diet.

T. Truschka made a statement on the record at the investigation, which is found at JX 19, pp. 69-72. He does not recall going over the statement with his union representative, Mr. Pastore, or with his general chairman, Mr. Drennan, before giving it at the investigation. In the statement, T. Truschka told Mr. Dunn, "You know what, this is stupid, just give me my instructions. And he jumped back like I was going to hit him or something." T. Truschka thought it was a weird reaction, and didn't know what it was about. In the statement at the investigation, T. Truschka

did not say anything like “we agreed to put this behind us.” He remembers that there was something along those lines, and if he left it out in the investigation, he forgot about it. The investigation statement also said that when he met with Mr. Carter, they discussed T. Truschka’s concerns “with safety of this IC move because it is a high-urban threat area...[which] also passes over the IHB property so our property is just as well high-urban threat area as the IC...” He does not think that statement was part of his conversation with Mr. Carter, which dealt more specifically with the caboose. He is not denying that he made the statement at the investigation, but does not think he had that conversation with Mr. Carter. At the time he referred to a high threat area, he thought it had to do with crew safety. He subsequently learned that a high-urban threat area is a designation by the Department of Homeland Security, because the Highlawn interchange is in a highly populated area where terrorists might want to stage an attack and get some tank cars and a lot of American citizens. T. Truschka does not agree that it was false to call that area a high-urban threat area; it wasn’t what he thought it was, but he thinks the trespassers he reported had a lot to do with the high-urban threat area. He is not suggesting that the trespassers were terrorists. The trespassing occurred on the IC, while the rock-throwing occurred on the IHB near Indiana Avenue.

In his statement at the investigation, T. Truschka said that after meeting with Mr. Carter, he went downstairs, went to his locker and got his radio, and called for a cab. He stated that Mildred Johnson was the cab driver, and she said she would respond as soon as possible; she was on her way back from Alsip. T. Truschka wonders whether there might have been a response from another cab at another time, because he remembers a woman telling him she was on her way back from Alsip, but it was a man who answered his radio call.

In his statement at the investigation, T. Truschka did not say that he had told Mr. Pikorz that the heat was on or that he was being watched. He did say, “I’ve got to switch Seven West and nobody told me that you’re here, so I don’t know what we’re going to do.” By that, he meant that he wasn’t going to stop the job unless somebody told him to, and he thought he conveyed that information accurately.

T. Truschka testified at the hearing that he asked the helper to get the Knucklemate, but didn’t tell him to come out and help; but at the investigation, he stated that he told the engineer to take the engine out so the helper could give him a hand moving the knuckle over. He does not dispute that he said that, but does not remember whether or not he specifically asked the helper to help, or asked for the Knucklemate specifically, but he did ask for help.

At the investigation, T. Truschka said it took 12-15 minutes to bleed air; he also said that he told Mr. Spano, “I job briefed with the trainmasters, we called the cab, we went out there, and everything we had done.” He did not tell Mr. Spano that they had not moved a car, because he told him what the crew had done, not what it hadn’t done. The first time he told anyone there was air in the track was when he testified at the investigation.

T. Truschka understood that his disciplinary record would become an issue once the investigation was held. His disciplinary record shows that on February 7, 2011, he waived his right to a hearing and accepted responsibility for delay of job, and received a letter of reprimand. T. Truschka agrees that “possibly” his disciplinary record is 3½ pages long. He does not think he

was a bad employee. He does not believe that anybody was questioning what happened in 2010 or 2011, but it was his performance on the 526 that was at issue. He doesn't know whether the issue was the failure of his crew to switch one single car 3½ hours after going on duty. His disciplinary record includes issues regarding his inability to be available to work for the railroad when he was supposed to be available. He has not been "repeatedly" disciplined for violating availability policies, because he has been there 10 years. He has seen people with worse records.

When he marked up on a job, T. Truschka thought he was entitled to that job, and he stayed on it. He was not upset when he marked up to the 526, and the 526 was assigned to switch autos rather than to the IC delivery. He has no evidence that any of the individual Respondents was rewarded with promotions or benefits because they participated in a witch hunt against him, as alleged in his complaint. He thought it was prudent to include allegations that he was in a high-urban threat area in his OSHA complaint, even though he had received clarification of that designation before filing it.

T. Truschka had worked the 526 job before May of 2013, and does not remember whether he was subject to any rock-throwing incidents. It was absolutely an issue. The reasons that he asked for a caboose starting on May 29, 2013 included (1) protection from the outside; (2) cabooses were helpful for shoving across public road crossings, because you are inside a caboose rather than walking into traffic; and (3) cabooses have an air valve to control the brakes on the rear of the train so that the conductor has control of the train if the engineer becomes unresponsive, and when you are hanging on the side of a train, you have nothing. He was trained to do the job with a caboose.

There was no procedure for requesting a caboose. He expected that when the crew built their train, they would put the caboose in the train and it would be there when the delivered it. He would ask the yardmaster initially; the yardmaster would tell him to ask the trainmaster, and the trainmaster would deny the request and tell T. Truschka to put a time claim in for it. Some of his time claims were paid in a settlement.

The drive from the Blue Island office to the West Yard is a little over a mile in distance, and takes 10-15 minutes because the drive is through a yard, not like on city roads.

5. *Complainant Eric Berg* [Tr. 201-269.]

Direct Examination

Mr. Berg lives with his wife of 19 years in Lake Village, Indiana, which is about an hour south of the Blue Island Yard. He had some substance abuse issues in the past, but has been sober since January 27, 2010. He lost his job with the railroad because of his issues, but was reinstated in the spring of 2013.

Mr. Berg's first railroad job was with the EJ&E Railroad beginning in July of 1999. After he worked as a tower operator for three years, his job was abolished, and he went to work for Chicago Rail, Inc., from November of 2002 until June of 2004. He started with IHB in July of 2004, and worked there until 2010, when he was fired the first time due to the substance abuse

issue. After he completed his rules examinations and his retraining, he went to the 526, which is the IC delivery job. When he was trained on the 526, IHB was using a caboose to perform that job; at that time, they were shoving out of the yard and pulling up to the IC. Then they would run around the train and tie up to the caboose, and go back to the yard. It didn't have to be a caboose; sometimes it was a switch engine, or whatever was available.

In the spring of 2013, Mr. Berg would request a caboose when he bid up on the 526 job. He initially started requesting cabooses from the yardmaster, who would say that they would not be getting a caboose. He then started requesting them from the trainmaster, with the same response. The railroad did not initially say why they were not allowing cabooses, but later in July, Mr. Gidney told them that it was coming from Mr. Schneider. Mr. Berg wanted a caboose, or an engine, because he thought it was more logical to shove out of the yard to make the move. It's safer, even more so with an engine, which has the lights, bells, and whistles. He communicated that belief to trainmasters Dunn and Gidney, and probably mentioned it to Mr. Hillegonds. He knows he talked it over with Mr. Caschetta on August 4. The trainmasters' response was just to do it the way they were directing.

In June, July, and into August of 2013, Mr. Berg was working the 526/IC delivery job, and did it the way the trainmasters instructed. No trainmaster, assistant superintendent, or anyone took issue with his job performance.

Mangers use efficiency testing to evaluate the performance of conductors. They do a SED test, which consists of them watching you switch for 20 minutes or so, and then they tell you whether you passed or failed. They are watching to see if you followed the rules. Mr. Berg had two SED tests in the summer of 2013, and passed them.

Mr. Berg agrees with T. Truschka that the two of them switched off the conductor and helper assignments during the summer of 2013. He kept requesting cabooses, or suggesting other options, even though it was clear that management would not provide them, because he was trying to make it a safer move. It didn't seem to him that shoving for 2½ or 3 miles was the safest way to do it. He gave them three or four ideas on how to do it, not all involving a caboose, but they just said to do it this way and that was the end of it.

In late July, Mr. Berg and T. Truschka saw a trespasser, and that made them a little nervous. The next day, which was about July 30, Mr. Berg and T. Truschka went to see Mr. Gidney and Mr. Carter in the old trainmaster's office, and T. Truschka asked Mr. Gidney if he was up there doing a SED test. He said he was not. T. Truschka told Mr. Gidney that they had seen someone and that it put them a little on edge, because it's dark up there and not the best of neighborhoods; having somebody stand there and stare at you in the dark is not comforting. After a little discussion, Mr. Gidney started mocking T. Truschka and Mr. Berg, telling them they were seeing ghosts. Mr. Berg walked away because it had reached the point where they weren't listening to him, and he didn't know where that conversation was going to go. Mr. Gidney was being rude, in his opinion, so Mr. Berg went out to the shanty and sat down. Within minutes, T. Truschka came out and started eating his lunch, and then Mr. Gidney came out. One of them asked Mr. Gidney about the caboose issue, and Mr. Gidney got kind of hot and told them they were not getting a caboose. He got loud, and was getting upset, and he ended up on a table

screaming at T. Truschka. Mr. Berg doesn't remember exactly what was said, but it was very loud and Mr. Gidney used obscenities. After he got off the table, Mr. Gidney said he would call Mr. Schneider; there was no answer, so he texted Mr. Schneider, who texted back "if they don't want to do it without the caboose, then send them home; we'll get somebody else to do it."

On August 4, 2013, at about 11:00 at night, the crew was coming back with some cars from the IC after going there with just an engine. T. Truschka and Mr. Berg got off the engine at CP 107, the train pulled out, and the two of them got on an auto rack at the end. Suddenly Mr. Berg heard T. Truschka on the radio; at first, he couldn't hear what was said, but did hear the rocks hitting the side of the auto rack. Mr. Berg asked T. Truschka if he was all right, but he doesn't think that T. Truschka heard him. They continued to shove, and then Mr. Berg heard D. Truschka call the East Yard, telling them that T. Truschka was being hit with rocks and requesting a gumshoe. They continued toward the yard, and stopped at Halsted Street, where T. Truschka got off. Mr. Berg rode the shove into the yard towards the hump.

When Mr. Berg got to the hump, Mr. Caschetta came and picked him up and was livid about Mr. Berg taking seven hours to do an air test. That was completely wrong, but Mr. Caschetta would not listen to Mr. Berg explain. Mr. Berg was trying to tell him why they had taken so long, but Mr. Caschetta didn't want to hear it. What had happened was that as soon as the crew went on duty, Mr. Berg had a random drug test, so he had to do that, which took 30-45 minutes because he had to drink eight bottles of water. He went downstairs and picked up an envelope for his paperwork, which he put in his locker. The train that the crew was going to bring back to the yard was already there, but it needed a marker and an air test. When Mr. Berg went to get a marker, there was a train getting re-crewed in track 7, and he had to weave his way around it. The crew had to drive all the way to the hump end because a train was being built on 9 lead and they couldn't get to the car foreman's office to get a marker. Mr. Berg called the IC, who told him that the cut of cars the crew was going to pick up was tied onto a cut of cars that was going to the IC yard, and the 526 crew had to go find that cut. The IC crew was going to make the cut and leave the 526 train where it was. They drove along 7, and looked in a couple of places, and found the cut of cars. Mr. Berg dropped off a marker. Everything they had to do that day took forever.

When they got the marker up to the cut, Mr. Berg did the air test on the train. There were some cars that had to be switched because they were hazardous cars, and were right up against the engine. There was nowhere to switch, so he decided to do the air test first instead of waiting until there was a spot to switch cars. It was the first time he had ever seen all the tracks full. The air test took about an hour and 45 minutes, and then there was an IC engine parked in 7 Pocket, so they had to wait for the track to clear. At some point the IC gave the crew permission to switch the cars out. At about 9:15, Mr. Berg called the East Yard to ask whether they should take a lunch or work through lunch. Mr. Caschetta got on the radio and was extremely angry that they were taking so long and, once again, he didn't give Mr. Berg a chance to explain what was going on. They ended up getting switched out and brought the train down, which was when T. Truschka was getting hit by the rocks. Mr. Berg wasn't there when T. Truschka wrote out his statement or made his phone call, but he knew that T. Truschka was going to do those things. T. Truschka took the statement to Mr. Caschetta, who then put the crew to lunch and then gave them some more work to do in the yard. But when they got out to the engine, they sat on it for

about two hours because another train was doing its own air test. There were trains on every lead, so they couldn't get out of the pocket. They got one track coupled, and that was the end of the 12-hour day.

On August 5, the crew took an engine up light power and did an air test, and something was being thrown at them at the Indiana Avenue crossing while they were on the engine. They saw the kids, and reported the incident to the dispatcher on the radio. This time, all three members of the crew signed the written statement, and T. Truschka took it to Mr. Hillegonds.

On August 7, Mr. Berg expected to work the IC delivery job, the same job they had been doing every day. T. Truschka got a phone call, and told Mr. Berg that the crew was going to switch autos. It's a 12-hour job, and Mr. Berg can do the job, but it's not what he prefers to do. It is boring; he likes to have a little variety, and the IC delivery job has a couple of moves in the yard and has variety in the day. Mr. Berg stayed in the shanty talking to another engineer about going to the West Yard when T. Truschka went upstairs. Mr. Berg remembers telling the other engineer that he wasn't happy about the assignment, but he wasn't out of control. Mr. Berg did not have his boots on. He came to work in his tennis shoes, and his boots were on the bench right in front of him; he was still in the shanty and wasn't required to have them on, and he just forgot until Mr. Carter asked him why he didn't have his boots on. Mr. Berg told the other engineer that he had a concern about the 520 crew being assigned the IC delivery, and felt they should be warned about what had been going on the past couple of days. The crew decided they should go talk to Mr. Dunn about it.

When T. Truschka and D. Truschka came downstairs, Mr. Berg went back upstairs with T. Truschka and Mr. Carter. Mr. Berg waited outside the office with Mr. Dunn, while the others went into the office. Mr. Berg asked Mr. Dunn why they were switching autos that day, and Mr. Dunn said that they were "fucking and failing"; Mr. Berg didn't know what he meant. Nobody had ever said a word to him about his performance. Mr. Dunn said he was getting it "from above" because the crew had had a seven-hour air test. Mr. Berg said there wasn't a seven-hour air test, but Mr. Dunn didn't want to listen. He said he had his orders. A minute or two later, Mr. Berg walked into the office, and Mr. Carter said that he still didn't have his boots on. Mr. Berg said he was sorry, and left the office to go downstairs and put his boots on. He noticed that the time was before 3:45, so he had been on duty for a half hour without his boots on, but he never went outside the shanty or the office.

While they were waiting for T. Truschka, Mr. Berg had a conversation with D. Truschka. When T. Truschka came downstairs, he had his switch lists. At some point, T. Truschka called for a taxi, which said it was at Alsip and it would be 20 minutes or so. The taxi arrived around 4:45, and they went to the West Yard and got out of the taxi at approximately 5:02. They went into the shanty where they talked for a few minutes. D. Truschka left the shanty to go inspect the engine, which took about 30 minutes. He pulled the engine down and got his grip. T. Truschka went back out and the crew went to work at about that time. During the period between 5:02 and 5:32, while D. Truschka was inspecting the locomotive, there wasn't anything for Mr. Berg to do as the helper.

Mr. Berg had worked the yard job on prior occasions. From the time of calling the cab, getting to the train, and waiting for the inspection, there was nothing different done on August 7 than before that date. Nobody had ever taken exception to the way Mr. Berg performed the auto switching job, and Dale Packard had complimented him.

After the inspection was completed, there was an issue with the switch where it wouldn't latch. That wasn't too big a deal because they got it to latch; it did need some attention, but it was usable. T. Truschka saw that the drawbar was crossed, so he sent the engine and asked Mr. Berg to send the Knucklemate back. Mr. Berg decided to go back with the engine in case T. Truschka needed any help. There was nothing unusual about that, and T. Truschka did need some help because there was no oil in the drawbar so it wouldn't slide.

After they got tied on, Mr. Berg walked out with the Knucklemate and set it up against the pole on the lead so it would be centrally located. T. Truschka had stretched on the cut of cars, and Mr. Berg heard some squealing and assumed T. Truschka had to release some brakes. Mr. Pikorz was out there walking around, but Mr. Berg doesn't recall having any conversation with him. Mr. Dunn came out with some supplies, and he and Mr. Berg talked about the switch. Mr. Berg told Mr. Dunn that they had gotten the switch to work, but it might need some oiling. He said it was usable, because they got it latched and it wasn't gapped. Mr. Dunn asked why they hadn't moved any cars, and Mr. Berg told him that it was because they just got tied on and T. Truschka had given it a stretch and was taking brakes off. Mr. Dunn was upset about the crew's work performance, but Mr. Berg didn't understand what the problem was. They had had two meetings in Mr. Dunn's office and didn't get to the yard until 5:02, and now it was 6:00 and D. Truschka had inspected the engine, and they were tied onto the cut. Mr. Berg told Mr. Dunn that he didn't want any problems because he had just returned to work. He just wanted to work his 12 hours every day and go home. Mr. Dunn then told Mr. Berg that he was going to let BP-12 come out ahead of the crew and double up his train. The BP-12 train had priority, because it was an over-the-road train, and that train wouldn't wait while the crew was switching autos. BP-12 was allowed to come in and make his double, then leave, after which the crew could start to switch. It probably didn't take BP-12 45 minutes. Based on his experience, Mr. Berg estimates that, if the crew had reached the West Yard at 4:02 instead of 5:02, they could have switched out a track of 20 cars in the hour before BP-12 came in. On August 7, when BP-12 came in, T. Truschka finished bleeding the cars that had air in them and Mr. Berg went to the engine; then they watched BP-12 double up. When BP-12 was finished doubling up, they called the dispatcher and got the repeater to follow behind BP-12, and that's when Mr. Gidney came and picked them up.

When Mr. Gidney arrived, he told the crew to tie the train down and to come over to his truck, which was on the lead. They did so, and Mr. Gidney told them that Mr. Spano was there to see them. Mr. Berg was sure that Mr. Spano wanted to discuss the reports they had made. When they got to the office, Mr. Spano was standing in the door, and told them to go upstairs and sit down. When they got to the conference room, Mr. Caschetta, Mr. Schneider, Mr. Dunn, and Mr. Carter were there. Mr. Spano asked who the foreman was, and T. Truschka told him that he was. Mr. Spano asked T. Truschka to tell him everything they had done that day, and he did so. Mr. Spano said, "I'm going to make this very simple, you're out of service, you're out of service, you're out of service," pointing to each crew member individually. T. Truschka asked why they were out of service, and Mr. Spano told him he knew why. Mr. Spano looked at Mr. Berg and

told him that he knew better, but Mr. Berg didn't know what he had done. At that point, Mr. Berg didn't know what the issue was.

On or around August 13, Mr. Berg received a charge letter. He felt sick to his stomach. He had just been off for three years and had done everything in his power to stay clean. All he wanted to do was to work on the railroad, and he had just been fired for rules violations that he had no idea he had committed. The investigation then took place, and on August 30 he received a termination letter. He cried when he received it. One of the charges in the termination letter was insubordination; Mr. Berg does not feel that he was insubordinate to anyone on August 7, 2013. Another charge was for delay of train; Mr. Berg did nothing as the helper on August 7 to delay a train. A third charge related to conductor duties; Mr. Berg does not believe that the rule applied to him on August 7 as he was working as a helper, and doesn't believe that he violated it in any case.

In rules classes, the IHB briefly covers reporting of hazards or unsafe conditions. When Mr. Berg talked to management the summer of 2013 about different ways to do the IC delivery job, he was trying to make the job not only safer, but more efficient. It just seemed to him that the way they were doing it was not the best way.

During the summer of 2013, Mr. Berg did nothing to try to antagonize IHB management, delay the job, or do the job in anything other than a professional manner. In his mind, he would not have done anything to jeopardize the job that he had just regained.

Cross-Examination

It is 2½ miles from CP-107 to CP Harvey on the IC. Mr. Berg does not disagree that the clearance point was at the old signal mast. It is incorrect that the crew would shove the locomotive to the old signal mast, and then cut off the locomotive off and leave the cars standing. The IC wanted them to shove down to CP Harvey. They would shove down to CP Harvey every day that there was nothing to tie onto; they would shove over the Little Calumet River and over Sibley, as far as the signals at CP Harvey.

RX 1 is a page from the CORA guide, and shows the move from the IHB up onto the Highlawn IC interchange. The CORA guide is a set of rules that train crews are required to follow when they are operating on another railroad, and they can't make those moves without permission from the other railroad. RX 1 shows the Little Calumet River, and then after that is a diamond with the number 19, which is a milepost. After that it says North Junction milepost 19.9, and CP Harvey is somewhere south of the diagram on RX 1. Mr. Berg believes it is at about milepost 20, so it is not far off the page.

When Mr. Berg made his suggestions about various alternatives for the IC delivery, his supervisors were not upset, but they told him that he had to do the job the way they told him to. He recognizes that it is their right; they're the boss. When Mr. Gidney responded to Mr. Dunn's text about the cabooses by saying that if the crew didn't want to do the job without a caboose, they could go home, Mr. Berg was not taken out of service or threatened with anything.

Mr. Berg is not sure whether the allegation about a seven-hour air test had anything to do with his being taken out of service, because that is what Mr. Dunn was referring to on August 7 when he said that the crew was failing him. Mr. Dunn was not on duty when Mr. Berg allegedly took seven hours to perform an air test; he had no involvement in that incident and didn't really know anything about it other than what other people had told him.

Mr. Berg is not sure why Mr. Spano pulled the crew out of service on August 7, and has no proof that he pulled them out because of what happened on August 4. He also has no information that the railroad's decision to terminate him had anything to do with what happened on August 4.

When Mr. Berg went up to the trainmaster's office on August 7, Mr. Dunn did not yell at or threaten him. After Mr. Carter spoke with T. Truschka, Mr. Carter took a look at Mr. Berg's feet and started to say something about Mr. Berg's not having his boots on, and Mr. Berg said he would go put them on. He got downstairs at about 3:45, and T. Truschka joined him at about 3:50. Between 3:50 and 4:25, when the call went out for the cab, the crew got together the things they needed to bring to the West Yard. They got their bags ready, meaning they needed to bring their books with them. They needed their lunches because they assumed they were going to be in the West Yard for 12 hours. Mr. Berg had no idea their hours were being cut off. The bag, or grip, stays in Mr. Berg's locker, and the rulebooks like the CORA guide are in the grip. Mr. Berg can't explain what they were doing for the time period between coming downstairs and calling the cab, but he is also not sure of the time they came downstairs. He remembers that he came down at 3:45, but doesn't remember what time T. Truschka came down. Mr. Carter was in the office, and there could have been more discussion. Mr. Carter was not named as a Respondent in this matter because he tried to work with the crew in getting a caboose for them. Mr. Carter was not the crew's direct supervisor; he was responsible for the locomotive engineers, who are not covered by the caboose removal agreement.

When he testified at the investigation, Mr. Berg took no exception to the way T. Truschka performed his duties on August 7. He would say that T. Truschka is a great conductor. He expressed no concerns at the investigation about the fact that 3½ hours after coming on duty, the crew had not moved a single car. He couldn't understand why Mr. Spano thought it was a problem.

The first time that Mr. Berg violated Rule G, the substance abuse policy, he would have been terminated had IHB not given him the opportunity to go into a six-week program and the return to work on probation. He then violated the agreement by testing dirty after completing the program, and at that point he was terminated. His union representative, Mr. Pastore, didn't answer or return his calls, so Mr. Berg assumed he didn't have a chance of getting the job back, so he didn't pursue it as much as he should have. Mr. Berg "absolutely" recognized it was a gift when Mr. Spano let him come back three years later. He thought he would be treated like any other employee unless it involved Rule G, even though he promised Mr. Spano that Mr. Spano would never see or hear from him again.

Mr. Berg believes that he left the shanty and threw switches and got the lineups during the period between 5:02 p.m., when the crew arrived at the West Yard, and 5:42 p.m., when they left the shanty.

When T. Truschka called for a cab in the Blue Island shanty, Mr. Berg heard on the radio that the driver was in Alsip and it would take her a while to get there. At his deposition on May 5, 2015, Mr. Berg testified that he did not hear the conversation, but that T. Truschka told him about it. Mr. Berg took no exception to T. Truschka's call requesting earplugs. He and T. Truschka were not complaining about the fact that they had to switch autos rather than work the IC delivery.

Mr. Berg had been back at work for less than three months when the events of August 7 occurred. He understood that the IHB's disciplinary policy allows them to consider his prior disciplinary record. His Rule G violations were the only things on his record.

A Knucklemate is a tool to help adjust the knuckle on the end of a car. If the drawbar is skewed, a Knucklemate gives leverage to move the drawbar. It is about three feet tall and weighs no more than 50 pounds.

The "lead" is the track that comes into the yard, from which all the switches come off. A cut is a number of cars on a track.

On August 7, Mr. Berg thought Mr. Spano was there to talk about either the rock-throwing reports or the calls to the safety hotline, or about the caboose. He thought Mr. Spano was there to discuss everything that had happened over the last week or so.

Redirect Examination

The conductor on the railroad is the foreman. The foreman is the boss, who takes instructions from the supervisors, and passes them on through job briefings with the helper and the engineer. In the yard, the engineer runs the engine, and the conductor is the one making all the ties, meaning that he brings the cars in and ties them together. The helper stands out on the lead and operates the switches. The conductor calls for the van, but it could be the helper. On August 7, Mr. Berg and T. Truschka did not talk about who would call the van; he either had his radio on, or T. Truschka told him that he had called for the van. If Mr. Berg was unsure whether the van had been called, he would ask the conductor. While they were waiting for the cab, the crew was in the shanty. The shanty is a room on the lower level of a two-story brick building; it is about 20 x 20 feet with three tables and benches. There is a pop machine and a candy machine and a coffee machine, and almost floor-to-ceiling windows all around. A door out of the shanty leads to a couple of vacant offices, and then to a restroom and the locker room. To go to where the meetings with the trainmaster and Mr. Carter took place, they would have walked out of the shanty, along the front of the building, and then in the door and upstairs. Entire crews hang out in the shanty, and managers walk through it. On August 7, Mr. Berg first met Mr. Carter in the shanty; the first and only conversation they had about his boots took place upstairs.

After the second meeting with the managers on August 7, the crew went down to the shanty, and the van picked them up out front. Mr. Berg is not aware of a rule that sets a time limit for calling a van after coming on duty. In the years that Mr. Berg has worked as a railroader, nobody has taken exception to the length of time it took from the time of coming on duty to the time of telephoning a van. That issue has never come up as a rules test.

6. *Complainant Donald Truschka* [Tr. 275-346.]

D. Truschka lives in Crown Point, Indiana with his wife of 15 years, and has been employed by IHB as a locomotive engineer for almost 11 years. Before working for IHB, he worked for CSX Transportation as a switchman and as an engineer, beginning in 1998.

D. Truschka has worked the IC delivery from 2005 to the present. He was trained to always use an engine and a caboose. In the wintertime they would use another engine or a heated caboose, and would shove out of the yard and pull up to deliver to the IC. A caboose or second engine was used to protect the foreman and the helper from any kind of hazard. It made for a much safer environment for the switchman helper.

In the summer of 2013, a caboose was requested when D. Truschka worked the IC delivery job with his brother, T. Truschka, and Mr. Berg. It was requested by the foreman; T. Truschka and Mr. Berg regularly alternated working in that position. D. Truschka supported the use of a caboose for safety reasons, and it was the foreman that made the decision for the crew. As the engineer, D. Truschka did not have to request a caboose. During the month that D. Truschka worked with T. Truschka and Mr. Berg, they worked the IC delivery job as often as they could. They requested a caboose every chance they got, and it was always denied because they wanted the job done more quickly.

On about June 30, 2013, the crew came into lunch and were talking to Mr. Gidney and Mr. Carter about trespassers on the track the previous day. After a few minutes, Mr. Gidney and Mr. Carter made a few jokes about the trespassers. D. Truschka went to the bathroom, and when he heard some yelling, he came out and Mr. Gidney was on his phone while T. Truschka and Mr. Berg were sitting at the table. They were talking about IHB not being safety conscious. Mr. Gidney tried to call his supervisor, Mr. Schneider, and ended up getting a text from Mr. Schneider saying that if the crew didn't want to make the move without a caboose, they could go home and somebody else could do it. D. Truschka told Mr. Gidney that they really needed a caboose on the job. Mr. Gidney did not respond, but focused on T. Truschka and on his phone.

On August 4, the crew was coming back from the IC with a train, and T. Truschka and Mr. Berg were riding the point across 113. T. Truschka got on the radio and told D. Truschka that he was getting pelted with rocks, and he was trying to reach Dale Packard, Jr. in the East Yard. Mr. Packard responded on the radio, and D. Truschka told him that T. Truschka was being pelted with rocks and they needed a gumshoe. Mr. Packard said he would get somebody out there to check it out. D. Truschka "gave it an extra notch" to get T. Truschka out of the position. The train eventually came into the IHB yard, and D. and T. Truschka went to see Mr. Caschetta. T. Truschka handed his statement to Mr. Caschetta, who said, "What the F am I supposed to do with this?" T. Truschka responded that he wanted Mr. Caschetta to give it to his boss, Mr.

Schneider. D. Truschka told Mr. Caschetta that it was getting dangerous, and they needed a caboose to do the job. Mr. Caschetta said that it was out of his hands, and they left.

On August 7, the crew reported to work expecting to do the 526/IC delivery job. When they came on duty, T. Truschka got a call from the East Yard telling him to go see the trainmaster for paperwork, because they would be switching autos that day. T. and D. Truschka went up to see the trainmaster, and T. Truschka asked Mr. Dunn what was going on. Mr. Dunn said that they were switching autos. T. Truschka asked why they were switching autos, and Mr. Dunn said that they were “fucking and failing us,” and the decision was coming from above him. After a few minutes, T. Truschka picked up the phone and tried to call and make a move to the hump. At some point, Mr. Dunn said he was putting them on a diet, and that they were not delivering to the IC. D. Truschka had heard the phrase “put you on a diet” before; it means that overtime would be cut and they would be going home in eight hours.

Before August 7, nobody took exception to how they were performing their job as a crew. They successfully delivered and pulled the ICs when they were ordered to do so, and never once failed in their job.

After the meeting with Mr. Dunn, they went downstairs, and Mr. Carter intercepted the Truschkas. Mr. Berg was behind him, and Mr. Carter said that they were going to go upstairs and “take care of this.” D. Truschka said that he had heard enough and stayed downstairs. T. Truschka and Mr. Berg went upstairs, and D. Truschka stayed in the shanty for about 15 minutes. He then went upstairs to see what was going on. Mr. Carter was in the office with T. Truschka, and Mr. Berg and Mr. Dunn were standing in the hallway outside. Mr. Berg then said something and left. D. Truschka peeked into the office and saw T. Truschka sitting down. D. Truschka heard something about talking to Mr. Bolster to take care of the caboose issue, and they said they were going to come up with some kind of agreement. T. Truschka said they would go to work; he just wanted to get the issue rectified. The Truschkas left and went downstairs. T. Truschka got his grip and his radio and called the cab. It was before 4:00 that the crew was all together after the discussions with the trainmaster and Mr. Carter. It didn't seem at all like an excessive period of time between coming back downstairs and the time T. Truschka made the phone call; it was pretty much immediate.

It would be unusual for an engineer to call for a cab; it is a routine thing for the foreman to do so. If for some reason a foreman did not call for a cab and was just sitting around, D. Truschka would tell him it was about time they did call.

The cab showed up about 25 minutes after it was called; they got into the cab and went over to the West Yard. D. Truschka put his grip in the shanty, and then walked up to his motor for an inspection. The inspection took about 30 minutes. When he was ready, D. Truschka pulled up on the lead, and they attempted to go to work.

Inspecting the locomotive is a normal, routine thing that D. Truschka has done thousands of times. The only problem on August 7 was an issue with the engine seat. He called T. Truschka to come and help with it; it was just a lever that D. Truschka couldn't get loose, so the two of them were able to loosen it and they adjusted the seat.

While D. Truschka is inspecting the locomotive, the foreman and the helper would typically discuss paperwork and the things that needed to be done for the day, and would wait for the engineer to finish the inspection. D. Truschka would let them know if he needed any supplies, and they would gather them and bring them to him; or, he might bring the engine to them. No manager or trainmaster has ever taken exception to that routine.

After D. Truschka finished his inspection on August 7, he brought the locomotive to T. Truschka and Mr. Berg. He pulled past the switch for the track he was operating, and then T. Truschka and Mr. Berg tried to operate the switch but had an issue. Although D. Truschka was in the engine, he heard his brother ask Mr. Berg for a hand with the switch. He heard it through the window, and believes that they reported the issue to the East Yardmaster on the radio as well. Then they fixed the switch, and they went to work. They tried to tie onto a track in the West Yard, but there was an issue with the drawbar. After trying for a few minutes, T. Truschka couldn't get the drawbar adjusted, so they sent the engine out to the helper to bring back a Knucklemate. Mr. Berg returned on the engine, which stopped short, and a three-step was initiated. T. Truschka and Mr. Berg adjusted the drawbar and tied onto the track, and then told D. Truschka to stretch the train. All the brakes were set, so D. Truschka couldn't budge the train. T. Truschka then started knocking the handbrakes off and bleeding air, and by the time he walked up, they were blocked by BP-12.

A foreman frequently finds a sticky switch. Likewise, it is not unusual or rare to find that a drawbar needs adjustment with a Knucklemate. It happens on auto racks all the time. Every set of cars that is sitting in the yard, by rule, has at least some handbrakes if the track is unattended, because otherwise it could roll away. It has happened that there was still some air in the auto racks; for the most part, it probably was not properly bled, so T. Truschka took care of it. In D. Truschka's opinion, doing so expedited the move.

Just before getting doubled up, all of T. Truschka's and Mr. Berg's work had been done and D. Truschka was ready to move cars as the locomotive engineer. Then, BP-12 doubled up in front of them, and they couldn't move. BP-12 was a belt job, which has priority because they are the trains that are ready to depart. BP-12 was blocking the switching lead, so D. Truschka couldn't occupy the lead. When BP-12 cleared, Mr. Gidney was there making hand signals to tie the train down. They secured the equipment and walked up to Mr. Gidney, who told them that Mr. Spano was there to see them. They all jumped in the trainmaster's truck and drove over to the East Yard shanty.

Mr. Spano was there and told them to go upstairs. They went up, and Mr. Spano was right behind them, and told them to have a seat. Mr. Spano was at the head of the table, and then Mr. Berg, T. Truschka and D. Truschka were on one side. Mr. Carter, Mr. Dunn, Mr. Caschetta, and Mr. Schneider were all standing on the other side of the table. Mr. Spano asked who the foreman was, and T. Truschka responded that he was. Mr. Spano asked who T. Truschka reported to; T. Truschka responded that he worked for the East Yardmaster. Mr. Spano asked whether T. Truschka worked for Mr. Dunn, and T. Truschka said "indirectly." Mr. Spano then said he was going to make it easy for them, and told each of them that he was out of service. T. Truschka asked why, and Mr. Spano said, "You know why." He told Mr. Berg that he should know better. The crew cleaned out their lockers and left.

On August 13, D. Truschka received the charge letter. When he received it, he felt defeated; he had worked for ten years at IHB with a clean record. He is not a problem. He works almost the maximum federal hours, which is 276 per month. He works weekends, and barely has a life outside the railroad. At the time he received the letter, he was trying to start construction on a house, and had a one-year-old child, and his wife was pregnant with their second child. The second child was born on August 22, and D. Truschka thought he wasn't going to have a job.

On August 30, T. Truschka and Mr. Berg received their termination letters. T. Truschka called D. Truschka and told him that he had just got a call, and D. Truschka could expect a call soon. He expected to be terminated, but never received a call. A week later he was called back to work, as if nothing had happened.

Cross-Examination

In the time he has been a railroad engineer, D. Truschka has developed a routine for reporting to work, getting assignments, and going to work. He worked out of Blue Island Yard for about nine years. When he reported to Blue Island, he went to the shanty near the office building; the conductor and the helper would report there as well. There are lockers in the shanty, where D. Truschka keeps his grip and personal protective equipment. He would go to the locker and start getting his materials together as soon as he got to the yard. He looked at the computer to see if there is a time slip to make sure he's on the job, and to find out who he's working with. He would arrive at the yard together with T. Truschka and Mr. Berg because they carpooled. Typically, the conductor would be the one who received the job assignment for the crew. He would receive it from the East Yardmaster, and then the foreman would give a job briefing to the crew. A job briefing entails discussing the day's assignment; if the assignment was to switch cars, the job briefing would include the cars and tracks they were going to switch. It would include the equipment they were going to use. On a yard switching job, the foreman would receive a list of the cars and tracks to be switched by fax. He would also receive a sheet laying out what tracks are occupied, which are empty, and how many cars might be on specific tracks.

The initial job briefing would include a discussion about personal protective equipment, asking each other whether they had all the gear they needed, such as gloves and vests. There is some safety equipment available at the office building. Safety glasses are kept in the trainmaster's office, which is upstairs. Before leaving the shanty, the crew has the ability to get whatever personal protective equipment they need, including hearing protection.

The foreman and the yardmaster discuss the tests to be done, and the yardmaster tells the conductor what the crew will be doing; that is about all that falls under the classification of "job briefing" between those individuals. D. Truschka is sure that the foreman would question the yardmaster about why they were given a different assignment, and that would be part of a job briefing. He wouldn't expect that kind of conversation to go on for 20 minutes, because the answer doesn't matter; they have been given an assignment, and they should go to work.

When marking up on a job, D. Truschka uses a computer kiosk to find out which jobs he might be able to hold, meaning jobs for which he had enough seniority that nobody could bump him off it. The computer gives the job number, such as 526, and the start time. The 526 is a Blue

Island Yard job. There is nothing that identifies the assignment that the 526 crew is going to have on a particular day, so he is just signing up for a yard job that starts at a certain time. The particular assignment is made by the yardmaster or the trainmaster when the crew arrives.

On days when the 526 job includes the IC delivery, there is other yard work that can be assigned to the crew, which could occur before or after the IC delivery.

The caboose removal agreement is an agreement with the UTU for switchmen. They can make time claims if they ask for a caboose and don't get one.

On August 7, the day started with the yardmaster telling T. Truschka to go see the trainmaster, because the crew would be switching autos that day. D. Truschka went with T. Truschka to go see the trainmaster. It is not unusual for a crew that is only switching cars to be told to see the trainmaster, because West Yard jobs are supervised by the trainmaster. It was unusual for the 526. The 526 made an IC delivery 99% of the time. There is nothing about the 526 job that dictates that the crew make an IC delivery, but as long as D. Truschka worked that job, it did the IC delivery. It was abnormal to get a different assignment other than to do a little yard work before delivering or pulling ICs. At the time D. Truschka went with T. Truschka to see the trainmaster, he had been to his locker and gotten his grip, and was ready to go.

D. Truschka has worked auto switching for many years. It is generally more difficult, with more stress on the body; it is more vigorous as far as the motion goes. There is a lot more stress on the foreman and the helper, and even on the engineer because of the mental effort needed to judge distances. Questioning why the assignment had changed had an effect, because they thought they were going to have their normal routine. As soon as the yardmaster called, they knew they were not. The discussion between T. Truschka and Mr. Dunn had to do with asking what was going on, and why they were being put on a diet.

When T. Truschka picked up the phone and tried to call the caller to get switched to the hump, that request was going to be for the next day. He could not change his assignment at the beginning of a shift. Calling to schedule the next day's job is not part of a job briefing between a foreman and a trainmaster. Rather than call from the trainmaster's office, T. Truschka should have done so after work. D. Truschka didn't think it was a bad idea for T. Truschka to make that call and said to come see the show with glasses and boots on, because he was defending himself. D. Truschka heard Mr. Dunn tell T. Truschka that the call was on a recorded line, and heard T. Truschka say that it wasn't recording because it had not yet been answered. Mr. Dunn said that it's recorded as soon as the phone is picked up, and then T. Truschka hung up. D. Truschka had heard around that it was a recorded line, and the thought went through his head that T. Truschka should not be saying those things on a recorded line.

After they left, the Truschkas went downstairs with the paperwork at about 3:45 p.m., a half hour after the came on duty. Mr. Berg and Mr. Carter were there, and went back upstairs; T. Truschka joined them. D. Truschka did not, because he had had enough and decided to wait and go to work when they were ready. At about 4:00 p.m., D. Truschka went back upstairs to see what was taking so long, because there was work to do and to find out what the discussion was about. A little after 4:00, the entire crew came downstairs, and T. Truschka got his grip and

immediately called a cab. They then waited for the cab, which came after they waited for about 20 minutes. While they were waiting, they had their initial job briefing, discussing what they were going to do at the West Yard. D. Truschka just asked generally what his engine number was, and where it was located. They might have discussed what tracks were to be worked, but there would be a more detailed conversation later because there might be different circumstances. They talked about personal protective equipment, such as glasses, boots, and hearing protection.

The conductor and the helper do the work of finding the right tracks and the right cars. They would tell D. Truschka where and when to go.

In the West Yard, the shanty is located between the lead and the West Yard tracks. The cab brought the crew to the shanty, and his engine was an easy walk from the shanty. D. Truschka believes the engine inspection took closer to 30 than 20 minutes, but if the video shows it was 20 minutes, he would not dispute that. When he pulled the engine up to the shanty, the inspection was done except for the seat adjustment; after he pulled up, T. Truschka helped him adjust the seat and he was ready to roll. When he pulled up, he expected the conductor and the helper to come out and get on the locomotive, because he was ready; he does not believe he waited a while for them to come out. D. Truschka got off the locomotive, but thinks they were already out, because he couldn't abandon the locomotive without putting a handbrake on it.

When D. Truschka went into the shanty after arriving at the West Yard, he put his lunch in the refrigerator in the shanty, but there was no further job briefing at that time. D. Truschka doesn't recall any phone calls being made when he was in the shanty before he left to do his inspection.

Three-step protection is a procedure that must be completed before a conductor or switchman can go between cars. It involves putting the locomotive in a condition where it can't unexpectedly operate or move. D. Truschka would knock the generator field, which cuts power to the traction motors; he would then apply the independent brake which controls the engine, and then the automatic brake which would put air through the train to power the brakes on the entire train. After all three are in place, D. Truschka would notify the foreman or the helper that three-step had been applied for his engine number. Three-step is put into place when ordered by the conductor or the helper. It remains in place until the conductor and helper are out from between the equipment. At the time that D. Truschka took the engine back to where T. Truschka needed to address the drawbar issue, D. Truschka was directed to implement the three-step procedure.

When D. Truschka took the engine up to pick up Mr. Berg and bring him back with the Knucklemate, D. Truschka remembers that the Knucklemate was on a telephone pole about 20 feet east of the shanty. If the videotape shows that it was actually about 2/3 of the way from the shanty to where the train was, D. Truschka would not disagree with that. After Mr. Berg got on board, D. Truschka backed the locomotive to where the cars were, and was directed to put on three-step protection so the conductor and the helper could use the Knucklemate. The Knucklemate is a one-person tool. D. Truschka could not see how T. Truschka and Mr. Berg used it on August 7.

On August 4, when the rock-throwing incident occurred, D. Truschka was on the locomotive at the point of the shove, which was located near Indiana Avenue. They had come off the Highlawn and were returning with cars from the IC. D. Truschka heard T. Truschka using the radio to try to contact the East Yard, but heard no response. D. Truschka then used the radio in the locomotive, which has stronger transmissions, and contacted Dale Packard, Jr. in the East Yard. He reported that his brother was getting pelted with rocks, and Mr. Packard told him that he was going to send gumshoes out to the location. When they returned to the yard, T. Truschka called the safety line, and D. Truschka heard what he said. T. Truschka described where they were and that he was getting hit with rocks. D. Truschka believes that T. Truschka wrote out his statement and read it into the safety hotline. The Truschkas went to see Mr. Caschetta, who was the trainmaster that day, and gave him the written statement. When Mr. Caschetta asked what he was supposed to do with it, T. Truschka told him to give it to Mr. Schneider, who was Mr. Caschetta's boss. D. Truschka does not know whether Mr. Caschetta ever gave the statement to Mr. Schneider. The safety hotline is a direct line into the safety department to make reports and to take action.

D. Truschka was outside in the hallway when the discussion with Mr. Gidney about a trespasser took place. He did not hear the entire conversation. He did hear discussion about a request for a caboose, but the discussion was more about the trespasser the day before. D. Truschka did not work on that day; the rock-throwing occurred on August 4, and D. Truschka was off on August 5 and 6. D. Truschka heard Mr. Gidney make a comment about the crew seeing ghosts. He did not see Mr. Gidney on a table; his foreman and his helper told him that Mr. Gidney was on the table. D. Truschka heard Mr. Gidney say that he would check with Mr. Schneider about whether the crew could have a caboose; that occurred after the discussion about the trespasser. The discussion about the caboose was an agitated conversation, and it was clear to D. Truschka that Mr. Gidney was saying they could not have a caboose. The conversation about the caboose lasted for about 15 minutes, and then Mr. Gidney said he would contact Mr. Schneider about the issue. Mr. Schneider's response was that if the crew didn't want to do the job without a caboose, they would be sent home and somebody else would do it. D. Truschka told Mr. Gidney that they needed a caboose. However, he understood at that time that the IHB was not willing to assign a caboose for the IC delivery. After Mr. Schneider said they were not going to get a caboose, the crew pretty much went to work after that.

During the period from the end of July through August 7, D. Truschka never had any problems with Mr. Gidney, Mr. Dunn, Mr. Schneider, or Mr. Caschetta.

At the investigation hearing, both Mr. Dunn and Mr. Carter testified that they took no issue with D. Truschka's actions on August 7. That was the extent of the railroad's comment on his conduct. Both Mr. Dunn and Mr. Carter testified that they did take exception to the conduct of both T. Truschka and Mr. Berg, and they were both terminated. When T. Truschka called D. Truschka and told him that he had received his termination letter, he told D. Truschka that he could expect a call. D. Truschka took that to mean he was going to get a termination call.

Mr. Dunn told D. Truschka that the decision to put the crew on a diet came from above his head. The chain of command was that Mr. Schneider was a step above Mr. Dunn, then Dan

Kelley, then Mr. Packard, Sr., then Mr. Spano. Mr. Dunn did not say which of those people told him to put the crew on a diet.

The “point” is the leading end of a movement. It could be either end of the train. The engine is the leading point when the train is headed in a certain direction if the train is behind it. If a conductor or a foreman were to get on the rear, that would be the leading point if the train were being shoved in that direction.

7. Respondent Stephen Dunn [Tr. 346-443.]

Direct Examination

Mr. Dunn works for IHB, and has been assistant terminal superintendent of the Blue Island Yard since January of 2014. Before taking that job, he was the trainmaster at Blue Island. He has been in management for five years, all at the IHB. He first hired out with the railroad at age 19. Before going into management, he was a switchman at Blue Island.

Mr. Dunn was a carrier witness for the investigation into the August 7 incident involving delay of job and conduct unbecoming an employee. He testified that he took no exception to what D. Truschka did on that day. He did take exception to Mr. Berg’s performance; he had heard from Mr. Carter by text message that Mr. Berg was upset in the shanty, and saying that they were not going to perform any railroad work, or at least were going to slow down the job. He also heard from Mr. Carter that no work was actually performed the rest of the day. Mr. Dunn took exception to T. Truschka’s performance on that day; no work was done between the time he went on duty and the time he was pulled from service. He also picked up the phone at Mr. Dunn’s desk and called the crew dispatcher, saying that he was going to put on a show and Mr. Dunn should come up and lace his boots up and put on his safety glasses. Mr. Dunn interpreted that as a threat not to perform rail service.

Before August 7, Mr. Dunn had never received a caboose request, trespasser reports, or rock-throwing reports from this crew. Before August 7, he was not aware of hotline calls made by the crew reporting the rock-throwing incidents.

Before August 7, Mr. Dunn was made aware by Mr. Gidney in the summer of 2013 that the crew had made a caboose request. He is not sure of the date; Mr. Gidney simply told him that they had requested a caboose and Mr. Gidney had denied it. The reason for denial is that on the IC shove, there are three tracks available. If there is a caboose and a shove is made all the way on Track 4, there is no way to get the caboose back. There is no set of crossovers to receive the caboose, so after two days there would be no cabooses left. They would have to rely on the goodwill of the IC to let them run down the 7 Track to Markham, go through a signal, come back, tie onto the caboose, pull back to Markham, and then shove back to the IHB. Mr. Dunn obtained this knowledge from 12 years of working at the IHB; he has done the IC delivery.

No other crews have requested cabooses from Mr. Dunn. Years ago, just after he hired out, Mr. Dunn used a locomotive on the IC delivery, but has never used a caboose. The locomotive was used for the same purpose as a caboose. This crew couldn’t use a locomotive

because there are not that many available, and the road foreman did not like to use them. If two locomotives are so many car lengths away, the brakes on the trailing locomotive that is being used like a caboose may release slower, and if the train is already moving it would be dragging the brakes. When Mr. Dunn first hired out, there was an incident where Paul Holzclaw was shoving up to the IC, missed the switch, and ran into a locomotive, shoving it a number of car lengths. Mr. Dunn was not in management, so he doesn't know whether it was perceived as a safety risk. But they were then instructed to pull up to the IC.

Mr. Dunn did not view the request of a caboose as any kind of a safety request, and did not think that using a caboose would expedite the move with this crew.

Mr. Dunn does not recall how he learned about the rock-throwing incident, but had not heard about it by August 7, 2013. He never told the crew that they were seeing ghosts.

On August 7, Mr. Dunn had T. Truschka come to his office because he was going to assign him to switching autos, and Mr. Dunn was the trainmaster that day. The trainmaster almost exclusively handles the West Yard. The crew was being assigned to switch autos because Mr. Dunn's boss, Mr. Schneider, told him that the crew was not going to leave the yard. Mr. Schneider said something about a seven-hour air test the last time the crew was up on the IC. T. Truschka did not ask Mr. Dunn what the problem was on the IC delivery, and it wasn't relevant to Mr. Dunn because his boss said the crew was not to leave the yard. Mr. Dunn did not question Mr. Schneider, because Mr. Schneider was his boss and told Mr. Dunn they were not going up there. Mr. Dunn does not recall saying that the crew was "fucking and failing" him, but does not deny saying it. He has never used the phrase before; to him, it means that they were not performing their job in an efficient manner. Other than Mr. Schneider telling him that the crew was not performing their work in an efficient manner on the IC, Mr. Dunn did not have any other information, and had not reviewed anything. Mr. Dunn does not recall telling the crew on August 7 that he was going to "put them on a diet"; he has never used those words. On the railroad, it means that they would work an eight-hour day with no overtime. Mr. Dunn has heard the words around the railroad in his 12 years, but does not recall any managers saying it. It is said around union halls. To reduce overtime, the trainmaster can determine that the work's not getting done that day, and send the crew home.

Mr. Dunn met with T. Truschka and gave him the switch list for the tracks in the West Yard. T. Truschka got up pretty fast, and Mr. Dunn backed away because T. Truschka was upset and disrespecting Mr. Dunn's authority, and Mr. Dunn didn't know what his intentions were. T. Truschka picked up the phone and told Mr. Dunn that he better lace up his boots, because T. Truschka was going to the hump the next day and was going to put on a show. Mr. Dunn took that to mean that T. Truschka was going to lay down on the job and stop the most important job in the yard. Mr. Dunn then told T. Truschka that he was talking into a recorded line, and T. Truschka said that it hadn't picked up yet. Mr. Dunn said that it was still recording, and T. Truschka put down the phone and they left.

After they left, Mr. Dunn went about his work, and received a text from Mr. Carter saying that he overheard the crew saying they were going to "screw [Mr. Dunn] to death" and not get anything done. Before Mr. Dunn could respond, Mr. Carter, T. Truschka, and Mr. Berg

came back upstairs. Mr. Dunn stayed out in the hallway with Mr. Berg, and the others went into the office. Mr. Berg told Mr. Dunn that he just wanted to do his job; he had been off for three years and three months. Mr. Dunn just nodded; he didn't want to be in the office because he didn't think it was a debate. He just wanted everyone to get to work. Mr. Carter did not tell Mr. Dunn what he talked about with T. Truschka, but eventually Mr. Dunn went into the office. Mr. Dunn and T. Truschka were discussing the caboose. T. Truschka thought it was necessary for the assignment; Mr. Carter doesn't like whining, but is willing to discuss the issue and said he would discuss it with Don Bolster, the manager of safety. After Mr. Carter and Mr. Bolster discussed the issue, Mr. Dunn got back to T. Truschka with a compromise: that they could take a caboose as far as 7 Pocket, but would still have to shove and direct a point on the yarding tracks on the IC.

As a trainmaster, Mr. Dunn had the authority to assign work the way he wanted to. He would not explain to a crew how they were not living up to expectations on a job assignment, and that is why their assignment was being changed. He supposes that it might help efficiency to explain to a crew how they might to their job in a more efficient way.

The crew left Mr. Dunn's office after the second meeting at about 3:40 p.m. Mr. Dunn went about his daily business, working with the yardmaster, hump yardmaster, and operations center. In his job as trainmaster, he monitors traffic by moving car numbers in the computer. He also is on the phone with the operations center in Calumet City, working the outer bell assignments. Mr. Dunn stays in the terminal building, and communicates with two yardmasters on either end of the yard. He also has a clerical department that he can reach by intercom for paperwork, billing, or hazmat. There are many things that can happen. Email also a regular means of communication.

After a while, Mr. Dunn had a telephone conversation with T. Truschka about earplugs and batteries. T. Truschka said "yeah, sure, we could use some [batteries]." Mr. Dunn perceived the conversation as a dig at him, just a call of annoyance. Communications between an employee and a manager can be informal, but he thought that T. Truschka's comment that Mr. Dunn would not want him to use dirty earplugs was just childish. Discussing earplugs and batteries does not rise to a Rule D or Rule 941 violation.

T. Truschka's actions in Mr. Dunn's office in the initial meeting did, in Mr. Dunn's opinion, violate Rule D because he threatened delay in the work. As soon as T. Truschka argued about the assignment and picked up the phone, it was a delay of job, violating Rules 941 and 90. Mr. Berg was not involved in that initial meeting, so that initial meeting did not result in rules violations by him.

Eventually T. Truschka called for a van. It can take two minutes, or 20 minutes, for a van to arrive, and the crew has no power over the time it takes the van to arrive after it is called. Likewise, the crew has no control over the length of time it takes the van to get from the office to the yard. On August 7, the first item on the agenda was to inspect the locomotive, and there is nothing unusual about that. It is reasonable to take 20-30 minutes to do so, and that is part of the reason that he found no fault by D. Truschka. While D. Truschka was inspecting the locomotive, T. Truschka and Eric Berg could have been dropping with the dispatcher, getting the switch list

ready, and lining up switches for the next movement. Mr. Dunn can't say if he has any criticism of what they did during the locomotive inspection; all he knows is how much time elapsed before any movement of any freight cars. Mr. Dunn is not sure whether the discussion with T. Truschka about earplugs and batteries took place during the inspection.

After the inspection is finished, it's time to start moving cars. The crew reported a defective switch, and Mr. Dunn went over to inspect it and there was nothing wrong with it. If they fixed it, he wasn't informed. He suspects that the report was a fabrication, because the switch was fine when he got there.

Mr. Dunn does not remember whether he had any criticism of how T. Truschka did his job as it relates to the drawbar issue. When Mr. Dunn went out to the field just after 6:00, Mr. Berg was standing on the lead, and Mr. Dunn asked him what he was doing. Mr. Berg said that he was walking back to make a standing cut. Mr. Dunn asked him if he was going to walk back, make a standing cut, pull all the way out to start switching, and then ride the shove all the way back in to pull out again. In his opinion, that procedure was purposely trying to lengthen the time it took to switch. Normal procedure would be to tie on, pull the cut out, make a cut in the clear, and go back switching, to reduce the time spend walking back and forth. He told this to Mr. Berg at the time, because that is when he learned that T. Truschka was knocking off handbrakes and bleeding air.

Before heading out with the batteries and the earplugs, Mr. Dunn received a call from Mr. Spano who asked him what was going on. This was the first time that Mr. Dunn had spoken with the general superintendent, and he was shocked to hear from him. He told Mr. Spano about other work, and Mr. Spano asked what was going on with the 526. Mr. Dunn figured that Mr. Spano had already heard, so he told Mr. Spano that they had not done anything in three hours. Mr. Spano told him to get the crew and Mr. Schneider into the office, because he was coming in. Mr. Dunn did not tell Mr. Spano at that time about the two meetings he had had with the crew. He believes that the conversation with Mr. Spano took place before the crew reported the 8 West switch.

Mr. Spano came right out, and he listened to the phone call conversation that Mr. Schneider had already asked the communications department to pull. Mr. Dunn was present when Mr. Spano listened to the phone call in Mr. Schneider's office, which is right next to the trainmaster's office. He listened to it at about 6:30, nodded his head, and said "okay." Mr. Gidney then brought up the crew, and they went in the other room. Mr. Spano asked who the foreman was, and T. Truschka said he was. Mr. Spano asked T. Truschka who he worked for, and T. Truschka responded that he worked for the IHB. Mr. Spano pointed to the yardmaster and to Mr. Dunn and asked T. Truschka if he worked for them, and T. Truschka answered in the affirmative. Mr. Spano said, "You're out of service, you're out of service, you're out of service." He asked T. Truschka if he knew what he had done, and T. Truschka said he had no idea what was going on. Mr. Spano pulled all three out of service pending investigation.

Mr. Berg's conduct with respect to the delay was that he was standing on the lead and nothing was getting done. He was the helper, and T. Truschka was the leader of the crew. D. Truschka was exonerated from any rule violation. If Mr. Dunn were a helper, he would expect

his conductor to move him along, so Mr. Berg could have told T. Truschka to pick up the pace because they had to move some cars. It was a failing on his part that he didn't. Mr. Dunn has done so, and usually the conductor will be stubborn.

A trainmaster can observe a crew's productivity at Ashland because there are cameras there. They are not used to evaluate a crew's performance on a delay basis. Typically, the trainmaster would go out into the field and observe the crew. Mr. Dunn has gone out into the field and asked crews what was taking so long, and that one-on-one contact is sometimes called a corrective action. He has heard excuses when he has done so, but he found in the one time he can recall that his presence alone was enough to get the crew working. He has not immediately pulled a crew off the line.

Rules of the IHB require employees to report unsafe or hazardous conditions on the job. One way to report them is verbally to a yardmaster, trainmaster, or dispatcher. Another way to report them is on the hotline, and another way is to physically write it out and turn it in to the trainmaster or dispatcher. Mr. Dunn thinks the best way to do it is on the hotline, but reporting can be done verbally to a trainmaster. The safety hotline is routed to the safety department, and the subjects of hotline calls are brought up in conference calls. A good way to address safety on the railroad is in a conference where managers are around to discuss them.

Mr. Dunn has never been trained on IHB anti-retaliation policies, and is not aware whether there are any.

Cross-Examination

The fourth page of Exhibit 12, designated 12-D, is an overhead view of IHB's Blue Island Yard. His office is located at the bottom right of the map, near where it says "Blue Island IHB Yard" indicated by a round white dot with a brown square inside it. The West Yard is located where the map says "finish." The trainmaster for Blue Island Yard has responsibility for everything that is going on in the yard in a daily basis.

The hump is located about an inch underneath the word "finish," where there is a darkening with one lead fanning out to about six. The hump is a hill that breaks off into six leads with seven retarders going into 44 classification tracks. A retarder is a device that slows down the cars, and is operated by a computer system. There are round-the-clock hump crews in three shifts. The crews tie onto a train that may have come from a foreign line, or may be IHB crews pulling in from customers at Burnham Avenue or Michigan Avenue. They may be trains pulled down from the Union Pacific. The car department goes to the hump and knocks the brakes off the cars, and the hump crew takes it and pulls it west. They shove over the hill, and the computer system decides which track the cars will go into. Track 13 will be a BNSF track, so that if a car is destined for BNSF it will go to lead into Track 13. The hump classification will break down a train that will be built later for a destination road or another terminal. It organizes the cars based on where they will be going.

When the rail cars come into the Blue Island Yard, they are all mixed up within the trains, and the hump organizes them. They then go to other parts of the yard where they are

sorted further by train crews, and then switched out to be delivered to other railroads. If there is a problem at the hump, it essentially shuts down Blue Island. It feeds everything that is going on; other jobs in the east end may be waiting to pull tracks for the north or south yard, which are used to build the outbound trains that the hump sorts out. Those jobs will be sitting there waiting for the hump to break the cars down. So, when T. Truschka said on the recorded line that he would “take care of this” and mark up to the hump, and told Mr. Dunn to come to the hump with his boots and glasses and watch the show, and invited Mr. Schneider to come, Mr. Dunn perceived that to mean that T. Truschka would mark up to the hump job with the deliberate intent of slowing down the operation.

Up until August 7, Mr. Dunn had very little contact with the 526 crew as it existed on that day. The routine of T. Truschka, Mr. Berg, and D. Truschka was to get yardwork from the yardmaster, pull tracks, set the train, switch out cars from the east end, and then go to lunch, after which they would routinely go to the IC. If the crew came on duty at 3:15 p.m., then by the time they got to the IC, Mr. Dunn would be off duty because he worked the 6:00 a.m. to 6:00 p.m. shift. Any caboose request made by the crew would not go to Mr. Dunn, because he was already off the property by the time they would make one. None of the Complainants ever approached Mr. Dunn personally to tell him that they had had problems with Mr. Gidney or Mr. Caschetta refusing to provide cabooses.

Mr. Dunn has no idea why he told T. Truschka that the call he was making was on a recorded line. It was just the first thing that came to mind; he couldn't believe that somebody was doing that with the phone next to his ear. He has never had anybody threaten him with the action T. Truschka wanted to take on the hump, and talk into a recorded line at the same time. It was not something that happened at Blue Island on a regular basis. The phone that T. Truschka used is not one that is available for use by train crews; it is in Mr. Dunn's office, on his desk. T. Truschka walked across the office to Mr. Dunn's desk and picked up the phone without asking permission to do so. There are two phones that are available downstairs for train crews to use.

When a crew wants to mark up on a job on another day, they have to call the crew dispatcher. Mr. Dunn has heard them at Blue Island using the available phones to do so. It would not have been a problem, in and of itself, if T. Truschka had made his call downstairs in the shanty.

Almost immediately after T. Truschka made the phone call and then left Mr. Dunn's office, Mr. Dunn received a text message from Mr. Carter saying that the 526 crew was in the crew room saying they were going to screw over the trainmaster.¹⁵ Mr. Dunn did not go down to the crew room, or pick up the phone and call anyone about the text message. The next thing that happened was that Mr. Carter came up the stairs.

The crew room is actually in a separate building from Mr. Dunn's office. Mr. Dunn is in an old brick two-story building, and the crew shanty is actually a new building. The new building is where the trainmen's lockers are, as well as facilities, a supply closet, and bottles of water that are available for the crews to take. At the time, there was also an engine machinist office and an

¹⁵ Although the transcript (p. 388) indicates that the threat was to the train crew, it is clear, and I find, that it was to the trainmaster.

office for the road foreman, Mr. Carter. The yardmaster's office is in the two-story hump tower across the parking lot looking over the yard; the crew room for the hump crew is on the ground level. The hump tower also has a basement. On Exhibit 12-D, the yardmaster's office is located about a half inch and up to the left of the main office, where there is a brown speck between the tracks. The crew room is in the gray building to the left of it.

The tracks at the bottom of Exhibit 12-D are the old rip track, used years ago. There were five tracks there used as a repair facility for bad-ordered cars. Three tracks were for "bad order heavies," which needed to be separated so that they could get equipment in to do major repairs. The other two tracks were for "bad order lights," which required just a weld or an adjustment with a wrench or the like. The big building in the center bottom is a new repair facility, where bad-ordered cars come in from the east and go out to the west. There are car repair and locomotive repair employees at Blue Island, and the track department also has offices there. The track department has track gangs that inspect and maintain the rail. Their office is at the building directly to the left of the East Yard tower.

There are three industries that are served by crews at Blue Island Yard: Airgas, at the very top of Exhibit 12-D toward 138th Street, and American Transload and Weekes, which are not shown in the exhibit. American Transload and Weekes are both lumber companies, and Airgas is a chemical company. Airgas receives inhalation hazards, including ammonia that requires positive handoffs monitored by TSA. By noon, each industry must notify the assigned IHB clerk that they have a delivery coming in on the following day, and Mr. Dunn, as trainmaster, will then plan for a crew to make that delivery. If a track is out of service because the track department has determined that a repair or maintenance is necessary, Mr. Dunn has to plan around that condition. He also has to plan around any locomotives being out of service because of some sort of defect or other problems, so every day he has to know how many locomotives are available in the yard to plan where and to whom they have to go. That involves not only industries, but other railroads as well.

There are agreements, called Interline Service Agreements, that place requirements on IHB's with regard to IHB making deliveries to other railroads. The agreements specify interchange windows. For example, the CSX delivery requires IHB to have a train on offer between 9:00 a.m. and 1:00 p.m.; that is the window during which CSX is supposed to accept the IHB train. If they do not accept the train, there is a tariff penalty. Likewise, IHB suffers a penalty if it does not accept a CSX train. Due to the agreements and other requirements at Blue Island, nearly every track is spoken for at any given time. To maintain the fluidity of operations and facilitate the movement of traffic, certain times must be made; IHB has to be on time. For example, they have to get Train A out of Track 2, the receiving road, so they can take in a delivery that is scheduled for two hours later. Delays at Blue Island affect not only IHB's operations, but the operations of the railroads and industries to which IHB makes deliveries, as well as the operations of the railroads and industries that those entities deliver to. Delay will cause congestion in one of the yards, and traffic will back up preventing the other railroads from delivering.

The congestion of railroads is a very big issue in the Chicago area. There are meetings all the time about how to improve the movement of traffic; the industry has gone to using terms like

“op con yellow,” where a railroad may have too many cars in their yard and want restrictions on how many trains come in. So the IHB’s desire to keep the freight moving is not just a local problem involving this particular train crew at Blue Island, but it is important to the entire Chicago area and to every railroad that operates there. And all the big railroads go through Chicago. The BNSF and the UP bring rail traffic from the Pacific to Chicago to the Mississippi River; other railroads like the Norfolk Southern and CSX bring rail traffic from the Atlantic to the Mississippi River; and railroads like the IHB take that traffic and switch it from one railroad to another so that it can go on to its destination. Mr. Dunn is not pushing this or any other train crew because he wants to be a jerk, but it is an important part of his job to keep the IHB profitable and to help it stay in business.

Mr. Dunn has safety responsibilities as a trainmaster. Trainmasters go out in the field, and discuss safety with crews. The observation program includes efficiency testing for both operational rules and safety. There are safety meetings, and job briefings for the new hires. There is a safety sheet that each crew is required to fill out every day. If there is a safety issue one month, the rule involved will be emphasized the next. There is a safety focus sheet, which crews must fill out with their names and ID numbers when they review bulletins. There are monthly meetings where the managers discuss the injuries that have occurred, what could have been done to prevent them, and what caused them. There is a daily safety scorecard showing the total number of injuries and the number of days since the last one.

Before becoming a trainmaster, Mr. Dunn worked as a switchman at Blue Island and was a union official. He was local chairman of 1883, the Blue Island district, and general chairman of GO 449 which serves the locals at Gibson, the Hammond yard, Blue Island, Argo, and Norpaul. As a local chairman, he handled penalty time claims, including caboose removal. If an employee filed a claim and it was denied, they could forward the claim to Mr. Dunn within 60 days, and he would request a meeting with the carrier to discuss the claim. The system is that if the carrier doesn’t do what they say they will do, the union member can file a claim, and if the carrier is wrong, they will pay the claim.

Caboose claims have been made at IHB for as long as Mr. Dunn has worked there. It has never been an issue that became hostile or unfriendly or intimidating on either side; it was just a part of doing business. It is like lunch claims, which are based on the railroad’s requirement to provide adequate facilities and on the length of the job. If a train crew is stuck at a place where adequate facilities aren’t available, and they have to eat lunch on the locomotive, they can file a lunch claim. For a caboose claim to be paid, there has to be a caboose that is not provided when requested, for a shove that is longer than a mile. If there is no available caboose, there is no claim. Many people make caboose claims, and it has never been discussed in the context of a safety issue, from Mr. Dunn’s experience either on the union side or on the management side. It was always a money issue. A caboose claim was not an issue that Mr. Dunn cared about on August 7, 2013.

Joint Exhibit 38 is a crew contest notice, and the second page refers to the Blue Island Yard. A crew contest notice is a document that would identify every job in the Blue Island district for a two-week pay period; these are the jobs that are there on a daily basis. The crew contest notice is the bulletin that the crews see when they decide where they want to mark up.

The 526 job is listed as an East Yard transfer assignment for two switchmen, and is available seven days a week. It says nothing about IC delivery, Highlawn, or switching. The trainmaster on duty can assign any train crew that marks up for an East Yard transfer job to any assignment at Blue Island on any day, based on the carrier's needs. The job that is worked is entirely at the discretion of the carrier.

When Mr. Schneider told Mr. Dunn that he wanted the train crew to work in the yard on August 7, 2013, he did not say that it was because they were complaining about safety, or about not having a caboose. He did not say it was because they were asking for cabooses, or making caboose claims. He did not say that he wanted to discriminate against them for any reason. He said to keep them in the yard; it was something to do with a seven-hour air test that occurred when Mr. Dunn was off work. He did not question or cross-examine Mr. Schneider, or ask him to justify his decision; Mr. Schneider was his boss, and Mr. Dunn accepted the decision and enforced it. When Mr. Schneider told him to do so, Mr. Dunn knew that the crew would be upset and assumed that he would not get a lot of production out of them. He could not put them on the 524 job because that crew left the yard and did industry work. The 594 worked at the hump, and Mr. Dunn didn't need any problems there. The 522 was by North Puller, and needed to pull four or five trains to send them to the air. He decided to put the 526 crew in the West Yard where they would do the least amount of damage. If he needed to, he would re-crew with a third-shift job. After they left his office, Mr. Dunn was already planning some way to recover, because he didn't think they were going to get a lot done.

Mr. Dunn put the 526 crew on the auto switching job because that was where they would have the least adverse effect on the rest of the operations. He did not put them on that job because they were reporting safety conditions, or because they were asking for a caboose or making caboose claims. It was the best he could do to have a productive day at work. When Mr. Spano and Mr. Daly came to the IHB, there was a culture change, with an emphasis on greater efficiency. Mr. Spano still wanted safety, but wanted the crews briefed when they came on duty, and then to go out on a locomotive and provide service. If the 526 crew had their conversation with the yardmaster, then went to Mr. Dunn's office and asked why they were not making the IC delivery and, after he answered the question, said "okay" and took their paperwork, left, and went to work, we would not be here today.

If a crew reports a defective switch, the trainmaster calls a foreman of the track maintainers and asks the foreman to go out and check the switch. If it is after hours, the trainmaster goes out to check the switch. The switch that was reported by this crew, the 8-W switch, is the main switch on the lead. If it was defective, no switching could be done on that lead and it would create an operational problem. Mr. Dunn would have to call out a track maintainer on overtime to either repair the switch, or to spike it and wedge it, and take two tracks out of service until it could be repaired. Mr. Dunn receives reports of defective switches only once every two weeks or once a month. He has never gone out to check a switch after it was reported defective, and found nothing wrong with it. That contributed to his belief that there was never anything wrong with the 8-W switch in the first place. If the crew had repaired it, he would have expected them to report the repair, given its importance. Complainants were experienced railroaders who had an understanding of the significance of the 8-W switch to the operations of the West Yard, and they never contacted Mr. Dunn or anyone else to tell them that they had fixed

the switch. The fact that they never did so meant that Mr. Dunn started preparing to go straight out to the West Yard, stopping whatever else he was doing in the office. He did not feel that the request for earplugs was urgent, but when the switch was reported, his perception of how quickly he had to get out to the West Yard changed. Mr. Dunn can drive out to the West Yard and back in 20 minutes, which means at least 20 minutes that he could be moving freight; that is a problem, because he is a link in the chain of rail traffic just like the train crew is. Time fixing a switch is time not doing something else.

Mr. Dunn created a statement after August 7, which was used at the investigation hearing. Nobody told him to create it but based on past practice, it was best to write it down to do the best to preserve the events that had happened. He was not doing any investigation into the incident. He did not pull radio tapes or video, or direct people to do any of that. He did not participate in any meeting with superior managers to discuss the goal of the hearing. He made his statement, and then went to the hearing to testify as a witness, and that was all. Nobody above him told him what to say or what not to say. He testified as truthfully as he could at the hearing, based on what he recalled. He does not recall anyone at the hearing accusing him of saying that he was going to put the crew on a diet, and he did not see any of the Complainants making that accusation when he reviewed the transcript.

Mr. Dunn was not on duty on August 5 or 6, when T. Truschka had called the safety hotline. He had completed duty on Sunday, August 4 before any issue of a seven-hour air test occurred, and he didn't know about that when he came on duty on August 7. All he knew was that his boss had told him to keep the in the yard. When he told T. Truschka that they were working in the yard, T. Truschka said that it was discrimination and that he was going to call OSHA the next morning. Mr. Dunn doesn't recall whether he knew what T. Truschka was talking about when he said he was being punished for reporting a safety hazard. When he said that, he had not reported any safety issues to Mr. Dunn. Mr. Dunn referred T. Truschka to the incident where it had taken seven hours to make an IC delivery, and T. Truschka replied by saying that Mr. Berg had been drug tested for two hours. That statement had no effect on Mr. Dunn's decision to assign the crew to switch autos. It wasn't relevant, because his boss had told him to keep them in the yard.

In Mr. Dunn's mind, there was no point to any further discussion; when he said things like "you're my yard job and I'll do what I want with you," he was trying to let them know that this was their assignment and there was no discussion or debate. T. Truschka continued to complain about the assignment, and thereafter walked over to Mr. Dunn's space, picked up the phone, and dialed the crew dispatcher's number. That call is the recording that was retrieved and played for Mr. Spano. After that, they took their paperwork and left, and almost immediately Mr. Dunn received the text from Mr. Carter. At that point, Mr. Carter came upstairs with Mr. Berg, and Mr. Dunn spoke with Mr. Berg outside the office. He doesn't recall Mr. Berg telling him about the drug test, or much about that conversation. His statement indicated that Mr. Berg did tell him about a two-hour drug test on Sunday, and that was consistent with what T. Truschka had said to Mr. Dunn. That statement was not going to change his decision.

The crew left Mr. Dunn's office at about 3:40 p.m., after Mr. Dunn instructed them to get the locomotive out of 11 West, and to switch the cars on the list he had given them. They were

supposed to move the cars from where they were, to wherever the list told them to move them. During the next hour and 20 minutes, Mr. Dunn had no contact with the crew. He did his job, and did not look at the television screen to see what they were doing. Mr. Dunn had the conversation with T. Truschka about earplugs and batteries, and about providing them with a caboose. Mr. Dunn told T. Truschka that he could have a caboose, but would have to set it out at 7 Pocket so it wasn't lost, and T. Truschka said that was fine. If the crew had a caboose and had to set it out at 7 Pocket, it would only be available to them while they were on IHB tracks; it would not be available for any part of the shove from when the crew gets onto Highlawn to wherever they leave the cars. T. Truschka did not express any concern about that to Mr. Dunn at the time. He did not say anything to Mr. Dunn about it being a high-urban threat area; Mr. Dunn would not expect a train crew at IHB to know what that is. There is security training for IHB employees required by the Department of Homeland Security; Mr. Dunn recalls that it's about a 15-minute video, and that they are instructed to report suspicious characters asking about rail cars or about destinations.

When Mr. Dunn went to inspect the switch, T. Truschka and D. Truschka were in the track doing something, but Mr. Dunn only knows what they were doing from what Mr. Berg told him. Train crews are required to have job briefings among themselves so that all of the crew knows what each of them is going to do. It is to make the operation safer and more efficient. When Mr. Dunn asked Mr. Berg what T. Truschka was doing, Mr. Berg told him that he was making a standing cut. That meant that T. Truschka had walked back, pulled a pin, and left the car standing wherever he made the cut. Essentially, Mr. Dunn understood that T. Truschka had walked 1800 feet along an 18-car cut to make a standing cut, and Mr. Dunn took issue with that. The efficient way to have done it would have been to pull the cut with the locomotive until the 18th car was close to where the conductor was located, and that would be the beginning of the train that the crew was supposed to make up. When Mr. Berg told Mr. Dunn that T. Truschka had gone to make a standing cut, Mr. Berg shook his head and said he had been off work for three years and three months. Mr. Dunn considers that T. Truschka's making a standing cut was delaying the job. Mr. Berg did not say anything about a problem with a drawbar or with a Knucklemate, or about T. Truschka needing to release handbrakes or bleed air.

The car department has the job of bleeding air from the trains; Mr. Dunn wants the train crews to switch cars, not bleed air. If a car department employee fails to bleed the air out of a cut of cars, the railroad would want to know about it. Joint Exhibit 7 is a report by Inspector Stewart of the car department, reflecting that the air on the train had previously been bled. When Mr. Dunn was in the West Yard inspecting the switch, none of the crew members told him that there had been a delay caused by the need to bleed air from the cars. That would have been something he would have wanted to know, so he could get hold of the mechanical department to see what was going on.

When Mr. Spano arrived at Blue Island, Mr. Dunn only told him that the crew had been on duty for several hours and had not moved a car. Mr. Spano also listened to the recording of T. Truschka's phone call. Mr. Dunn did not tell Mr. Spano anything that would have precipitated Mr. Spano's question to T. Truschka about whether he worked for Mr. Dunn.

That Mr. Berg was the helper does not relieve him of his duties to the company, or his responsibility to move cars. It does not relieve him of his responsibility to report to someone if he sees delays. And it does not exonerate him from liability for following a conductor who is delaying a job.

Questions by the ALJ

If the inspector had not in fact bled the air on the inbound inspection, then it would have been appropriate for T. Truschka to walk down the train and bleed the air if that was what Mr. Dunn wanted him to do. Mr. Dunn could have switched him to a track that was already bled, but he didn't know about it. He also could have told T. Truschka to walk the track and bleed the air. The engineer would have had a hard time pulling the train if the air had not been bled.

When Mr. Dunn testified that using a caboose would not have increased efficiency "with this crew," he was clarifying whether the question was a general one or was about the 526 crew. He did not mean to say that the crew, as opposed to another crew, would not have benefited from a caboose.

Redirect Examination

Mr. Dunn did testify at the investigation that he probably told the crew that they were going to be in the yard to "diet from overtime."

Reporting unsafe conditions helps to make the railroad safer. Mr. Dunn would agree in theory that if the railroad responded a report of an unsafe or hazardous condition in a hostile way, saying that they didn't want to hear it, or that they didn't want to fix it because it would cost a lot of money, that type of response would create a more unsafe railroad. He cannot perceive whether another person would be frustrated after reporting a hazardous condition with rocks hitting them, and then being told that the railroad didn't want to fix it.

When Mr. Dunn got the job assignment from Mr. Schneider, he knew the crew was going to be upset. He put them in the least productive assignment in the yard, because he knew they would be dogging it because he was going to put them on a diet.

Recross-Examination

Mr. Dunn talked to Mr. Carter, who had talked to Mr. Bolster, and the caboose request was resolved. Mr. Dunn communicated that to Mr. Truschka.

8. *Respondent Brian Gidney*

Direct Examination

Mr. Gidney is a trainmaster for IHB at the Blue Island station, and has been for over five years. He hired on to the IHB in 1998 as a switchman, and has worked as a conductor, a bulk

conductor, and a car retarder operator, and then became a yardmaster. He resigned as yardmaster for personal and family reasons, and went back to being a conductor and switchman. He was involved with the local union as vice chairman and then local chairman, and then became a trainmaster. All of Mr. Gidney's railroad experience has been with IHB.

Mr. Gidney remembers receiving caboose requests for the IC delivery job from the crew consisting of T. Truschka, D. Truschka, and Mr. Berg in the summer of 2013. The requests were not often, or once in a while, but somewhere in between. When he received the requests, he checked to see if a caboose was available, and most of the time there was nothing available, so he denied the requests. If there was a caboose available, whether or not the request was granted depended on what the next day's work was. Most of the cabooses were required for industry jobs, and Mr. Gidney had to be sure they were available the next morning for those crews, so most of his decisions were denials. This crew requested cabooses because they had rocks thrown at them, and because they had seen people on the rail at Highlawn. The one time he remembers the crew reporting people at Highlawn, who disappeared after a little while, Mr. Gidney asked the crew if they were sure they weren't seeing ghosts. He does not believe he actually received the report of the rock-throwing incident, but knows about it. When he made the comment about whether the crew was seeing ghosts, he did not climb on top of a table. He heard D. Truschka testify that he did, and he denies it. The conversation did get a little emotional; there was the comment about seeing ghosts, and then T. Truschka was requesting a caboose. Mr. Gidney told him he couldn't have a caboose, and it just kept going on and on. Mr. Gidney decided to check with his supervisor, and the answer was still no, and he wanted the crew to get out and do their job. He believes that the crew did go to work after the conversation, but can't recall whether he followed up to see if they were working efficiently.

Mr. Gidney did call a police officer to go down there, since the crew couldn't get a caboose. Sending a police officer may be the appropriate response to a crew reporting trespassers on Highlawn during the IC delivery, depending on the situation. It can be a reasonable response.

Mr. Gidney heard the hearing testimony about the crew being hit by rocks while riding the side of a car during a shove, but does not remember the crew reporting it to him at the time. If he does receive such a report, he usually goes to take a look or sends an officer to do so. He agrees that throwing rocks at a conductor who is hanging on the side of a car during a shove is a safety issue.

Mr. Gidney was working on August 7, 2013. He was not present at the start of this crew's shift when they received their work orders from Mr. Dunn; he came on duty at 6:00 p.m. He came to work, went upstairs, and had a job briefing with Mr. Dunn. Somebody then told him that Mr. Spano was on the way and to go pick up the 526 crew. He "beelined" out, jumped into the truck, and went to Ashland, where he told the crew to tie it down and come back to the office because Mr. Spano was on his way. He did not know at the time what the issue was. Mr. Gidney did not know that the crew had been told to work in the yard, and not on the IC delivery. He did not know until the hearing what the reason was for keeping the crew in the yard.

Mr. Gidney was not present in the office when Mr. Spano pulled the crew from service. He was in his office working, and Mr. Dunn came and told him that they were out of service. Mr.

Gidney had to figure out whom to send to switch autos. At that point, nobody knew why they were pulled from service. Mr. Gidney did not participate in the investigation, and was not a carrier witness. He did not make any of the decisions about charging the crew, and did not take part in any conversations or decisions about what discipline to impose or not to impose.

Mr. Gidney agrees that employees of the IHB are required by rule to report unsafe or hazardous conditions to the dispatcher. It is their duty to report up the chain when they feel unsafe in some aspect of their jobs. Failure to report would be a rule violation, and the railroad would not be able to rectify the problem if there was one. Having a free and open exchange between the employees and management about safety is in the best interest of the railroad in terms of both safety and efficiency.

Mr. Gidney has not been trained on anti-retaliation policies at IHB.

Cross-Examination

While Mr. Gidney was working as a switchman and conductor at IHB, he worked at Blue Island and did the IC delivery job. He did not use a caboose. When he was with the union, his role was similar to that of Mr. Dunn, whose testimony he heard. As part of his union work, he was familiar with the caboose removal agreement, and with switchmen and conductors making caboose claims. It was his understanding that if a conductor requested a caboose for a qualifying shove, and didn't get one, the conductor could submit a claim and potentially receive compensation.

During the summer of 2013, Mr. Gidney worked from 6:00 p.m. to 6:00 a.m. The daytime trainmaster would give the crew their assignment for the day when they came on at 3:15 p.m. During the course of his shift, Mr. Gidney would be the supervisor in charge of the yard where the crew was working, and in that context would receive caboose requests for the IC delivery. When considering a caboose request, Mr. Gidney had to look 24 hours ahead to see if everything was covered, including the need to have a caboose for industry jobs. If the IC delivery crew had a caboose, it would be shoved in to the IC and would be at the far south of the track, all the way behind the cars. The IHB would then have to rely on the IC to move the caboose to a clear track, and would have to run the locomotive down the clear track to pick up the caboose. If that wasn't possible for some reason, the IHB would lose the caboose until some arrangement could be made to get it back.

It was no particular problem for Mr. Gidney that a crew would ask for a caboose. He would give them an answer. The particular conversation with T. Truschka about a caboose became heated, because T. Truschka would not take no for an answer; he kept explaining why he needed one, and Mr. Gidney finally decided that he had to call his supervisor. Normally, when he gives an answer to a crew, he doesn't have to go to his boss. In this case, he called Mr. Schneider because the crew would not let go of the issue. It isn't something normally done, but in this case it had to be resolved.

Mr. Gidney heard Mr. Dunn's testimony about the role of a trainmaster, and the windows under the ISAs that must be met. He agrees with that testimony. The ISA windows mean that there have to be tracks available to accept the deliveries in the window.

In 2013, there were about seven yard jobs during the 6:00 p.m. to 6:00 a.m. shift. Those crews generally have more than one thing to do during a shift, and a crew that makes an IC delivery has other work to do during a shift. They would have other assignments to do. There are occasions that there are other jobs for a crew to do after making an IC delivery.

At the end of each shift, Mr. Gidney had job briefings with Mr. Schneider, informing him of everything that went on during the shift. The purpose of the job briefings is to let Mr. Schneider know what he is walking into; what got accomplished and what didn't get accomplished. Mr. Schneider needs to know where to put his assets and figure out the start of the day. During the job briefing, Mr. Gidney might tell Mr. Schneider that a job took longer than expected, if it affected other work and stopped other things from getting done. He does not recall telling Mr. Schneider about the length of time taken to do an IC delivery, but it could have happened. It has happened that a job took longer than he expected, and he would tell Mr. Schneider about it if Mr. Schneider asked why something didn't get done. He would just inform Mr. Schneider of the issue, but wouldn't tell Mr. Schneider what to do about it. He has not given Mr. Schneider any direction or suggestion about job assignments for the Complainants, or for anyone else. Nobody told Mr. Gidney anything about what had happened with the 526 crew on August 7 before his shift started, and he doesn't think he saw or spoke with Mr. Spano that day.

9. *Daniel Kelley*

Mr. Kelley is employed by the IHB. He started in 1979 as a car inspector, and was furloughed in the early 1980s for about three years. He returned and worked as a carman, car foreman, trainmaster, terminal superintendent, superintendent, superintendent of transportation, and superintendent of transportation and mechanical operations. Two years before the hearing, he was promoted to his current position as assistant general superintendent. In that position, he is directly below Mr. Spano in the IHB chain of command.

Mr. Kelley did not provide any information to Mr. Spano about the 526 crew before the crew was pulled from service on August 7, 2013. He had not received any information from any supervisors of Blue Island regarding safety complaints or safety conditions by the 526 crew before August 7, 2013.

Mr. Kelley has had occasion while working at IHB to deal with caboos claims. It would be accurate to say that the railroad has literally hundreds of caboose claims pending. Filing caboose claims by the 526 crew would not have been anything unusual to Mr. Kelley, and he did not provide any information to Mr. Spano about the 526 crew filing caboose claims before they were pulled out of service.

After the investigation was held, Mr. Kelley was the person who recommended the discipline to be imposed on Complainants. He reviewed the transcript of the investigation and the exhibits that were entered into the record, and determined the responsibility for the conductor

and the helper and exonerated the locomotive engineer. He then reviewed the disciplinary history and work record of the two responsible parties and recommended dismissal.

Since that time, Mr. Kelley has reviewed the investigation materials both in the course of the appeal process, and for the present action. Joint Exhibit 2 is the yard video that he relied on in making his determination. At 5:02:20 p.m., the video shows the yard delivery cab dropping the crew off at the Ashland Avenue auto yard shanty. The cab driver exits the cab and opens the doors, and the crew gets out. The building immediately to the right is the shanty. Mr. Kelley can't tell who is who in the video, but there is a three-man crew entering the shanty at 5:03:55. The crew had been told that their locomotive¹⁶ was in 11 West, and it appears in the background behind the first utility pole beyond the shanty. It was unusual for the van to drop off the entire crew at the shanty; usually, the cab driver would drop off the conductor and the helper, and then take the engineer down the road to the locomotive to begin the inspection. In this case, that means the inspection could have started shortly after 5:05.

At 5:10 p.m., somebody exits the shanty and starts walking east. Mr. Kelley believes it is D. Truschka, because the person ultimately gets on the locomotive. D. Truschka didn't have anything in his hands, but it would be normal for an engineer to go out to the locomotive without his grip, because he doesn't need the grip to perform an inspection. D. Truschka walks down a road that the cab could have used to drive him to the locomotive.

It was Mr. Kelley's understanding that the crew had received their instructions and locomotive assignment from Mr. Dunn before leaving his office, and they could have had their job briefing in the Blue Island crew quarters while they were waiting for a cab, rather than doing it in the West Yard shanty before T. Truschka went out to the locomotive.

At 5:31 p.m., the locomotive moves near the shanty. Mr. Kelley saw no evidence of any activity by T. Truschka or Mr. Berg such as lining switches. It appears that D. Truschka took about 15 minutes to inspect the locomotive. When the locomotive arrives near the shanty, there is movement inside it which Mr. Kelley believes is D. Truschka; D. Truschka exits the side door at about 5:34 p.m., and walks on the catwalk down the side of the locomotive to where Mr. Kelley believes the handbrake is. Judging by the amount of time D. Truschka spent there, Mr. Kelley believes he was setting the handbrake before leaving the locomotive unattended. If T. Truschka and Mr. Berg had been ready for duty, Mr. Kelley would have expected them to be standing out on the lead ready to assist. There are several things the crew could have been doing at that time. There is no reason for the engineer to have spent the time to get out of the locomotive, set the handbrake, and go into the shanty to let the crew know that he was ready to work.

D. Truschka goes into the shanty at 5:35 p.m., and exits the shanty with his grip at 5:39. There is no rule that would have prevented him from taking his grip with him when he first went to the locomotive. At 5:40:38 p.m., there is movement at the back of the locomotive, which Mr. Kelley believes is D. Truschka releasing the handbrake that he had set six minutes earlier. At this point, neither T. Truschka nor Mr. Berg has come out of the crew quarters, and he takes exception to the fact that 10 minutes after the locomotive pulled up, the train crew is still not

¹⁶ The transcript uses the word "power"; previous testimony established that "power" refers to the locomotive.

visible in the video. The crew could have been adjusting the seat, or lining up switches, or several other things.

At 5:42:32 p.m., T. Truschka and Mr. Berg come out of the shanty. Mr. Berg goes to the bottom of the screen, which Mr. Kelley believes is due to his establishing a lineup for two switches for the movement that the train crew is going to make. At 5:43 p.m., T. Truschka is standing near the switch, D. Truschka is on the locomotive, and Mr. Berg is believed to be lining switches. Mr. Berg walks back into the video and starts heading to where T. Truschka is, near the locomotive. At 5:44:32, T. Truschka first gets on the locomotive that had arrived at the location at 5:31. Mr. Kelley believes that it is sometime after that that T. Truschka helped D. Truschka with the seat on the locomotive, because T. Truschka had not been seen getting on the locomotive until 5:45. Mr. Berg then picks up the Knucklemate and walks down the lead with it, to station it along one of the poles down the lead. There was earlier testimony that the Knucklemate weighs about 50 pounds, but Mr. Kelley did not believe that and researched the issue; RX-16, an excerpt from a parts catalog, shows that the Knucklemate is 39 inches long and weighs eight pounds. When the Knucklemate first came out, it was entirely metal, but that model has been eliminated at IHB and replaced with a lighter version. At no time did a Knucklemate of any design weigh 50 pounds, and the way that Mr. Berg is seen carrying it on the video suggests that it doesn't weigh 50 pounds.

Mr. Berg placed the Knucklemate near a pole east of the shanty at about 5:46 or 5:47 p.m. T. Truschka gets off the locomotive at 5:48 p.m., and Mr. Berg starts walking in his direction. At 5:48:43 p.m., BP-12 is seen approaching on 5 West, and at 5:50 p.m. Mr. Pikorz gets off BP-12 and walks over to T. Truschka and Mr. Berg. It is a problem in Mr. Kelley's mind that there was ample time for activities to take place; they were eating up three minutes here and two minutes there. No one action or inaction could be termed delay of job, but when the entire activities of the crew are piled up it becomes apparent in his mind that there was no desire to perform service, but to delay the job. At this point, the crew has been in the West Yard for 49 minutes and has not switched any cars.

Mr. Berg and T. Truschka chat with Mr. Pikorz for some period of time, and D. Truschka appears to be still in the locomotive. There are still a significant number of cars in the West Yard, and they need to be switched, classified, and set for departure. At 5:55 p.m., T. Truschka, Mr. Berg, and Mr. Pikorz finish their discussion and walk over to the switch.

Mr. Pikorz pulled into the yard on 5 West, and stopped in the clear, meaning that he was not following any tracks that could have been assigned to the 526 crew for switching. His arrival would not have impeded any of the crew's work.

At 5:56 p.m., the locomotive for the 526 crew proceeds east onto the track where the work is to be performed, with T. Truschka on board. The locomotive operated over the allegedly defective switch, which appeared to be in compliance when they went over it.

At 5:57 p.m., Mr. Pikorz goes into the shanty followed by Mr. Berg. There is no reason for Mr. Berg to have gone into the shanty with Mr. Pikorz. He could have been stationed on the lead to line the switch, and any other switch in his list switch that would have been required.

There are other switches that can be lined up in advance of a move. Mr. Berg then comes out of the shanty, and the locomotive backs up again toward the switch with no cars moving. This is when the engine comes out to pick up the Knucklemate and Mr. Berg. Mr. Berg retrieves the Knucklemate from the pole where he had placed it earlier, walks back to the locomotive, and gets on it, and the locomotive goes into the track where T. Truschka apparently is located.

At 6:01 p.m., the crew had been at the West Yard for an hour and no cars had been moved. When Mr. Kelley watched the video as he was trying to evaluate whether or not the evidence supported the charges, he took exception to that. Any single action could have been explained or excused, but the continual compounding of activities shown on the video indicated that the crew had no intention of performing service, but was dragging through moves in order to delay the job. He has seen that before, although not always on video, and the railroad has had previous investigations of crews charged with delaying jobs by doing exactly the kind of things going on in the video. Sometimes it would be shown on the event recorder on a locomotive that shows when it moved, and piecing different things together. This one just happens to be on video and recorded phones, which makes it glaringly apparent. In this case, the download was pulled from the locomotive, and Mr. Carter created a timeline that was introduced at the investigation, documenting the times that three-step was applied and other activities.

At 6:03:50, someone that Mr. Kelley believes was Mr. Berg is on the ground walking toward the lead, crossing tracks, and then walking back toward the lead in an easterly direction. At 6:04:28, Mr. Berg is out walking, D. Truschka is between the locomotive and the first car, and T. Truschka is in the track. At 6:05, Mr. Berg continues to walk past where he had retrieved the Knucklemate and toward the switch that they had had an issue earlier in the day, but Mr. Kelley does not know what the purpose of Mr. Berg's activities was.

The truck with Mr. Dunn bringing supplies pulls up, and Mr. Dunn gets out of the vehicle. The video view changes, but there is no way to tell who changed it. The camera can be operated by anyone from any computer, as long as they have proper login information. Mr. Dunn goes into the shanty, and comes out with Mr. Berg, who had apparently gone back into the shanty to do something. There is no restroom facility in the shanty. Mr. Dunn and Mr. Berg are having a conversation at the switch at 6:15:22; the crew had been in the West Yard for an hour and 15 minutes and only the locomotive had moved. Mr. Kelley takes exception to that fact as he is reviewing the video to decide whether or not the crew delayed the job. Mr. Dunn departs at 6:19 p.m., having verified that the switch is working, delivered the supplies, and talked to Mr. Berg, all in about five minutes.

The next thing seen on the video is at 6:53 p.m., when there is a moving train that may be BP-12 that is occupying the lead. At 6:54 p.m., Mr. Gidney is there with the truck to pick up the crew to bring them back to the Blue Island Yard office. Mr. Gidney and the crew walk to his truck at 7:03 p.m., and the locomotive was still tied to the same track as it was when D. Truschka and T. Truschka went out there the first time. The only cars that have moved are the cars pulled out of 8 West by BP-12.

The audio recordings admitted as RX-18 contain time stamps, which are not perfectly synced with the video recordings; they are off by 30-45 seconds.

Respondent's Exhibit 18B is an audio recording. On the recording, someone says "Hey foreman, 526, come on up and help me adjust the seat"; that is apparently D. Truschka asking T. Truschka to help him on the locomotive. RX-18C, another audio recording, refers to headroom; that is the crew receiving permission from the dispatcher to pull out onto the main line track and get headroom at the next signal. When the call for headroom is made, "he" had been in the shanty for 40 minutes. RX-18D, another audio recording, reflects that at 5:48 p.m., the crew determined that there was something wrong with the switch and reported it to the yardmaster as defective. They had already moved the locomotive across the 8-W switch, but that wasn't an issue because it was aligned for that movement. RX-18E, another audio recording, is calling out the three-step from the locomotive engineer to adjust the drawbar at 5:57 p.m. RX-18F, another audio recording, reflects T. Truschka asking D. Truschka to release the three-step and take the locomotive out to meet the helper or the Knucklemate. Then D. Truschka confirmed the request, which is the process to ensure that everyone in the crew knows when someone is between cars. Mr. Kelley did not take any issue with this process. RX-18G, another audio recording, is of another three-step after Mr. Berg has returned with the Knucklemate and RX-18H is a recording of the release of that three-step; had Mr. Berg just walked to the locomotive with the Knucklemate, neither three-step process would have been necessary. RX-18I is apparently a request to back up a car-and-a-half after release of the three-step; they would have had to have enough distance between the locomotive and the equipment being worked on when adjusting the drawbar. RX-18J is an audio recording from about 10 minutes later in which Mr. Berg announces that Mr. Dunn has arrived, and the conductor saying to have Mr. Dunn put the supplies in the office because he was walking the track to make sure the handbrakes are released. He did not say anything about bleeding the cars at that time. In addition, Mr. Berg says for 526 to "stay in the clear," meaning not to come out and follow the track until receiving permission. Mr. Kelley presumes that at some point Mr. Berg had had some conversation with Mr. Dunn about future moves in the West Yard. RX-18K is an audio recording of Mr. Berg saying that "we're" done checking the switch, referring to himself and Mr. Dunn, with an inaudible response from T. Truschka.

After listening to the audio, watching the video, listening to the telephone conversations, and reading the investigation transcript, Mr. Kelley made a determination that T. Truschka who, as foreman conductor was responsible for delay of job, did not meet the requirements of conductor responsibility, and was guilty as charged. He determined that although D. Truschka did sit on the lead without calling the crew or blowing the horn, he did not take a major role in the delay of job. Mr. Berg, considering his positioning of himself on the road, to the side and back again, going to the shanty, and the statements he made earlier at the shanty, was guilty of delay of job as well. The phone calls made by T. Truschka from the shanty at Ashland, including the call to Mr. Dunn for earplugs, influenced his decision. If there was nothing other than that phone call, we would not be here today; none of the things that happened in and of themselves would have indicated insubordination, but when they are compiled all over the course of three to three and a half hours, it clearly indicated to Mr. Kelley that there was intent on the parts of both parties to delay the productivity of the job. In fact, Mr. Dunn had said that he specifically heard Mr. Berg express that intent at 3:20 p.m. at Blue Island, when Mr. Berg was ranting and raving in the shanty about how he was going to screw over the trainmaster because they had to switch autos. The significance of that remark is that it occurred before T. Truschka had any

conversations with Mr. Dunn that inflamed him or Mr. Dunn. Mr. Carter's testimony at the hearing influenced Mr. Kelley significantly in making his determination regarding Mr. Berg.

Mr. Berg's comment and the recorded phone call of T. Truschka might be explained by themselves as somebody having a bad moment, but to imply that the job will be delayed and then go out and do it makes it clear and evident what was going on. If they had gone over to the yard, pulled the track out, switched cars, and were productive, then the statements could be written off as people having a bad moment, but the fact that they carried out their threats or fulfilled their promises convinced Mr. Kelley that the crew was acting intentionally. Had they gone to Mr. Dunn's office, asked why they were not doing the IC job, and Mr. Dunn told them that it was his decision and they had walked out and gone to work, there would be no problem.

At the time of the investigation, Mr. Kelley didn't know about the issues relating to the Renzenberger cab. He believed that when the crew called for the cab, it was in Alsip and had to drive all the way to Blue Island. After termination of Mr. Berg and T. Truschka, it was discovered through GPS data that the cab was nowhere near Alsip when it was called, but was at 138th and Halsted, which is at the northeast corner of Blue Island Yard, only 50 or 100 yards off IHB property. The drive from Alsip to Blue Island could take up to 45 minutes depending on the traffic and time of day. RX-12A is a map from Mapquest showing the route from Alsip to Blue Island; 138th and Halsted is located at the corner where the last turn is before the red dot on the map. Someone could walk to the Blue Island shanty from 138th and Halsted faster than they could drive there from Alsip.

Respondent's Exhibit 5 is a list of discipline by IHB for similar rules violations. Since 2005 there have been numerous employees at the railroad who have been charged with violations of rules similar to the charges against Complainants. Some are similar factually, and some are factually different but involve the same rules. There were some disciplinary hearings that were waived when an employee decided to accept responsibility for the violation, avoiding the time and expense of a hearing, and the company showed leniency. T. Truschka was shown leniency in a prior act of insubordination, when he was charged with failing to obey written and instructions from Mr. Gidney. The incident occurred on December 20, 2010, but the waiver was not completed until February 7, 2011. Ultimately T. Truschka signed a waiver and accepted a letter of reprimand. The railroad's disciplinary policy allows punishment up to and including dismissal for a first instance of insubordinate conduct. The railroad can consider prior acts in making the penalty determination, within a certain time period: three years for a Level 1 or Level 2 violation, or one year for "caps," or missed calls. As this case involves conduct that occurred on August 7, 2013, the prior incident could be considered, as it was within three years. Mr. Kelley was not required to consider it, but he did.

Once a determination is made that an employee is guilty as charged, the next step is to look at the prior discipline history. Mr. Kelley did so with T. Truschka and Mr. Berg. As to T. Truschka, Mr. Kelley thought that dismissal was appropriate, and the fact that he had a previous incident of insubordination on his record supported that decision. Mr. Kelley is sure that he discussed the matter with others, either at his management level or above, regarding his recommendation for termination, to be sure that his decision could be supported. In almost all dismissal cases, other senior managers will weigh in before the letter is actually sent out.

As to Mr. Berg, his return to work three months earlier out of leniency factored heavily in Mr. Kelley's decision. In his opinion, it wasn't a second chance for Mr. Berg, but a third chance. Mr. Spano showed great leniency in returning him to service, and three months later Mr. Berg conducted himself as shown in the video and made statements about being upset with the assignment to switch autos, statements that he does not profess not to have made, was disproportionate to the leniency shown to him by Mr. Spano. Mr. Berg's insubordination and delay of train, along with his return-to-service agreement, justified termination in Mr. Kelley's mind. Mr. Kelley has only heard of one case in 20 years in management where an employee in transportation has returned to service after twice violating Rule G.

Mr. Kelley did not talk to Mr. Caschetta, Mr. Dunn, Mr. Gidney, or Mr. Schneider when he made his decision. He did not give any weight to the safety concerns reported by the crew while they were working at Blue Island. The issue of caboose claims was in the transcript, but it did not influence his opinion either way. It would be fair to say that the safety concerns expressed by T. Truschka and Eric Berg and the submission of caboose claims and requests for a caboose were neither a cause nor a contributing cause to his decision to terminate them.

Cross-Examination

Mr. Kelley did not create RX-5, but has reviewed it. There was one case involving a cumulative effect of actions that created a delay of job, which appears on the third to last page of RX-5 and states "Trainman 1/16/2015." Mr. Kelley was not the ruling officer on that case, but was the hearing officer. It was the cumulative actions of the crew on that day that caused the delay; it involved proper peer protection, safety glasses, an improper brake test, and letting a car roll freely down the track. The trainman was dismissed, although Mr. Kelley did not make that decision. Mr. Kelley is sure that there are others in RX-5, but would have to study it long and hard. There are people listed who were dismissed for molestation/conduct unbecoming. There was another crew within the past six months where the record included the download, radio tapes, and picture evidence of a destroyed gate. In that case, a crew at Argo yard set two cars on a track and left them unattended before doing a C-102 airbrake test. There are several other cases on the list where videos and event records were used to determine responsibility.

A D rail is a device that is placed on a track to protect either that location or men working in the foul; it is supposed to disengage the wheels from the track to stop the equipment from going any farther than its momentum will take it. Running over a D rail means that a crew operated in violation of restricted speed. That is different from this case, in that it could be an act of omission or a mistake, while insubordination is a conscious decision. Both a D rail violation and insubordination are listed as Level 2 offenses, which could result in dismissal in the first instance.

Failing to protect a shove means the absence of a main on the point, or in advance of the movement, to be sure that they distance to be traveled is clear and doesn't have a D rail on it. It could be a major violation depending on the scenario, such as whether there is property damage over the reporting threshold. The policy is separated by different dollar amounts and by different activities.

The pornography and racial-slur cases are not the type of cases or discipline that were involved in this case, and in this case the crew did not damage any track or equipment. This case is not about missing a call or a FMLA violation, or presenting the carrier with a false doctor's note. This case is not about failing to properly inspect the locomotive; in this case, the crew did a proper locomotive inspection. Mr. Kelley would agree that the list shows in some of the cases that there was a Rule D violation, with a myriad of different reasons.

After the BP-12 pulled up at about 5:50 p.m., T. Truschka and Mr. Pikorz chatted behind the locomotive. Mr. Pikorz then went into the shanty, and left it sometime later. Mr. Kelley doesn't recall whether it was five minutes later; it could have been 15 minutes. If it was 30 minutes, Mr. Kelley would ask if he was waiting for paperwork, what time he received his train sheet, and whether he was awaiting instructions. Nobody brought any actions by Mr. Pikorz to Mr. Kelley's attention with regards to a delay of job.

If Mr. Pikorz pulled up at 5:50 p.m. and doesn't start to leave until 6:53 p.m., Mr. Kelley would want to know what time he was given the lead. It appeared to Mr. Kelley that when Mr. Pikorz pulled up, he stayed clear in track, meaning that he had no authority to occupy the lead or paperwork to advance his train. The video shows that he pulled out of 8 West Yard later, and Mr. Kelley made mention of the fax machine inside the yard office where Mr. Pikorz could gather his information. Without doing a forensic investigation into Mr. Pikorz's activity, Mr. Kelley cannot say whether he would take exception to his conduct. Because he does not know when Mr. Pikorz was given the lead, Mr. Kelley can't say that he didn't move cars for over an hour. He does know that when Mr. Pikorz arrived at Ashland Avenue in the West Yard, the 526 crew had the authority to occupy the lead. Although the videos were pulled before the August 20 investigation, Mr. Pikorz was not forensically examined for every minute of his time waiting for BP-12 to continue to the BNSF. Six hours after going on duty, he had already departed the terminal and arrived at another terminal to make a pickup. Mr. Kelley does not take exception to that conduct until it is forensically examined.

The audio recordings that are difficult to understand is radio communication. The recording that is very clear is T. Truschka on a telephone communication. The second audio was the 5:45 telephone communication from T. Truschka asking permission for headroom. There is no company-issued telephone on the locomotive.

Mr. Kelley is not sure who presented the charges against Complainants, but Mr. Schneider, Mr. Carter, Mr. Dunn, and Mr. Spano sounds right. Mr. Kelley believes that they strongly felt that Rules D, 90, and 941 had been violated.

Mr. Kelley was aware after the fact that two hotline calls had been made in the days before the Complainants were pulled from service. Mr. Kelley becomes aware of all hotline calls when they are made, but the reports are not by individual. If the report says people are having rocks thrown at them, it doesn't say who it was that had rocks thrown at them. Hotline calls are discussed during the morning conference calls Monday through Friday, but Mr. Kelley does not believe that he was aware of the reported rock-throwing incident before Complainants were pulled from service. He was not aware of the caboose requests made by this crew before they were pulled from service, although he was aware of caboose requests as part of the claim

process. Being aware of a caboose requests means to him that a crew is going to be submitting a claim for shoving more than a mile without a caboose.

Mr. Kelley did not determine the validity of Mr. Schneider's opinion of the crew's performance on the IC delivery job. Whatever Mr. Schneider's reasons were for keeping the crew in the yard didn't matter in this case; only what happened afterward did, with respect to compliance with the supervisor's request.

Based on the number of hours, a seven-hour air test is more of a delay of train than a three-and-a-half-hour delay. Mr. Kelley had no knowledge of a seven-hour air test until he read the transcript, and would need to do a forensic examination to determine if the responsibility for a seven-hour delay could be placed squarely on a crew. Nobody was charged with delay of train for the seven-hour air test.

If a crew reports for duty and goes home in six hours, they are paid for eight. With regard to the earlier statement that "if they don't want to do it they can go home," they still would have been receiving eight hours' pay. Mr. Kelley would not tell a crew he was putting them on a diet. He would reduce their overtime to that point that the crew would come to him and ask him what was going on, at which point he would tell them it was because of their lack of performance. In his opinion as a manager, it would be more productive to have the crew come to him asking why they were "getting tied up" at eight hours, than just to do it arbitrarily; it's not malicious at that point. There is no way to relieve somebody at eight hours. After a crew goes on duty, the cab ride from the crew room to the West Yard is 15-20 minutes, and the crew has to get its instructions, so that the crew is going to make 8½ or 9½ hours. Reducing them to a straight eight-hour day would mean pulling them off the job and letting the equipment sit idly.

Mr. Kelley does not believe that climbing on a table and yelling at conductors or engineers is Mr. Gidney's management style. He has never seen that behavior, and would not agree that it is appropriate. Using the phrase "fucking and failing" is not part of Mr. Kelley's management style, and he doesn't agree with it. Throwing that type of term around is not going to gain any operation. He hears it all the time on the railroad, but it is not the way to set expectations or to instruct or chastise somebody.

How Mr. Kelley would address the performance of a particular crew depends on whether it was a one-time activity or repetitive, whether he had spoken to them before, how much experience he has had with them, what their abilities and inabilities are, and would take it from there.

10. *Respondent Dameon Schneider* [JX 43]

Mr. Schneider testified at a deposition taken on August 5, 2015.

Direct Examination

At the time of his deposition, Mr. Schneider was IHB's assistant superintendent of terminal operations. Mr. Schneider hired out with IHB in October 2005 as a switchman, and

worked in that job until January of 2006 when he was promoted to trainmaster and worked in that position until 2008. From 2008 to 2010 he was assistant superintendent at Blue Island West, and from January 2010 to January 2011 he was assistant superintendent, train operations. Between January 2013 and January 2014 he was superintendent of the Chicago Transportation Coordination Office, and from January 2014 to September 2014 he was assistant superintendent at Blue Island West.

In the summer of 2013, Mr. Schneider was assistant superintendent at Blue Island West, with supervisory responsibility over Complainants. He was in charge of the overall performance of the yard, including production, inbound/outbound trains, on-time scheduling, car velocity, cars moving in and out of the yard, and making scheduled connections. He supervised the trainmasters.

During the summer of 2013, Mr. Schneider became aware that T. Truschka, D. Truschka, or Eric Berg had requested a caboose to perform the IC job. He remembers trainmasters Larry Caschetta and Brian Gidney telling him about caboose requests from this crew, and there were other crews that requested cabooses as well. It was within Mr. Schneider's authority to grant or deny requests for a caboose. He denied the requests from this crew because there are only a limited number of cabooses in the yard, and he had scheduled work that required their use. If there had been free cabooses when this crew requested them, he would not normally have granted the request. A caboose is not productive in IC delivery job, because frequently when shoving up to Highlawn, they would be tying on to other cars that were already there, and you can't have a caboose between the cars. Some would say that they wanted to shove out of the yard and pull up with a caboose on the other end, but you can't shove out and pull up because frequently you are tying on to other cars. It would be unproductive because there might not be a place to set out the caboose, and IHB can't afford to trap their cabooses up there.

The cabooses were requested because the crew thought it would protect them from rocks being thrown at them. There is no other way to perform the IC delivery job, and no other equipment that can be used on that job, that would protect the crew. They can't use another locomotive, because frequently they would be tying on to the cars, and you can't have an engine between the cuts. If a locomotive were available, that would cause the same problems that using a caboose would. Mr. Schneider is not aware of any crews being granted the use of a caboose for the IC delivery job.

Mr. Schneider is sure that he communicated sometimes by text with his trainmasters in the summer of 2013. It would not have been an unusual way to try to get work done. He does not specifically remember sending a text to Mr. Gidney regarding a caboose request from the Truschka, Truschka, and Berg crew. He does not recall exactly what he said about doing the job or going home, but he would have worded it in a way that they were instructed to do a job, and if they were not going to do the job they were instructed to do, they would be sent home for insubordination.

Mr. Schneider does not have any knowledge of a report of a trespasser on the IC delivery job from the Complainants. He does remember a report from T. Truschka that he was hit by rocks while on the IC delivery job. Mr. Schneider brought it up to the safety officer, and they

arranged to have IHB police officers go out during the time of the moves to make sure nothing was happening and the crew was protected.

On August 7, 2013, Mr. Schneider had the trainmaster keep Complainants in the yard rather than perform the IC delivery job. He did so because Mr. Caschetta and Mr. Gidney had reported that the crew was not being productive on the IC delivery job. He does not recall the specific dates when he received the reports from Mr. Caschetta and Mr. Gidney, but it was a few days before August 7, 2013. Mr. Schneider wanted to keep them in the yard to monitor them, and to measure other crews doing the IC delivery job to see if the problem was specifically with the Truschka, Truschka, and Berg crew. He looked at reports from trainmasters about how long it was taking crews to do that job, and it seemed that it was consistently taking Truschka, Truschka, and Berg longer than other crews.

The IC is a railroad that the IHB interchanges with. He would consider the industries that they service the customers. Mr. Schneider does not deal with the marketing and budgeting issues, and doesn't know how much IHB charges the IC or the IC charges IHB.

The trainmasters had been switchmen for a long time, and Mr. Schneider relied on them to know how long the delivery job should take. They were telling him that it was taking this crew longer than it should take. Whether the crew could be assigned additional work after they returned from the IC delivery depended on the time they came back to the yard and what else was going on there. Some nights there might not be jobs, and some nights they might be sent to switch autos. It depends on the amount of time they have left. If they go up to the IC, and are up there for five or six hours and come back with only enough time to yard their train back in, or just get back light power, he can't assign them anything else.

Mr. Schneider has never told an employee of IHB that he was putting them on a diet. To him, that phrase means that a trainmaster was going to make a conductor or locomotive engineer work. They would be watched when they were not on a delivery where they could not be; in the yard, they can be watched for productivity and the trainmaster can make sure they are working continuously. They will work for eight hours instead of going to a delivery, and sitting somewhere for three hours where they can't be watched.

Mr. Schneider was present in the room when Mr. Spano informed the crew that they were pulled from service. He did not have any input into that decision. Mr. Spano said, "You're out of service, you're out of service, you're out of service." They asked why, and Mr. Spano told them they knew why. Mr. Spano pulled them out of service for delaying the job that was assigned to them on August 7. There were numerous things that delayed the job: Mr. Berg didn't have his boots on; it took quite a while to get the cab and get over before they actually started switching; they called for earplugs when they already had a set; sent the engine for Mr. Berg rather than having him just grab the Knucklemate and walk it down; arguing with the trainmaster; and calling the crew dispatcher and threatening to have Mr. Schneider come out and watch them put on a show. They said the switch was not functioning properly, they walked down to make a standing cut, and the cars supposedly still had air in them. The crew went on duty at 3:15 and didn't tie on to a cut until 5:30 or later. That length of time is sufficient to be charged with delaying a job.

Mr. Schneider did not participate in developing the charges against Complainants, and did not participate in the investigation. He did not participate in meetings about the decision to terminate T. Truschka and Mr. Berg, and did not make the decision.

IHB has rules that requires employees to report safety concerns to management, and if an employee does not do so, that employee might be subject to charges depending on what the situation was. If something happened because the employee didn't report a safety violation, then there might be charges, but Mr. Schneider can't recollect anybody getting in trouble for not reporting. If a safety concern is not being addressed right away, an employee should not stop reporting it, but should bring it up. The employees are the IHB's eyes and ears.

There have been many times that Mr. Schneider and the trainmasters have met one-on-one with train crews to find out what safety issues they had seen, so they could be addressed. If the concerns are about the track and ballast, they are handed off to the Engineering Department. If the concerns remain present, the employees should talk to the safety officer or write a letter, and the safety officer opens a file with the Maintenance-of-Way Department. Once they have addressed the problem, the safety officer will close it out.

Mr. Schneider has been trained on how to talk to employees in a management class.

Cross-Examination

The caboose requests by Complainants for the IC delivery did not affect in any way Mr. Schneider's decision to keep them in the yard on August 7, 2013. The frequency with which they made caboose requests did not affect in any way his decision to deny them a caboose. There were other employees at Blue Island during the same time who requested cabooses. Mr. Schneider is familiar with the Caboose Removal Agreement, and is aware that employees must first request a caboose in order to be paid the penalty claims provided for, if appropriate, for not getting a caboose. As a result, there is a fairly substantial number of caboose claims made by trainmen at Blue Island Yard, Gibson, Argo, and Norpaul. At every location where IHB operates, there are caboose claims made by employees and denied by management.

Mr. Schneider is familiar with the area at Indiana Avenue, where T. Truschka reported the rock-throwing incident. There were other crews operating over the Indiana Avenue road crossing at the time. There have been occasional complaints over the years about people throwing rocks. In June, July, and August of 2013, the Complainants' crew was the only one that Mr. Schneider recalls saying that there were problems with trespassers at Indiana Avenue crossing.

There were generally two crews making the run to the IC, one making a delivery and another one picking up cars. Mr. Schneider was not getting reports from the crews that were going up to the IC to pick up cars as opposed to delivering them, about unusual incidents or trespassers. Picking up cars would be the same process as delivering them, only in reverse.

The process for trainmen and engineers bidding on jobs at Blue Island is based on seniority. They call the crew dispatcher, and if they have the seniority for the job, they mark up

for it. The jobs are bulletined as yard transfer jobs, which means they can be assigned anything within the limits of the territory. The trainmaster would have the responsibility for deciding what particular tasks to assign to a train crew on any particular day. There was nothing in the job bulletin that indicated that a crew would be doing an IC delivery or pickup. There were even days that the afternoon crew starting at 3:15 p.m. wouldn't do the IC at all because of operational reasons.

It has been over a year since Mr. Schneider saw the video of the activities at the West Yard involving this crew after they arrived there. Assuming that they arrived at 5:02 p.m., that would be extremely late for a crew that came on duty at 3:15 p.m. There is no reason for the trainmen who went in the shanty at 5:02 p.m. to be in there for 40 minutes.

Mr. Schneider did listen to the recording of the phone call by T. Truschka indicating that he was going to put on a show, and inviting Mr. Schneider to come and watch him. He took offense to that. He did not take offense to the fact that the crew was asking for cabooses to perform the IC delivery. He did not take offense at any safety complaints that the crew made, such as rock-throwing or trespassers.

11. *Respondent Michael Carter* [JX 42]

Mr. Carter testified at a deposition taken on August 5, 2015.

Direct Examination

Mr. Carter hired out on the railroad with Norfolk Southern in 1998, and was a conductor with Norfolk Southern from 1998 to 2001. In 2001, he was hired as a conductor for the Canadian Pacific Railroad, and did that job for eight months. He then started working for IHB, first as a locomotive engineer for IHB for 11 years, then as a road foreman for four years. At the time of his deposition, he had been working as a senior road foreman of engines for eight months.

Mr. Carter had a role in the investigation of the rules charges against Complainants. His role was limited to the alleged rule violations against D. Truschka, because D. Truschka was working as a locomotive engineer and Mr. Carter, as road foreman of engines, was the supervisor of locomotive engineers. He does not remember specifically who asked him to look into D. Truschka's actions. Respondent's Exhibit 11 is a statement that Mr. Carter wrote out on August 8, 2013, the day after the incident.

Complainant's Exhibit 12 is the investigation, and Exhibit 11 to the investigation is a timeline of events that Mr. Carter put together from watching from the camera, the radio, the phone, and the event recorder from the engine. Based on his investigation and the information that he put together, it was Mr. Carter's opinion that D. Truschka did not commit a rules violation on August 7.

Mr. Carter did not deny a caboose request from Complainants in the summer of 2013. Typically requests would not go to him as a road foreman of engines, but as a manager, it was brought to his attention. Mr. Berg brought it up, but Mr. Carter does not remember the exact day

that it was first brought to his attention. Mr. Berg basically gave him a rundown of a rock-throwing incident that had happened on a past job, and Mr. Carter told Mr. Berg that he would look into it and see what he could do about getting a caboose. Mr. Carter talked to the safety manager, who said that if there was a caboose available, the crew would get it. There are other jobs that use a caboose, and if there weren't any available, they couldn't give one to the crew. Mr. Carter thought that was a reasonable accommodation by the safety manager. He was not present at any time during the summer of 2013 when trainmasters denied a caboose request from the Truschka, Truschka, and Berg crew.

Mr. Carter was not informed on August 7, 2013 that the crew was taken off the IC delivery job and assigned to do a yard job. He heard about it on that day when he was using the restroom, and heard Mr. Berg walking through the shanty about 40-50 feet away. Mr. Carter went out and spoke to Mr. Berg, who told him about the assignment. The statement marked as RX-11 is Mr. Carter's recording, to the best of his recollection, of the conversation he had with Mr. Berg. Shortly thereafter, the events occurred in the yard office, and then T. Truschka came downstairs and the crew eventually went out to do the yard job. Mr. Carter assumed the discussion was done because by then he had left to go to another location.

Mr. Carter first learned that the crew was being pulled from service when he was on his way back from Argo, and Mr. Dunn told him that the general superintendent was coming out to the property. He didn't have a clear understanding what was going on, but guesses it was due to a conversation between Katterman and Spano. After speaking with Mr. Dunn, Mr. Carter arrived at the Blue Island shanty. Blue Island was between Argo and his residence, so he stopped by since the general superintendent was going to be there. The crew arrived shortly after he did, and Mr. Spano wanted to know what was going on. Mr. Spano then removed the crew from service. Mr. Carter does not remember what any member of the crew told Mr. Spano. Mr. Spano basically told the crew that they were out of service. After the charge letters came out and Mr. Carter started collecting data, he learned that the reason they were pulled from service was for delay of job. His main focus was on D. Truschka, and he was not too much concerned with the acts of T. Truschka or Mr. Berg. He does not even know in general terms what their delay of job was. D. Truschka was not withheld from service for a long time, and eventually returned to work.

IHB rules require that an employee make their safety concerns known to management. If an employee believes there is a safety issue on the job, he absolutely has to report it to a supervisor. Mr. Carter has never been trained on anti-retaliation policies at IHB.

Cross-Examination

At 3:00 in the afternoon, Mr. Carter was at Blue Island Yard, and was in the restroom sometime around 3:15. While he was in the restroom, he heard Mr. Berg saying something to the effect that "We're not doing our regular job, we're going to the West Yard to switch autos, that's bullshit, I don't think that's fair." Since Mr. Carter was 40-60 feet away, it would be fair to say that Mr. Berg was not saying these things in a conversational tone. At the time, there were other employees in the shanty because it was crew change, and there were several crews around. While he was still in the restroom, Mr. Carter sent a text to Mr. Dunn advising him that Mr. Berg was in

the shanty complaining. Mr. Carter decided to have a conversation with Mr. Berg about what he was saying, and grabbed a crew sheet, and asked Mr. Berg why he was still in tennis shoes. He doesn't remember Mr. Berg's reply, and then they discussed the issue of the assignment.

Considering that Mr. Berg's shift began well before Mr. Carter talked to him, he should have been dressed and ready for work. Switchmen are absolutely not permitted to wear tennis shoes while working.

When Mr. Carter started to have his conversation with Mr. Berg, Mr. Berg requested to talk with the trainmaster. Mr. Carter was more concerned with getting Mr. Berg out of the shanty so other crews would not get involved in what was going on. At that point, Mr. Carter did not know anything about any difficulties at Blue Island with regard to Mr. Berg, and until he looked at the crew sheet, didn't even know who Mr. Berg's fellow crew members were.

When Mr. Carter took Mr. Berg out of that area, they went up to the trainmaster's office. There were other crews there, and while Mr. Carter and Mr. Berg were heading out the door on the way upstairs, Mr. Berg was ranting about the assignment and about his issues with the caboose. He had not complained about the caboose when Mr. Carter was in the restroom.

As road foreman, Mr. Carter's primary job was to supervise the locomotive engineers. In 2013, locomotive engineers were not subject to the Caboose Removal Agreement. Mr. Carter would not have dealt with caboose issues, and the first time he heard about the caboose was as he and Mr. Berg were walking up the stairs. T. Truschka and D. Truschka were coming down the stairs as Mr. Carter and Mr. Berg started up, and for some reason T. Truschka decided to follow them upstairs. Mr. Carter can't remember whether he suggested that T. Truschka come because he was the foreman, or whether T. Truschka decided on his own to come. D. Truschka left the area, and Mr. Berg, T. Truschka, and Mr. Carter went up to the trainmaster's office. Mr. Carter had a conversation with T. Truschka up in the office, and T. Truschka expressed the problems he thought he was having with regard to a caboose. That was the first time that Mr. Carter heard T. Truschka say anything about problems getting a caboose. Mr. Carter said that he would look into it and talk with someone about whether or not a caboose would be provided. Mr. Carter had not previously indicated to any trainman or engineer that he would look into a caboose request. Mr. Carter subsequently spoke with Mr. Bolster, the safety manager, who told Mr. Carter that if there was a caboose available, the crew would get one. Mr. Carter gave that information to Mr. Dunn while Mr. Carter was en route to Argo.

After finishing his business at Argo, Mr. Carter received a call from Mr. Dunn telling him that Mr. Spano was coming out to Blue Island because of things that were going on with this crew. Mr. Dunn told Mr. Carter that Rich Katterman had somehow become involved. Mr. Katterman was an assistant manager of train operations at the time. An MTO is a dispatcher's job, and the dispatchers are located in Calumet City. They have no control over trainmen in the yard; they control trains that are out on main lines as well as other crews that might be on IHB's property. There are times that a dispatcher needs to talk with a trainmaster; the only time they would talk about a yard job would be when the dispatcher needs to know that a train has been built. Mr. Katterman had called Mr. Dunn about something, and Mr. Dunn vented to him about what had been going on earlier in the day – specifically the confrontation between Mr. Dunn and

T. Truschka, when T. Truschka had said to put on his boots and come watch the show. Mr. Katterman took that to Mr. Spano, and that prompted Mr. Spano to come out. It would be fair to say that Mr. Dunn was upset to a certain extent at what T. Truschka had said to him, but when Mr. Carter was at Blue Island, Mr. Dunn had not told him anything about it, and neither of them had any intent to elevate the issue to a higher level. Mr. Dunn was not happy at all that Mr. Spano was coming out; neither he nor Mr. Carter was interested in elevating the issue.

In a case where a manager above Mr. Carter was going to ask questions about things that had happened during the day, he would make himself available in case the locomotive engineer was involved. He would also be the person to pull the download from the locomotive if that was necessary to evaluate what had happened. Mr. Carter did not tell Mr. Spano about what had happened earlier that day with Mr. Berg until he wrote out his statement. Before Mr. Spano took the crew out of service, Mr. Carter had only told Mr. Dunn about Mr. Berg's conduct on August 7. When Mr. Spano took them out of service, he did not ask Mr. Carter for his opinion, and did not to Mr. Carter's knowledge ask anyone else.

After Mr. Carter was notified that he would be testifying at the investigation, he had a conversation with D. Truschka's¹⁷ union representative. Sam Sipich called Mr. Carter to find out what was going on; it happens all the time, and there was nothing unusual about his calling Mr. Carter. Mr. Carter told him that once he got the facts together, and found that D. Truschka had done whatever he was supposed to do, he would "take care of it." After he reviewed the download, the video, and some of the recordings, Mr. Carter took no exception to D. Truschka's conduct on that day, and he testified to that effect at the investigation.

Nobody ever said anything to Mr. Carter that indicated that the Complainants were taken out of service because of their requests for a caboose. He did not provide information to management or at the investigation because he was concerned or upset about the fact that they had been requesting cabooses. Mr. Carter has worked as a locomotive engineer, including belt jobs, and the majority of the time was without cabooses. He does not consider the presence or absence of a caboose to be a safety problem for the trainmen, and it does not affect the safety of the locomotive engineer.

Mr. Carter started his timeline at 5:02 p.m. when the crew arrived at the West Yard. He left Blue Island Yard at approximately 4:15 p.m. After the crew left Mr. Dunn's office, Mr. Carter did not talk to Mr. Dunn about what had happened; Mr. Carter followed behind the crew because he had to go to Argo, and he wanted to address the caboose issue with the safety manager. He had already left Blue Island when he talked to Mr. Bolster and then called Mr. Dunn back.

When Mr. Carter had a conversation with Mr. Berg about the crew's assignment, he said there is no particular assignment to a crew; you do whatever the trainmaster asks.

When Mr. Carter was a locomotive engineer, Mr. Berg had worked with him as a switchman. Mr. Carter was not made aware by anyone on August 7, 2013 that there was an

¹⁷ The transcript refers to "Mr. Truschka" without specifying whether it was Donald or Thomas, but the context makes it clear that it was D. Truschka to whom the answer referred.

agenda to punish the crew because they had been making caboose requests for the IC delivery. It is not the norm that a crew coming on duty at 3:15 p.m. not to arrive at the West Yard until 5:02, but it happens.

Exhibits

A. Joint Exhibits

Caboose Removal Agreement [JX 1]

This document, effective September 1, 1985, is the agreement between IHB and the United Transportation Union setting forth the procedures for trainmen or conductors to request a caboose in the performance of duties, and the rights of the trainmen and conductors to file penalty claims should their requests be denied.

Yard Video of August 7, 2013 [JX 2]

This exhibit is part of the DVD submitted under cover letter dated August 15, 2015, which also includes the audio recordings discussed in testimony and listed below under JX 4, 5, 6, 8a, 8b, 9, 10, 11, 12, and 22. The yard video is in two parts, and shows the performance of Complainants between 5:02 p.m. and 7:07 p.m. on August 7, 2013.¹⁸

Crew Information Sheet [JX 3]

This document identifies the Complainants as the members of a crew working a shift that came on duty at 3:15 p.m. on August 4, 2013 and went off duty at 3:40 a.m. on August 5, 2013.

Telephone Call of August 4, 2015 re Mr. Berg – IHB Police to Mr. Packard [JX 4]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is accurately transcribed on the transcript provided, and consists of an IHB police officer informing Yardmaster Dale Packard Jr. at 3:55 p.m. that he was finished with “your man from the 315 east yard job.”

Telephone Call of August 4, 2013 re Mr. Berg – Mr. Packard to Train Crew [JX 5]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. Although the audio recording does not include the parties’ final words (each saying “all right”), it is otherwise accurately transcribed on the transcript provided. It consists of Mr. Packard telling T. Truschka that Mr. Berg had finished

¹⁸ The video begins at approximately 4:02 p.m., but there is no activity for the first hour. It continues for about nine minutes after showing the crew departing the West Yard at 7:07 p.m., but again there is no activity shown after 7:07 p.m.

his urinalysis test, and T. Truschka telling Mr. Packard that Mr. Berg was not there yet. This conversation took place just a few seconds after that set forth in JX 4.

Telephone call of August 4, 2013 – Mr. Berg to Mr. Packard [JX 6]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is cut off before the end of the transcript, but the portion that is shown in the transcript but not contained on the recording is unimportant. The conversation consists of Mr. Berg calling Yardmaster Dale Packard Jr. at 4:13 p.m. and receiving instructions from Mr. Packard as to the IC job the crew was to perform.

Letter of August 30, 2013 [JX 7]

This document is a letter from Paulette J. Peterson, manager of regulatory compliance, to Mr. Berg informing him that the results of his drug and alcohol test on August 4, 2013 were negative.

Hotline Calls of August 5 [JX-8a] and August 6 [JX-8b]

The recordings of these telephone calls are contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recordings was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recordings are accurately transcribed on the transcripts provided.

On August 5, 2013, T. Truschka reported a gentleman jumping over the fence 2-300 feet west of Indiana Avenue while the crew was shoving back from CP-107. The individual screamed obscenities and threw rocks, hitting T. Truschka in the back and in the leg. T. Truschka said that he wanted to make the company aware of the situation, and that he was going to write a statement and take it to the trainmaster for his signature.

On August 6, 2013, T. Truschka reported a group of individuals throwing rocks at the locomotive as the crew was moving west across Indiana Avenue. Because the crew was inside the locomotive, nobody was injured. T. Truschka reiterated that he had been hit the previous day.

T. Truschka Phone Call of August 7, 2013 in Mr. Dunn's Office [JX 9]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is accurately transcribed in the transcript provided. It reflects that at 3:19:55 p.m. on August 7, 2013, T. Truschka dialed a four-digit number and, while the phone was ringing, said "I'll take care of this tomorrow." He asked Mr. Dunn whether Mr. Dunn was working the next day, and when told he was, told him to "have your boots and eyeglasses ready. We're going to take care of this tomorrow. We're going to have fun. Tell Dameon [Schneider], he might want to come out here

too and watch the show.” After Mr. Dunn told T. Truschka that he was on a recorded line, T. Truschka further said “I’m going to the hump tomorrow. Let’s see them switch me now.”

T. Truschka Phone Call to Mr. Packard on August 7, 2013 re Earplugs [JX 10]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is cut off before the end of the transcript, but the portion that is shown in the transcript but not contained on the recording is unimportant. The conversation consists of T. Truschka calling Yardmaster Dale Packard Jr. at 5:20:37 p.m. on August 7 and requesting that Mr. Packard send over some blue earplugs with the red strings on them.

Mr. Dunn Phone Call to T. Truschka re Earplugs [JX 11]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is accurately transcribed in the transcript provided. The conversation consists of Mr. Dunn calling T. Truschka at 5:21:04 p.m. (less than 30 seconds after T. Truschka spoke with Mr. Packard) and asking why the crew did not already have earplugs. T. Truschka responded that he did, but wanted some sent over in case he dropped his in the dirt, saying, “do you want me to keep wearing those after I’ve dropped them in the dirt?” Mr. Dunn told T. Truschka, “next time be clear.”

Crew Van Request Phone Call by T. Truschka [JX 12]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording accurately transcribed in the transcript provided. In this recording, T. Truschka called the van driver at 4:23:16 p.m. on August 7 and requested a “pickup at the office” after identifying himself as “526.” The driver replied “we’ll respond.”

GPS Crew Van August 7, 2013 [JX 13]

This document shows the position of the crew van at 13 different times between 4:26 and 5:06 p.m. on August 7, 2013.

Charge Letters of August 13, 2013 [JX 14, 15, and 16]

These documents are three copies of a letter from P.G. Oresik, superintendent of IHB’s Chicago Transportation Coordination Office, to each of the Complainants, directing to attend a formal hearing on August 20, 2013. The letter advises the Complainants that the investigation is intended to ascertain the facts and determine their responsibility, if any, for alleged violations of NORAC General Rule D, NORAC Rule 90, and NORAC Rule 941 during their tour of duty on Run KB24/526 on August 7, 2013.

T. Truschka and Mr. Berg Termination Letters of August 30, 2013 [JX 17]

This exhibit consists of two letters from Mr. Kelley, one to T. Truschka and one to Mr. Berg. Mr. Kelley informed each of them that as a result of the facts developed at the formal hearing on August 20, substantial evidence established that they were responsible for violation of the rules identified in the charge letter, and that they were dismissed from employment with IHB.

Mr. Berg Termination Letter of August 30, 2013 [JX 17b]

This document is a letter from Mr. Kelley to Mr. Berg informing him that as a result of the facts developed at the formal hearing on August 20, substantial evidence established that T. Truschka was responsible for violation of the rules identified in the charge letter, and that he dismissed from employment with IHB.

OSHA Complaint [JX 18]

This exhibit is Complainants' complaint under the Act filed with the Occupational Safety and Health Administration, along with several attachments. The complaint lists a number of protected activities and adverse employment actions which will not be summarized as this is a *de novo* hearing. The exhibits to the complaint, which will be considered, include (A) T. Truschka's written report of rock-throwing on shortly after midnight on August 4-5, 2013; (B) the written report of rock-throwing at 11:30 p.m.-12:00 a.m. on August 5-6, 2013, signed by T. Truschka as foreman, Mr. Berg as helper, and David Munter as engineer; (C) designation of portions of two tracks as High Threat Urban Areas; (D) a printout of a web-based news report of the murder of a Metra officer near the Sibley Metra station in Harvey on September 27, 2006, together with a report of the arrest of suspects in the murder of the Metra officer; (E) the August 13, 2013 charge letter issued to T. Truschka; (F) the August 30, 2013 termination letter to T. Truschka; (G) the August 30, 2013 termination letter to Mr. Berg; (H) a copy of the IHB Safe Start newsletter for the second quarter of 2013, showing that a foreman and helper were commended for reporting a gapped switch on July 10, 2013; and (I) a copy of NORAC Operating Rules D, 90, and 941.

Respondents' Answer to OSHA Complaint [JX 19]

This exhibit consists of the response of IHB and the individual Respondents to the OSHA complaint filed by Complainants. The substantive response will not be considered on its merits, as this is a *de novo* hearing, but will be considered as necessary for evaluation of credibility, to determine whether Respondents were inconsistent in their explanations of the disciplinary action taken against Complainants, and to assist in clarifying the exhibits attached to it. Those exhibits, which will be considered, include (A) a printout of Mr. Berg's work history from June 3 to June 8, 2013; (B) a printout of T. Truschka's work history from June 10 to June 13, 2013 and a copy of a message from Mary Kay Conley to Tammy Winterfeldt regarding a settlement involving T. Truschka; (C) a copy of a Department of Homeland Security announcement regarding security standards for freight and passenger rail systems and the role of the Transportation Security Administration in railroad security; (D) aerial photograph of a "general interchange"¹⁹; (E) a

¹⁹ The substantive response of IHB refers to this exhibit as a "Google Map of the general interchange location," without identifying what interchange it is.

handwritten injury report from Craig Bushma dated August 16, 2009; (F) photos of the interchange area where Mr. Bushma was injured; (G) the transcript of the IHB's August 20, 2013 investigation into the charges against Complainants based on the events of August 7, 2013; (H) an email from Jim Sheppard listing the deliveries made by IHB to the IC, to Mittal Riverdale, and to the IAIS between June 16 and June 18, 2013, with supporting work orders; (I) a copy of the IHB police activity logs from several different officers for the period from July 30 to August 8, 2013 with a number of illegible entries, along with an illegible copy of a document from Networkfleet entitled "Activity Detail²⁰"; (J) a list of claims made under the Caboose Removal Agreement between November 14, 2008 and April 4, 2013.

T. Truschka's Past Record [JX 20]

This exhibit consists of a list of 21 events, including 20 incidents of discipline imposed on T. Truschka, between August 18, 2005 and August 30, 2013.

Mr. Berg's Past Record [JX 21]

This exhibit consists of a list of six events, including five incidents of discipline imposed on Mr. Berg between September 5, 2008 and August 30, 2013.

Mr. Dunn Phone Call to T. Truschka re supplies [JX 22]

The recording of this telephone call is contained on the DVD submitted on August 15, 2015, and the agreed transcript of the recording was provided by the parties on November 23, 2015 as part of their Joint Stipulation of Transcripts. The audio recording is accurately transcribed in the transcript provided, except that the last statement by T. Truschka ("okay") is transcribed, but not recorded. The conversation consists of Mr. Dunn calling T. Truschka at 5:25:43 p.m. and asking whether there was anything else that T. Truschka might need. T. Truschka responded that Mr. Dunn could send some batteries over too, and Mr. Dunn said he was sending batteries, safety glasses, and earplugs. Mr. Dunn then told T. Truschka that Mr. Carter had spoken with Mr. Bolster, and that if a caboose was available, the crew could use it. T. Truschka responded that he had no problem with that; he just didn't like the total disregard of the issue by the carrier. He then said that he still didn't understand why the crew was switching autos, and Mr. Dunn responded, "Well, that's because you're my yard job, and I can do what I want," to which T. Truschka replied, "That's fine."

Affidavit of Mary Kay Conley [JX 23]

Ms. Conley is IHB's Director of Labor Relations and Human Resources. She is familiar with the collective bargaining agreements governing the disciplinary process under the CBAs and the Railway Labor Act. As a general rule, all members of a train crew are cited to attend any investigation involving Transportation Department employees. The reason for doing so is to insure that the facts as to each employee's involvement in the incident being investigated are

²⁰ The entries are illegible due to a poor-quality copy, as well as a black mark (apparently from copying highlighted text) across several of the entries. The parties will not be invited to submit new copies of the exhibit, as its contents are immaterial to this decision and order.

adduced, and to prevent an employee who is not cited from taking responsibility after it is too late to charge them under the applicable CBA.

Car Department Inspection Form [JX 24]

This exhibit is a copy of a car department inspection form, showing that on August 7, 2013, inspector Stewart locked track 7 West with 17 cars at 2:25 p.m. and opened the track at 3:25 p.m. Inspector Stewart conducted an inspection of the cars from 2:30 p.m. to 3:20 p.m. He identified the cars at the east and west ends.

Eric Berg Job Applications (Railroad) [JX 25]

This exhibit consists of documents showing that Mr. Berg applied for numerous railroad jobs after his termination from IHB.

Eric Berg Job Applications (Non-Railroad) [JX 26]

Although this exhibit was identified in the table of contents to the exhibit binder, no documents appear behind the tab labelled "26."²¹

Eric Berg Family Loans [JX 27]

This exhibit consists of copies of three checks from Mr. Berg's family members, identified as loans for vehicle repair and for payment of bills.

Eric Berg Mortgage Modification [JX 28]

This exhibit consists of a letter dated February 11, 2015 from CitiMortgage, Inc. offering Mr. Berg new terms for the payment of his mortgage along with legal documents required to effect the modification.

401K Loan to Eric Berg's Wife [JX 29]

This exhibit consists of a printout of contributions and loan repayments to a Republic Services, Inc. 401K plan. The beneficiary is not identified, but I accept the parties' representation that it is Mr. Berg's wife.

Mr. Berg Drug Testing [JX 30]

This exhibit consists of documents showing that Mr. Berg tested negative for drugs and alcohol on January 3, April 4, May 15, May 29, June 6, June 14, June 23, July 2, July 18, and August 4, 2013.

Experian Credit Report for Mr. Berg [JX 31]

²¹ Because any job search would be relevant only on the issue of damages, and I will find that IHB has not violated the FRSA, the parties will not be invited to submit a new copy of the exhibit.

This exhibit is a credit report prepared by Experian with regard to Mr. Berg on March 24, 2015.

Integrated Counseling Reports [JX 32]

This exhibit consists of two letters prepared by Tim Dworniczek, Certified Addictions Counselor. The letter dated July 14, 2010 reported that Mr. Berg had been admitted into an outpatient substance abuse program on February 9, 2010 with a diagnosis of cannabis dependence, and that he had been able to achieve abstinence. The letter dated November 17, 2012 reported that Mr. Berg had been discharged from the program on July 28, 2010 after achieving and maintaining abstinence, and that after interviewing Mr. Berg and his wife, and after two drug screens, Mr. Dworniczek considered Mr. Berg's prognosis to be excellent.

Daniel Kelley Letter to UTU Local Chairman [JX 33]

This exhibit is a letter dated December 23, 2013 from Mr. Kelley to Greg Faucault, Local Chairman of the UTU, answering questions raised by Mr. Faucault in a previous letter in explanation of the disciplinary action taken against Mr. Berg.

Updated Job Applications by Mr. Berg [JX 34]

This exhibit consists of a number of documents showing that Mr. Berg applied for numerous railroad and non-railroad jobs between April and June of 2015.

T. Truschka Job Applications [JX 35]

This exhibit consists of a number of positions for which T. Truschka applied between November of 2013 and March of 2015.

T. Truschka Credit Plus Credit Score [JX 36]

This exhibit sets forth T. Truschka's credit score as evaluated by Experian, TransUnion, and Equifax as of March 18, 2013.

T. Truschka FICO Score [JX 37]

This exhibit sets forth T. Truschka's FICO score as evaluated by Experian, TransUnion, and Equifax as of March 24, 2015, along with details of his credit history.

Crew Consist Notice [JX 38]

This exhibit is the document by which available IHB jobs were bulletined for the period of July 31, 2013 through August 13, 2013 for the Gibson District, the Blue Island District, the Norpaul District, and the Argo District of IHB.

USB Drive [JX 39]

This exhibit is the USB drive submitted by the parties, containing the video and audio recordings that were also placed on the DVD submitted on August 15, 2015, and the audio recordings were transcribed on JX 41. The USB drive has not been reviewed due to IT restrictions in this Office; the parties have agreed that the recordings on the DVD could be reviewed instead.

Secretary's Findings [JX 40]

This exhibit consists of the Secretary's Findings dated January 16, 2015, reporting the results of the investigation of the complaint filed with OSHA by Complainants. The Secretary's Findings will not be summarized, as this is a *de novo* proceeding.

Stipulated Hearing Transcript Corrections [JX 41]

This exhibit consists of the parties' agreed corrections to the transcript of the hearing conducted on August 10-11, 2015.

Deposition of Mr. Carter [JX 42]

This exhibit was summarized above.

Deposition of Mr. Schneider [JX 43]

This exhibit was summarized above.

B. ALJ Exhibit

Joint Statement of Facts [ALJX 1]

This exhibit was summarized above, identified as the parties' stipulations.

C. Respondents' Exhibits

CORA Guide: Highlawn Area [RX 1]

This exhibit consists of a diagram of the Highlawn interchange, from 18th Street, north of milepost 17.9, to the CSX main lines south of milepost 19.9. It identifies the maximum speeds for the Highlawn tracks, and defines the area between milepost 18 and milepost 21 as a High Threat Urban Area.

Reinstatement Letter [RX 2]

This exhibit consists of a letter from Ms. Conley to P.D. Drennan, General Chairman of the UTU, informing him that IHB agreed to reinstate Mr. Berg's employment with IHB after having been terminated in March of 2010 for violating IHB's substance abuse policy.

Caboose Claims [RX 3]

This exhibit consists of the decisions by IHB on appeals related to claims under the Caboose Removal Agreement for the period from May 24, 2012 through August 6, 2013.²² The document shows that during that period of time, IHB ruled on 103 appeals, granting 23 of them and denying 80. Of those appeals, six were filed by T. Truschka and 25 by Mr. Berg, all of which were denied.

IHB Letter to OSHA [RX 4]

This exhibit consists of a sur-response dated April 30, 2014 of the named Respondents to OSHA during the OSHA investigation of the complaint herein. It will not be summarized, as this is a *de novo* hearing, and will be discussed only as necessary to assess credibility or Respondents' shifting explanations, if any, for the actions taken.

Chart of Discipline [RX 5]

This exhibit consists of a chart of discipline imposed on IHB employees other than Complainants for what Respondents contend are rules violations similar to those for which Complainants were disciplined.

Statement of Michael Carter [RX 11]

This exhibit consists of the statement prepared by Mr. Carter shortly after the events of August 7, 2013, which he read into the record at the IHB investigation hearing and to which he referred during his deposition testimony in this proceeding.

Google Maps [RX 12]

This exhibit consists of five printouts of Google Maps pages showing:

- The driving route from Alsip to the Blue Island Yard (RX 12-A)
- An overhead view of Alsip yard (RX 12-B)
- An overhead view of the area from Alsip Yard to the Blue Island Yard (RX 12-C)
- An overhead view of the path of the Renzenberger cab transporting Complainants to the West Yard on August 7, 2013, based on the GPS coordinates shown in JX 13) (RX 12-D)
- GPS readings (the same document as JX 13) (RX 12-E)

Google Map – West Yard [RX 13]

This exhibit consists of a printout from Google Maps showing an overhead view of the West Yard.

²² Page 3 of the document covering the period from May 24 to July 23, 2012 is missing from the exhibit, and the results of 4 appeals are missing; thus the total numbers contained in the summary do not match the total numbers set forth in IHB's own summary contained within the exhibit.

Google Maps – Highlawn Interchange [RX 14]

This exhibit consists of two printouts from Google Maps showing the Highlawn interchange. RX 14-B is zoomed out somewhat in comparison to RX 14-A, and RX 14-B shows that the approximate distance from the Old Signal Mast to the Little Calumet River is approximately 3,650 feet.

Page from Railroad Supply Catalog [RX 16]

This exhibit consists of a copy of a page from www.railwayparts.com, showing that a drawbar alignment tool, referred to in this matter as a Knucklemate, is 39” long and weights eight pounds.

Audio and Video Exhibit Lists [RX 17 and RX 18]

These exhibits contain lists of the audio and video files contained on JX 39, the USB drive that was not reviewed. The combination of the lists is identical to the list of files contained on the DVD submitted on August 15, 2015.

D. Complainants’ Exhibit

Public Law Board Awards [CX 1]

This exhibit consists of two undated awards of the Public Law Board, ordering the reinstatement of T. Truschka and Mr. Berg to employment with IHB, and letters from Ms. Conley directing them to report for return-to-duty physical examinations by June 17, 2016.

Findings of Fact and Conclusions of Law

To prevail on a claim of discrimination under the FRSA, Complainants must demonstrate by a preponderance of the evidence that (1) they engaged in protected activity; (2) they suffered an unfavorable personnel action²³; and (3) the protected activity was a contributing factor in the unfavorable personnel action.²⁴ If Complainant satisfies his burden, Respondents may escape liability only if they can show by clear and convincing evidence that the same adverse actions would have taken in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

²³ The terms “unfavorable personnel action,” “adverse employment action,” and “adverse action” appear in the FRSA, in the incorporated provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the regulations implementing both statutes. They terms are used interchangeably in this Decision and Order.

²⁴ 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. See *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013).

Findings of Fact

T. Truschka began working in the railroad industry in 2000, and was hired by IHB in 2004. He worked for IHB as a trainman/switchman until he was terminated on August 30, 2013.

D. Truschka began working in the railroad industry in 1998. At the time of the hearing, he had worked as an engineer for IHB for 11 years.

Mr. Berg began working in the railroad industry in 1999. He was hired by IHB in July of 2004, and worked there as a trainman/switchman until 2010, when he was terminated for violating IHB's policy against substance abuse. In 2013, he was rehired by IHB after having successfully completed a course of rehabilitation, and having remained sober since January of 2010.

The 526 Job

Thanks to their seniority with IHB, Complainants were able to "mark up" – that is, to claim assignment to – the "526 job," which is a yard job that usually includes one IC transfer job per shift. The IC transfer job consists of either a delivery of cars to or a pickup of cars from the IC at the Highlawn interchange.

To perform the IC delivery job, the crew – which consists of a conductor, a helper, and an engineer – pulls the train cars eastward out of the Blue Island yard on tracks belonging to IHB. While pulling the cars, the engine is located at the front. Once the cars are pulled past CP 107, the cars are "shoved" (pushed by the engine, with the engine now at the rear of the cars) back slightly westward, then south onto the Highlawn interchange, which is owned by the IC. When the cars have been pushed far enough south, the engine is detached from the cars, which are left on the Highlawn interchange, and returns to the Blue Island yard without them by proceeding north on the Highlawn interchange and then west on the IHB track. Both in the course of pulling the cars out of Blue Island, and returning to Blue Island after making the delivery, the crew rides the train across the Indiana Avenue interchange.

To perform the IC pickup job, the crew rides the engine east on the IHB track, then south on the Highlawn interchange and is attached to the cut of cars; it pulls the cars northward on Highlawn and then eastward on the IHB tracks, and thereafter shoves the cars westward to Blue Island. During the shove portions of both the pickup and the delivery moves, the engine pushes the cars ahead of the engine, and the conductor rides on the front car (the point of the shove).

Complainants made an effort to work together on the 526 crew whenever they could, and did so much of the time during the summer of 2013. As T. Truschka and Mr. Berg were both qualified conductors, they had an agreement to switch off on a daily basis between the conductor job and the helper job. They came to expect that, after marking up to the 526 job, they would be assigned to perform an IC transfer job on every shift. The 526 job, however, is a yard job, and the IC transfer job is not a specified assignment for the 526. The 526 crew may be assigned any job in the yard, including an assignment to switch autos, at the discretion of the yardmaster and the trainmaster.

Caboose Issues

Under an agreement with the United Transport Union, which represents trainmen/switchmen (a category that includes conductors), an employee covered by the agreement may request a caboose on any qualifying job. If the job involves a move of more than one mile, and a caboose is reasonably available, the IHB will permit its use on that move. If a request is made and denied, a conductor may submit a claim for a time penalty. If the caboose was improperly denied under the Caboose Removal Agreement, the conductor will receive penalty pay for that denial. The agreement does not apply to engineers.

During the period between May 24, 2012 and August 6, 2013, IHB ruled on 103 appeals of caboose claims, granting 23 of them and denying 80. Of those appeals, six were filed by T. Truschka and 25 by Mr. Berg, all of which were denied. T. Truschka was paid for some of his caboose claims. For that reason, and because the claims in the record were classified as “appeals,” I conclude that there were more claims that were made and granted, and therefore were not appealed.

On May 29, 2013, T. Truschka began working the 526 job routinely, after having previously worked the 520 job, which involves auto switching in the yard. Beginning on May 29, he requested a caboose every time he came on duty, because he was trained to do the 526 job with a caboose and because he thought it would be safer for the crew to use one. All of his requests were denied.

In the spring of 2013, Mr. Berg requested a caboose whenever he worked the 526 job. His requests were all denied. He requested a caboose because he thought it was more logical to shove out of the yard, rather than pull out, to make the move. He believed it was safer to do the job that way. He stated that belief to trainmasters Dunn and Gidney, and possibly to Mr. Hillegonds as well. He discussed it with Mr. Caschetta on August 4.

D. Truschka never requested a caboose or made a caboose claim; as an engineer, he was not a beneficiary of the Caboose Removal Agreement.

In late July of 2013, T. Truschka and Mr. Berg saw a trespasser, which made them a little nervous, and they along with D. Truschka discussed it with Mr. Gidney. Mr. Gidney accused them of seeing ghosts, and the conversation became heated. D. Truschka told Mr. Gidney that the crew really needed a caboose. Mr. Gidney repeatedly told the crew members that they would not be getting a caboose and eventually texted his supervisor, Mr. Schneider, about the caboose issue. Mr. Schneider responded that the crew would not be getting a caboose, and if they didn't want to work without one, they could go home.²⁵

²⁵ T. Truschka and Mr. Gidney both testified regarding T. Truschka's allegation that Mr. Gidney had jumped up on a table during this discussion. On this specific matter, I find Mr. Gidney to be credible and credit his version of events over that of T. Truschka, whose testimony in general reflected a tendency to exaggerate. Thus, I find that Mr. Gidney did not jump up on a table during this conversation. I note, however, that whether or not he did makes no difference in my ultimate conclusions.

On a shift beginning in the afternoon of August 4, 2013, the 526 crew consisting of Complainants was assigned to pick up cars from the IC. Sometime between midnight and 12:15 a.m. on August 5, T. Truschka observed a number of people standing along the fence line on the IHB side of the fence 200-300 feet west of Indiana Avenue²⁶, one of whom was on the south side of the fence and thus trespassing on IHB property. At that time, the engine was shoving the cars westward toward Blue Island, and T. Truschka was riding the point of the shove. The individual who was inside the fence line shouted an obscenity at T. Truschka and began throwing rocks at him. T. Truschka was hit in the back and in the back of his right thigh. He decided not to stop, as that would have created more danger, and attempted to reach the yardmaster on his handset. After he was unable to do so, the engineer, D. Truschka, reported the incident to the dispatcher. After the crew completed its run, T. Truschka wrote out a statement describing the events and called the safety hotline to report it, saying that he wanted the company to be aware of the situation. T. Truschka took his written report to Mr. Caschetta, the yardmaster, who asked “What the fuck am I supposed to do with this?” T. Truschka replied that he didn’t care what Mr. Caschetta did with it, and told him that he had also made a complaint on the safety hotline. Mr. Caschetta said that T. Truschka was “really pushing it,” and T. Truschka replied that he was not “getting into it” with Mr. Caschetta. Mr. Caschetta forwarded the document to Mr. Schneider. T. Truschka wrote “THIS COULD HAVE BEEN PREVENTED WITH A CABOOSE.” (Capital letters in original.) I find that Mr. Caschetta’s hostile response was motivated not by the report itself, but by his belief that the crew had just taken 7 hours to perform an air test, and had taken too long to perform their assigned duties.

On a shift beginning in the afternoon of August 5, 2013, the 526 crew consisting of T. Truschka, Mr. Berg and engineer David Munter performed either an IC delivery or an IC pickup job (the record is not clear, and that issue is not material to this decision). At a time when all crew members were riding the engine, they encountered a group of pedestrians throwing rocks which struck the engine. None of the crew members was hit with rocks. The crew immediately notified the dispatcher. After completing the run, T. Truschka again wrote out a statement and signed it; Mr. Berg and Mr. Munter signed it as well. T. Truschka again called the safety hotline and reported the incident, and gave the written statement to Don Hillegonds, who was the trainmaster on duty. Mr. Hillegonds responded more civilly than had Mr. Caschetta the day before, and offered to investigate the matter and send out a gumshoe if one was available.

Based on the foregoing, I conclude that although T. Truschka and Mr. Berg believed as early as May of 2013 that using a caboose on the IC transfer job was a safety issue, they did not communicate that belief to any yardmaster, trainmaster, or other supervisor or management official of IHB until, at the earliest, late July of 2013, during the heated conversation with Mr. Gidney.²⁷ Until that time, their requests for a caboose and subsequent claims were a matter of routine for IHB; they were only some among many, and there was nothing to indicate that the requests had anything to do with safety concerns. However, the discussion with Mr. Gidney

²⁶ Indiana Avenue crosses under the IHB track west of the IC track. An IC pickup job involves pulling the cars north on the Highlawn interchange (IC track), east on the IC track, then shoving the cars west to Blue Island. Apparently, then, the rock-throwing incident started well after the 526 crew began the westward shove, as T. Truschka, who was on the point, was well past the IC track.

²⁷ Although D. Truschka testified that this discussion took place on June 30, 2013, all other parties to the discussion testified that it occurred in late July, and I so find.

about cabooses in June or July was related to safety concerns. After that discussion, the caboose requests were again considered a routine part of IHB's business, until Complainants submitted the written reports of August 5 and 6 and had discussions with Mr. Caschetta, Mr. Carter, and Mr. Hillegonds between August 5 and August 7. Those reports and discussions regarding trespassers pelting the crew with rocks made it clear that they believed the absence of a caboose on the IC transfer job was a safety issue. Likewise, D. Truschka believed as of the June or July discussion with Mr. Gidney that it was a safety issue, and communicated that belief to Mr. Gidney then.

"Seven-Hour Air Test" of August 4, 2013

On August 4, 2013, Complainants marked up for the 526 job. Their shift started at 3:15 p.m. At the beginning of the shift, Mr. Berg was selected for a random drug test, and reported to another office to do so. He was unable to provide an immediate urine sample, and drank several bottles of water. After about 30-45 minutes, he provided his sample, and returned to work at about 4:16 p.m. The crew was assigned to pick up a cut of cars on the IC tracks, and the first order of business was to place a marker and conduct an air test of the cars to be picked up. It took some time for Mr. Berg, who was acting as the conductor on that day, to get the marker, because the yard was busy and he had to weave his way around a train being re-crewed. After he got the marker, Complainants had to drive all the way to the hump (far west) end of the yard before they could find an open track to drive east to the IC pickup point. They did not know exactly where the cut of cars was located, and looked in a couple of possible locations. When they found it, they placed the marker and started the air test. Mr. Berg saw that the cars would have to be switched because there were cars with hazardous materials present, but there was no room to make the switch because all the tracks were full. He decided to start the air test. At about 9:15 he called Mr. Caschetta to ask whether the crew should take lunch or work through lunch, and Mr. Caschetta was angry that the crew was taking so long to perform its job. Eventually the cars were switched out and the crew started bringing them back to Blue Island. It was during that return trip that the first incident of rock-throwing occurred. When the crew arrived at Halsted Street, T. Truschka got off and Mr. Berg continued to ride the point of the shove to the hump. Mr. Caschetta picked him up at the hump and was very angry about the length of time the crew had taken to perform the job.

Events of August 7, 2013

Complainants marked up to the 526 job to begin at 3:15 p.m. on August 7, 2013. T. Truschka was to serve as conductor/foreman, Mr. Berg as helper, and D. Truschka as engineer. Prior to their coming on duty, Mr. Schneider had directed Mr. Dunn to assign the crew duties that would keep them in the yard, and not to perform any IC transfer. He also directed that their overtime be limited. Mr. Schneider did so because he believed, having been told by Mr. Caschetta and Mr. Gidney, that the crew had taken too long to perform an air test on August 4, 2013, and had generally taken too long to perform their duties. By keeping them in the yard, their supervisors could evaluate their job performance, and could also observe how long the IC transfer job was taking other crews to perform. His decision had nothing to do with reports of trespassers or rock-throwing, and had nothing to do with caboose requests by T. Truschka and/or Mr. Berg.

3:15 p.m.: Complainants reported for duty.

3:16 p.m.: Dale Packard, Jr., the yardmaster on duty, told T. Truschka to go talk to Mr. Dunn because they were going to be switching autos that day. The crew members were unhappy with that assignment. T. Truschka and D. Truschka went to Mr. Dunn's office to discuss the assignment with him, while Mr. Berg remained in the crew shanty.

Between 3:15 and 3:20 p.m.: Mr. Dunn informed the Truschkas that the crew would be switching autos that day. The Truschkas asked why, and Mr. Dunn responded that he had been told that they were "fucking and failing" him and that he had been instructed to place them on a diet. T. Truschka became upset and argued with Mr. Dunn about the assignment. He specifically accused Mr. Dunn of making the assignment because they had raised safety issues, and said that he was going to call OSHA. Mr. Dunn told T. Truschka that the reason for the assignment was that the crew had taken 7 hours to perform an air test, and T. Truschka started to explain the reason that the August 4 job had taken so long. Mr. Dunn told him that he could make any assignment he wanted, and T. Truschka asked, "That's the way you want to play it?" Mr. Dunn responded, "Yup." T. Truschka then stood up, walked next to Mr. Dunn, picked up the phone, and dialed the crew dispatcher.

3:20 p.m.: Time of phone call by T. Truschka to the crew dispatcher. While the phone was ringing, he said "I'll take care of this tomorrow." He asked Mr. Dunn whether Mr. Dunn was working the next day, and when told he was, told him to "have your boots and eyeglasses ready. We're going to take care of this tomorrow. We're going to have fun. Tell Dameon [Schneider], he might want to come out here too and watch the show." After Mr. Dunn told T. Truschka that he was on a recorded line, T. Truschka further said "I'm going to the hump tomorrow. Let's see them switch me now." T. Truschka then hung up the phone and the Truschkas departed Mr. Dunn's office.

At about the same time that T. Truschka called the dispatcher, Mr. Carter overheard Mr. Berg in the crew room complaining about the assignment to switch autos. He stated that the crew was going to "screw [Mr. Dunn] to death"²⁸ and not do any work. Mr. Carter, who was in a restroom 50-60 feet away, heard Mr. Berg's comments, and sent Mr. Dunn a text about them.

3:27 p.m.: Mr. Carter exited the restroom and met Mr. Berg in the crew room. He wanted to remove Mr. Berg and his "negative energy" from the crew room because other crews were in there. When he met Mr. Berg, he observed that Mr. Berg did not have his work shoes on although he had been on duty since 3:15. He asked Mr. Berg to come upstairs to the office with him, and while they were walking up, Mr. Berg continued to complain about the auto-switching assignment, and also complained about the lack of a caboose for the 526 job, referring to the rock-throwing incidents.

²⁸ I credit Mr. Carter's testimony over Mr. Berg's denial that he said any such thing. Mr. Carter was a straightforward and credible witness, and his actions following Mr. Berg's statements are consistent with having heard Mr. Berg say these things, including an immediate text to Mr. Dunn and the decision to take Mr. Berg out of the crew shanty because of his "negative energy."

As the Truschkas were heading downstairs from Mr. Dunn's office to the crew room, they met Mr. Carter and Mr. Berg, who were heading up to the office. D. Truschka continued to the crew room, and T. Truschka, Mr. Berg, and Mr. Carter returned to the trainmaster's office. T. Truschka and Mr. Carter went into the office, and Mr. Berg and Mr. Dunn waited outside. While waiting outside with Mr. Dunn, Mr. Berg said that he just wanted to do his job; he had been off for three years and three months. Mr. Dunn did not respond. Inside the office, Mr. Carter told T. Truschka that he was tired of the whining and complaining, and wanted to know why Mr. Berg was not dressed for work. T. Truschka told Mr. Carter that he felt the crew was being harassed for raising safety issues, specifically the trespassers and rock-throwing incidents. T. Truschka and Mr. Carter discussed the caboose issue for several minutes. Ultimately, Mr. Carter told T. Truschka that he would discuss the matter with Mr. Bolster, the safety manager, and T. Truschka was satisfied with that response. Mr. Carter also told T. Truschka that Mr. Dunn could make any assignments he saw fit.

Mr. Dunn and Mr. Berg then entered the office, and Mr. Carter asked Mr. Berg why he still had his tennis shoes on in spite of having been on duty for 15 minutes, and stated that he should "send [Mr. Berg] home."

3:40 p.m.: T. Truschka and Mr. Berg departed the trainmaster's office and went back to the crew room.

3:40 p.m. – 4:23 p.m.: Complainants were in the crew room; the only activity in which they engaged was that T. Truschka got his grip and retrieved his radio.

4:23 p.m.: T. Truschka called for a Renzenberger cab to drive the crew to the West Yard.²⁹

4:43 p.m.: Renzenberger cab arrived at the East Yard to pick up Complainants for transport to the West Yard.

4:47 p.m.: Renzenberger cab departed the East Yard, taking Complainants to the West Yard.

5:02 p.m.: Complainants arrived at the West Yard to begin auto-switching duties. All of them entered the crew shanty, where they had a brief discussion about the work to be done.

5:10 p.m.: D. Truschka left the shanty and walked to the locomotive.

5:20:37 p.m.: T. Truschka called Yardmaster Dale Packard, Jr., and requested that Mr. Packard have earplugs sent to the 526 crew in the West Yard, specifying the "blue ones with the red strings on them."

²⁹ There is a dispute whether the cab driver told T. Truschka that the cab was located at the Alsip yard and it would take a while to pick them up. I need not resolve that dispute. The facts establish the chronology, and Respondents are not asserting that Complainants had any control over the length of time they had to wait for the cab. Further, although T. Truschka's testimony at the investigation about his conversation with the cab driver was inconsistent with the recording introduced at the hearing, this insignificant matter has no effect on his credibility.

5:21:04 p.m.: 27 seconds after T. Truschka called Mr. Packard, Mr. Dunn called T. Truschka asking why the crew did not already have earplugs. T. Truschka responded that he did have a pair, and asked for some more to be sent over in case he dropped his in the dirt. Mr. Dunn told T. Truschka, "Next time be clear."

5:26 p.m.: Mr. Dunn called T. Truschka and asked if he needed any other supplies in addition to earplugs. T. Truschka asked for batteries, and Mr. Dunn suggested safety glasses as well. Mr. Dunn informed T. Truschka that Mr. Carter had informed him that the safety manager agreed to let the crew use a caboose if one was available, although not for the entire IC transfer run. T. Truschka responded that he respected that decision, and that he had objected only to being disregarded on the issue before. T. Truschka stated that the caboose decision still did not answer why the crew was switching autos, and Mr. Dunn replied that "you're my yard job, and I can do what I want."

5:30-5:40 p.m.: Mr. Spano received a phone call from Mr. Ketterman, the chief dispatcher on an unrelated matter, and Mr. Ketterman asked him in the course of the conversation whether Mr. Spano knew what was going on at Blue Island. Mr. Spano did not, and Mr. Ketterman told Mr. Spano that there was some kind of issue going on. Mr. Spano had Mr. Katterman patch him in with Mr. Dunn. Mr. Dunn told Mr. Spano that the crew had not switched any cars, and Mr. Spano was upset at having a crew on duty for 2½ hours without having performed any work. Mr. Spano decided to go to Blue Island Yard.

5:31 p.m.: The locomotive pulled up to the shanty.

5:34 p.m.: D. Truschka exited the cab of the locomotive and walked down the side of the engine to set the hand brake.

5:35 p.m.: D. Truschka entered the shanty.

5:39 p.m.: D. Truschka exited the shanty carrying his grip, and returned to the locomotive, releasing the handbrake at about 5:40 p.m.

5:39 – 5:42 p.m.: Some time during these three minutes, D. Truschka asked T. Truschka for help adjusting his seat.

5:42 p.m.: T. Truschka and Mr. Berg exited the shanty for the first time. T. Truschka went to a nearby switch, and Mr. Berg went to line up switches.

5:44 p.m.: D. Truschka requested that T. Truschka help him adjust the seat on the engine. T. Truschka went aboard the engine for the first time, and helped adjust the engineer's seat.

5:45:30 p.m.: T. Truschka called the dispatcher to request headroom on CP-129, and was given instructions.

5:45 p.m.: Mr. Berg carried a Knucklemate up the lead and placed it alongside a pole at about 5:46 p.m.

5:49 p.m.: T. Truschka reported to Mr. Dunn that the 8-W switch was defective because the keeper did not drop.

5:50 p.m.: BP-12 arrived on 5 West and stopped in the clear, meaning that its location did not prevent the 526 crew from performing its job. The BP-12 conductor, Mr. Pikorz, got off and walked toward T. Truschka and Mr. Berg. The three conversed for a few minutes.

5:55 p.m.: T. Truschka, Mr. Berg, and Mr. Pikorz walked over to the switch.

5:56 p.m.: The 526 locomotive moved east onto the track where the crew was to perform work, with T. Truschka on board; the engine moved over the allegedly defective switch, meaning that it was not defective when they went over it.

5:57 p.m.: Mr. Pikorz and Mr. Berg went into the shanty. Mr. Berg had no work-related reason to go into the shanty.

5:57:36 p.m.: T. Truschka determined that a drawbar was skewed, and requested a Knucklemate to realign it with the engine. He ordered the application of three-step protection. Shortly thereafter, Mr. Berg exited the shanty, walked to the pole and picked up the Knucklemate.

5:58:27 p.m.: 51 seconds after requesting the Knucklemate, T. Truschka told Mr. Berg that he would send the engine down to pick Mr. Berg up to come help him adjust the drawbar. T. Truschka then directed release of the three-step protection and told D. Truschka to take the engine to pick up Mr. Berg.

Between 5:58 and 6:01 p.m.: The engine moved to the shanty. Mr. Berg got on board with the Knucklemate to take it to T. Truschka.

6:01 p.m.: T. Truschka directed application of three-step protection for the foreman and the helper. He directed release of three-step protection about one minute later, and about one minute after that, D. Truschka released it. Shortly thereafter, T. Truschka directed D. Truschka to “stretch” the train “one and a half.” T. Truschka then realized that the air had not been properly bled from the cars that they were going to switch, and took about five minutes to bleed the air.

6:14 p.m.: Mr. Dunn arrived at the West Yard with the supplies requested by T. Truschka. He walked to the 8-W switch, and inspected it along with Mr. Berg.

6:16 p.m.: Mr. Berg reported to T. Truschka that the inspection of the 8-W switch had been completed.

6:30 p.m. (approximate): Mr. Spano arrived at Blue Island. He listened to the recorded phone call by T. Truschka concerning marking up to the hump on the next day, and Mr. Carter told him that Mr. Berg was wearing gym shoes after the start of his shift. Mr. Spano interpreted T. Truschka’s comment that Mr. Dunn should come to the hump and watch the show to be a threat to delay work at the hump. He directed that the Complainants come to the yard office.

6:54 p.m.: Mr. Gidney arrived at the West Yard to pick up Complainants.

7:03 p.m.: Mr. Gidney and Complainants departed from the West Yard. At that time, the locomotive assigned to the 526 crew was still tied to the same track as it was when the Truschkas went out to it the first time. The only cars that had moved were the cars pulled out by BP-12.

Mr. Gidney drove Complainants to the yard office, where they were told to go upstairs. They did so. Also present were Mr. Spano, Mr. Schneider, Mr. Dunn, Mr. Carter, and Mr. Caschetta.³⁰ Mr. Spano asked who the foreman of the crew was, and T. Truschka replied that he was the foreman. After some discussion about what the crew had done that day, Mr. Spano told each of the Complainants that he was being taken out of service. Under the CBAs applicable to trainmen/switchmen and engineers, Mr. Spano did not have the authority to terminate them immediately, but he could take them out of service pending an investigation, and did so. At the time Mr. Spano took Complainants out of service on the evening of August 7, he did not know that they had been requesting cabooses, and did not know of their reports of trespassers or rock-throwing incidents. Mr. Schneider was aware that T. Truschka had made caboose requests, based on his responding to a text on that issue from Mr. Dunn. Mr. Gidney and Mr. Caschetta likewise were aware of the caboose requests. Mr. Carter became aware of the rock-throwing incidents when Mr. Berg told him about them on August 7 and said that the issue could have been averted if they had a caboose. Although Mr. Schneider, Mr. Gidney, Mr. Caschetta, and Mr. Carter were aware of the caboose requests, they did not tell Mr. Spano about them at the time that he pulled Complainants from service. Mr. Spano did not seek their input, and they did not give it. Mr. Spano learned of the caboose requests related to trespassing and rock-throwing incidents the day after he removed Complainants from service.

Events After Removal from Service

Each of the Complainants received a charge letter dated August 13, 2013, directing them to report for an investigation into alleged violations of Rule D, Rule 90, and Rule 941 based on their tour of duty on August 7, 2013. The charge letters were signed by P.G. Oresik, Superintendent of IHB's Chicago Transportation Coordination Office. None of the individually named Respondents had any role or input in the charges made against Complainants. The investigation took place on August 20, 2013, with Milton Leppert as the hearing officer. Mr. Leppert conducted the hearing, at which Complainants, Mr. Carter, and Mr. Dunn testified. The transcript of the hearing and exhibits were provided to Mr. Kelley. Mr. Kelley determined that T. Truschka and Mr. Berg were culpable for the charged rule violations, and that they should be terminated. He determined that D. Truschka committed no violations and should be returned to duty. T. Truschka and Mr. Berg were terminated, and D. Truschka was returned to service with no loss of pay.

Discussion

As discussed above, to prevail in this matter, each Complainant must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an

³⁰ Although Mr. Gidney was on duty, and had just driven Complainants from the West Yard back to the office, he was not present at this meeting.

unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013). If any Complainant satisfies his burden, Respondents may escape liability only if they can show by clear and convincing evidence that the same adverse action would have been taken in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

1. *Protected Activity*

As applicable to this matter, the FRSA provides that “[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...reporting, in good faith, a hazardous safety or security condition....” 49 U.S.C. § 20109(b)(1)(A); 29 C.F.R. § 1982.102(b)(2)(i)(A). Thus, any good-faith reports of hazardous safety conditions made by Complainants qualify as protected activity.³¹

In their closing briefs, the parties did not address with any specificity the issue of whether Complainants engaged in protected activities and if so, which of their actions fall within that definition. That is likely because there really is no dispute that they did. The protected activities in which Complainants engaged include some of their caboose requests and the reports of trespassers and rock-throwers in August of 2013.

Caboose Requests

Both T. Truschka and Mr. Berg, who were subject to the Caboose Removal Agreement, made requests for cabooses when they performed the 526 transfer job. Under the agreement, trainmen/switchmen were authorized to submit penalty claims – that is, claims for additional pay – when they made caboose requests that were denied. Caboose claims were a routine part of doing business at IHB, and no employee or management official took umbrage at any of them. Many of the claims submitted by T. Truschka and Mr. Berg were denied, and the denials were upheld on appeal. I find that because they were routine, the caboose claims by T. Truschka and Mr. Berg did not by themselves qualify as protected activity. I further find that none of the caboose requests made before late July of 2013 so qualify.

In addition, IHB had a legitimate reason for denying the requests: due to the nature of the IC delivery, the cabooses would be left on the IC tracks at the Highlawn interchange, with no guarantee that they could be retrieved, and they were needed on other IHB jobs. I find that the denials were unrelated to any indifference about or hostility to crew safety.

³¹ In their closing brief, Complainants allege that they engaged in protected activity when they “completed unsafe condition reports, hot line calls, and statements and turned this information in to IHB management” relating to a personal injury sustained by Engineer Yoder on April 13, 2013. [Complainants’ Closing Brief, p. 6.] Complainants cite to four pages of the hearing transcript and to the joint statement of facts set forth above in support of this allegation. However, the cited transcript pages and the statement of facts contain no information about any such complaints. There is nothing in the record to support that Mr. Yoder was injured, or that Complainants made any communications to management about his injury.

Some of the caboose requests (as opposed to claims), however, do qualify as protected activities. In late July 2013, Complainants coupled a caboose request with a statement that a caboose was needed for their safety. They had observed a trespasser on the IHB tracks, which made them nervous. When T. Truschka and Mr. Berg spoke with Mr. Gidney the next day, they told him they needed a caboose because of the trespasser. D. Truschka chimed in to say that T. Truschka and Mr. Berg needed a caboose for safety reasons. This caboose request constituted protected activity, and all three Complainants participated in it.³²

Reports of Trespassers and Rock-Throwing

The reports of trespassers and rock-throwing on August 5 and 6 clearly qualify as protected activity. There is no dispute that being pelted with rocks is a hazardous safety condition, and IHB does not dispute it. T. Truschka reported them in writing, in person, and by making calls to IHB's safety hotline. Mr. Berg signed the written reports. D. Truschka reported the first of the rock-throwing incidents, in which T. Truschka was actually struck by rocks, to the yardmaster as it was happening. Thus, all Complainants participated in these protected activities.

In addition, T. Truschka and Mr. Berg were, by the time of the rock-throwing incidents, linking the need for a caboose with their personal safety, rather than simply making requests for the purpose of submitting penalty claims later. The written report of the August 6 rock-throwing incident explicitly says that the incident "could have been prevented with a caboose." This linkage supports my conclusion and finding that the caboose requests in late July and August of 2013 constitute protected activity.

2. Adverse Employment Action

It is indisputable that all three Complainants suffered adverse employment actions. All three Complainants were pulled from service on August 7, 2013 pending investigation. Complainants T. Truschka and Mr. Berg were not paid for the time they were out of service. Although D. Truschka received retroactive pay when he was reinstated after the investigation, being pulled from service pending investigation is the type of action that would dissuade a reasonable employee from reporting hazardous safety conditions. *See Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002 (ARB Sep. 30, 2008); *Rudolph v. National Railroad Transport Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 12 (ARB Mar. 29, 2013).

Likewise, being required to attend an investigation into on-the-job performance, whether or not an employee is ultimately disciplined, is the type of action that would dissuade a reasonable employee from reporting hazardous safety conditions.

Whether the reassignment of Complainants to the auto-switching yard job on August 7, 2013 constitutes adverse employment action is a closer question. Although marking up to the

³² This action may or may not have been the prerequisite for filing a caboose claim by T. Truschka or Mr. Berg. Whether it was makes no difference; Complainants requested a caboose for safety reasons, and in the course of doing so referred to trespassers and rock-throwing incidents. Given the hazardous safety condition being discussed, this request qualifies as a protected activity.

526 job does not guarantee that a crew will perform an IC transfer job, or overtime, the common practice was that Complainants worked 12-hour shifts, including an IC transfer job, and as a result earned overtime pay. Under the *Melton* and *Rudolph* rubric, I find that reassignment to yard duties in itself is not adverse action, but the decision to reduce Complainants' overtime was. Any employee who has to decide between reporting a hazardous safety condition and continuing to earn overtime pay will be dissuaded from reporting the safety condition.

It need not be discussed that the terminations of T. Truschka and Mr. Berg constitute adverse employment actions.

Accordingly, I find that all Complainants suffered adverse employment action (1) when they were reassigned to auto-switching duties on August 7, 2013, with a resulting reduction in pay, (2) when they were pulled from service by Mr. Spano on August 7, 2013, and (3) when they were thereafter subject to an investigative hearing. T. Truschka and Mr. Berg suffered an additional adverse employment action when they were dismissed from service with IHB after the investigative hearing.

3. *Contributing Factor*

The Administrative Review Board has instructed that a "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 8 (ARB May 31, 2013); *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). The board has observed:

Causation or "contributing factor" in a FRSA whistleblower case is not a demanding standard. The FRSA expressly adopts the standard of proof applicable to AIR-21 whistleblower cases. The "AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard." As the Eleventh Circuit reasoned in the context of the nuclear whistleblower law upon which AIR-21 was based: "For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." "The 2007 FRSA amendments [adopting AIR-21's contributing factor standard] must be similarly construed, due to the history surrounding their enactment."

The FRSA's legislative history ... reveals Congress's intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Congress's adoption in 2007 of the comparatively lower contributory factor standard reflects congressional intent to promote effective enforcement of the Act by making it easier for employees to prove causation. A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor" in a personnel action. Therefore, a complainant need not show that protected activity was the only or most significant reason for the

unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected" activity. Indeed, the Third Circuit recently held that the 2007 FRSA amendments adopting the contributing factor standard for FRSA whistleblower complaints reflects Congress's intent to be "protective of plaintiff-employees."

Hutton, supra, slip op. at 7-8 (internal citations omitted). A complainant's burden of proving contributory causation will be met upon a "minimal showing even if the employer also had a legitimate reason for the unfavorable employment action against the employee." *Rudolph, supra*, slip op. at 20 (ARB Mar. 29, 2013). The contributing factor element of the complainant's *prima facie* case may be proven by "direct evidence or indirectly by circumstantial evidence." *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-0009, slip op. at 6-7 (ARB Feb. 29, 2012). Circumstantial evidence may include "motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence." *Bobreski v. Givoo Consultants, Inc.*, ARB No. 13-001; ALJ No. 2008-ERA-003, slip op. at 17 (ARB Aug. 29, 2014). Nonetheless, I find that Complainants have failed to meet this low burden with respect to any of the adverse employment actions. Each will be addressed more fully.

First, however, I note that Mr. Gidney and Mr. Dunn responded appropriately to Complainants' safety-related caboose requests of August 4-5 and 5-6. They dispatched IHB police to the location of the rock-throwing incidents to assist in the crew's safety, and on August 7, Mr. Dunn personally spoke with Mr. Bolster, the safety director, who agreed that Complainants could have a caboose for the part of the IC delivery that included the location of the rock-throwing incidents. Mr. Dunn conveyed that commitment to T. Truschka, who was satisfied with the response. The appropriate response by IHB managers to the trespassing and rock-throwing incidents supports my conclusion that the adverse employment actions were not in retaliation for those protected activities.

Second, Complainants' argument is based largely on the fact that their reassignment to yard duties and removal from service took place very shortly after they reported trespassers and rock-throwing on the IC delivery job. While temporal proximity between the protected activity and the adverse action, may be sufficient to satisfy the contributing factor element, temporal proximity alone is not sufficient where relevant, objective evidence disproves that element of a complainant's case. *See, e.g., Spelson v. United Express*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3, n.3 (ARB Feb. 23, 2011); *Robinson v. Northwest Airlines*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). Temporal proximity of protected activity is not dispositive, however, when there is compelling evidence to the contrary. *Spelson, supra*, and cases cited therein. As more fully discussed below, there is ample, persuasive, and compelling evidence to overcome any inference that the temporal proximity of Complainants' protected activities contributed to the adverse employment actions in this case.

Third, under the "cat's-paw" theory of liability, knowledge of protected activities can impermissibly influence the final decision-maker. In such cases, a complainant "need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can

be established that those advising the decision-maker knew, regardless of their motives.” See *Staub v. Proctor Hosp.*, 559 U.S. 1066 (2010); *Rudolph, supra*, slip op. at 18 (ARB Mar. 29, 2013). As explained below, I specifically find that this theory is not available to Complainants in this matter. With respect all of the adverse actions other than their removal from service on August 7, 2013, the decision-makers were themselves aware of Complainants’ protected activities, but those protected activities did not contribute to the decisions. Mr. Spano’s decision to remove Complainants from service was his alone; he had no knowledge of Complainants’ protected activities at the time he did so, and he sought and received no input from anyone who did.

Reassignment to Auto-Switching

Assistant Superintendent Dameon Schneider is the official who made the decision to keep Complainants in the yard on August 7, 2013, and instructed Trainmaster Steve Dunn to do so. Mr. Dunn accepted Mr. Schneider’s decision without discussion, and made the decision to assign Complainants specifically to auto-switching in the West Yard.

Before August 7, 2013, Mr. Caschetta and Mr. Gidney had informed Mr. Schneider that Complainants had requested cabooses,³³ and shortly before August 7 was aware of the rock-throwing incidents. However, he testified credibly that his decision to keep Complainants in the yard was unrelated to any of those requests or reports. Mr. Caschetta and Mr. Gidney had informed him that Complainants had shown a tendency to take too long to perform their job duties, particularly the IC transfer jobs, and he wanted to keep them in the yard for two reasons: first, so that their managers could keep an eye on them to make sure they were performing their duties, and second, so that managers could observe the length of time it took other crews to do the IC transfer jobs. Their observations were that other crews were taking less time than Complainants were to do the same job. The catalyst for Mr. Schneider’s decision was the so-called “seven-hour air test” that took place on August 4, 2013.³⁴ Complainants presented a great deal of evidence that tended to show that there had not been any seven-hour air test, and that to the extent the IC pickup job on that date was delayed, it was delayed by circumstances beyond Complainants’ control. But whether or not there was a seven-hour air test, or any delay caused by Complainants’ lack of performance, is not the issue I have to decide. The issue is whether Complainants’ protected activities played any part, however slight, in Mr. Schneider’s decision to keep them in the yard and cut their overtime. As previously discussed, I am persuaded that caboose requests were a routine part of doing business at IHB. Further, Mr. Schneider testified credibly that neither the fact of the caboose requests nor the number of caboose requests by T. Truschka or Eric Berg played any part in his decision to assign them to the yard on August 7. Mr. Schneider’s testimony on this issue was consistent throughout these proceedings, and is not contradicted by anything more than Complainant’s belief to the contrary, based on the short time between the caboose requests related to rock-throwing and the decision to keep them in the yard. As more fully discussed below, the fact that Complainants made caboose requests and reported hazardous safety conditions within a day of their being taken out of service is not sufficient to show that their protected activity played a role in their being assigned yard duties.

³³ Indeed, Mr. Schneider responded to a specific caboose request in late July by denying it.

³⁴ Although Mr. Schneider did not recall the exact date that he received the reports from Mr. Caschetta and Mr. Gidney, he recalled that it was “a few days” before August 7, 2013. I find that he received those reports after the purported “seven-hour air test” on August 4, 2013 and that those reports were a result of that incident.

Before August 7, 2013, Mr. Dunn had never received a caboose request from Complainants, and had not received any reports of trespassers or rock-throwing incidents from them. Sometime in the summer of 2013 before August 7, however, Mr. Dunn had been informed by Mr. Gidney that Complainants had requested a caboose, and that Mr. Gidney had denied the request. Likewise, before August 7 he was not aware of hotline calls made by the crew reporting the rock-throwing incidents. I find that Mr. Dunn's testimony on these matters was credible. His demeanor was straightforward, and his testimony is consistent with his actions on August 7. Further, Complainants have provided no evidence that Mr. Dunn knew any more than what Mr. Gidney had told him at the time Mr. Schneider directed him to keep Complainants in the yard. Mr. Dunn did not play any role in that decision by Mr. Schneider, but he did make the decision to assign them to auto-switching duties. I find that Mr. Dunn did not influence Mr. Schneider's decision or question it; Mr. Schneider was his superior in the chain of command at IHB and had the authority to make that decision. Based on Mr. Dunn's credible testimony, I find that he was following Mr. Schneider's instructions when he assigned auto-switching duties to Complainants, and did not consider any of Complainants' protected activities when he did so.

Respondent Caschetta was also aware of Complainants' protected activities before they were assigned yard duties on August 7, and he was on duty that day. However, he did not make the decision to assign Complainants to yard duty, or specifically to the auto-switching job. He was not involved in those decisions, and was not aware of them until after Complainants had been pulled out of service. In making these findings, I credit Mr. Caschetta's credible testimony that he did not, and Mr. Schneider's and Mr. Dunn's testimony that they did make those decisions. In addition, although Mr. Caschetta served variously as yardmaster and trainmaster, he was serving in neither role with respect to Complainants when they came on duty on August 7. At that time, the yardmaster was Dale Packard, Jr. and the trainmaster was Mr. Dunn.

Respondent Gidney was also aware of Complainants' protected activities before they were assigned yard duties on August 7. However, he did not make the decision to assign them to yard duty or to assign them the auto-switching job, and he had no input into those decisions. Indeed, Mr. Gidney did not come on duty until several hours after the decisions were made.

Mr. Spano did not know of Complainants' protected activities before pulling them out of service on August 7. He had no knowledge of Mr. Schneider's decision to assign them to yard duties, or of Mr. Dunn's decision to assign them to switch autos. Mr. Spano was not involved in those decisions and was not aware of them until after he had pulled Complainants out of service.

In sum, Complainant's protected activities did not contribute to the decisions to keep them in the yard, reduce their overtime, or to assign them to auto-switching duties. Mr. Schneider and Mr. Dunn did not consider their protected activities in making those decisions. No other individual who had knowledge of their protected activities had any input in those decisions. Accordingly, I find that the Complainants have failed to meet their burden to show that their protected activities contributed to Mr. Schneider's decision to keep them in the yard and reduce their overtime, or to Mr. Dunn's decision to assign them to auto-switching duties. Beyond finding that Complainants failed to meet their burden, I find affirmatively that their protected activities did not contribute to Mr. Schneider's or Mr. Dunn's decisions.

Removal from Service

The only person involved in removing Complainants from service on August 7, 2013 was Mr. Spano. He did not seek or receive any input from any other person before doing so. At the time he made the decision, no person had told him about Complainants' protected activities, and he was not aware of them. He was aware only that they had come on duty at 3:15 p.m. and, two hours later, had not performed any work; and he only learned that because of an off-the-cuff remark from the chief dispatcher that there were some problems with the crew. He then had the chief dispatcher connect him with Mr. Dunn, who told him that Complainants had done no work. There was no discussion of their caboose requests or their reports of trespassers or rock-throwing at that time; Mr. Spano did not learn of them until, at the earliest, the day after he removed Complainants from service.

Based on the foregoing, I find that Complainants have failed to meet their burden to show that their protected activities contributed to Mr. Spano's decision to remove them from service on August 7, 2013. Beyond that failure, I affirmatively find that their protected activities did not contribute to Mr. Spano's decision.

Investigation

After they were removed from service, Complainants were subjected to an investigative hearing to determine whether any disciplinary action was warranted. The evidence does not show what official made the decision to refer them to an investigative hearing. The "charge letters" were signed by P.G. Oresik, who did not testify, and the investigation was conducted by Mr. Leppert, who also did not testify. I credit the testimony of all individual Respondents who addressed the matter that they did not participate in the decision to charge them. Mr. Spano and Mr. Schneider specifically denied having done so, and I find their denials credible. Although Mr. Dunn testified that he played a role in the investigation, he did not testify that he was involved in preparing the charges; instead, his role was limited to that of a witness. Mr. Caschetta testified that he was not involved in any meetings or discussions about the discipline imposed on T. Truschka or on Mr. Berg, and was not consulted on the decision not to discipline D. Truschka, and I find his testimony credible and do credit it. Likewise, Mr. Gidney testified that he did not participate in the investigation, that he made none of the decisions about charging the crew, and that he did not take part in any conversations or decisions about what discipline to impose or not to impose. I find his testimony to be credible, and I do credit it.

Based on the foregoing, I find that Complainants have failed to meet their burden to show that their protected activities contributed to the decision to charge them with rules violations and conduct an investigative hearing. Beyond that failure, I affirmatively find that their protected activities did not contribute to the decision to charge them and to conduct an investigative hearing.

Termination

After the investigative hearing, T. Truschka and Mr. Berg were terminated from their employment with IHB. Mr. Kelley was the individual who made the decision to terminate them,

after reviewing the transcript of the investigation and the documentary evidence admitted therein. Before being appointed to conduct the investigation, he had no involvement in any of Complainants' protected activities – he did not receive or deny any caboose requests or caboose claims, and was not informed of their requests for cabooses for safety reasons. He may or may not have been aware of the hotline calls made by T. Truschka after the rock-throwing incidents; if he was, he did not know who made those calls.

From evidence developed at the investigative hearing, Mr. Kelley certainly became aware of Complainants' protected activities. Complainants testified at the investigation about the hazardous safety conditions they encountered from trespassers and rock-throwing and introduced evidence that they had requested cabooses for the personal safety of the conductor and the helper. However, Mr. Kelley's detailed testimony about his forensic analysis of the audio and video recordings of Complainants' actions and inactions on August 7 persuades me that his decision to terminate T. Truschka and Mr. Berg were related solely to their performance on that date. He performed virtually a minute-by-minute analysis of Complainants' performance while they were in the West Yard, and considered the testimony of the witnesses at the investigative hearing concerning Complainants' actions before ever going out there. He forthrightly testified that no one inaction on the part of Complainants amounted to a delay of job, but that taken together, it was clear that they intended to perform little to no work. Considered with the evidence that Complainants resented being assigned to auto-switching, that T. Truschka was perceived to have threatened to delay the work of the entire yard by marking up to the hump on the next day, and that Mr. Berg explicitly threatened not to do the work, it is clear to me that his decision was based solely on his conclusion that the crew inexcusably failed to perform assigned duties. His testimony was forthright and credible, and was contradicted by nothing more than Complainants' supposition – but no evidence – that he must have considered their protected activities.

Although Mr. Kelley testified that he discussed his decision to terminate T. Truschka and Mr. Berg with others at or above his management level, he did so to be sure that his decision could be supported. In almost all dismissal cases, other senior managers will weigh in before the letter is actually sent out. There was no testimony that he discussed the reasons for his decision, or that he told anyone that he considered Complainants' protected activities.

Based on the foregoing, I find that Complainants T. Truschka and Mr. Berg have failed to meet their burden to show that their protected activities contributed to the decision to terminate their employment. Beyond that failure, I affirmatively find that they did not.

Conclusion

Because Complainants' protected activities did not contribute to any of the adverse employment actions taken against them or any of them, their complaint must be denied.

ORDER

IT IS HEREBY ORDERED that the complaint filed by Complainants under the FRSA is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ard
Newport News, Virginia

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).