

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 21 December 2017**

**CASE NO.: 2016-FRS-82**

**IN THE MATTER OF:**

**CORBY ACOSTA**

**Complainant**

**v.**

**UNION PACIFIC RAILROAD COMPANY**

**Respondent**

APPEARANCES:

JERRY EASLEY, ESQ.

For the Complainant

FRED S. WILSON, ESQ.

For the Respondent

BEFORE: LEE J. ROMERO, JR.  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (herein the FRSA or Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

## I. PROCEDURAL BACKGROUND

On December 16, 2015, (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor alleging that on or about May 13, 2015, Union Pacific Railroad Company (herein Respondent) violated Section 20109 of the FRSA by terminating his employment.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on August 11, 2016. OSHA determined that the evidence developed during the investigation was not sufficient to support the finding of a violation. (ALJX-1).

On September 6, 2016, Complainant filed his objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ). (ALJX-2).

A de novo hearing was held in Covington, Louisiana on January 17, 2017. Complainant offered 15 exhibits and Respondent proffered exhibits A-N, which were admitted into evidence, along with five administrative law judge exhibits. This decision is based upon a full consideration of the entire record.<sup>1</sup> Respondent also identified exhibits O and P which were never formally admitted into the record. Counsel for Claimant indicated he proffered no objection to the admission of RX-O or RX-P. As such, Respondent's Exhibits O and P are hereby received and admitted into the record.

Post-hearing briefs were received from Complainant and Respondent by the brief due date of July 7, 2017. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## II. UNDISPUTED FACTS

At the commencement of the hearing, the parties stipulated, and I find:

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Complainant's Exhibits: CX-\_\_\_\_; Respondent's Exhibits: RX-\_\_\_\_; and Administrative Law Judge Exhibits: ALJX-\_\_\_\_.

1. At all times material, Complainant was an employee of a railroad carrier within the meaning of 49 U.S.C. § 20109. (Tr. 10).
2. At all times material, Union Pacific Railroad Company was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. (Tr. 10).
3. Complainant engaged in protected activity under the Act, and Respondent had knowledge of such protected activity. (Tr. 214-215).
4. Complainant suffered adverse personnel action on June 19, 2015, when he was dismissed from his employment with Respondent. (Tr. 215).

### **III. SUMMARY OF THE EVIDENCE**

#### **Testimonial Evidence**

##### **Tobe Allen**

Allen has worked for Respondent for approximately 20 years. He was hired in 1998 as a switchman in Nebraska where he worked for one year. He then worked as an engineer for one and one-half years before becoming a yardmaster in Nebraska for three years. He became a Manager of Yard Operations (MYO) for one year and then Manager of Train Operations for two and one-half years. He worked as Senior Manager of Terminal Operations in Little Rock, Arkansas for six years before becoming the Director of Terminal Operations (DTO) in Avondale, Louisiana on July 1, 2014, where he worked for 18 months. He was DTO during Complainant's incidents. His last day at Avondale was May 15, 2016. He is now DTO in Livonia, Louisiana. (Tr. 12-15).

Allen presently holds a certification as a conductor and has held the certification since 2012, but has not used his certification to work as a conductor. Allen was the investigating officer and charging manager for rule violations against Complainant for the events of May 13, 2015. It was Allen's decision to charge the rules and hold the formal investigation. Chad Billson from Little Rock was the hearing officer for Complainant's formal hearing investigation. During Allen's six years working in Little Rock, he worked alongside Billson. Billson was the senior manager of remote operations in

Little Rock. Allen requested Billson to serve as the hearing officer, because he was a "perfectly neutral hearing officer." Allen acknowledged he could have requested another neutral person as hearing officer from Louisiana, but believed Billson to be neutral because he "had no idea on any kind of background information on any of the involved parties." He discussed the selection of Billson with the DRO and Superintendent who were okay with Billson. (Tr. 15-19).

Allen testified that, prior to coming to Avondale on July 1, 2014, he had never heard of Acosta. (Tr. 20).

As DTO, Allen testified he is responsible for all crafts, locomotive, transportation, signal, mechanical, and engineering department which includes the bridge department and track department. The track department is responsible for track right-of-ways (25 feet more or less from the track). The Federal Railroad Act (FRA) regulations mandate track maintenance and inspection. The FRA regulations require that vegetation alongside the track be controlled so that it does not interfere with trackside duties of the train crews. Overgrown grass could also be a violation of that regulation. (Tr. 20-22).

Allen allocates his work time with 10% in engineering, 15% with locomotive/mechanical, and 75% with transportation. He is responsible for and has 30 engineers under his authority. FRA regulations recognize "Class 8" certification for conductors. A "Class 8" conductor may receive different designations depending on their job position. If it is a road job, one person might be the conductor and the second conductor might be called a "brake man." If it is a yard job, the conductor might be called a switchman. Other designations that fall under the "Class 8" conductor certification include: foreman and footboard yard master. (Tr. 22-24).

During his time in Avondale, Allen had approximately 30 certified conductors under his authority. Between Allen and the engineers there was an intermediate layer of management, a senior or manager of operator practices (MOP). Between Allen and the conductors there was a MYO. The conductors and engineers would report to their MOPs or MYOs and the MYOs and MOPs would report directly to Allen. While at Avondale, Allen had four MYOs reporting to him: Jimmy Cougett, Brad Hoksch, Darien Atkins and Matt Gordon. Allen reported to the Superintendent. RX-D, page 18 reflects that Jimmy Cougett was Acosta's supervisor. (Tr. 24-27).

Allen interfaced with Jeff Everett, the departing DTO, for two days after arriving in Avondale. They discussed terminal operations and areas of responsibility. There were no discussions about issues with any conductors. Allen met with the MYOs and introduced himself and gave a brief work history. Everett did not tell Allen of any incident with Cougett reporting a rule violation by Acosta a week or so before Allen's arrival. Cougett did not tell him of the incident either. (Tr. 26-29).

Allen denied having knowledge of any reputation held by Acosta as being "accident prone, having reported several personal injuries and even one resulting in the termination of a manager." Allen testified his behavior is to develop his own relationships with people as he meets them. (Tr. 30).

Allen was asked to review RX-C, a chart of acute and non-acute injuries for Acosta. Allen has no cause to dispute the exhibit or whether it was prepared by Respondent. Allen was also asked to review RX-F at the hearing. Allen testified he did not review RX-F in preparation for his testimony. RX-F is a "report of matters" reported to Union Pacific's safety hotline. Allen is familiar with "reports of matters" in his line of work. (Tr. 31-32).

Allen stated the "safety hotline" is reviewed daily. The moment an employee submits a safety hotline report, Allen is notified of the report and who submitted the report by e-mail. Allen could not confirm whether he knew if Acosta reported safety issues more frequently than any other employee. Allen did not know how many reports Acosta had submitted, but admitted that if Acosta had submitted 150 safety reports he would be surprised. To Allen, that many reports by one employee is "a lot." (Tr. 33-34).

The issue I.D. 76920 found on RX-F stated "[a]long the toe path in what we go in 10 yards from 55 to 54 switch, has snakes galore hiding in the weeds where the rocks meet the water. At this point, there is tall grass where they are hanging out and you can't see them. The grass needs to be cut where the rocks meet the water." Allen would have received notice about this issue in his weekly reports, but not instantaneous with its reporting. Rather, that issue was assigned to the MPO, to manager track maintenance. The "55-54 switch" is in the same yard as the Kinder Morgan switch. (Tr. 34-36).

Allen testified he has not read the transcript of Complainant's hearing investigation. CX-4, page 28 reflects two rule violations charged by Allen on May 13, 2015, one at 1:41 pm and the second at 2:57 pm. (CX-4, pp. 28, 33). RX-F, page 1, reflects that the issue of snakes in the tall weeds incident was repaired at 3:33 pm. Allen does not recall any maintenance of way employees working in the yard when he arrived on May 13, 2015. (Tr. 36-38).

The two incidents which occurred on May 13, 2015, include the "sideswipe" incident and the "single car" incident. On that date, Acosta was working on a three-man crew. Acosta's certified locomotive engineer was Pete Altmeyer. The other certified conductor was David Bise. Allen recalled testifying that there was a "shoving" movement made into a 55 track on May 13, 2015. Allen testified that a shoving move could include a situation where a locomotive is at the back end of a series of rail cars pushing the rail cars from the back end, instead of pulling the rail cars. In such a situation, the engineer that is in the locomotive cannot see anything in front of the movement. His view is obstructed by the rail cars. When a movement is made in this manner, a point protector is required. A point protector is on the leading end of the movement, either riding in the leading car or walking alongside the track to make sure the movement does not shove any rail cars into any obstructions or off the tracks. When someone is providing point protection on a movement like this, the point protector is in control of the movement. When the point protector says "stop," the engineer must stop. (Tr. 38-41).

In this incident, Allen stated Acosta rode the shove on the leading end and provided point protection for the movement. Allen recalled Acosta reporting that he rode the shove movement closer to the facility so he would not have to walk as far to go inside the plant and get the gate open and permit the rest of the work to commence. Allen confirmed that there was no "exception" to the shoving moment just prior to Acosta getting off the cars and going into the plant. Based upon the video recordings, the people Allen talked too, and the statements he took, there was nothing about the shoving movement with which Allen took exception. Allen did not see whether the shove move came to a safe stop, because he was not present and he did not review it in a video. Allen also did not see Acosta when he went into the plant. He did not see it in the video and was not present to see it. (Tr. 41-45).

The video shows Bice pulled the pin to disconnect the cars which were coupled up to two locomotives. Acosta did not appear anywhere in any of the video screenshots Allen attached as exhibits to the company investigation transcript. Before Bise pulled the pin, the cars coupled up to the two locomotives. Because they were coupled up to the locomotives, they were considered "secure" according to Union Pacific's rules. The cars which rolled and side-swiped did not become unsecured until after Bise pulled the pin and detached the locomotives from the cars. (Tr. 46-47).

At the time of pulling the pin, Bice was required to perform a securement test. The purpose of the securement test is to make sure that the cars have enough hand brakes on them to keep them from rolling away. Union Pacific has guidelines about how many hand brakes must be "tied" based upon the number of cars, the angle of the grade of the track, etc. Depending on the area, the guidelines require a minimum of two hand brakes. However, local management in certain areas sometimes loosen the general guidelines, but such a decision has to be published and approved by the superintendent. While Allen was DTO, Mr. Chapelle was the superintendent. (Tr. 48-49).

After Bice failed to conduct a securement test, the cars rolled back down the tracks and caused a side-swipe. During these events, based upon his viewing of the video, Allen was never able to see Acosta. Allen went to the location of the incident with Eric Atkins after the yardmaster, Kurt Viola, told him of the incident. The yardmaster manages the yard proper at Avondale. On the date of the incident, Acosta was called a "footboard yardmaster." Allen's interpretation of a footboard yardmaster is a person in charge of a crew and/or a yard locally that is involved in the switching. Thus, not only will a footboard yardmaster be doing the work, but they will be in charge of all of that work that goes on in the yard. (Tr. 49-52).

Upon arriving at the location of the incident, Allen checked the safety of the crew and asked questions. The engineer told Allen that Bice pulled the pin and the video reflected the same. Allen asked whether any hand brakes were set on the set of cars at issue. The engineer, Acosta, and Bise all told Allen that there were two hand brakes set. Allen's opinion was that no hand brakes were set. When he arrived at the scene, the cars were secured and a third hand brake was set. The west end of the cars was near the locomotive and two brakes on the east end of the cars were farthest from the locomotive.

Allen proceeded based on the reports of the incident from the crew. He kept the crew out to move the cars. (Tr. 54-59).

In order to move the rail cars after the side-swipe, the hand brakes on that cut of cars had to be released. Allen observed Acosta release a hand brake on a cut of cars. The crew had told Allen those hand brakes had been set the whole time. Allen stated he thinks the brakes were set "after the fact." Bice testified at the hearing investigation that he set the two hand brakes. Allen stated he believes there were no hand brakes set. (Tr. 59-62).

Kinder Morgan had several cameras which showed the railroad tracks. Allen viewed the videos. Allen asked for copies of the videos, but was told he had to make a formal request for the videos and chose not to do so. Allen did not believe he would be able to get a copy of the video in time for the investigation. Moreover, Allen believed that his own video showed the same thing as the Kinder Morgan videos. According to Allen, his video shows "when they pulled out on the single car, we see David Bise walk in front. We know the engineer on the locomotive. There's a hand thrown switch that has to be thrown by hand. It cannot --- it's not automatic. So, the engineer pulls out of one track and then winds down to make the hook on another track. I asked Corby if that was him that threw the switch. He said yes so there was no need to go any further with that." Allen did not disclose the existence of the Kinder Morgan video during the investigation, because he did not believe the video was necessary. Prior to the investigation, Allen met with Mr. Tommy Albarado to go over his evidence and decided the video was not necessary. (Tr. 62-67).

At the investigation, Allen showed the video and introduced the screenshots. The local union chairman also viewed the video before the formal investigation. The video was not used at the formal investigation, only the screenshots were made part of the record. Allen does not remember the Union requesting the video be made part of the record. (Tr. 68-69).

The "side-swipe" incident produced a little property damage to one of the locomotives. There was no derailment, no damage to the track or switches and no personal injuries. Allen stated all rail incidents have to be reported to FRA. The reporting threshold to FRA is \$10,000 in damages. Generally, the practice is to charge rules that apply to each situation, the company does not charge rule violations or make decisions to charge rule violations differently based on the severity of the outcome. A

rule violation which results in no property damage, no personal injuries, and the same rule violation which results in a fatality will be charged and assessed similarly. (Tr. 69-72).

The second incident involved a single car and occurred about an hour and 20 minutes before the events that led to the side-swipe. The video shows Bice pulled the pin on the car to detach it from the locomotive. Acosta was not in the video. Acosta reported he was at the rail switch, some distance behind the locomotive. The incident involved a car and two locomotives. Acosta was behind the locomotive and Bice was nearer the car. Bice was in a better position than Acosta to comply with safety dictates. Bice would have been providing control and charge. The last movement made before Bice pulled the pin was a shove movement. Allen could not say who provided point protection for that shove movement. Allen did not find any problem with the single car incident. According to Allen, he did not find anything wrong with the employee's actions based on the video. There was no movement or damages or injuries from the single car incident. (Tr. 73-80).

Allen had "no exception" to the single-car shove or the "side-swipe" shove with regards to Acosta. Allen's complaint about Acosta regarding the single car incident was that Bice violated the rules and Acosta should have been watching and admonishing Bice for violating the rules. Acosta was the footboard yardmaster and Bice was part of Acosta's crew. Acosta was near the switch during the single car incident. Between Acosta and the locomotive there was a distance of empty track and then the length of the two locomotives which are about 60 to 63 and one-half feet long. Allen did not take exception to the division of work between Acosta and Bice nor with their locations during the movement. Allen testified he would not expect an employee to do anything about another employee he could not see. (Tr. 80-85).

With regards to procedure, a railroad manager is the person that charges rule violations which result in an employee going to a formal investigation. At the formal investigation, the hearing officer is another railroad manager. The hearing officer rules on objections to evidence and testimony during the formal investigation. Then, after the formal investigation, the transcript is sent to another railroad manager to determine whether or not to discipline the employee. (Tr. 85).

Allen had a conversation with Superintendent Chappelle regarding the investigation of Acosta and Bice. Allen spoke

with Chappelle about the incident, that an investigation was occurring and when the investigation was completed. Billson, the hearing officer, was told of the evidence, the charges, the rules, and the pre-meeting with the union. Allen also spoke with Mr. Billson in advance of the investigation and requested Mr. Billson be at the investigation. Allen did not relay the substance of his testimony prior to the investigation. In his charge letter, Allen indicated what he anticipated the testimony of Acosta, Altmeyer, and Bise to be at the investigation. (Tr. 86-87).

With regards to the single car incident, there was no movement of the rail car after Bise detached it from the locomotive. There was no damage to any property or any rail equipment or personal injuries from the single car incident. With regards to the side-swipe incident, there were no personal injuries. (Tr. 87-88).

The employees involved in the two incidents were sent for drug tests which is the protocol when there is a rail incident. Yet, the employees worked for several hours after the incidents. Allen had no reason to believe any employee was on drugs. The evening of the incidents, Acosta was pulled off duty, but Bice was not. Acosta had a "level four charge." Altmeyer was not pulled out of service either; he signed for the discipline assigned to him for the incidents. The single car incident, a move made to shove and then detach the single car, was a switching move. (Tr. 88-90).

Allen reviewed Acosta's personnel records when making the charge. Union Pacific had an "upgrade" policy in place at the time of the investigation. In applying the policy, the decision maker would look at an employee's disciplinary history in order to determine what discipline to impose in the current instance. For example, if an employee is charged with a level 4 rule violation, prior to setting up the charge letter, Allen would look to see if the employee has any levels. If an employee is on a level, the next higher level will be assessed with a policy. In this matter, the employee had a level 4 violation, so another level 4 charge dictated a level 5, which is the next upgrade. (Tr. 90-93).

CX-4 contains the exhibits to the investigation transcript. The exhibit list shows that Acosta's disciplinary history report was not attached as an exhibit. A superintendent reviewing the investigation transcript does not receive a disciplinary history report. The superintendent can look up an employee's

disciplinary history the same way as Allen, on the computer. (Tr. 93-96).

On cross-examination, Allen identified CX-4, page 3, as the notice of investigation to Acosta. Following the listing of possible rule violations, the notice indicated "a review of your previous discipline history indicates that your current discipline status is level 4. The proposed discipline for the charges contained herein may result in a level 4C pursuant to Union Pacific Railroad discipline upgrade policy. If you're found to be in violation of this alleged charge, the discipline assessed may be level 5 under the Carrier's upgrade discipline policy. Level 5 may result in permanent dismissal." Such information is provided to the superintendent following the investigative transcript being compiled when the formal investigation had taken place. (Tr. 98-99).

Allen stated he became aware of the "side-swipe" incident which took place at the Westwego yard near the Kinder Morgan facility within minutes of the incident. Allen also noted that the safety line report made by Acosta on May 8, 2015, had no bearing on the present investigation. He was also unaware of the 154 prior safety line complaints made by Acosta. (Tr. 100).

Allen was aware Acosta held the union position of Secretary. Acosta could make complaints for union employees. Acosta made 150 plus complaints which is "a lot," even for a union representative. However, Allen did not believe that over 150 complaints was a lot for a union representative acting on behalf of his constituents. (Tr. 100-101).

Complainant's exhibit 4, page 14 or 57 is a diagram created by Allen subsequent to the incident. According to Allen, there is a "process in the yard" called the flashing red process. There is a red light and some green lights, if the lights are flashing green there is an incident. If there is an incident, a critical incident, the lights go red and there is a 72-hour blitz discussing the incident which took place. In such a case, Allen prepares a document like CX-4, page 14, and delivers it to all subordinates in order to brief all the crews. CX-4, page 14, is an explanation or a diagram of the incident. (Tr. 101-103).

When Allen created CX-4, page 14, he was trying to convey to the rest of the crew "securement." According to Allen, the consequences of his work can sometimes be catastrophic and securement is something we cannot take lightly. The foreman, the conductor, the engineer are responsible for all the equipment to

be secure or are responsible for ourselves and to protect all of the equipment of the Union Pacific, and the public. Allen explained "in this case, it's grotesquely important that we're as safe as we can possibly be especially in areas where it's totally congested with people." (Tr. 103-105).

Allen confirmed that CX-4, p. 14, shows Mr. Acosta's crew, on May 13, 2013. The diagram shows Mr. Acosta's crew shoved 22 cars into Track 55 and then cut free of those cars, came back out past the switch which leads into the Kinder Morgan plant, the second move. Then, the third move was a move back into the Kinder Morgan plant where the crew was going to pick up some empty cars or other cars as part of the switching process. The fourth move was a move back out away from the Kinder Morgan plant, because the crew had realized the cars were rolling free to the east towards the same switch which leads into the Kinder Morgan plant. At that point the collisions between the cut of 22 cars and the crew's locomotive took place. (Tr. 105-106).

Complainant's Exhibit 4, pages 3 through 8, contain the Notices of Investigation for Mr. Acosta, Mr. Bise and Mr. Altmeyer. As a result of Allen's investigation of the scene and what occurred on May 13, 2015, Allen determined that the members of the crew had violated a number of rules. Allen believed Acosta violated rules 7.6, 32.1.1, 7.1, 32.1, and 32.1.4. Allen based his belief that Acosta had violated the rules on "the collision, the equipment and, in reference to the video, the single car securement process which was clearly not followed." According to Allen, since there had been a collision there was clearly an issue with securing a cut of cars. (Tr. 106-107; CX-4, pp. 3-8).

David Bice was charged with a Rule 1.6 violation for carelessness of safety, due to Mr. Bise not following any of the critical rules which can result in derailments, personal injuries, and endangerment to oneself, the public, and co-workers. Bise's Rule 1.6 violation ultimately resulted in Mr. Bise's dismissal. (CX-4, p. 5). Acosta was not charged with a Rule 1.6 violation, because Allen did not see anything from Acosta's behavior to warrant such a charge. (Tr. 107-109).

According to Allen, Acosta was terminated even though he was not charged with a termination level offense, because Acosta had previous discipline within 24 months of the incident. Allen was not aware of the nature of the prior event which gave rise to Acosta's "level four" discipline status. (Tr. 109-110).

Peter Altmeyer, the engineer, was charged with three rule violations, 7.6, securing cars or engines, 32.1, securing procedures, and 32.1.4, single car securement. Though Altmeyer was not charged with a 7.1, because he is an engineer on a locomotive, the three rules he was charged with are all critical rules that demand a "level four" discipline status. Even though an engineer is not responsible, Allen charged Altmeyer with a single car securement violation. Because Altmeyer knows there must be a one minute wait and Altmeyer would have known a single car securement had not been completed, Allen found Altmeyer partially responsible. (Tr. 110-111).

With respect to the second incident, diagramed in CX-4, page 14, Allen believed that there were never any hand brakes tied on that cut. Allen opined that there were never any hand brakes tied on that cut of cars, because the cars rolled into the side of their own engines. According to Allen, the crew is responsible for the securement of all equipment. By "crew," Allen means all personnel on the crew, whether it be a foreman or a footboard yardmaster, the crew is responsible for the securement of the equipment. (Tr. 111-112).

Allen testified, the cars were absolutely not secured. Following the investigation, "the organization" questioned the breaks, so Allen had a mechanical qualified inspector re-test and inspect the same two cars. The inspector checked the couplers, nuts, bolts, lock box, pin lifters, coupler height, strike casting, casting irons, error breaking system, hand breaking system, wheels, axles, and seal steps. The inspection revealed no defects in the cars involved in the incident. (Tr. 112-114).

When securing cars at the end of the Westwego yard at the Kinder Morgan plant, two hand brakes are normally sufficient. Even when the two hand brakes are set, the employees must still conduct a securement test. If the crew conducts a securement test and the cars start to roll, the crew knows they need to set another hand brake - maybe even four hand brakes. (Tr. 114).

The formal investigation is governed by certain procedures or protocol based upon an agreement with "CBA," the employee's union. Allen was unaware of any complaints regarding the procedures or protocols which were followed with respect to the investigation of Acosta and Bice. (Tr. 114-115).

Prior to the investigation, Allen met with the union representative, Mr. Albarado. During that meeting, Allen

disclosed all of his evidence to Mr. Albarado and Mr. Dumas, a local chairman. Mr. Albarado never made any requests with respect to evidence or witnesses on behalf of Acosta. (Tr. 115).

Allen requested Mr. Billson as the hearing officer, because Allen knew Mr. Billson was neutral and professional. In the event that someone wanted to contest the use of Mr. Billson, the local chairman could make a complaint to the superintendent. Allen was not aware of any complaints against the use of Mr. Billson. (Tr. 115-117).

The safety hotline is an avenue for employees, working in the field, to report safety issues to management. Respondent relies upon the employees as its "eyes and ears." The hotline is a great tool which assists in getting a lot of things "fixed" that would only be seen by people out in the field. Acosta made a complaint about tall weeds and snakes on May 8, 2015, and the issue was corrected on May 13, 2015. Allen stated he had no knowledge of Acosta's complaint about tall weeds and snakes when he charged Acosta. (Tr. 117-119).

Bise and Altmeyer were not pulled from service following the incident at issue. Acosta was pulled from service, because he already had discipline on his record. Acosta already had a level "4" rule infraction on his record. A "44C and a 44C additional rule violation within the same 24-month period dictates a level '5' violation, which is permanent dismissal or could lead to permanent dismissal." Altmeyer received the same level 4 violation, but had no previous discipline on his record. Altmeyer chose to accept responsibility for the instance and was permitted to return to work. With regards to Bise, a 1.6 rule violation which is level 5 violation, was discovered on the video the next day. Thus, Bise was pulled from service the next day. (Tr. 119-121).

Acosta appealed his termination to the Public Law Board and was reinstated to work without back pay. Acosta had not yet been returned to work at the time of the instant hearing. Allen testified that he had no desire to prevent Acosta from returning to work. Allen "[n]ever had any issues working with Mr. Acosta prior to the incident." (Tr. 121-124).

On re-direct examination, Allen testified that during the single car incident, the actions taken by Bise and the engineer in uncoupling the cars could have been accomplished by just two employees. There is no requirement that the move have "a third set of eyes." Allen testified that he would not expect a crew

member who did not see or was not aware of a problem to correct it. However, in the case of the shove procedure which was made on the day in question, the crew is expected to talk to the other crew members and be aware of what the other crew members are doing. If the crew member does not hear the other crew members, he is supposed to stop. In a shoving maneuver there is an absolute regulatory duty for the point protector to communicate with the engineer. For an employee or third crew member who is not the point protector or the engineer, there is no duty to communicate. Even though Acosta was not doing the securement test and was by the switch several yards away, Allen expected Acosta to ensure the communication was occurring between the crew members. (Tr. 124-128).

In the single car incident, the person who is protecting the shove is in control of the movement. If Bise was signaling with hand signals and Acosta was 70 yards away, he may or may not have been able to see the signals which were being given. (Tr. 128-129).

During the shoving movement prior to the side-swipe incident, Acosta rode the shove and safely brought the shoving movement to a stop and the locomotives were attached to the cut of cars. The cars required no hand brakes at that point in time. (Tr. 129).

Allen testified that he has never had anyone express to him a concern about turning in a safety issue out of fear of retaliation from management. (Tr. 129-131).

### **David Bise**

Bise began working for Respondent on March 30, 1998. Throughout his career with Union Pacific Railroad Company Bise performed duties as a switch foreman, conductor, remote control operator for the yardmaster, and foreman. Bise was also a certified conductor for Union Pacific. Bise testified that he knows Acosta and is less senior than Acosta by "25-30 slots," or two weeks less senior. (Tr. 132-133).

On May 13, 2015, Bise was working as a "switchman" or "helper" with Acosta near Kinder Morgan. Prior to May 13, 2015, Bise had worked as a footboard yardmaster "many times." On May 13, 2015, Bise acknowledges there were two incidents: a side-swipe and single car incident. Bise was the switch man, he was the person that pulled the pin to release the car from the locomotive. Based on Bise's experience and training, Bise

testified that Acosta had no culpability for the side-swipe or single car incident. (Tr. 133-135).

On cross-examination, Bise testified that he performed a securement test during the first, single car incident. However, Bise noted "according to the officials" he did not wait one minute. Bise testified that the car was secured and he did a "securement check" where an engineer moves the brakes in order to see if anything moves. (Tr. 136).

In the 22 car incident, Bise set two hand brakes for the "opposite end from the locomotive." Bise conducted a securement test on the cars when it was on the "far end" or "west end." However, Bise testified he failed to conduct another securement test after the crew shoved back to the east end. During the movements, Bise was communicating with Altmeyer, the engineer, primarily by hand signal. If Bise was not communicating via hand signal, he used a radio. (Tr. 136-138).

When asked to describe the difference between a switchman and a footboard yardmaster and whether the footboard yardmaster is in charge of the crew, Bise testified "[h]e's in charge of the crew? Yes, yes in the job and the work to be done and the things to be done, yes, sir." Bise also confirmed his prior testimony that, with regards to the cut of 22 cars that he was putting into Track 55, Bise set the hand brakes on the east end, the far away end. (Tr. 138-139).

Prior to the shoving movement on which Acosta rode to the fence at Kinder Morgan, Bise set the hand brakes. Bise explained that you are still able to shoe the cars with two hand brakes set. When Bise set the two hand brakes prior to Acosta riding the shove, the two hand brakes held the cars in place. Bise did a securement test at the location where he set the handbrakes. After Acosta rode the shove up to the fence and Bise pulled the pin, he did not conduct another securement test. Bise confirmed he was fired for pulling the pin without conducting another securement test. (Tr. 139-140).

On recross-examination, Bise testified that not doing a securement test after shoving in was a breach of the rules. Bise affirmed he should have done a securement test. Bise did not agree that the footboard yardmaster who oversees the work of the crew would have been responsible, and is ultimately responsible, for ensuring that the securement test gets done. (Tr. 140-141).

**Thomas Albarado**

Albarado testified he has been an employee of Respondent for 37 years. He was hired in 1979. He has worked as a switchman, brakeman and conductor. He is a member of the United Transportation Union and has been Local Chairman since 1995. As Local Chairman, Albarado represents employees in grievances and issues with the company. He also represents employees at formal investigations and has participated in 100 or so investigations. (Tr. 142-144).

Albarado stated Acosta is Secretary-Treasurer of the Local Union and is also the State Legislator representative. Albarado is aware of Acosta's propensity to report safety issues to the "UP" safety hotline. According to Albarado, Acosta's job is safety-related issues, so he reports issues both face-to-face with yard masters and local managers, through the hotline, and sometimes through letters to management. Acosta is also regularly approached by other members to handle the reporting of issues that other members discover. Many members prefer to pass off safety concerns on Acosta in order for Acosta to report the issues, because Acosta has a reputation of not being afraid of repercussions. (Tr. 144-146).

Albarado was asked to recall, prior to May 13, 2015, incidents where local management at Avondale took actions against Acosta that were different than what they would be for other employees. According to Albarado, three years ago Acosta and Snowden were on a "transfer job" bringing a train over the bridge. Acosta and Snowden had "expired on hours of service" and were relieved by a road crew prior to yarding the train. The road crew yarded the train and in doing so, they left some cars in the file. The MYO assumed Acosta had left the cars in the file, because Acosta's crew had retrieved the train to bring it over the bridge. Acosta was immediately pulled out of service, but the engineer was not pulled out of service. When it was ultimately discovered that Acosta was not responsible, that the road crew had left the cars in the file, Acosta was put back in service. However, the MYO never investigated the road crew and the road crew was never coached. The MYO at the time of the transfer job incident was Mr. Cougett. Mr. Cougett is still Acosta's supervisor. (Tr. 146-148).

On the day of the transfer job incident, Albarado contacted Mr. Cougett and asked whether Michelle Hogg, the director of road operations, had followed instructions to pull Acosta out of service. According to Albarado, Respondent is not supposed to

pull an employee out of service without the benefit of an investigation and without permission from the vice-president or designee - the superintendent or the director of road operations. Albarado testified that Mr. Cougett became "very belligerent" and "cursing" in response to Albarado's question. Mr. Cougett reported that he did not ask Ms. Hogg. Rather, Cougett pulled Acosta from service on his own and Cougett reported that he "had every right to do so and there's not a f'in thing you can do about it." In response Albarado said "Sure there is Jimmy" and flipped Cougett the finger. Shortly thereafter, the special agent escorted Albarado off the property. Cougett attempted to get Albarado fired. Several days later, Albarado returned to Avondale to meet with Cougett and Everett. While he was there, Everett introduced Albarado to Mr. Allen. During the meeting, Everett explained the basic premise of the incident to Allen and expressed "that's not the way we normally do business." (Tr. 148-150).

Albarado stated that the position of footboard yardmaster was part of the merger between Southern Pacific and Union Pacific Railroads. At the time of the merger, the Southern Pacific Railroad had a number of jobs that were paid at a footboard yardmaster rate of pay, but the Union Pacific did not. As part of the merger agreement, they agreed to continue to pay the jobs that were previously footboard yardmasters at the footboard yardmaster rate of pay. Beyond the rate of pay, there are no further qualifications or authority granted. The position is the same as a foreman or switchman or conductor. (Tr. 150-151).

A yardmaster is a person whose job it is to coordinate the workings of the yard to determine which cars need to be switched, which trains need to be built at what time to build the trains and to move them in and out of the yard. When crews are working in the yard, they are under the supervision of the yardmaster. He provides the switch lists and instructions, and tells the crew what work needs to be done. (Tr. 151).

As the local chairman, Albarado finds out about any employees subject to discipline. Albarado gets a letter and an e-mail from the company informing Albarado of the employee and the specific charges in place. From time to time, Albarado has had members be charge with rule violations while they were switching in the yard. He has also had members who were yardmasters charged with rule violations that occurred while they were switching in the yard. Albarado has never seen a situation where a crew violated a critical rule and the

yardmaster was charged with the same critical rule, because the train crew violated the rule. (Tr. 151-152).

Albarado stated that for the side-swipe incident management pulled an event video/recorder from the locomotive. It was the first time he had ever experienced such action by management. In his experience, Acosta was not culpable. (Tr. 152-153).

On cross-examination, Albarado stated he did not know if Cougett had anything to do with the present incidents. Albarado testified that following the "transfer job" incident three years prior, Mr. Everett introduced Albarado to Mr. Allen as his new DTO. Mr. Everett explained what had transpired and expressed "this is not the way we normally do business." (Tr. 153-156).

Albarado confirmed his prior testimony that he had never seen a yardmaster charged when a crew violated a rule in a yard under that yardmaster's control. Albarado agreed that there is a difference between a footboard yardmaster and a yardmaster. (Tr. 156).

On May 13, 2016, Acosta was on a crew that consisted of an engineer, a switchman, and a footboard yardmaster. When asked whether he would "consider that footboard yardmaster to be the equivalent of the foreman or the person in charge of that crew," Albarado testified "[h]e's the foreman." Albarado went on to explain that the footboard yardmaster does not act as a yardmaster. According to Albarado, the footboard yardmaster is "just the vestige from a contractual agreement to pay certain jobs 40 minutes per day. That's it." When asked whether a footboard yardmaster, in a crew composed of an engineer, switchman, and footboard yardmaster, was in charge of the crew, Albarado expressed "just as the foreman, yes, sir." (Tr. 156-157).

Prior to May 13, 2015, Albarado had never seen management pull an entire TIR and look at an entire crew's activity for a day in an investigation. He did not take exception with management taking whatever efforts necessary to identify and correct unsafe practices. (Tr. 156-158)

On re-direct examination, Albarado confirmed that a footboard yardmaster is not a management position. (Tr. 158).

On re-cross examination, Albarado also testified that he had never seen a yardmaster disciplined for events that occurred by a crew. He had also never seen a footboard yardmaster

disciplined for events that occurred by a crew, if he was not the one culpable for it. Albarado has seen the whole crew be charged for a violation, but then the culpable party gets the responsibility. If the crew puts a car on the wrong track, the foreman could be held responsible. (Tr. 159).

On re-direct examination, Albarado testified that there was no question regarding the location of the cars or which cars were sent out about Kinder Morgan on May 13, 2015. As far as getting paperwork and making sure the right car was in the right place, Acosta did his job on May 13, 2015. (Tr. 159).

On re-cross examination, Albarado testified that he took no exception with the fact that an investigation was held following the rollout of 22 cars on May 13, 2015. (Tr. 160).

### **Corby Acosta**

Acosta was employed by Respondent and terminated, but reinstated by the Public Law Board on November 2, 2016. (RX-N). He has not yet been recalled to work. He understands the Respondent has a certain amount of time to comply with the Public Law Board's decision. Then, it is up to the service unit to start the process of returning Acosta to work, including rules class, job briefings, etc. After receiving the letter from the general chairman, Acosta called Mr. Anderson, who is in charge of returning Acosta to work. Acosta has called Mr. Anderson everyday about returning to his job. According to Acosta, Mr. Anderson is the "DRO," the one with the authority to return Acosta to work. Acosta called every day until Mr. Ben Bailey from Union Pacific took over the matter. In early December 2016, Acosta started communicating with Mr. Bailey and was told he needed to undergo a physical. Acosta had to wait several weeks for the physical to be transmitted to Respondent. In late December 2016, Acosta was told by Ben Bailey that he would also need a rules class, maps class, and job briefing before he could return to work. (Tr. 161-166).

Acosta missed two rules classes, one because of the instant hearing. The first rules class was missed due to missed communications between Acosta and Respondent. He is scheduled for a Rules class on January 31, 2017, and believes he could return to work by the first week in February 2017. (Tr. 166-167).

RX-F is the safety hotline reports for Acosta and others. He stated management pushed back over the hotline reports.

Acosta was kicked off of the safety committee by Everett. However, Acosta reported the issue to management and Allen put Acosta back on the safety committee. (Tr. 167-169). At times, management also requested Acosta not report issues to the safety hotline, but rather handle the issues through other means. Management set up a board where they would write down issues. Other times they asked to report issues to the yardmaster and then to a manager. (Tr. 170).

The safety hotline was not just for the Avondale yard. Management was able to see all safety reports, but employees could only see their own safety complaints. RX-F, page 1, shows a safety report made by Acosta, on the safety hotline, regarding grass, weeds and snakes. (Tr. 170-172; RX-F, p. 1). Acosta testified that he was working in the yard, near the reported safety hazard on May 13, 2015. Despite there being a note that the problem had been addressed, Acosta testified that the issue had not been fixed or addressed. He stated he made safety reports through the hotline, because reporting to management did not get things done. (Tr. 172).

With regards to the side-swipe incident, Acosta testified that he rode the shove in towards the gate. When the shove came to a stop, Acosta got off and walked to the foreman's office. Acosta was in Kinder Morgan's office when the incident occurred. On the date of the incident, Allen came out to the site. During the single car incident, Acosta was "opposite of the switch." There were a lot of weeds and snakes where Acosta was standing, so he was keeping an eye on his surroundings near his feet. (Tr. 172-174).

RX-C is a list of Acosta's injuries. Acosta's first injury was in 1998. Since his first injury, Acosta had a reputation with management for reporting too many injuries. According to Acosta, once you report an injury, you have "a target on your back forever." (Tr. 174-176).

Acosta has had one other whistleblower claim in 2008. The genesis of Acosta's 2008 whistleblower claim arose when Acosta through a switch and felt something in his back. He reported the incident and went in to fill out an accident report. He was asked to report the injury as an "off duty" injury that would be a falsified report, which he would not do. Acosta was fired. The claim was investigated and a hearing officer from Spring, Texas was appointed to conduct the hearing investigation. The hearing officer was a friend of the Superintendent. Acosta proffered a series of recorded conversations he had with his

supervisors regarding the falsified reports at the hearing. As a result of hearing the recordings, the hearing was terminated and Acosta was permitted to return to work. Ultimately, Acosta filed a whistleblower claim due to the events surrounding his back injury. (Tr. 176-180).

Acosta reported the overgrown grass, weeds, and snakes a few days prior to May 13, 2015. According to Acosta, such conditions impaired his ability to perform his trackside duties, because there is no space to walk from the rail to the switch. (Tr. 181-182).

Acosta stated, as a result of his termination due to the events which occurred on May 13, 2015, he has a loss of wages. In 2014, his last full year of employment, he earned \$95,182.44 or \$260.00 a day ( $\$95,182.44/365 = \$260.00$ ). His last day worked was May 13, 2015. He received three weeks of vacation which was paid on his last check. Following his termination, Acosta sought alternative jobs, such as a Uber driver and Lyft driver earning \$9,000.00. He applied for oilfield work and plant work with AT&T Energy, "Bolero," Shell, Chevron, and Deltone Electronics. He applied for jobs operating cranes and forklifts. Acosta also attempted to apply online for positions with Amtrak, CSX, Norfolk Southern, NOGC, and KCS. Acosta received no responses from the online applications. (Tr. 182-185).

On cross-examination, Acosta confirmed that his 2008 whistleblower claim, involving Scott David, was the only other claim he has made under the Federal Railway Safety Administration Act. As a result of Acosta's whistleblower claim, Mr. David was terminated and Acosta returned to work a couple months later. Following that incident, Complainant worked until May 13, 2015. During that time, Complaint filed no other complaints. RX-F lists 154 complaints filed relating to safety and no complaints about retaliation. Acosta reported that "sometimes" the safety concerns he raises on the hotline are addressed. Some, he can specifically recall not being addressed include: the toe paths and the tower where it leaks when raining. Acosta testified that he has had managers retaliate against him, as a result of his safety hotline complaints, but none have caused his loss of job. (Tr. 185-189).

Acosta confirmed that the May 13, 2015 incidents warranted investigation, but he feels he is not culpable. After the investigative hearing, he appealed to the Public Law Board. In November, the Public Law Board reinstated Acosta. He plans to

take the rules class at the end of January and return to work. (Tr. 189-190).

Acosta testified, as a footboard yardmaster he is in charge of the work, but not the crew. When asked whether a footboard yardmaster serves in the same position as a foreman since there is no foreman assigned to the crew, Acosta testified, "[y]es, that job, it could be foreman. If Mr. Allen wanted to cancel the footboard yardmaster to make it a foreman, then you'd be the foreman...." Acosta confirmed that the foreman is in charge of the work done by the crew or he "can emphasize the work order. There's a work order that we have to follow." (Tr. 190-191). Following the events of May 13, 2015, Acosta was disciplined and assessed a dismissal, because his discipline level under the previous upgrade system was already a level 4. (Tr. 191).

Acosta was already at a level 4. He was disciplined for "not calling the yardmaster." He did not challenge the discipline and he did not make a claim under the Federal Railroad Safety Act. According to Acosta he did not challenge the discipline, because he never called the yardmaster. Acosta did not call the yardmaster on that date, because he had "four jobs in front of [him] that said there was nothing to do" and MYO Cougett had also informed him there was nothing to do. Acosta did not make a whistleblower claim regarding such events, because he did not follow the "Avondale Bulletin" which instructs employees to call the yardmaster. Acosta was assessed with a Level 3 violation and penalized with five days off work. Acosta's discipline level rose to a level 4 due to a second incident. Before Mr. Allen arrived at Avondale, Mr. Everett separated the engine and the cars to make a coupling and told Acosta that he did not separate them 100 feet. According to Acosta, he was supposed to receive a coaching event, but it turned into a charge. Because Acosta already had a level 3 offense and he received a level 3 offense for the "100 foot" violation, his discipline rose to a level 4. He got five days suspension for the "100 foot" violation also. (Tr. 191-194).

Acosta does not take exception with the fact that he was at a heightened level of discipline on May 13, 2015, and that these events could give rise to a dismissible offense if he was guilty of the allegations. (Tr. 193).

Acosta agreed that there should have been an investigation as to why a cut of 22 cars rolled out of Track 55. Acosta testified that he was not responsible for the cut of cars not being secured. RX-K, page 5, is Acosta's statement from May 13,

2015. (Tr. 194-195; RX-K, p. 5). According to Acosta, his statement reads as follows: "I watched the shove on 54 and 55 after digging out Kinder Morgan's spots in 55. We had two hand brakes on 55. While we dug out the spot, cars held the whole time, the 23 cars we dug 55 Track. David was on the head end and I was in the plant getting the gate open when the incident occurred." The statement indicates that Bise set two hand brakes; Acosta did not tie the hand brakes on that cut of 22 cars in Track 55. (Tr. 195-197; RX-K, p. 5).

Acosta denied feeling any responsibility to make sure the brakes were secure before making his way to the Kinder Morgan offices. Acosta denied ever indicating to anyone else that he set the hand brakes on those 22 cars. Before the cars rolled free, two hand brakes, at the end Acosta was on while protecting the shove, were set. Acosta confirmed that Bise set the hand brakes. Acosta did not feel any responsibility to make sure the hand brakes were held once the engineer was cut off, because he did not tell Bise to cut the cars off. Rather, Bise cut the cars off himself. Whether Bise was going to cut off the locomotive was not covered in any job briefing, such a decision would have been between Bise and Altmeyer, because Acosta was in the office. Acosta was unaware if any communication took place between Altmeyer and Bise. (Tr. 197-198).

Acosta confirmed that Bise was not the footboard yardmaster of the crew on May 13, 2015. Acosta testified that Bise was in charge of the move and Acosta was "taking care of [his] business doing paperwork in the office." Acosta went into Kinder Morgan's yard office on May 13, 2015, to talk to Cindy who is in charge of adding cars and releasing cars to make sure his crew got the right order. Acosta briefed Bise and Altmeyer on his plan to go to the Kinder Morgan office. Right before the last move, before Acosta "started shoving back" he relayed that he was going to go into the Kinder Morgan office over the radio. There was no discussion, at that time, that Bise was going to cut off power. (Tr. 199-200).

In the Kinder Morgan office, Acosta spoke with Ms. Cindy about what was coming out of the plant, what was going in, the desired order of the cars. After speaking with Ms. Cindy, Acosta discussed opening the gate with the employee who drove him to the gate in a golf cart. Acosta had relayed to Bise and Altmeyer that he was going into Kinder Morgan to open the gate, but there was no discussion about cutting off the locomotive. According to Acosta, such a discussion would have been "another rolling job briefing." (Tr. 200-203).

During discovery, Acosta was asked to identify any businesses or places where he sought employment. Acosta reported that he applied to approximately 30 jobs at "all the plants, all the big businesses, just about everything on the LA Job Search." In response to his applications Acosta only received some e-mails saying "thank you for applying." (Tr. 203-204).

Since May 13, 2015, Acosta has received compensation from Uber or Lyft. He has also been compensated a gross amount of \$300.00 per month as a union representative which he received before his termination. He also received unemployment benefits from the Railroad Retirement Board in the amount of \$16,104.00, since July 2015 to present, which is reimbursable. (Tr. 205-206).

When Acosta went into Kinder Morgan to speak with Ms. Cindy, he believed Altmeyer and Bise were sitting on the engine waiting for him. Acosta had no idea what Bise and Altmeyer were doing during that time. (Tr. 206).

Acosta testified, when he indicated Bise "was in charge of the move" he meant that Bise took the initiative to take the engine off of the cars without [Acosta] telling him to [do so]." When asked whether Acosta would normally instruct the crew members to do certain tasks, Acosta explained that if "I came out of the office with Kinder Morgan and I got up to the gate and [] they were still sitting where they were sitting before..., [he] would tell them on the radio that I'm opening the gate, 'you all pull on up' and I would get on the engine. We'd all sit down and...we'd go over, 'this car goes here, this car goes there, this car goes here' and then we'd have a job briefing and cutting off the cars and how we were going to switch." (Tr. 206-207).

Acosta explained that when he said "Bise was in charge of the move," he was saying that Bise took the move and owned the move, because he took it upon himself to move the cars, without Acosta's instruction. As footboard yardmaster, Acosta would receive the work order. He would make extra copies of the work order for each crew member so that they would have a general knowledge of the day's work. If Acosta saw one of the crew members engaged in unsafe activity, he would have a responsibility to stop them and the crew member would have an obligation to listen to Acosta as a fellow employee. Acosta

agreed with Bise's testimony that Bise was responsible for both incidents on May 13, 2015. (Tr. 207-210).

### **Formal Investigation Transcript of June 9, 2015**

On June 9, 2015, a formal investigation was held in the presence of Mr. C.W. Billson (Conducting Manager), Mr. T.C. Albarado (Local Chairman- SMART-TD), Mr. R.D. Dumas (Vice General Chairman - SMART-TD), Mr. D.B. Bise (Switchman - Charged), Mr. C.A. Acosta (Footboard Yardmaster - Charged), Mr. T.E. Allen (Director of Terminal Operations-Charging Manager/Company Witness), Mr. J.E. Lane (Manager of Operating Practices - Company Witness), Mr. P.J. Altmeyer (Engineer - Company Witness). (RX-J, pp. 1-5).

The parties conducted a hearing pursuant to the Notices of Investigation dated May 21, 2015, for Mr. Acosta, Mr. Bise, and Mr. Altmeyer. (RX-J, pp. 6-14). During the hearing, Mr. Allen entered into the record a document indicating that Mr. Altmeyer accepted responsibility for his actions on those rules mentioned in the Notice of Investigation and was enrolled in the Safety Intervention Program, SIP-1. Thus, Mr. Altmeyer was not charged during the investigation. (RX-J, pp. 14-18).

During the investigation, Mr. Allen described the incident which took place on May 13, 2015. Mr. Allen explained in "the last move that led up to the collision, the crew shoved east on Track 55. This [was] to get Mr. Acosta down to the east end and...up to the gate; it relieve[d] him of having to walk."

Then, after they dropped Acosta off, "they pulled back west on that lead, Track 55...." The second move then "was to pull back west where they were going to cut off flight power, pull west further past the switch into Kinder Morgan where they lined the switch to Kinder Morgan. Proceed west on the Kinder Morgan - or east on the Kinder Morgan lead. At this point, the crew notices the cars are rolling west on Track 55. The crew attempts to pull back west to get out of the way of the rolling cars. At that time, they collided with their own cut approximately where the little splash mark with the green field is on it."

Based on the foregoing, Mr. Allen contended, "that those cars were not secured, which - and they were not tested for securement after leaving them there, which resulted in this collision." (RX-J, p. 25).

Allen explained he responded to the collision which occurred on May 13, 2015. Thereafter, Allen reviewed the videos from the locomotives which revealed a "single car set out" move which was performed earlier in the day. The video revealed that earlier in the day, before the side-swipe collision, the crew pulled a cut of cars up on the 55 track. According to Allen "both crew members were at that location and pulled a single car up, set it into the Kinder Morgan lead, but "did not perform a single car securement or any type of securement." (RX-J, pp. 32-33). Allen explained, after the crew left the car on the lead, the locomotive was pulled west by the switch, where Mr. Acosta was standing. The crew lined the switch back to the cut and Mr. Bise was observed "walking between the equipment with less than 100 feet." (RX-J, p. 32).

Based upon what was viewed in this video, Allen found multiple rules were violated. Specifically, Allen cited Rule 32.1.4, Single Car Securement. According to Allen, the steps required by Rule 32.1.4 were not followed in the video he observed. In explaining why Acosta was charged with this rule, Allen explained "well, in the video while we do not see Mr. Acosta, we know that he was there." According to Allen, "Mr. Acosta was standing at the switch where he would've observed all of this operation, lined it back for the cut of cars that were in track 55." Allen explained that while Bise made the single car set out, Acosta was on site and "would've seen" the entire operation. (RX-J, p. 35).

During the investigation, Allen confirmed that Acosta is "required to know and understand [Rule 32.1.4]." Moreover, Allen expressed that Mr. Acosta was the Footboard Yardmaster on the job and would have been required to stop the move and make sure the securement was performed prior to Bise cutting away from the cars if Acosta had observed it." Allen further explained that Acosta was in violation of the rule, because the single car securement was not done or performed. Bise was also in violation of the rule, because "the entire crew is responsible for proper securement." (RX-J, p. 36).

Allen also charged Acosta and Bise as being in violation of Rule 7.6 "Securing Cars or Engines." Allen believed this rule applied to both the single-car incident as well as the second incident which resulted in collision. With regards to the single-car incident, Bise failed to conduct a securement test and was in violation of the rule even though it did not result in uncontrolled movement. Allen explained that the engineer was also in violation of Rules 32.1.4 and 7.6, because the Engineer

"is at the controls of the locomotive" and "would have been the one that physically released the [] brake on the locomotive. The engineer is responsible to make sure a single car securement is performed before he cuts away. According to Allen, the Engineer was also responsible, because "all crewmembers are responsible for securement of their train." (RX-J, pp. 37-41).

With regards to the single-car incident, Allen re-emphasized that Acosta was in violation, because Acosta "is the Footboard Yardmaster on the job" and that Acosta is "part of the safety plan to ensure those cars are switched safely and efficiently." Allen believed that Acosta would have been able to stop the move before the cut away to make sure Bise checked the brakes. (RX-J, p. 41).

With regards to the side-swipe collision incident, Allen explained how he came to charge Mr. Acosta and Mr. Bise for violating Rule 7.6. According to Allen, due to the fact that there was a collision, "we know that there was...no securement check done on those-that cut of cars that rolled uncontrolled." Allen expressed that "[t]here were no hand brakes on that cut of cars, so the whole - the crew is responsible for ensuring securement. Acosta...should have ensured that - along with Mr. Bise and Mr. Altmeyer, should've ensure that those cars were secured properly." (RX-J, p. 42).

With regards to the side-swipe incident, Allen explained that he was not sure where Acosta was located during the collision. Acosta was like "getting a ride from Kinder Morgan." Allen believed Acosta was in violation of the rule, just the same as Bise, even though he was not present during the violation. Allen believed Acosta was still in violation of the rule, because "the crew is responsible for securing their trains and cars." According to Allen, the single-car incident revealed that no securement check was performed on the single car, "[s]o it's a pattern and as the Footboard Yardmaster on the job, Mr. Acosta is as responsible for the securement of those cars." Allen asserted that "Mr. Acosta should've corrected the situation earlier with the single car and the pattern here is that I see Mr. Acosta is as responsible for the securement of that cut of cars as I see Mr. Bise, that's the one that's physically there, because Mr. Acosta was there for the single car securement and again they didn't do it then and they - that's a pattern." According to Allen, "[Acosta] should've at least at that point spoke with Mr. Bise when they were doing the single car securement and corrected the behavior at that point." (RX-J, pp. 50-51).

Allen also charged Acosta, Bise, and Altmeyer with violating Rule 32.1.1 for failing to "verify that the hand brakes applied on equipment will prevent movement by releasing all air brakes." Allen explained that he charged all three of the crew members for violating this rule, because "Bise and Acosta [were] both responsible for applying hand brakes" and "Altmeyer [was] responsible...for then releasing the independent air brakes...." Allen believed Acosta was just as responsible as Altmeyer to ensure that the securement was done. According to Allen, with regards to the single-car incident, Acosta was present. Thus, after seeing the first occasion with the single car, "as part of that being Footboard YardMaster" the behavior should have been corrected at that point. Thus, Allen believed Acosta is responsible for ensuring the equipment is secured. (RX-J, pp. 52-53).

Allen also charged Bise and Acosta with violation of Rule 7.1 for failing to "switch safely and efficiently." Allen believes that Acosta and Bise violated this rule, because when the crew failed to do the securement test that placed the equipment "in the foul." The rule instructs employees not to leave equipment standing where it will "foul." According to Allen, the only way one can ensure that the equipment doesn't stand in the "foul" is to "cut [the equipment] off in the clear." (RX-J, pp. 53-58).

Allen went on to express, if just one of the crew would have said to check the securement, which all of the crew is responsible for, then there would have been no violations. (RX-J, p. 63).

Later in the investigation hearing, Acosta was questioned by Mr. Billson regarding the events which took place on May 13, 2015. Acosta disagreed that he was "responsible to make sure that the car was secured and that the single car securement was done properly." Acosta did not believe he was responsible, because he "had nothing to do with setting the car out. We placed the car over, I sent it to David [Bise]. I was up by the switch." When asked whether, as the Footboard Yardmaster, Acosta "oversees the job," Acosta expressed that he "oversee[s] the job," but not every move. Acosta denied being responsible for the single-car incident, because Bise was in control of that movement. Acosta was standing by the switch, but did not see what Bise was doing. According to Acosta, "I sent the cars to [Bise], I moved above the switch to get 20 feet away from the switch. Better standing where you can stand, not be on rocks.

It's more 'of a dirt' right there. You got more shade from the tree, so you get out of the sun. And we have a snake problem down there, which I reported on the Safety Hotline days before, so I got myself looking for snakes, get in the shade." (RX-J, pp. 237-238).

According to Acosta, he was not required to make sure Bise secured the car properly. It was Bise's responsibility to secure cars. Acosta believed that Allen charged him with violating the rules because Allen wanted the whole crew "to go down." (RX-J, pp. 238-239).

### **Other Evidence**

#### **Union Pacific Railroad "Report of Personal Injury or Illness"**

On January 15, 1999, Complainant was injured while cleaning off his shoes. Complainant was at home and reported that his injury was not work-related. Complainant specifically injured, possibly fractured, his big toe. His toe was examined by Drs. Glenn, Juncan and Farris. Complainant was instructed to stay off of the toe, ice it, and take medication. (CX-6).

On October 16, 2001, Complainant suffered a muscular injury to his lower back when he bent to lift the low-handle lever. After lifting the switch halfway, he applied downward pressure, the lever had no resistance and the switch fell causing Complainant to become off balance and fall to the ground. (EX-C).

On June 19, 2004, Complainant suffered injury to his upper arm when he was stung by a wasp that swarmed from the mast of a switch on the north end of the track. (EX-C).

On September 10, 2004, Acosta reported that he was walking from his vehicle to the East End Shack when he was stung by a wasp in the left leg. Complainant reported that his injury was caused by a wasp's nest on the East End Shack in the North Yard. According to Complainant, the lack of maintenance to the East End Building caused or contributed to the incident. (CX-7; EX-C).

As a result of the sting, Complainant suffered injury to his left leg, specifically the upper thigh. Complainant experienced swelling, stinging pain, muscle soreness, itching, and difficulty walking. Complainant received treatment at West Jefferson Hospital Emergency room and was given two shots. He

was prescribed a medipack for five days, Benadryl and Ibuprofen, and given an ice pack for swelling. Complainant ultimately reported to his primary care physician who cleared Complainant to return to work. (CX-7).

On January 21, 2008, Complainant suffered an injury to his right wrist from "over 10 years of working in the yards." (EX-C).

On March 10, 2008, Complainant injured the muscles of his upper back while being transported by van to train and the van was struck from the rear by a Dodge truck. (EX-C).

On October 25, 2009, Complainant reported that he suffered an injury while throwing the switch for an engine movement. Specifically, the injury was caused by the "switch being difficult to throw due to lack of maintenance." Complainant reported the lack of maintenance to the switch by Union Pacific Railroad directly contributed to or caused his injury. (CX-7, p. 1). Complainant suffered a muscular injury to his lower back. (EX-C).

#### **Complainant's 2015 W-2 Wage and Tax Statement**

For the 2015 fiscal year, Complainant earned \$50,981.58 in wages, tips, and other compensation. He had \$5,001.26 in federal taxes withheld. (CX-9).

#### **U.S. Rail Road Retirement Board "Certificate of Service Months and Compensation"**

The U.S. Railroad Retirement Board 2014 Certificate of Service Months and Compensation indicated that Complainant had 200 months of service and contributed \$45,503.47 to retirement. The Certificate also indicated Complainant earned "creditable compensation" in the amount of \$68,498.12 for 2012, \$69,207.09 for 2013, and \$95,182.44 for 2014. (CX-12).

The U.S. Railroad Retirement Board 2015 Certificate of Service indicates that Complainant had a total of 212 months of service and contributed \$48,290.84 to his retirement. The Certificate also indicated Complainant earned "creditable compensation" in the amount of \$68,498.12 for 2012, \$69,207.09 for 2013, \$95,182.44 for 2014, and \$56,885.20 for 2015. (CX-11).

## **Respondent's "Statements from Acosta, Bise, and Altmeyer"**

Bise reported that after stopping cars in Track 55 with 2 hand brakes, he cut away and went west "to plant switch stopped and lined switch." Bise started towards the gate when he saw cars rolling towards him and the crew. Bise stopped movement then signaled Pete Altmeyer to "go ahead." Bise reported he "couldn't get out of the way in time." (RX-K, p. 3).

Altmeyer reported that, after shoving Track 55 the engine was cut off and moved ahead to Kinder Morgan switch. The Switch was thrown and movement was made towards the Gate. Bise noticed cars moving on track 55, gave Altmeyer a signal to move ahead. Altmeyer reportedly "started to move ahead when car...." (RX-K, p. 4).

Acosta reported watching the shove on Tracks 54 and 55. After digging out Kinder Morgan Spots in 55, Acosta and the crew placed 2 hand brakes in 55 while digging out the spot. According to Acosta, the cars held the whole time. David Bise was on the head end and Acosta was getting the gate open...." (RX-K, p. 5).

## **Notification of Discipline Assessed**

On June 19, 2015, Respondent sent a letter to Complainant titled "Notification of Discipline Assessed." The letter indicated it was in regards to the investigation and hearing held on June 9, 2015 in Avondale, LA as originally outlined in the Notice of Investigation dated May 21, 2015. (CX-5).

The letter indicated, after a careful consideration of the evidence adduced at the investigation and the hearing, the evidence more than substantially supported the charges against Complainant. Specifically, it was found, on May 13, 2015, at approximately 15:30 while employed as a Footboard Yardmaster, Complainant failed to properly secure equipment, resulting in uncontrolled movement colliding with own engine and allegedly failed to secure equipment. Such actions were a violation of rules/policy numbers: (1) 7.6: securing cars or engines - resulting in uncontrolled movement; (2) 31.1.1: securement procedures - resulting in uncontrolled movement; (3) 7.1: switching safely and effectively; (4) 32.1: securing equipment; (5) 32.1.4: single car securement - did not result in uncontrolled movement. (CX-5).

Under the Upgrade Progressive Discipline Table, this violation calculated to an Infraction Level 4C. The Level 4C

violation, plus Complainant's current discipline status of a Level 4, resulted in the assessed discipline Level 5. The discipline assessment of Level 5, under the Carrier's Upgrade Discipline Policy, resulted in permanent dismissal. Effective immediately, Complainant was dismissed from all service with the Union Pacific Railroad. (CX-5).

**U.S. Department of Labor, Occupational Safety & Health Administration Secretary's Findings and Subsequent Request for Hearing**

On August 11, 2016, the Occupational Safety and Health Administration ("OSHA") completed its investigation of the above-referenced complaint, filed on December 16, 2015. OSHA found no reasonable cause to believe Respondent violated FRSA. (ALJX-1).

More specifically, OSHA found that Complainant filed a complaint with the Secretary of Labor on December 16, 2015, alleging Respondent discharged him for reporting via Union Pacific's safety hotline, a complaint regarding overgrown grass/vegetation and snakes in the crew's work area on May 8, 2015. As the complaint was filed within 180 days of the alleged adverse action, the Regional Administrator for OSHA found Complainant's complaint to be timely. (ALJX-1).

Furthermore, the Regional Administrator found Respondent was a railroad carrier within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102. Respondent provides transportation, in that it is a Class I Railroad operating on more than 3,500 route miles to transport goods using the general railroad. Complainant is an employee within the meaning of 49 U.S.C. § 20109. (ALJX-1)

Though Complainant alleged Respondent terminated his employment after reporting overgrown grass/vegetation and snakes in the crew's work area, the investigation showed Complainant's employment would have been terminated for policy violations in the absence of his protected activity. As the Regional Administrator found insufficient evidence to sustain the violation, the complaint was dismissed. (ALJX-1).

On September 6, 2016, Complainant objected to the Secretary's findings and dismissal of his complaint. Complainant requested a hearing on the record and a **de novo** review of the evidence in the matter. (ALJX-2). A Notice of Hearing and Pre-Hearing Order was issued by the undersigned on September 28 2016. (ALJX-3). Complainant filed his Complaint on October 17,

2016. (ALJX-4). On October 17, 2016, Respondent also filed its Answer to Complainant's Notice of Objection to the findings of the Secretary of Labor in FRSA 49 USC § 20109 Complaint and Request for Hearing. Respondent filed its Answer on November 21, 2016. (ALJX-5).

#### **ISSUES**

1. Was Complainant's alleged protected activity a contributing factor in the alleged adverse, unfavorable personnel action?
2. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?

#### **IV. CONTENTIONS OF THE PARTIES**

Complainant alleges it is uncontested that he engaged in protected activity on May 8, 2015, when he reported overgrown vegetation and snakes. Moreover, Complainant alleges he has engaged in systematic and continuous protected activity by reporting hundreds of other safety conditions to the Safety Hotline; numerous personal injuries; and even a prior FRSA Complaint. Moreover, Complainant believes there can be no dispute that Complainant suffered an adverse action in the form of termination of employment.

With regards to whether Complainant's protected activity was a contributing factor, Complainant asserts he had no culpability or responsibility for either the side-swipe incident or the single car securement incident. Rather, Complainant contends "the falsity of [Respondent's] claims is readily apparent." According to Respondent, the only evidence, a video, which allegedly showed Acosta doing anything at all, was a video from Kinder Morgan which Allen never introduced during the formal investigation. Moreover, Complainant asserts that Allen's pulling of the locomotive video to hunt for additional violations with which to charge Complainant was "a wholesale departure from its prior conduct" as testified to by Albarado. Moreover, Albarado testified that Respondent wholly departed from prior practice in alleging that Complainant, as a footboard yardmaster, was vicariously liable for Bise's rule violations. Moreover, Complainant notes the "absurdity of [Respondent's] group-punishment narrative in this case is contradicted by Mr.

Allen's admission that he would not [] expect someone who cannot see somebody take action to correct that person."

With regards to Respondent's knowledge, Complainant asserts (1) employer knowledge is not a distinct element of an FRSA claim, and (2) to the extent evidence of such knowledge is offered, it may take the same form as other circumstantial evidence of causation. According to Complainant, Complainant's numerous incidents of protected activity are well documented in Respondent's Records. Moreover, Allen testified he is notified anytime someone makes a safety hotline report and Allen reviews the safety hotline reports weekly. As manager, Allen knows which employee made a specific safety hotline report. To the extent Allen testified that he had no knowledge of Complainant's May 8, 2015 safety hotline report, as well as ignorance of any of the other 150 hotline reports made by Complainant, Complainant asserts such testimony is not credible. Moreover, as the May 8, 2015 hotline complaint is set out in the investigation transcript, Complainant asserts that "anyone, such as Mr. Chappell, was fully aware of Complainant's protected activity if they reviewed the investigation transcript." Complainant also alleged Respondent has failed to meet its high burden on its affirmative defenses.

In regards to Damages, Complainant seeks back pay in the amount of \$156,100.00. According to Complainant he has been without pay for 635 days, from May 13, 2015 through February 17, 2017. Complainant also seeks an order directing Respondent to expunge, from its personnel and labor relation files, any negative references concerning the matter which forms the basis of this Complaint. Complainant also seeks post-judgment interest, attorney's fees, and litigation expenses.

In its post-trial brief, Respondent asserts that Acosta was not disciplined because of his FRSA report, but was disciplined because of his safety-rule violations on May 13, 2015. According to Respondent, Allen had no knowledge of Complainant's reputation as someone who was accident prone nor did he have any knowledge of Complainant's May 8, 2015 safety-line complaint when he investigated the incident or even when he made the decision to charge Complainant and his crew. Moreover, Respondent asserts that, Complainant was the "point protector for the movement of rail cars at the location in question." As point protector, Complainant had an obligation "to make sure that they don't shove the rail cars into any obstructions or off the tracks or over a derail or through broken rail." Moreover, Respondent points out that neither Bise nor Albarado took

exception to the fact that there was an investigation after the incidents.

Moreover, Respondent alleged that Acosta was in a leadership position, which means he justly bears responsibility for the actions of his crew. According to Respondent, Acosta was responsible for Bise because, as footboard yardmaster, Acosta was in charge of the crew. Respondent asserts that Bise, Albarado, and Acosta all admitted that a footboard yardmaster is in charge of the crew.

Respondent acknowledged that Complainant participated in numerous protected activities over the course of his career, Respondent knew Complainant participated in protected activities, and Complainant's termination was an adverse action. Nevertheless, Respondent contends Complainant did not meet his burden of proving that a protected activity factored into UP's discipline decision.

According to Respondent, the circumstances raise no inference that Complainant's protected activities contributed to his dismissal. Though Complainant's complaint alludes to a prior FRSA claim in "2007-2008," Respondent believes nothing in the record suggests this event had anything to do with his discipline for this specific rule-violation. Moreover, where months or years pass between the protected activity and adverse action, Respondent asserts that courts consistently hold that the Complainant cannot meet his causation burden as a matter of law. Additionally, Respondent asserts that Complainant's dozens of safety complaints each year for several years without repercussion diminishes Complainant's case for causation rather than supporting it.

With respect to the May 8, 2015 protected activity, Respondent asserts that Allen - the DTO - investigating officer and charging manager in this matter - testified that he had no knowledge of Complainant's May 8, 2015 protected activity during his investigation of the events of May 13, 2015, or when he made the decision to charge Complainant and his crew.

Further, Respondent asserts it clearly and convincingly would have disciplined Complainant the same way in the absence of any protected activity. According to Respondent, Complainant's safety-rule violation caused a 22-car collision that could have had catastrophic consequences. As Complainant was on the final step of Respondent's progressive-discipline scale, the slightest infraction - including the securement-rule

violation Complainant committed hours before the collision - would have triggered Complainant's dismissal. Further, Respondent points out that Acosta and the rest of his crew members - Bise and Altmeyer - were also charged. As such, Respondent asserts Complainant's actions on May 13, 2015, and not his safety complaints, led to being charged with rule violations. Moreover, Complainant's prior disciplinary record, when combined with the new infractions, warranted his termination.

In its Response to Complainant's Closing Brief, Respondent alleged there was no evidence supporting any inference that Complainant's protected activity was a contributing factor in the adverse action taken. Respondent points out Allen had no knowledge of Acosta's past safety complaints and that no evidence existed of Allen's retaliatory animus towards Acosta. According to Respondent, Complainant's repeated safety complaints bore no corresponding adverse actions. Moreover, Respondent contends that it does not, and did not, discipline its employee for voicing safety concerns. Respondent believed "nothing in the record before this Court supports the accusation that [Complainant's] protected activity factored into [Allen's] ultimate decision.

Furthermore, Respondent re-asserted, assuming **arguendo** that Complainant's protected activity was in any way a contributing factor to his discipline, Respondent is nonetheless not liable, because Complainant's rule violations on May 13, 2015, were clearly independent, intervening events severing any causal link between his protected activities and his termination. According to Respondent, the hearing testimony unequivocally established that the events on May 13, 2015, warranted investigation. As a result of the investigation, Respondent clearly and convincingly would have terminated Complainant's employment in the absence of any protected activity. Respondent asserts that Complainant's safety-rule violations directly caused a 22-car collision that could have had catastrophic consequences. Respondent notes that Complainant was on the final step of Respondent's progressive discipline scale, meaning the slightest infraction would have triggered his dismissal.

#### V. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA § 20109(a)(1)-(4) and (b)(A)-(C), which provides:

(a) In General-A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452));

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

....

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

(A) reporting in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of a safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

49 U.S.C. §§ 20109(a) (1)-(4) & (b) (A)-(C) (2008).

## **VI. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF**

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21). See 49 U.S.C. § 20109(d) (2) (A) (i). Accordingly, to prevail, a FRSA complainant must demonstrate that: **(1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.**<sup>2</sup> See 49

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<sup>2</sup> In Hamilton v. CSX Transportation, Inc., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited a fourth element, the employer's knowledge of the protected activity. Id. slip op. at 3. The ARB cited case law that provides that the final decision maker's "knowledge" and "animus" are only factors to consider

U.S.C. § 42121(b)(2)(B)(iii); Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip opinion at 11 (ARB March 29, 2013); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007); Luder v. Continental Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." See Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence, and the evidence need not be "overwhelming" to establish a **prima facie** case. In fact, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, \_\_ F.3d \_\_, 2013 WL 600208 (3rd Cir. Feb. 19, 2013).

If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121 (b)(2)(B)(iii)(iv); Menefee v. Tandem Transportation Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) citing Brune, ARB No. 04-037, slip op. at 13.

In view of the undisputed facts noted above, it is found that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainant was a covered employee of Respondent under the FRSA. No evidence to the contrary was introduced at the hearing.

As outlined in the post-hearing briefs of the parties, the issue to be decided is whether Complainant's protected

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in the causation analysis; they are not always determinative factors. Id. citing Staub v. Proctor, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation); Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

activity(ies) was a contributing factor in the adverse actions suffered by Complainant.

#### **A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found the testimony of the witnesses at the hearing to be credible. Specifically, I found Complainant's

testimony to be consistent and credible, both at the hearing and throughout the investigation. I found Complainant's behavior, bearing, manner and appearance while testifying before me, in short his demeanor, to be persuasive and sincere.

With regards to Allen, I also found Allen's behavior, bearing, manner and appearance, in short his demeanor, to be persuasive. I found Allen's testimony to be uniform, credible, and forthright throughout the formal hearing. In addition, I found Allen's testimony at the hearing to be consistent with his testimony at the investigation hearing which took place on June 9, 2015. Allen appeared to relay the events which took place on May 13, 2015 - as he perceived them - candidly and consistently. I did not find anything in Allen's testimony to be incongruous or inconsistent.

I also found Albarado and Bise to be sincere and credible witnesses. At the hearing I found Albarado to be especially candid and persuasive. As with Allen, I found Albarado's behavior, bearing, manner and appearance while testifying before me, in short his demeanor, to be persuasive. Bise did not appear at the hearing, but testified via teleconferencing. Nevertheless, I found Bise's testimony to be sincere and heartfelt. Moreover, I found Bise's testimony at the hearing and at the investigation to be consistent and credible.

## **B. Protected Activity and Alleged Unfavorable Personnel Action**

As noted above, it is uncontested that Complainant engaged in protected activity on May 8, 2015, when he reported the presence of tall grass, weeds, and snakes in the work yard. Moreover, Respondent acknowledged, in brief, that Complainant participated in numerous protected activities over the course of his career; Respondent knew Complainant participated in protected activities, and Complainant's termination was an adverse reaction.

## **C. Contributing Factor**

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650

F.3d 563, 567 (5th Cir. 2011); Palmer v. Canadian National Railway, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB. Sept. 2016) (en banc), reissued with full separate opinions (January 4, 2017), erratum with caption correction (January 4, 2017); Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015).

Recently the ARB reemphasized in Palmer "how low the standard is for the employee to meet, how 'broad and forgiving' it is." Palmer, supra at 53; see also Rudolph, supra at 16. The ARB observed "'[a]ny' factor really means **any** factor," it need not be "'significant, motivating, substantial, or predominant' it just needs to be **a** factor." Palmer, supra at 53 (emphasis in original). The complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action, he need only prove that it played "**some**" role. Araujo, supra at 158; Palmer, supra, at 53, n. 218. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tended to affect in **any way** the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). Furthermore, the complainant is not required to demonstrate the respondent's retaliatory motivation or animus to prove the protected activity contributed to respondent's adverse personnel action. See Halliburton, supra at 263 (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016) (noting that intent and credibility are crucial issues in employment discrimination cases); see, e.g., DeFrancesco v. Union Railroad Co., ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015); Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Apr. 25, 2014); Palmer, supra, slip op. at 55, n. 227. Whether considering direct or circumstantial evidence, an administrative

law judge **must make a factual determination**, under the preponderance of the evidence standard of proof about what happened. The ALJ **must be persuaded** and must **believe that it is more likely than not** that the complainant's protected activity played some role in the adverse action. Palmer, supra, slip op. at 55-56.

If the respondent claims the "nonretaliatory reasons were the only reasons for the adverse action (as is usually the case)," the evidence of employer's nonretaliatory reasons **must be considered alongside** the complainant's evidence in making such a determination. Palmer, supra at 54-55. However, the fact-finder need not compare the respondent's non-retaliatory reasons with the complainant's protected activity to determine which is more important in the adverse action. Id. at 55.

Even if the fact-finder determines that the respondent has a true nonretaliatory reason for terminating the complainant, this still does not preclude protected activity as a contributing factor in the termination of employment. Palmer, supra, slip op. at 54, n. 224 (citing Bobreski v. J. Givoo Consultants, Inc. [Bobreski II], ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)). A "legitimate business reason" to take an adverse action "is **by itself insufficient** to defeat an employee's claim under the contributing-factor analysis . . . **since unlawful retaliatory reasons [can] co-exist with lawful reasons.**"<sup>3</sup> Palmer, supra at 58 (quoting Bobreski II, supra, slip op. at 17 (internal quotations omitted) (emphasis added); contra Henderson v. Wheeling Lake Erie Ry., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 11 (ARB Oct. 26, 2012) (citing Zinn v. Am. Commercial Lines Inc., ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012)) (holding that the "legitimate business reason" burden of proof analysis does not apply to FRSA whistleblower cases). In the event that the ALJ believes the protected activity **and** the employer's nonretaliatory reasons **both played a role**, the ARB declared "the analysis is over and the employee prevails on the contributing-factor question." Palmer, supra at 54-55.

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<sup>3</sup> The ARB noted in Palmer, that the administrative law judge specifically stated "the argument that [Illinois Central] had a 'legitimate business reason' to take the adverse action is inapplicable to FRSA whistleblower cases." The Board explained it would be "**clear error**" for the fact-finder to conclude that Illinois Central's "legitimate business reason" is **irrelevant** to the contributing-factor analysis. Id., slip op. at 58.

As mentioned above, Complainant denies any culpability or responsibility for either the side-swipe incident or the single-car securement incident which led to his ultimate termination on June 19, 2015. Believing he has no culpability or responsibility for such events, Complainant alleges that Respondent's reason for his dismissal is false. Complainant points out that the "only piece of evidence which allegedly showed [Complainant] doing anything at all, much less something wrong, was never introduced at the formal investigation," or in the instant formal hearing. Moreover, Complainant asserts that Respondent's "group punishment narrative" is absurd and contradicted by Allen's admission that "he wouldn't [] expect someone who cannot see somebody to take action to correct that person."

Moreover, Complainant asserts that Respondent's actions towards Complainant in pulling the locomotive video to search for additional violations, is a "wholesale departure from [Respondent's] prior conduct." According to Complainant's witness, Albarado, throughout his 20 years as a conductor's union local chairman, Albarado has never seen Respondent pull locomotive video to use against an employee. Further, Albarado testified that Respondent wholly departed from its prior practice in alleging that Complainant, as a footboard yardmaster, was vicariously liable for Bise's rule violations.

### **1. Temporal Proximity**

"Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. See Kewley v. Dep't of Health and Human Servs., 153 F.3d 1357, 1362 (Fed.Cir. 1998) (noting that, under the Whistleblower Protection Act, 'the **circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was a contributing factor to the personnel action**') (internal quotation omitted)." Direct evidence of an employer's motive is not required. Araujo, supra, slip op. at 19.

Determining, what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science, but requires a "fact intensive" analysis. Brucker, supra, slip op. at 11 (quoting Franchini v. Argonne Nat'l Lab.,

ARB No. 11-006, ALJ 2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Northwest Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005).

Nevertheless, the ARB has observed that "while temporal proximity alone may at times be sufficient to satisfy the contributing factor element, ARB precedent has declined to find 'contributing factor' based on temporal proximity alone where relevant, objective evidence disproves that element of complainant's case." Powers, supra, at 23 (footnotes omitted) (emphasis as in original). Where an employer has established one or more legitimate reasons for the adverse actions, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006). On this basis, an inference of a causal link due to temporal proximity may be broken when an **intervening event exists** that is sufficient to independently cause an employer to discharge an employee. Abbs v. Con-Way Freight, Inc., ARB No. 12-016, ALJ No. 2007-STA-037, slip op. at 6 (ARB Oct. 17, 2012) (holding that an ALJ correctly found the employee's falsification of his log book and payroll records acted as an intervening event sufficient to independently cause Con-Way to discharge the employee); Kuduk v. BNSF Ry. Co., 768 F.3d 786, 792 (8th Cir. 2014) (finding that Kuduk's "fouling the tracks" incident was an intervening event that independently justified adverse disciplinary action, despite his protected activity being close in time to his termination); Stanley v. BNSF Ry. Co., ALJ No. 2013-FRS-00041, slip op. at 28, 32-33 (ALJ Dec. 9, 2013) (holding that the complainant's theft of scrap metal was an intervening event that overwhelmed any inference of causation based on temporal proximity between the complainant's protected activity and termination). Here, there is insufficient evidence, as discussed below, to support a conclusion that intervening events exist in this matter.

Here, as agreed by the parties, Complainant has engaged in "numerous protected activities over the course of his career." Most recently, on May 8, 2015, Claimant engaged in protected activity when he reported the presence of tall grass, weeds, and snakes along the rail line. On May 13, 2015, Complainant was charged with a level 4 rule violation by Mr. Allen. According to Mr. Allen, Complainant was subject to a level 4 rule violation for failing to secure equipment, resulting in uncontrolled

movement. Due to the events which took place on May 13, 2015, and the charges imposed on that date, an investigation was held on June 9, 2015. The transcript of the investigation and all documents submitted at the investigation were forwarded to Mr. Jamal Chappell, Superintendent of Transportation Services. On June 19, 2015, Mr. Chappell rendered a Notification of Discipline Assessed, dismissing Claimant from all service with the Union Pacific Railroad, effective immediately.

The record reveals a mere 5 days passed between Complainant's May 8, 2015 protected activity and his rule violation charges on May 13, 2015. Moreover, only 42 days passed between Complainant's May 8, 2015 protected activity and his ultimate termination from employment on June 19, 2015; thus, less than two months passed between Complainant's protected activity and the adverse action. Given the temporal proximity between Complainant's protected activity and his ultimate termination, I find there may be sufficient circumstantial evidence to prove, **prima facie**, that the protected activity was a contributing factor to the adverse action.

## **2. Respondent's Knowledge of the Protected Activity**

Although the respondent's knowledge of the protected activity is not conclusive evidence that the complainant's protected activity was the catalyst for respondent's adverse personnel action, it is certainly a causal factor that must be considered. See Hamilton, supra, slip op. at 3. Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the "decision-makers" who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB, Jan. 30, 2004). The ARB has noted that the final decision-maker's "knowledge" of protected activity and "animus" are only factors to be considered under the contributing factor analysis. See Hamilton, supra; Johnson v. BNSF Ry. Co., ALJ. No. 2013-FRS-00059, slip op. at 11, n.8 (ALJ July 11, 2014).

I believe Respondent had knowledge of Claimant's protected activity, especially the protected activity which took place on May 8, 2015. Specifically, I find that though Allen did not have knowledge of the May 8, 2015 protected activity, I find the ultimate decision maker, Mr. Chappell, had knowledge of the protected activity. Moreover, it is quite clear that Respondent

has kept diligent records of all safety hotline reports made by Complainant. (RX-F; CX-2).

At the hearing, Allen testified that he generally receives a notification when an employee makes a hotline report. Allen also conducts weekly reviews of all the hotline reports. Nevertheless, Allen denied having received notice of Claimant's specific hotline report on May 8, 2015. According to Allen, a safety complaint regarding overgrown grass, weeds, and snakes would have first been assigned to the "MPO," the manager of track maintenance. Allen explained, he would not have received notice of the May 8, 2015 report until he conducted his weekly review of all hotline safety reports. Moreover, Allen specifically denied having any knowledge of Claimant's May 8, 2015 complaint when he charged Acosta on May 13, 2015.

As noted above, I generally found Allen to be credible and forthright throughout his testimony. I did not find Allen's testimony to be incongruous or inconsistent. I am generally persuaded by Allen's testimony and am specifically persuaded that he did not have knowledge of Claimant's May 8, 2015 safety hotline report when the charges were filed against Claimant on May 13, 2015. I am persuaded by Allen's testimony that a safety report, of the kind made by Acosta on May 8, 2015, would have been delivered to the Manager of Track Maintenance prior to being sent to Allen. I find no reason to discredit the testimony of Allen with regards to his knowledge of the May 8, 2015 safety hotline report. It is logical that the Manager of Track Maintenance would receive notification of a safety report, which required maintenance, before the Director of Terminal Operations received such a notification. Nevertheless, Allen's knowledge, or lack thereof, of Complainant's May 8, 2015 protected activity - or any other protected activity - is not essential. Allen was not the ultimate decision maker in the case at hand. Rather, Mr. Jamal Chappell, rendered the Notification of Discipline Assessed, sustained the charges against Complainant, and affected Complainant's dismissal on June 19, 2015.

As per Allen's testimony, the hearing transcript from the formal investigation is forwarded for review and consideration in determining the discipline to be assessed against the employees. (Tr. 85-86). In this case, Mr. Jamal Chappell, rendered the Notification of Discipline Assessed on June 19, 2015. In the Notification, Mr. Chappell indicated that he "carefully consider[ed] the evidence adduced at the investigation and hearing" in finding the evidence "more than substantially support[ed] the charges against Claimant." (CX-5).

Mr. Chappell was the final decision-maker, he "sustained" the charges filed upon Complainant and affected Complainant's dismissal on June 19, 2015.

I believe that Mr. Chappell had knowledge, at the very least constructive knowledge, of Complainant's May 8, 2015 protected activity. During the formal investigation, Complainant explained the events which took place on May 13, 2015. According to Complainant, "...I moved west above the switch to get 20 feet away from the switch. Better standing where you can stand, not be on rocks. It's more of 'a dirt' right there. You got shade from the tree so you get out of the sun. And we have a snake problem down there, **which I reported on the Safety Hotline days before**, so I got myself looking for snakes, get in the shade." (RX-J, p. 23). As the hearing transcript reveals evidence of Complainant's May 8, 2015 protected activity and Mr. Chapell - the ultimate decision maker - indicated he "carefully consider[ed] the evidence adduced at the investigation and hearing," I find sufficient evidence to establish that the decision maker who subjected Complainant to the adverse action, the termination, was aware of his protected activity.

Accordingly, I find that Mr. Chappell was the ultimate decision maker who subjected Complainant to the adverse action. Moreover, I find Mr. Chappell had knowledge of Claimant's May 8, 2015 protected activity. Given the knowledge of the ultimate decision maker as well as the proximity between Claimant's protected activity and the adverse action, I find there is sufficient circumstantial evidence to prove, **prima facie**, that the protected activity was a contributing factor to the adverse action. I find there to be sufficient circumstantial evidence of the involvement of a contributing factor, especially considering the lack of evidence to support Respondent's reasons for Complainant's termination.

### **3. The Legitimate Reasons for Employer's Actions**

A complainant need not prove that the respondent's "proffered non-discriminatory reasons [for respondent's actions] are pretext," this is so, because an unlawful retaliatory reason may co-exist with a lawful reason. Coates, supra, slip op. at 4. However, showing that an employer's reasons are pretextual or illegitimate "can, of course, be enough for the employee to show protected activity was a 'contributing factor' in the adverse personnel action." Palmer, supra at 53-54 (citing Bechtel v. Competitive Techs. Inc., ARB No. 09-052, slip op. at 13 (ARB

Sept 30, 2011) aff'd sub nom Bechtel v. Admin Rev. Bd., U.S. Dep't of Labor, 710 F.3d 443, 449 (2d Cir. 2013)).

Thus, it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. Eastern Air Central, Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel actions." Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

I find the evidence of record reveals Respondent's reasons for taking adverse personnel action against Complainant is illegitimate or pretextual. As noted above, in brief, Respondent made several allegations to refute Complainant's claims. First, Respondent asserted Complainant was not disciplined because of his protected activity. Rather, Respondent alleged Acosta was disciplined because of his safety-rule violations on May 13, 2015.

Respondent asserts that Allen, who responded to and investigated the incident on May 13, 2015, had no knowledge of any issues with Complainant, knowledge that Acosta had "a reputation of being accident prone," or any knowledge of Acosta's May 8, 2015 safety line complaint when he investigated the incident or charged Acosta, Bise, and Altmeyer with any violations. From here on, Respondent's argument is unclear.

Respondent goes on to allege that Allen explained "in a shoving movement, the engineer in the locomotive needs a point protector 'to make sure that they don't shove the rail cars into

any obstructions or off the tracks or over a derail or through a broken rail.'" Respondent asserts that Allen "further confirmed that on May 13, 2015, Acosta was the point protector for the movement of rail cars at the location in question." Then, Respondent alleges "David Bise, the Switchman on Acosta's crew, admitted in his testimony that failure to perform the proper securement procedures after a shove was a violation of the rules." Lastly, Respondent noted "Thomas Albarado, Acosta's union representative, testified that he took no exception with the fact that there was an investigation after the incidents."

To say Respondent's foregoing argument is decipherable would be generous. Respondent's assertions do not connect-the-dots as to Acosta's violation of any safety rule on May 13, 2015. Respondent's argument does not prove that Acosta violated a safety rule on May 13, 2015.

Based upon my review of the record, I find Allen **did** testify that an engineer in the locomotive needs a point protector to ensure safety. However, Allen never testified that Acosta was **the** point protector during the entirety of the events which took place on May 13, 2015. Rather, Allen specifically stated that he "**could not say who provided point protection** for the initial shove movement." The only time Acosta provided point protection, according to the record, was when he rode the shove on the leading end into Kinder Morgan.

Moreover, the record consistently reveals Acosta was never subject to the adverse action due to his own violation of any safety-rules. Allen testified, at the hearing, that he took no exception to Acosta's action with regards to the single-car shove or the "side-swipe" shove. Rather, according to Allen, the complaint about Acosta - regarding the single car incident - was that **Bise violated the rules and Acosta should have been watching and admonishing Bise for violating the rules**. Since I find Acosta was not even present during the subsequent rule violations of the other crew members, Allen found Acosta liable due to a "pattern." Allen testified that Acosta was "as responsible for the securement...as [] Mr. Bise, that's the one that's physically there, because Mr. Acosta was there for the single car securement and again they didn't do it then and [] that's a pattern."

Thus, based upon the record, it appears Acosta's role as point protector was never questioned, taken exception with, or subject to a rule violation. As such, I find Respondent's allegations in brief, with respect to Acosta providing point

protection, to be misleading. Moreover, my review of the record reveals Acosta was never found to have directly violated any rules. Rather, he was held accountable for his crew member's violations of those rules. Accordingly, I find Respondent's attempts to now allege - in brief - Acosta is directly responsible for a rule violation to be incongruous and false.

In brief, Respondent went on to assert that "Acosta was in a leadership position, which means he justly bears responsibility for the actions of his crew." Respondent notes "Allen testified that his main complaint against Acosta was that 'Bise messed up and violated a lot of rules and Mr. Acosta should have been watching him and seeing and admonished him for violating those rules.'" According to Respondent, Acosta was responsible for Bise, because as footboard yardmaster, he was in charge of the crew.

In support of its argument, Respondent relies upon the testimony of Bise, Albarado, and Complainant. Specifically, Respondent observed that though Bise took full responsibility for the events of May 13, 2015, Bise "nonetheless admitted that a footboard yardmaster, unlike a switchman, is in charge of the crew" and "in a situation where a crew puts out a car on the wrong track, the foreman would be responsible for it." With regards to Albarado, Respondent asserts that though Albarado testified a footboard yardmaster is the same as a foreman or a switchman and he has never seen a yardmaster charged with a rule because of the crew's violation of said rule, Albarado admitted that "a footboard yardmaster is the equivalent of a foreman, the person in charge of the crew." Moreover, Respondent alleges that though Albarado does not believe the footboard yardmaster acts as a yardmaster, he did concede that "in a crew composed of an engineer, a switchman, and a footboard yardmaster, the footboard yardmaster is in charge of the crew as its foreman." With regards to Complainant's own testimony, Respondent alleges that "Acosta himself admitted in his testimony that a footboard yardmaster can be considered the equivalent of a foreman." According to Respondent, Acosta did not feel he had the responsibility to ensure the cars were secure before leaving the area, and that Bise was the one who took the initiative to perform the move and thus Bise was in charge of the move. However, Respondent notes that Acosta admitted, "although Bise had many years of experience, Bise was not the foreman on this occasion; Acosta was in charge."

In spite of Respondent's foregoing arguments, I find Respondent's interpretation of the testimony of Bise, Albarado,

and Acosta to be disingenuous. Based upon my review of the record, I find no testimony, by Bise, Albarado, or Acosta, that the footboard yardmaster position is a leadership or management position. My review of the record reveals Bise, Albarado, and Acosta uniformly testified that a footboard yardmaster is in charge of the work to be done, but a footboard yardmaster is not in charge of or liable for the actions of the crew. (Tr. 138-141, 150-151, 156-159, 190-191; RX-J, pp. 237-238).

With regards to the testimony of Bise, Bise believed a footboard yardmaster is in charge of the crew "in the job and the work to be done." Bise specifically denied that a footboard yardmaster "who oversees the work of the crew would be responsible, and is ultimately responsible, for whether the securement test gets done." Respondent inappropriately associated Bise with Albarado's testimony regarding whether a foreman would be responsible "in a situation where a crew puts out a car on the wrong track." Thus, I generally find Respondent's characterization of Bise's testimony to be disingenuous and I find such testimony does not support Respondent's reasons for the adverse action against Complainant.

With regards to Albarado's testimony, I similarly do not find any support for Respondent's reasons for the adverse action. I find Respondent's assertions that Albarado admitted "a footboard yardmaster is the equivalent of a foreman, the person in charge of the crew" to be inconsistent with the testimony. Rather, Albarado was asked whether a footboard yardmaster, in a crew of consisting of a switchman, engineer, and footboard yardmaster, the yardmaster was either (1) a foreman, or (2) the person in charge of that crew.<sup>4</sup> In response to such a question,

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<sup>4</sup> Question: All right. You'd agree with me there's a difference between a footboard yardmaster and a yardmaster, correct?

Answer: Absolutely, yes sir.

Question: And as I understand things, Mr. Acosta was on a crew on May 13, 2015, that consisted of an engineer, a switchman and a footboard yardmaster?

Answer: That's correct.

Question: Would you consider that footboard yardmaster to be the equivalent of a foreman or the person in charge of that crew?

Answer: He's the foreman.

Question: Okay. That would be the difference between a footboard yardmaster and just the yardmaster in the yard. The yardmaster prepares

Albarado testified "[h]e's the foreman." (Tr. 156-157). Later, Albarado was again asked whether a footboard yardmaster, in a crew composed of an engineer switchman, and footboard yardmaster, was in charge of the crew, Albarado testified, "just as the foreman, yes sir." (Tr. 156-157). Moreover, Albarado explained the footboard yardmaster position is merely a concession made during the merger of Southern Pacific Railroad and Union Pacific. (Tr. 150-151). According to Albarado, the footboard yardmaster position is the same as a foreman, switchman, or conductor and is not a leadership or management position. (Tr, 158).

Based upon my interpretation of the foregoing, I do not find Albarado's testimony establishes that a footboard yardmaster is in charge of the crew, responsible for, or liable for the actions of the crew. Moreover, though Respondent attempted to equate a footboard yardmaster with a foreman through the testimony of Albarado, Respondent then provided no evidence of the responsibilities and duties of a foreman. Indeed, it is unclear whether even a foreman would be responsible for and liable for the safety violations of the other crew members under similar circumstances.

Lastly, as noted above, Respondent sought to rely upon the testimony of Complainant to support its assertion that as footboard yardmaster, Complainant is responsible for the crew, specifically, the actions of Bise. As noted above, Respondent alleged "Acosta himself admitted in his testimony that a footboard yardmaster can be considered the equivalent of a foreman." Similar to the testimony of Bise and Albarado, I find Respondent's interpretation of the testimony to be inconsistent with the record. Based upon my review of the testimony, I believe Acosta testified that **a footboard yardmaster is in**

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the paperwork and tells you what it is. A footboard yardmaster acts as both a foreman and a yardmaster?

Answer: No, sir, he doesn't act as a yardmaster. This is just the vestige from a contractual agreement to pay certain jobs 40 minutes per day. That's it.

...

Question: Can we at least agree that the crew designated as I was indicating to you, engineer, switchman, footboard yardmaster, the footboard yardmaster is in charge of that crew?

Answer: Just as the foreman, yes, sir.

(Tr. 156-157).

**charge of the work**, but not in charge of the crew. When asked whether a footboard yardmaster is the equivalent of a foreman, Acosta actually testified "[y]es, that job, it could be foreman. If Mr. Allen wanted to cancel the footboard yardmaster to make it a foreman, then you'd be the foreman..." (Tr. 190-191). With regards to the responsibilities of a foreman, Acosta noted that a foreman is in charge of the work done by the crew or "can emphasize the work order." (Tr. 190-191). As with the testimony of Bise and Albarado, I do not find the testimony of Acosta supports Respondent's reasons for its adverse actions.

Respondent attempted to equate the footboard yardmaster position with a foreman position - through the testimony of Bise, Albarado, and Acosta, but then provided no evidence of the responsibilities or duties of a foreman. It is unclear, from the record, whether a foreman would be liable for the safety violations of his crew members any more or less than a footboard yardmaster, a conductor, or a switchman. I am not convinced, by the evidence of record, that a footboard yardmaster is a foreman. Indeed, as Complainant expressed, if Respondent wished the footboard yardmaster position to be a foreman position, it could classify the position as a foreman position. Thus, I find Respondent's attempts to argue that a footboard yardmaster is the equivalent of a foreman to be both diverting and unconvincing.

Moreover, I am not convinced, by the evidence of record, that a footboard yardmaster is responsible for the actions of the other crew members. Nor do I believe the evidence supports a finding that a footboard yardmaster is vicariously liable for the safety violations of his crew. In general, the record is almost wholly devoid of any evidence which actually serves to establish the responsibilities and duties of a footboard yardmaster. My review of the record reveals that the only evidence which assists in determining the job duties of a footboard yardmaster is brief testimony by Albarado and Allen at the hearing.

Allen testified, "[m]y interpretation of a footboard yardmaster is a person in charge of a crew and/or a yard locally that's involved in the switching. So, not only will they be doing the work, but they will be in charge of all of that work that goes on in that yard." (Tr. 51-52). In contrast, Albarado testified "[a] footboard yardmaster is a contractual labor contract agreement where they pay the person an extra 40 minutes a day. It has --- it was a vestige from pre-merger, the merger between the Union Pacific and the Southern Pacific Railroad. At

the time of the merger, the Southern Pacific had a number of jobs that were paid at a footboard yardmaster rate of pay. The Union Pacific didn't. As part of the merger agreement, they agreed to continue to pay the jobs that were previously footboard yardmasters at the footboard yardmaster rate of pay." Albarado testified that "[t]here are no further qualifications or no further authority granted [for a footboard yardmaster]. It's the same as a foreman or switchman or a conductor." (Tr. 151-153). Albarado went on to testify that he has never seen a footboard yardmaster disciplined for the events that occurred by the crew, if he was not the one culpable for it. Typically, Albarado had seen an entire crew charged for a violation, but then the culpable party bore the responsibility. (Tr. 159).

Based upon the record before me, I believe the combined testimony of Albarado, Bise, and Complainant. Albarado, Bise, and Complainant consistently testified that a footboard yardmaster is responsible for the work, but not the crew. Considering the fact that Allen's testimony was merely his "interpretation" of the footboard yardmaster position, I am especially convinced by the testimony of Albarado, Bise and Complainant. Such an "interpretation" is not supported or bolstered by any other evidence put forth by Respondent. As such, I find Respondent has wholly failed to convince me of the legitimacy of its reasons for its adverse actions against Complainant. Respondent failed to establish that a footboard yardmaster is a leadership position. Respondent also failed to establish that a footboard yardmaster is responsible for or liable for any safety violations of his crew members - regardless of whether he witnesses such violations.

Accordingly, in consideration of the temporal proximity between Complainant's protected activity and Respondent's adverse action, the ultimate decision-maker's knowledge of such activity, and the illegitimacy of Respondent's reasons for such adverse action; I believe, more likely than not, Complainant's protected activity played a role in the adverse action. Thus, Complainant has established, **prima facie**, that his protected activity was a contributing factor to the adverse action.

#### **D. Clear and Convincing Evidence**

Respondent next has the burden to establish that it would have taken the same action absent the Complainant's protected activity. A respondent's burden to prove this by clear and convincing evidence is a purposely high burden, as opposed to complainant's relatively low burden to establish a **prima facie**

case. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. DeFrancesco, supra at 5-7.

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo v. New Jersey Transit Rail Operations, Inc., 708 F.3d 152, slip op. at p. 16 (3<sup>rd</sup> Cir. Dec. 14, 2012). To meet the burden, Respondent must show that "the truth of its factual contentions are highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

In DeFrancesco v. Union Railroad Co., the ARB quoted Speegle, "as the ARB said in Speegle v Stone & Webster Construction, the plain meaning of the clear-and-convincing phrase requires that the evidence must be "clear" as well as "convincing." "Clear" evidence means the employer has presented an unambiguous explanation for the adverse action(s) in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. DeFrancesco, supra at 7-8 (citing Speegle, supra at 6).

In brief, Respondent asserted "Union Pacific clearly and convincingly would have terminated Acosta's employment in the absence of any protected activities." According to Respondent, Complainant's safety-rule violations directly caused a 22-car collision that could have had catastrophic consequences. Respondent notes, before the incident, Acosta was on the final step of Respondent's progressive discipline scale, meaning the slightest infraction - including the securement-rule violation Acosta committed hours before the collision - would have triggered his dismissal. In relying upon the testimony of Allen, Respondent explained "Acosta and several others in his crew were charged in the May 13, 2015 incidents, Acosta received the particular discipline in question because had had prior rule violations that placed him at Level 4." Complainant was ultimately upgraded to Level 5, "which is and could lead to permanent dismissal," due to the combination of being at "Level 4" with a new rule violation. According to Respondent, "Union Pacific will charge rule violations based on actions, not outcomes," and points out that "fellow crew members Bise and

Altmeyer were also charged" in connection with the events which took place on May 13, 2015.

In his brief, Complainant asserted that he has proven that his protected activity was a contributing factor to the adverse action that he suffered, and thus Respondent's sole means of avoiding liability is to prove by clear and convincing evidence that it would have taken the same adverse action against Complainant in the absence of his protected activity.

For the same reasons I am unconvinced by the legitimacy of Respondent's reasons for its adverse action, I am similarly unconvinced that Respondent would have taken the same action absent Complainant's protected activity. Simply put, I am wholly unconvinced by Respondent's reasons for its adverse actions against Complainant.

I believe - as Respondent asserts - Complainant would have been upgraded to a "level 5" and thus subject to the possibility of termination **if** he violated safety rules. However, as discussed above, Respondent was unable to convince me of the legitimacy of its reasons for charging Complainant with the safety rule violations and the ultimate adverse action taken against Complainant. Respondent failed to establish sufficient evidence of the actual responsibilities and duties of one of its own employee positions. As such, the undersigned found the validity of Respondent's reasons for the adverse action taken against Complainant to be questionable. In this particular case, without convincing me of its reasons for the adverse action, Respondent cannot convince me that it would have taken the same action absent Complainant's protected activity. Accordingly, I find Complainant has established that his protected activity was a contributing factor to the adverse action and Respondent failed to establish that it would have taken adverse action absent Complainant's protected activity.

## **VII. REMEDIES**

A successful complainant under the FRSA is entitled to all relief necessary to make the employee whole including reinstatement with back pay, compensatory damages and punitive damages. Specifically, the FRSA provides that:

(e) Remedies.-

(1) In general.-An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.-Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.-Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 20109(e)(1)-(3).

#### **A. Reinstatement and Back Pay**

On June 6, 2017, Respondent advised the undersigned that Complainant was reinstated following the Public Law Board ruling of November 2, 2016. Following the November 2, 2016 ruling, Complainant was required to undergo testing regarding the safety rules and to meet with a supervisor. Complainant ultimately met these prerequisite, was formally "marked up," and returned to work as of February 7, 2017. Based upon the foregoing, I find Complainant was properly entitled to immediate reinstatement with no loss of benefits or seniority.

Regarding back pay, Complainant credibly testified that his earnings ceased on May 13, 2015, and he was not reinstated to his position until November 2, 2016. However, Complainant's earnings have not resumed and were not expected to resume until February 7, 2017.

According to Complainant, from May 13, 2015 through February 7, 2017, Complainant lost 635 days of earnings. In 2014, the calendar year before Complainant was terminated; he

earned \$95,182.44 working for Respondent, for an average of \$260.00 per calendar day. Accordingly, Complainant alleges he lost \$165,100.00 (635 days x \$260.00/day = \$165,100.00) and, despite reasonable efforts to find alternative employment, Complainant claims he was only able to earn approximately \$9,00.00 while unemployed from Respondent. As such, Complainant seeks backpay of \$156,100.00 (\$165,100.00 - \$9,000.00 = \$156,100.00). Respondent put forth no objections, arguments, or any assertions regarding the appropriate calculation of Complainant's lost wages in either its Post-Trial Brief or its Response to Complainant's Closing Brief.

I find that Complainant is owed back pay for those 635 days plus interest. Moreover, I find no material error in Complainant's calculation of his lost wages. As such, to make Complainant whole, Respondent must pay Complainant an amount of \$156,100.00 for lost wages plus interest.

#### **B. Other Relief**

Under 49 U.S.C. § 20109(e)(1), an employee prevailing in any action under subsection (d) shall be entitled to **all relief necessary** to make the employee whole. As such, Complainant, a prevailing employee, is entitled to the expungement of any negative references concerning the matter which forms the basis of this complaint from his personnel and labor relations files.

#### **C. Attorney's Fees and Costs**

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

### **VIII. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I find and conclude that Complainant has established Respondent, Union Pacific Railroad Company, retaliated against him in violation of the Federal Rail

Safety Act for reporting hazardous safety conditions.  
Accordingly,

**IT IS HEREBY ORDERED** that:

1. Respondent, Union Pacific Railroad Company, shall pay Complainant, Corby Acosta, \$156,100.00 in back pay for 635 days of missed work plus interest from the date such wages were lost until the date of payment at the rate prescribed in 28 U.S.C. § 1961.
2. Respondent, Union Pacific Railroad Company, shall expunge Complainant's personnel file of any negative record or reference related to the May 13, 2015 charges, the formal investigation of June 9, 2015, and all other references to the matter which formed the basis of this complaint.
3. Respondent shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

**ORDERED** this 21<sup>st</sup> day of December, 2017, at Covington, Louisiana.

LEE J. ROMERO, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondenceatdol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 for Occupational Safety and Health. See 29 C.F.R. § 1982.110(a).

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).