

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 01 February 2017**

**CASE NO.: 2016-FRS-13**

**IN THE MATTER OF:**

**TRACIE AUSTIN**

**Complainant**

**v.**

**BNSF RAILWAY COMPANY**

**Respondent**

APPEARANCES:

JERRY EASLEY, ESQ.

For the Complainant

PAUL S. BALANON, ESQ.

JACOB E. GODARD, 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 February 27, 2013, Tracie Austin (herein Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor, alleging that on or about December 4, 2012, BNSF Railway Company (herein Respondent) violated Section 20109 of the FRSA by terminating her employment in retaliation for reporting a work-related injury, hazardous working conditions, and/or requesting medical treatment.<sup>1</sup> (CX-1; CX-2).

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on November 17, 2015. OSHA determined that the evidence developed during the investigation was sufficient to support the finding of a violation. (CX-6; ALJX-1).

On December 11, 2015, Respondent filed its 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 Dallas, Texas from June 1-3, 2016. Complainant offered 42 exhibits and Respondent proffered 27 exhibits, which were admitted into evidence, along with seven administrative law judge exhibits.<sup>2</sup> This decision is based upon a full consideration of the entire record.

On September 26, 2016, Complainant filed an unopposed Motion for Extension of Time from the due date of October 3, 2016 to October 31, 2016, to file post-hearing briefs. On October 3, 2016, the undersigned issued an Order Extending Due Date of Post-Hearing Briefs to October 31, 2016. Thereafter, the post-hearing briefs were timely received from Complainant and Respondent. 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.

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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-\_\_\_\_.

<sup>2</sup> In particular, the exhibits admitted into evidence on behalf of Complainant were exhibits 1-8, 9-19, 21-26, 29-32, 37, 39-47, 49-50, and 54. Respondent's exhibits consisted of exhibits 1-10, 12-26, and 30-31.

## II. UNDISPUTED FACTS

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

1. At all times material, Complainant worked as a train dispatcher for the BNSF Railway Company within the meaning of 49 U.S.C. § 20109. (Tr. 14).
2. At all times material, Respondent was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. (Tr. 14).

## III. SUMMARY OF THE EVIDENCE

### Testimonial Evidence

#### Erin Elledge

Elledge testified she is a dispatcher for Respondent and has worked for Respondent for 17 years. (Tr. 18). She works in the Network Operations Center (NOC) in Fort Worth, Texas. As a dispatcher, she communicates with train crews and yard masters in moving trains. Her job is similar to that of an air traffic controller's job and is a safety sensitive position. (Tr. 19).

Elledge knows Complainant and has worked with her for about six years. She may have trained Complainant when Complainant began working for Respondent as a dispatcher. (Tr. 20).

On October 20 and 21, 2012, she was working the desk in front of Complainant. (Tr. 21). She worked until 6:30 a.m. on October 21, 2012. When she arrived home after work, she discovered she was missing from her purse an Advil pill bottle which contained miscellaneous medications. The miscellaneous medications in the bottle included Prilosec, Advil, a couple of Fiorinal and aspirin. (Tr. 22). She was scheduled to be off for two days. Elledge called the ROC, the BNSF police, and reported the Advil bottle missing. (Tr. 23). Elledge confirmed a surveillance camera is outside her portal, on a wall behind her desk, and is in plain view to all employees. (Tr. 23-24).

Elledge testified she told Complainant to use her (Elledge's) Advil or Aleve "anytime." (Tr. 25). One to two

weeks before Elledge's Advil bottle disappeared, Elledge had a niece living with her whom she had asked to leave because of a prior incident where Elledge's bottle of Fiorinal went missing from her purse. Her niece, who used a lot of alcohol, told Elledge that she was "not into that [prescribed medications]." (Tr. 26).

Elledge testified if she had known Complainant had taken her medication bottle, she would have treated the incident differently. (Tr. 26). The evening after Elledge realized her Advil bottle disappeared, Complainant telephoned Elledge. Complainant was upset and apologetic; she told Elledge she had taken the Advil bottle, but was busy and thought she would see Elledge after work. Complainant informed Elledge that she did not intend to walk away with the bottle. (Tr. 27).

Elledge stated that Respondent requested she come in for an interview regarding the missing bottle. She had a union representative present during the interview, along with six to seven of Respondent's representatives. Elledge told Respondent that "it was a non-issue" and Complainant had permission to use her medications. (Tr. 28). Robert McConaughey, a representative of Respondent whose position she did not know, did not appear pleased with her explanation and she believed he was trying to pressure her into changing her story. (Tr. 29-30). Elledge conjectured that McConaughey thought Complainant was a thief. Elledge stated it seemed like there may have been a recording of the interview. She believed the incident was a "non-issue" and it should not go anywhere. (Tr. 30).

Elledge testified she has seen CX-18 which is a written "interview" statement. (Tr. 30-31). She did not draft the statement and had no input into the statement. She reviewed the statement for the first time the day before the formal investigation. (Tr. 31). Bob Newlun, who is a company official in charge of dispatchers, sent the interview statement via email to Elledge. (Tr. 31-32). The statement failed to mention that Complainant had "permission" to use Elledge's medications. (Tr. 32).

Elledge is aware of the formal investigation process, which in this case was conducted with Dennis Mead, who acted as the "judge [and] jury." She was a witness at Complainant's formal investigation. (Tr. 33). She viewed the surveillance video of Complainant at the investigation, but it did not change the fact that, on prior occasions, she gave Complainant permission to use her medications. (Tr. 34).

Elledge confirmed that she later met Complainant for lunch, during which Complainant returned the Advil bottle. Elledge stated she was not mad at Complainant and had no intention to get her in trouble. (Tr. 35). When Complainant returned the Advil bottle, the prescription medications were in the bottle, but she was not sure about the other pills. (Tr. 35-36).

Elledge was aware Complainant fell in the restroom and was hurt on either October 10 or 11, 2012. Complainant had a headache after the fall, but would not leave work. (Tr. 36). Complainant used a "community heating pad" which was offered to her by "Brandi," who is also a dispatcher. Employees were told they could use the heating pad "anytime." (Tr. 37). Employees in the Northwest zone work together and share items such as plastic forks and plates, etc. Such items are stored in a "community drawer" along with over-the-counter pills. (Tr. 38).

Elledge is also aware Complainant was charged with being in another work area. (Tr. 39). Elledge is also aware of an employee, David Landry, who took water bottles off Respondent's dock and brought them to the dispatcher zone to share with other co-workers. Elledge recalled that Landry only received a "slap on the wrist." (Tr. 39-40). She confirmed dispatchers often frequent other work areas. She went into her POD last night to get a plate, and at times, dispatchers will go into empty PODS to check their emails. (Tr. 41).

Elledge testified she was injured in 2000 or 2003, but received no discipline for reporting her injury. She also was never disciplined for any matter connected to her report of the missing Advil bottle. (Tr. 42).

On cross-examination, Elledge stated that in October 2012, items kept in the community drawer included candy, salt and pepper, Tums, Advil, sinus medication, and Tylenol. (Tr. 43). Cabinets also contained cups, plates, bowls, etc. (Tr. 44).

Elledge testified she never consented to anyone going in her purse and taking her Fiorinal medication. (Tr. 45). Elledge was not aware that Complainant alleged it was wrong for Elledge to have prescription medication on work premises because it violated state law. (Tr. 45-46). Complainant had frequent headaches before October 2012, for which Elledge suggested she take Fiorinal for her headaches. (Tr. 47). In the past, Elledge communicated to Complainant that Elledge, as well as her sister, were prescribed Fiorinal for headaches. She also

suggested that Complainant go to a doctor to get a prescription for Fiorinal. (Tr. 48).

Elledge testified that no one had permission to go into her purse. When watching the October 20, 2012 surveillance video, Elledge observed Complainant put the Advil bottle in her pocket, which gave her pause because she was not sure why Complainant hid the bottle. (Tr. 49). She confirmed that Landry took a case of bottled water from Respondent's dock and provided the bottles to other employees. (Tr. 50-51).

Elledge stated she may have had encounters with Complainant on the night of the incident, but Complainant was so busy they could not talk. On October 20, 2012, Complainant never told Elledge she took the Advil bottle during their shift. (Tr. 51-52). However, the next day Complainant called Elledge late at night around the time her shift began which was at 10:30 p.m. to tell her that she took the Advil bottle. (Tr. 53).

On re-direct examination, Elledge affirmed that the rule against entering other PODs was impossible to enforce due to the nature of their jobs. (Tr. 55). She also confirmed the POD where the community drawer is located was farther away from Complainant's desk, than her purse. (Tr. 56).

On re-cross examination, Elledge acknowledged she did not participate in drafting the Respondent's letter in response to Complainant's complaint filed with OSHA. (Tr. 56). Further, she never used the phrase "implied consent" when discussing whether Complainant had permission to enter her purse and take the Advil bottle. (Tr. 56-57).

**Tracie Austin Lawson (Complainant)**

Complainant testified at the formal hearing and was deposed by the parties on March 15, 2016. (RX-16). Complainant was married after filing her complaint and was referred to in the record as Tracie Austin. She married Shawn Lawson in March 2013. (Tr. 60; RX-16, p. 15). She has lived at her present address for five years, and has an 11 year old daughter who was eight years old in December 2012. (Tr. 60-61).

Complainant has a high school diploma and served in the U.S. Navy for eight years as a Hospital Corpsman. Once honorably discharged from the Navy, she worked as a home health care nurse until she was hired by Respondent, BNSF. Her father also worked for BNSF as a dispatcher. (Tr. 61; RX-16, p. 23).

Complainant was hired by Respondent on September 3, 2007, after completing a four month course about the rules of the railroad which was taught at a community college. (Tr. 62). She received training and testing on the General Code of Operating Rules (GCOR) and the Train Dispatcher's Manual. (RX-16, p. 25). She trained on the job for two to three weeks before working by herself as a dispatcher. She was trained by various people including Charlie Soloman, Becky Wortell, Kelly Martin, and Erin Elledge. (Tr. 63).

Complainant worked in the Northwest Zone which she described as "family" because all of the employees worked well together. (Tr. 64; RX-16, p. 24). On October 11, 2012, the day of her work-accident/injury, she was assigned to the Fort Worth West desk where her shift began at 10:30 p.m. and ended at 6:30 a.m. Around 2:00 a.m. she was leaving the restroom when she slipped and fell on a puddle of water. (Tr. 63; RX-16, p. 33). She fell flat on her bottom and hurt her tailbone. (Tr. 63-64). She stated she got up and hobbled to the Chief dispatcher, Joshua Stout, and told him she had fallen in a puddle of water in the restroom. (Tr. 64).<sup>3</sup> She reported to Stout that she was "hurting pretty bad" and asked if she could go see a doctor at the Urgent Care facility across the street. Stout called for back-up, but he stated there was no one available to take Complainant's place and as a result, she could not go to the doctor. (Tr. 65). Complainant asked Stout to call back, which he did, but there was still no one to relieve her. She testified Stout told her the only way she could leave was "by ambulance." Complainant told Stout that getting an ambulance was "ridiculous" because her injury was not an "ambulance issue."<sup>4</sup> She again told Stout she was hurt and wanted to be seen by a doctor. (Tr. 66; RX-16, pp. 36-37). She reported the aforementioned facts about her work accident during her interview with Stan Lewis, an OSHA representative. (RX-16, pp. 38-39).

Complainant testified that on the night of her work-accident she had to stand, use a heating pad, and take Motrin for the remaining four and one-half hours of her shift.<sup>5</sup> (Tr.

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<sup>3</sup> Complainant deposed she did not take a picture of the water on the ground, nor did she tell anyone how much water was on the ground. (RX-16, p. 34).

<sup>4</sup> Complainant also stated in her deposition that Stout offered her medical attention and would call an ambulance if she thought she needed one, but Complainant declined Stout's offer because she "thought that was ridiculous." (RX-16, p. 36).

<sup>5</sup> During her deposition, Complainant stated she did not take any over-the-counter pain medication (i.e., Advil or Motrin), but later stated she may

66-67; RX-16, pp. 41, 45). When her shift ended, Complainant was told she had to give an injury report at her POD or work area. Her injury report was given to June Fife and Barry Anderson, and was received into evidence as CX-9. (Tr. 67-68). Fife and Anderson came to her desk for ten minutes to interview her and also informed her that Brewer, one of the superintendents, wanted to talk to her before she left work. (Tr. 69; RX-16, pp. 41-42). Brewer took her into McConaughy's office, who is the Assistant General Superintendent for the Texas zone, where they both listened to Complainant's description of her work-accident and injury. (Tr. 70). She was asked if she planned to be seen for medical care and she responded "yes," she was going across the street. Brewer gave Complainant his cell phone number and told her to call him after being examined about any medical plan. Brewer offered for her to take off from work. (Tr. 71; RX-16, pp. 43-44). When Complainant asked about the procedure to receive medical attention, Stout provided her with a copy of the standard operating procedures for receiving medical attention at the emergency room and for reporting an injury. She was also given a copy of her personal injury report. (RX-16, p. 54).

Complainant was examined at First Choice ER on October 11, 2012. The attending physician faxed a medical report to Respondent. (Tr. 71; CX-10, p. 8). Complainant was prescribed Norco, 5 mg, and was told she could return to work on October 13, 2012. (Tr. 72; CX-10, p. 7). After the exam, Complainant called Brewer, as requested, and stated he was "nice" and expressed to her that he hoped she would be better soon. Complainant filled the prescription of Norco and took off two days from work. She returned to work on October 13, 2012, but felt bruised and sore. (Tr. 72-73).

Complainant testified that from October 13, 2012 to October 19, 2012, nothing of note at work occurred. (Tr. 73). October 20, 2012, was a busy night for Complainant which required multitasking and there was not a lot of time to go anywhere. (Tr. 73-74). She was working "dark territory" where no signals were present and everything had to be very precise. (Tr. 74). She had to provide verbal movements of 12 to 16 trains going both ways. It was a very busy night with both "Z" trains and AMTRAK. (Tr. 75). Complainant stated that a delay of a "Z" train was frowned upon, as well as an AMTRAK train.

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have taken Motrin she had with her. She did not go the "community drawer" to get any kind of medication. (RX-16, pp. 45, 49).

About one hour into Complainant's shift, she got a "really bad headache." (Tr. 76). Complainant knew Elledge was in the POD in front of her work area. She quickly took her headphones off and peeked around the corner to see if Elledge was in her POD. Elledge was not present. So Complainant "just went on in [the POD] and [she] knew in the past that [she] had been able to borrow Motrin, Aleve, whatever was in her [Elledge's] bottle." Consequently, Complainant took Elledge's Advil bottle of medications from Elledge's purse and returned to her work area. (Tr. 77). Complainant stated she and Elledge were good work friends and had worked together for five years. (Tr. 77-78). She took an Advil, but did not return the bottle to Elledge. She intended to return the bottle, but became busy and forgot to do so. (Tr. 78).

When Complainant got home she realized she had Elledge's Advil bottle. She went on Facebook and sent Elledge a message that she had her bottle and would return it. Elledge did not respond to her Facebook message. Complainant did not have Elledge's phone number and could not call her. (Tr. 78-79).

Complainant reported to work for her next shift, when Josh Stout approached her and requested that she go to the conference room for an interview. She asked for and received union representation. (Tr. 80). Complainant is a member of the American Train Dispatchers Association (ATDA). (Tr. 81). John Davidson and June Fife were also present in the conference room. (Tr. 81-82). Fife informed Complainant that she was interviewing dispatchers about personal property missing from a dispatcher's POD. Fife did not identify what or whose property was missing. (Tr. 82). Complainant immediately had an idea about what "property" Fife was referring to, and asked Fife if Elledge's property was missing and Fife confirmed that it was Elledge's property. (Tr. 82-83). No one else in the room mentioned Elledge's name prior to Complainant identifying her. (RX-16, pp. 105-06). Complainant reported to Fife that she had a headache and had borrowed Advil from Elledge in the past, and took her Advil bottle, but forgot to return it because she got busy. She also reported to Fife that she attempted to contact Elledge through Facebook to let her know she had the Advil bottle. (Tr. 83). The report of theft from Elledge's purse is dated October 22, 2012, the same date as Complainant's interview. (Tr. 83-84; CX-15).

Complainant testified that she felt "embarrassed" and thought there was a miscommunication. (Tr. 84). She recalled Davidson and Fife confirming that, if Elledge reported the

situation was "Ok," management would not view the incident as an "issue." (RX-16, p. 106). Rather than work that evening, Complainant was told to go home.<sup>6</sup> She wanted to call Elledge, but did not have Elledge's phone number because they were "work friends" and did not socialize outside of work. (RX-16, p. 110). She obtained Elledge's phone number from a co-worker and called Elledge on her way home. (Tr. 85; RX-16, p. 109). She told Elledge she had taken the Advil bottle and expressed her embarrassment about the situation. They met for lunch on Elledge's "rest day" at which time Complainant returned the Advil bottle to Elledge.<sup>7</sup> (Tr. 86; RX-16, p. 129).

On October 23, 2012, Respondent issued a Notice of Investigation for October 26, 2012, which was thereafter postponed on two occasions until November 16, 2012. (Tr. 87; CX-19). Complainant stated she was very upset and surprised by the Notice. She thought "it" was going to be a non-issue. Complainant believed she had done nothing wrong. However, she understood she could be terminated because of the incident. (Tr. 88). She called union representative Phil Maucieri, Vice General Chairman of ATDA. (Tr. 89). She asked if there was anyone she could talk to about the investigation. (Tr. 90). Complainant met with Robert McConaughy, who was in charge of the Northwest Zone, before the November 16, 2012 formal investigation. (Tr. 90-91; RX-16, pp. 121-22). She told McConaughy that there was a misunderstanding. (Tr. 91). McConaughy mentioned the "video" and told Complainant "there was nothing he could do, it was over his head and that she was going to be terminated so get ready." (Tr. 92; RX-16, p. 123).

The formal investigation was conducted on November 16, 2012. Dennis Mead was the official over the investigation. Robert Newlun was called as a witness. Elledge also testified at the investigation as a witness for the union. (Tr. 93; CX-21). Complainant felt "Ok" about the investigation after Elledge told her story. It was three weeks before she heard about the results of the investigation. A dismissal letter dated December 4, 2012, was issued by Respondent. (Tr. 94; CX-26; RX-16, p. 18). Complainant testified she continued to work, but was depressed and work was harder. Complainant was dismissed for violating GCOR Rule 1.6 for conduct and

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<sup>6</sup> In her deposition, Complainant stated management said they would find someone to work her shift that night because Complainant was tearful and "was upset." (RX-16, p. 107).

<sup>7</sup> During the formal investigation, Complainant testified she met Elledge for lunch after Elledge's rest day on either Tuesday, October 23, 2012, or Wednesday, October 24, 2012. (CX-21, p. 9).

dishonesty. (Tr. 95; CX-23). The train dispatcher operations manual provides at 40.23 that dispatchers are "not to frequent unoccupied work areas not pertinent to duties." (CX-24). Complainant was not aware of any other dispatcher being charged for violating the same rule. (Tr. 96). She confirmed dispatchers go into unoccupied work areas to check emails in empty PODs, working a training desk, or retrieving items from the "community drawer." (Tr. 96-97). She was devastated by her dismissal and felt faint and nauseous; she could not believe it and became irritable, sick, and could not sleep. (Tr. 97). She decided to seek help from a doctor, but is not seeking psychological damages. (Tr. 97-98).

Complainant acknowledged her employee transcript from her employment with Respondent demonstrates she had seven disciplines on her record most of which were related to attendance and absenteeism. (RX-16, pp. 19-20). The record shows that in May 2009, Complainant received a formal reprimand for attendance. In July 2010, February 2011, and July 2011, she was disciplined for excessive absenteeism. Complainant could not remember any specific reason why she was absent from work. (RX-16, p. 20). Complainant deposed she believes Respondent retaliated against her when they dismissed her in December 2012, because she filed a personal injury report, reported an unsafe condition, and denied her medical care. (RX-16, pp. 32-33). However, Complainant confirmed "nothing came to mind" in regard to a conversation with Respondent or an email from Respondent that indicated Respondent dismissed her for the aforementioned reasons. (RX-16, p. 33).

Complainant offered her W-2 forms for the years 2007 through 2012. (CX-32). She earned \$16,991.77 in part of the year in 2007. (Tr. 98; CX-32, p. 1). In 2008, she earned \$69,820.00. (CX-32, p. 2). In 2009, her earnings were \$76,698.00. (CX-32, p. 3). In 2010, she earned \$80,220.00. (Tr. 99; CX-32, p. 4). Her earnings in 2011 were \$80,302.00. (CX-32, p. 5). In 2012, which may not represent wages for the entire year, she earned \$85,394.00. (Tr. 100; CX-32, p. 6). She was paid twice a month and may have missed one pay period in 2012. (Tr. 100-01). She expected her salary to increase in 2013, and thereafter. (Tr. 101). Complainant testified she read the December 6, 2012 ATDA Union Newsletter and found it to be reliable. The Newsletter indicated the wage rates after 2012 were consistent with her expectations. (Tr. 102).

After her termination, Complainant sought alternative employment at Maryville Pre-school in early 2013. (Tr. 105).

She earned \$86.25 in 2013, and \$4,908.00 from October 2014 to December 2014. (Tr. 105-06; CX-32, pp. 7-8). She also worked for her sister as a babysitter earning \$14.00 per hour for 40 hours per week in 2014. (Tr. 106-07). From January 2015 to April 2015, Complainant earned \$4,433.00. In April 2015 she signed on with Temporary Medical Agency doing medical assistant and medical office work at \$15.00 per hour and earned \$3,356.00. (Tr. 107-08; CX-32, pp. 8-10). She left the Agency in the beginning of the summer 2015, when placed with a pain management doctor. (Tr. 109). She earned \$8,646.00 in 2015, until the doctor closed his Fort Worth, Texas office. (Tr. 110; CX-32, p. 11). She also earned \$514.00 in 2015, for one week of work with UCB Surgical Associates as a temporary job. (CX-32, p. 12). She was hired as a front office manager with North Hills Hospital in March 2016, and earns \$17.00 per hour, working 40 hours per week. (Tr. 111).

Complainant testified she was paid \$3,627.66 twice monthly as a dispatcher for Respondent. (Tr. 114). The loss of her wages was a big impact and caused financial difficulty with her home mortgage. Foreclosure was threatened and she is \$20,000.00 behind on her mortgage, whereas before her termination she was current on her mortgage. (Tr. 115). As a result, she had to cash in her 401K of \$4,500.00. She suffered a 10% tax penalty as a consequence. (Tr. 116, 118; CX-37).

Complainant testified that when OSHA completed its investigation on November 17, 2015, she was excited to return to work based on a determination by OSHA that she should be reinstated. (Tr. 119-20; CX-6). However, Complainant was not offered reinstatement despite communication from her attorney to Respondent on November 19, 2015, that she was "ready, willing and able" to return to work. (Tr. 121-22; CX-8, p. 3).

Complainant testified that Respondent is a Class 1 railroad. Union Pacific is also a railroad in the area, but has no dispatching operation in the area. Union Pacific's dispatching is performed in Omaha, Nebraska. (Tr. 125-26).

On cross-examination, Complainant acknowledged that she was deposed before the formal hearing during which she confirmed she received medical training in the Navy. (Tr. 127). Her father worked for Respondent for 39 years before retiring in January 2016. (Tr. 128). She obtained various certifications some of which are current, but her rules and regulations certification has since lapsed. (Tr. 129; RX-16, p. 26). Complainant's

husband, Shawn Lawson, works for Respondent as a train master. She met her husband in 2011. (Tr. 129-30; RX-16, pp. 15-16).

Prior to October 2012, Complainant averred she was never prescribed Fiorinal. (Tr. 130). In 2013, after Respondent dismissed her, she was prescribed 325 mg. of Fiorinal for migraine headaches. (RX-16, pp. 13-14). After being terminated, she acknowledged she was referred to a psychiatrist, but did not see a doctor because she felt she could handle her emotional problems after termination. (Tr. 131; RX-16, pp. 65-66). In 2010, she sought counseling with the Employee Assistance Program. (Tr. 132). She has never been addicted to prescription drugs, alcohol, or illegal substances. (RX-16, p. 15).

Following her October 2012 work-injury, Complainant went to First Choice ER and was prescribed Norco. (Tr. 132-33; RX-30). She also used Motrin and a heating pad immediately following her injury. (Tr. 134).

Complainant affirmed that the formal investigation was transcribed. (Tr. 134; CX-21). At the formal investigation, she testified she had to "stand on a desk to see over the [POD] wall" into another POD. (Tr. 136; CX-21, p. 16). However, the video shown at the investigation and at formal hearing did not show Complainant standing on a desk to look over the wall of the POD. (CX-21, p. 18). Complainant confirmed that during the investigation, she admitted that she went into Elledge's POD and took her Advil bottle from her purse on October 20, 2012. (Tr. 137). She acknowledged the "community drawer" which contained over the counter medications was a two-minute walk, round trip, from her POD. (Tr. 137-38). However, she was busy at her desk and did not have time to walk to the community drawer to retrieve headache medication. Consequently, she went to Elledge's POD because it was less than two minutes from her desk. (Tr. 138-39).

After taking Elledge's Advil bottle, Complainant did not take any medications for 30 minutes because her headache was not bad enough to take the medications. (Tr. 139-40; CX-21, p. 8). Complainant did not talk to Elledge before taking her Advil bottle. Complainant could not recall whether she talked with Elledge after taking the Advil bottle. However, the surveillance video depicts Complainant and Elledge meeting and talking at 11:13 p.m., which was after she took the bottle. (Tr. 140-41). Complainant testified she was "too busy" to leave Elledge a note on her desk, call her at her desk, or send an

email telling Elledge she took the bottle. (RX-16, p. 84). In the past, she would ask Elledge for over-the-counter medication, but she never took the whole bottle. On prior occasions, Complainant also asked Elledge if she could have a Motrin, and Elledge, who was sitting at her desk, would point to her purse.<sup>8</sup> (RX-16, p. 77). She did not know Elledge had prescription medication in her Advil bottle because Elledge never told Complainant that she took Fiorinal. (RX-16, pp. 86-87).

Complainant never heard of Fiorinal before October 2012. (Tr. 142). She did not recall a conversation with Elledge about going to a doctor to get a prescription for Fiorinal for her headaches. (Tr. 142-43; RX-16, p. 76). Complainant did not send Elledge a note or email at work to tell Elledge she took the Advil bottle. Nor did she try to call Elledge because she did not have her phone number, but she did contact her on Facebook. When asked why she did not pop over to Elledge's POD to return the bottle, Complainant stated "I was very busy." (Tr. 143). During her shift, she opened the bottle and saw pills which were not over-the-counter medication, but still kept the bottle. (Tr. 144). She deposed Elledge should not keep prescription medications in a non-prescription bottle "like the law says." (Tr. 145-46; RX-16, p. 87). She did not know if Elledge needed the prescription pills in the Advil bottle. (Tr. 146).

Once Complainant arrived home from work at 7:30 a.m., she did not remember that she still had Elledge's bottle. (Tr. 147; RX-16, p. 91). At 11:30 a.m. when Complainant woke up, she realized she still had the Advil bottle. (RX-16, p. 92). Thereafter, she sent a Facebook message to Elledge, but she does not have a copy of the message. (Tr. 149-50; RX-16, pp. 93, 96). She did not send Elledge an email because she assumed Elledge would not check her work email while she was at home. (RX-16, pp. 98-99).

Complainant's "employee transcript" is set forth at RX-1, and highlights her employment history, discipline and personal injury record, as well as safety rules. (Tr. 154-55; RX-1).

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<sup>8</sup> During the formal investigation conducted by Respondent, Complainant testified that in the past she had permission to go into Elledge's purse, but she did not have permission to do so on October 20, 2012. Complainant indicated that when she did take medication from Elledge on prior occasions, Elledge was at her desk. When asked whether Complainant had the opportunity to ask Elledge for over-the-counter medication while in her POD, Complainant stated Elledge was on the radio so she did not want to disturb Elledge. (RX-6, p. 6).

Complainant's home was foreclosed in 2011. (Tr. 155). She testified her husband's salary is \$75,000.00 to \$76,000.00 per year, however in deposition she stated his salary was \$80,000.00 to \$90,000.00. (Tr. 155-56; RX-16, p. 180). She also stated her husband pays child support in the amount of \$2,500.00 per month, but the child support was also listed as \$1,185.00 per month. (Tr. 156-57).

Complainant did not ask her union about dispatcher jobs. She knew there were no other dispatching jobs with other railroad companies in the area where she lives. (Tr. 158). Complainant was married in March 2013, after which her daughter was put on her husband's insurance policy. (Tr. 160). Complainant deposed that she did not search for work from December 2012 to March 2013. (Tr. 160-61; RX-16, p. 167). In 2013, Complainant applied for unemployment compensation from the Railroad Retirement Board and received compensation for one year from June 2013 to June 2014. (Tr. 161-62). She stated the jobs she did obtain were medical jobs and not transportation related, which was her choice. (Tr. 164).

Complainant's tax returns reveal she received refunds each year. She did not report on taxes her income earnings received from her sister for babysitting. (Tr. 165-66). She did not consider \$8.00 an hour jobs because the job would not bring much money into the household. (Tr. 167).

On re-direct examination, Complainant added that \$8.00 an hour jobs would result in additional mileage on her vehicle, and costs relating to car maintenance, gas, and childcare. (Tr. 169). Complainant believes Respondent would never let her work on their property for Union Pacific. (Tr. 170). She stated that her lapsed certifications for dispatching could be re-certified in less than two weeks at the community college. (Tr. 172-74). She acknowledged she did not contact Union Pacific for employment, even though they employ dispatchers who work on Respondent's property, because she assumed she could not return to the premises. (Tr. 174-75).

### **Joshua Stout**

Stout testified he has been employed by Respondent since 2008. His first job with Respondent was as a train dispatcher. In August 2012, Stout became a chief dispatcher. Thereafter, in October 2012, he was the chief dispatcher at Respondent's Fort Worth Network Operations Center and had supervisory duties. (Tr. 177). He recalled Complainant reported her fall and

injury, but he could not remember if he called for relief or if Complainant went to the doctor. CX-11 is the report of injury dated October 11, 2012. (Tr. 177-79).

Stout testified surveillance cameras are present in the NOC area, none of which are hidden. (Tr. 183). He confirmed that he told his supervisor about Complainant's work-accident/injury. (Tr. 183-84).

On or about October 21, 2012, Stout went to the BNSF police with John Davidson about missing property. (Tr. 184-85). He reviewed a surveillance video from Respondent's cameras at the police headquarters. (Tr. 185). Shortly thereafter, Complainant was called into work for an interview with management in the conference room. (Tr. 185-86). Stout confirmed he was present at the interview, but he could not recall any details. (Tr. 186).

In May 2011, one of Respondent's chief dispatchers, Shaun Krocker, was engaged to Jessica, who also worked as a dispatcher for Respondent. (Tr. 186). Stout testified he was attacked by Krocker when Krocker observed him with Jessica at a restaurant. (Tr. 187). Stout was hit in the head with a tray and Krocker tried to take him to the ground. Stout injured his head and went to First Choice ER for treatment. (Tr. 188). Stout spoke with Human Resources who assured him they would talk to Krocker, but they failed to ever do so. (Tr. 188-89).

On cross-examination, Stout testified his job is to plan train movements with seven to eight dispatchers per shift. (Tr. 189). He supervised Complainant for 2 months before October 20, 2012. (Tr. 190). Stout never had issues with Complainant and had no ill will towards her. (Tr. 190-91). He does not recall telling Complainant, on the day of her work injury, that the only way she would leave the premises would be by ambulance. Moreover, such a statement was not something he would ever say to an employee. Stout did not recall interfering with Complainant's medical care. (Tr. 191). Other than reporting Complainant's work injury to his supervisors, Stout made no mention of her injury. Stout averred he would call an ambulance if an employee was in need of transportation to a hospital. (Tr. 192). On the other hand, if an employee did not want an ambulance he would offer his help and/or assist in giving the employee transportation for medical treatment. (Tr. 192-93). Stout was never under the impression Complainant was going to be disciplined for reporting her work injury. He confirmed

Respondent's policy prohibits retaliating against an employee for reporting an injury. (Tr. 193).

On the evening of October 20, 2012, Complainant was in the POD in front of Stout. (Tr. 193). There was a 5-foot wall between the PODs. (Tr. 193-94). The ROC called Stout about a theft and told him the identity of the suspect. (Tr. 194). Stout stated it is not normal for an employee to enter an empty POD when the person working in the POD is not present. (Tr. 195). He was not involved in discipline or input of any rule violations by Complainant. (Tr. 196).

Stout stated Respondent has a Code of Conduct which must be certified once a year. (Tr. 197). He confirmed the Code of Conduct (RX-13) includes reporting violations for which there should be no retaliation against any employee. (Tr. 197-98).

On re-direct examination, Stout recalled that an employee suffered heart palpitations and was removed from the work site by ambulance. (Tr. 200-01).

Stout confirmed that his incident with Shaun Krockner occurred off of Respondent's property. He added that, to his knowledge, Krockner had never engaged in any kind of theft of another employee's property. (Tr. 205).

### **Nathan Allen**

Allen is a senior special agent for Respondent. He has been a peace officer for 16 years in the State of Texas. (Tr. 207). In 2012, he was hired by Respondent at the Fort Worth campus. (Tr. 208). In October 2012, it was brought to Allen's attention that an employee reported a missing Advil bottle. (Tr. 209). The incident report from the investigation of the missing Advil bottle is set forth at CX-13. He estimated the approximate loss of the bottle and its contents to be \$10.00. (Tr. 210).

Allen testified Elledge reported the missing Advil bottle. (Tr. 210). The surveillance video of the work area was viewed. (Tr. 210-11). Allen called the chief dispatcher, Davidson, to identify the persons in the video. (Tr. 211). Allen confirmed the Advil bottle did not belong to BNSF. He also confirmed it was Elledge's prerogative to pursue criminal charges. (Tr. 212). Allen testified he was familiar with theft in the Texas Penal Code. (Tr. 213). He further confirmed "consent" can be

verbal or through a pattern of conduct. He acknowledged theft is "taking without consent." (Tr. 214).

On cross-examination, Allen confirmed that on October 21, 2012, at 6:24 p.m., Elledge reported that the Advil bottle was missing. (Tr. 215; CX-14). The video which was viewed by Allen revealed a person went into a purse in one of the PODs and took something out of the purse. (Tr. 216). The video of the work space is identified as RX-7K. (Tr. 218).

On re-direct examination, Allen stated he did not speak with Elledge after viewing the video and identifying Complainant. (Tr. 219). Allen confirmed that Elledge communicated there was controlled substances in a non-labeled bottle, however, he did not have an issue with it, nor did he address this issue. (Tr. 220).

On re-cross examination, Allen stated Elledge filed a complaint averring something was stolen from her. (Tr. 221). He was told that Respondent's management would handle the matter internally. Allen did not testify at the formal investigation. (Tr. 221-22).

### **Philip Maucieri**

Maucieri is presently unemployed. (Tr. 234). He began working for Respondent in 1995, working as a dispatcher for over 20 years. Maucieri was also a union member of ATDA. (Tr. 235). He was elected vice-general chairman in 2007, and served until 2016, performing various duties for the union. In 2007, he was assigned to manage disciplinary issues. He represented employees who were charged and investigated by Respondent. (Tr. 235-36).

Maucieri testified the first step of any disciplinary action is a Notice of Investigation which issues within five days of an alleged offense. (Tr. 236). An employee can accept the punishment offered for the alleged offense. He has been involved in more than 1,000 notices of investigation which average 100 per year. He has attended about 200 formal investigations as a union official. (Tr. 237). During an investigation there is no right to discovery of information. The notice of investigation does not require the company to identify the rules which have allegedly been violated. At a formal investigation, Respondent calls company witnesses first to establish what happened and which rules were violated. (Tr. 238).

Maucieri confirmed that he was present at the formal investigation involving Complainant, but not the entire time. (Tr. 238-39). Respondent called Complainant as its first witness. He testified that in his experience, Complainant being called first was the only time where Respondent did not call company witnesses first. He could not recall any employee ever being charged with a rule violation regarding frequenting areas not pertinent to the employee's work duties. (Tr. 239). The hearing officer at the formal investigation is a management employee of Respondent. (Tr. 240). At Complainant's investigation, Dennis Mead was the hearing officer who made rulings on evidence and objections. Maucieri stated that it was never his experience that a hearing officer followed rules of evidence. (Tr. 241).

Maucieri testified it was "common practice" for dispatchers to go into unoccupied PODs on an hourly basis. (Tr. 241-42). He described "sliding" as a practice where dispatchers are moved from one job to another and from one POD to another. In these circumstances the dispatcher may need to go to their POD for food and other items, look at emails, or make phone calls. He stated it was also common for dispatchers to borrow things from other dispatchers. (Tr. 242). Dispatchers may not always ask for permission to do so. (Tr. 243).

In 2011, Maucieri represented Krockner who was charged with violating GCOR Rule 1.6, as was Complainant. (Tr. 243-44). A notice of violation issued and a formal investigation was conducted. (Tr. 244).

On cross-examination, Maucieri testified that Krockner did not steal anything to his knowledge. (Tr. 245). Krockner was the chief dispatcher which is a management position. He does not know whether Krockner was terminated from his management position, but Krockner did return to the scheduled ranks. (Tr. 246). The general superintendent at the time, who was the highest ranking manager, was Danny Reynolds. (Tr. 247). Reynolds was replaced by Robert McConaughy. (Tr. 247-48).

Pursuant to the collective bargaining agreement, Maucieri testified the practice has been that the hearing officer is a management employee. He could not recall whether during the investigation any evidence presented by Complainant was not allowed into evidence. (Tr. 248). Maucieri acknowledged that theft is a stand-alone offense which could warrant termination by Respondent. (Tr. 249). Maucieri confirmed there is nothing

in the collective bargaining agreement that requires the hearing officer to call company witnesses first. (Tr. 249-50). He had no direct personal knowledge of the facts regarding Complainant's alleged violation. (Tr. 250).

On re-direct examination, Maucieri stated a Rule 1.6 violation is a dismissible offense, but dismissal is not required, rather it is at Respondent's discretion. (Tr. 251).

On re-cross examination, Maucieri confirmed employee violations of Rule 1.6 have resulted in termination in other instances. (Tr. 253).

### **Dennis Mead**

Mead testified at the formal hearing that he is not presently employed. (Tr. 254). He last worked for Respondent, where he was employed for 39 years. (Tr. 254-55). He left his employment with Respondent in July 2014. (Tr. 255). His last job title was "dispatcher" (for one month), but he did not work as a dispatcher because he obtained the designation only for insurance purposes and later put in for vacation. (Tr. 255-56).

Of Mead's 39 years of employment with Respondent, 36 to 37 years were in management. He was the Director of Transportation Processes for his last five years, supervising employees. (Tr. 256). Before becoming the Director of Transportation, he was a Supervisor of Crew Management and then the Transportation Superintendent. In addition, part of his duties while working for Respondent included performing formal investigations. (Tr. 257). Since 1981, he conducted over 500 formal investigations as the hearing officer. (Tr. 258).

Mead was the hearing officer for Complainant's formal investigation and ruled on objections and the receipt of evidence. (Tr. 258). As hearing officer, he interviewed employee witnesses in advance of the hearing, otherwise he would not know what the case was about. (Tr. 259). During the hearing proceeding, he could request employee witnesses to testify. Mead confirmed that it was not his job to act as a "prosecutor," rather it was his responsibility to bring out all of the facts so that the transcript reflects a true account of the matter being investigated. (Tr. 260).

Elledge was on the list of witnesses to testify at Complainant's formal investigation. (Tr. 265). He identified CX-19 which is Complainant's investigation Notice and

postponement letters. (Tr. 265-66). Elledge testified at the formal investigation and was called as a witness by the union. (Tr. 266). However, Mead did not send a letter to Elledge to appear at the hearing. (Tr. 267-68). Mead had the ability to recess the investigation and re-open it until he believed he had acquired all pertinent information. (Tr. 268). Mead testified that, according to the collective bargaining agreement, the Notice of Investigation is not required to list the rule violations committed by an employee. (Tr. 269-70). Nor was Mead required to exchange information with the charged employee or the union prior to the hearing. (Tr. 271). Nevertheless, Mead would prepare a chronological outline of questions, witnesses to call, and exhibits to be entered during the hearing. (Tr. 273).

Mead confirmed CX-20 is the outline used in Complainant's formal investigation. (Tr. 274-75). Mead's outline demonstrates he did not prepare any questions for Elledge. (Tr. 276).

On cross-examination, Mead confirmed that he conducted 500 investigations and that Complainant's investigation was consistent with other investigations. (Tr. 277). He acknowledged CX-19 is the Notice of Investigation, and although it did not list the specific rule number, the substance of the rule violated was stated in the Notice. The union officials are copied with the Notice of Investigation. (Tr. 278). During Complainant's investigation, Mead did not restrict the union from calling witnesses. He did not recall restricting the union from offering exhibits. (Tr. 279).

Mead made credibility determinations with respect to witnesses who testified at Complainant's formal investigation. (Tr. 280-81). In doing so, he found Complainant less than credible because she stated she could not see over the POD wall unless she knelt or stood on top of her desk. However, the security video shows her looking over the POD wall, without kneeling or standing on her desk. (Tr. 281). Mead confirmed RX-8 is an email he prepared and sent to management with his recommendations after reviewing the investigation transcript. (Tr. 282-83). He affirmed he was not the decision-maker in Complainant's case. (Tr. 283). He verified that Respondent's policies did not allow or tolerate retaliation. (Tr. 285).

On re-direct examination, Mead testified he considered Elledge to be a credible witness at the formal investigation. (Tr. 285). He recalled Elledge testified Complainant had

"implied consent" to use her medications, but not to go into her purse. (Tr. 285-86). Mead was aware of Federal laws that prohibit retaliation against employees who report a personal injury, hazardous safety conditions, or seek medical care. (Tr. 287). He testified Elledge discussed "implied consent" at the formal investigation, but she stated Complainant did not have permission to go into her purse when she was not present. (Tr. 290).

### **Kevin Porter**

Porter has worked for Respondent since May 2006. (Tr. 293). He is a train dispatcher and union member of ATDA. (Tr. 293-94). He holds two offices within the ATDA, including Vice-General Chairman and as an alternate trustee. (Tr. 294). His primary role as Chairman is to participate in the formal investigations. (Tr. 294-95). The union covers 600 employees, the majority of which are the 500 dispatchers at Respondent's NOC. (Tr. 295).

Porter attended Complainant's formal investigation and acted as the lead or primary, which is the person who conducts questioning at the investigation. He and Maucieri would alternate being the lead and the observer during investigations. Porter has participated in 140 investigations. (Tr. 296). He confirmed that after a Notice of Investigation issued, sometimes there is no investigation by waiver for a reduced discipline. He estimated that he has received 500 to 600 Notices of Investigation. (Tr. 297).

He testified that before Complainant's hearing, he sought out Elledge to determine how the events transpired leading up to Complainant's investigation. (Tr. 297). Based on Elledge's statements, he determined the incident was a misunderstanding. Porter confirmed Respondent did not ask Elledge to testify at the formal investigation. He requested Elledge attend the investigation, but, as a union official, he did not have the power to compel her to testify. (Tr. 298). Nonetheless, he stated Respondent can compel employees to attend an investigation. (Tr. 298-99). Elledge agreed to attend the hearing. However, prior to the investigation, Porter did not communicate to Respondent that she would be a witness. It was Porter's sense that Mead was agitated by Elledge's presence. (Tr. 299).

Porter testified that, as a union representative dealing with the investigations, he never received any advance

notification about the evidence to be presented. Generally, at formal investigations the common practice is for company witnesses to testify first. (Tr. 300). In contrast, during Complainant's formal investigation she was called to testify first which was entirely different than the other 140 formal investigations Porter attended. (Tr. 301).

Porter testified that CX-24, Rule 40.23, relates to employees (train dispatchers) "not frequent[ing] unoccupied work areas not pertinent to duties." (Tr. 301). To Porter's knowledge, no other employee has ever been charged with a Rule 40.23 violation other than Complainant. (Tr. 302). Porter has observed other dispatchers in the NOC who go to other work areas "every day," such as when training students, checking emails, to obtain food at a desk, or getting a bottle of Advil in a drawer. Porter described the environment as "like a family." (Tr. 302-03).

Porter examined CX-34 which is a document containing the contract earning rates for dispatchers.<sup>9</sup> He verified the rates for July 1, 2012, July 1, 2013, July 1, 2014 and January 15, 2015, were correct rates. (Tr. 304-05).

On cross-examination, Porter stated that, although he was very familiar with the earning rates, he was not certain of the rates for 2011, 2010, or 2009. (Tr. 305-06). He did not create CX-34 and had not seen the document before the formal hearing. (Tr. 306-07). Porter was not familiar with any public law board that states it would be improper to first call the principal as a witness. He confirmed Elledge agreed to testify at Complainant's formal investigation. Porter did not recall during the investigation whether there was a reference to a "Facebook message." (Tr. 307). Based on his notes during the formal investigation, Porter determined that Mead was agitated by his demeanor and facial expressions. He also confirmed both sides had an opportunity to question Elledge during the investigation. (Tr. 308). In regard to union representation at the formal investigation, Porter stated the union representative who is the "observer" simply observes the hearing. (Tr. 309).

Porter acknowledged the Policy for Employee Performance Accountability ("PEPA policy") has stand-alone dismissible offenses such as theft and dishonesty. (Tr. 309-10). Before representing Complainant, Porter never represented an employee

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<sup>9</sup> Although CX-34 was referred to during the formal hearing in this matter, it is not included in Complainant's proffered exhibits. (Tr. 304).

who was accused of stealing something out of a co-worker's purse. (Tr. 310).

On re-direct examination, Porter testified that it was his belief no theft occurred when Complainant took the Advil bottle from Elledge's purse. (Tr. 310). He confirmed the rule violations alleged against Complainant could result in termination, but Respondent had the discretion whether to discipline or terminate an employee. He acknowledged there is no requirement that an employee be terminated for a PEPA violation. (Tr. 312).

On re-cross examination, Porter stated he was not involved with Complainant's appeal to the Public Law Board. (Tr. 313).

### **Robert Newlun**

Newlun testified he currently is employed by Respondent as Director of Dispatching Practices and Rules. Prior to October 2012, he worked as a Senior Manager of Dispatching Practices and Rules (MDRP) for eleven years. (Tr. 317). In total, he has worked for Respondent for 32 years. (Tr. 318).

Other than the disciplinary matter, Newlun had no other interaction with Complainant. He did not know about Complainant's October 11, 2012 accident and injury. (Tr. 318). Nevertheless, he became aware of Complainant's accident/injury prior to the investigation, when Dave Rogerson, the General Director of Transportation Support, informed him about the incident. (Tr. 318-19). He confirmed Rogerson has since retired. Newlun testified that it was not uncommon for him to converse with Rogerson about pending investigations. However, Newlun acknowledged he had no need to know of Complainant's accident and injury. (Tr. 319).

Newlun testified that he reviewed the deposition and summary of Elledge's meeting with Respondent. He confirmed that he was present when Elledge testified at the formal investigation. (Tr. 320). He stated Elledge's estimate of the number of managers present at her meeting is not accurate. (Tr. 321). Further, he did not recall McConaughy or any other person being aggressive when meeting with her. (Tr. 321-22). Newlun did not recall giving a statement to OSHA concerning Elledge's truthfulness. (Tr. 322). Newlun identified CX-4 as a letter from OSHA to Respondent dated July 20, 2015. He does not recall an interview with an OSHA investigator during which he stated Elledge had given "implied consent" to Complainant. Nor

did he recall "animus" being discussed with OSHA as set forth on page six of the July 2015 letter. (Tr. 323). Newlun stated there has been no occasion on which he remembers meeting with an OSHA investigator. (Tr. 324).

Newlun testified the Network Operations Center (NOC) has unconcealed surveillance cameras where the dispatchers work. (Tr. 324). He stated Rule 40.23, regarding frequenting unoccupied work areas that were not pertinent to work duties, was implemented in 2003 or 2004. (Tr. 324-25; CX-24). When Newlun was deposed, he stated he could not think of anyone else who had been charged with a violation of Rule 40.23. (Tr. 325).

Newlun confirmed CX-18 is his written summary of his interview with Elledge and stated "implied consent" was not discussed in the interview. (Tr. 325-26). He affirmed that the Advil bottle was not Respondent's. (Tr. 327). He did not know why Elledge was not called as a company witness. (Tr. 328). Customarily, he would make recommendations for witnesses, but it was never solely his decision as to who would be called as a witness during the formal investigation. (Tr. 329).

Newlun's present job duties involve overseeing the managers in Dispatching Practices and Rules in each remote office, hiring and training dispatchers, monitoring dispatchers' work, and overseeing electronic technology development for communication in the dispatching department. (Tr. 329-30). In addition, Newlun has served as a hearing officer on five or six occasions. (Tr. 330). As a hearing officer, he has requested that employees testify as witnesses, but was hesitant to use craft employees and instead relied upon managers. (Tr. 330-31). He identified CX-27, as a letter written by Elledge regarding Complainant's discipline which mentioned "implied consent," but Newlun maintained Elledge never mentioned this term during her interview. (Tr. 332-33).

On cross-examination, Newlun testified that he was involved in the creation of Rule 40.23. The rule came about because of complaints of missing items such as staplers, rolls of tape, scissors, etc. (Tr. 333). Newlun stated the union was aware of the proposed rule, the reasons behind it, and received a draft copy of the rule before it went into effect. He confirmed Complainant's entry into the unoccupied POD was encompassed by the Rule 40.23. (Tr. 334). He also confirmed Complainant was trained on the rule. (Tr. 335).

Newlun was not involved with Shaun Krocker's investigation regarding "eavesdropping" on his ex-girlfriend's conversation. (Tr. 335). Newlun explained that when Krocker's eavesdropping incident occurred, all chief dispatchers had access to a generic password to have the ability to listen to the recording system that records all dispatcher communications. Newlun further explained that at the time, Respondent did not have in place serious password protection, nor were there concerns with identity theft. In fact, the password for chief dispatchers to enter the recording system was "P-A-S-S-W-O-R-D." (Tr. 336-37). Newlun believed Krocker did not "steal" a password to eavesdrop on the conversation because of the ease of obtaining various passwords to enter the system. (Tr. 337).

Newlun first learned that Elledge was missing medication from her purse after the ROC contacted John Davidson, the Assistant General Superintendent on duty. (Tr. 338). June Fife was the manager on duty who reviewed the surveillance video of the incident, and later provided a write-up of the events that occurred. (Tr. 338-39). Newlun reviewed the ROC ticket and Fife's write-up. He confirmed that he had no knowledge of Complainant's work-injury when he received notification of the report of theft by Elledge. He further confirmed Complainant's accident and injury had no bearing on his actions in the case. (Tr. 339). He had no involvement in determining Complainant's discipline and he did not retaliate against Complainant in any way. (Tr. 340-41).

Newlun identified RX-12 as the Injury Reporting Policy, RX-13 as the Respondent's Code of Conduct, and RX-15 as the Equal Employment Opportunity Policy. (Tr. 341-42).

On re-direct examination, Newlun confirmed that he first went into management in January 1988. (Tr. 344). Newlun recalled the incident with employee, David Landry, who absconded bottles of water from Respondent's dock and was not authorized to take the water bottles. He confirmed the water belonged to the Grain Department who had ordered and paid for the water. (Tr. 345). There was video of Landry taking the water, but Newlun could not recall if Landry's incident went to investigation or if Landry was fired for taking the water. Newlun stated Landry retired. (Tr. 346). He did not recall whether Landry had any conduct related offenses on his record prior to his taking the water. However, he confirmed Complainant had attendance issues stated in her record which were categorized as conduct related. (Tr. 347). He does not know or recall if Complainant was charged with a Rule 1.6

conduct violation. (Tr. 347-48). Newlun was aware that Shaun Krocker was involved in a log-in violation, but not eavesdropping on an ex-girlfriend. (Tr. 350). He stated that it was partly Respondent's fault for creating a weak password system that allowed Krocker to look up credentials of other co-workers. He could not make a determination whether Krocker acted dishonestly. Nevertheless, he testified Complainant was dishonest. (Tr. 351). He was not aware that Krocker received an "S30" discipline which is a 30-day record suspension or that he was investigated for his login violation and eavesdropping on a co-worker. (Tr. 352-53).

Newlun confirmed Respondent had a zero tolerance policy for retaliation. He had no knowledge of whether Respondent had ever retaliated against an employee. (Tr. 354). He had training about whistleblower protections for railroad employees (i.e., the Federal Railway Safety Act), as well as what constitutes a protected activity. (Tr. 357).

On re-cross examination, Newlun testified the incident when Landry took the bottles of water occurred quite some time before the incident related to Complainant. (Tr. 357-58). He confirmed that Landry took the water from the Grain Department, but distributed the water to other dispatchers at work. He also confirmed Landry did not leave the premises with the water and take it home. Newlun testified the union never disagreed with the implementation of Rule 40.23. (Tr. 358).

### **June Fife**

Fife has worked for Respondent for 21 years. She has been Manager of Dispatching Practice and Rules (MDPR) for five years. In October 2012 and November 2012, Newlun was her supervisor. (Tr. 364). Fife testified that she was not aware of any other Class 1 railroad company with dispatcher positions in the Fort Worth, Texas area. (Tr. 365).

Fife confirmed that on October 11, 2012, Complainant reported an accident and injury that occurred in the women's restroom on Respondent's property. Barry Anderson, the Assistant Corridor Superintendent, contacted her to interview Complainant shortly before the end of the shift. (Tr. 366). She recalled that Complainant reportedly slipped in the restroom, but did not report any pain. (Tr. 367). Fife did not recall Complainant reporting that she "fell on her tailbone," or that she was told to use "Motrin, heating pad" as stated in the injury report. (CX-9; Tr. 367-68). She expected Complainant

would be leaving work shortly after the interview. Fife confirmed that a normal shift for employees is eight hours, but they can work up to nine hours. (Tr. 370). She confirmed CX-10 is a report from First Choice ER which reflects Complainant had her vital signs taken at 7:03 a.m., which was likely after the shift ended. (Tr. 371). She acknowledged CX-11 is a "Supervisor's Report of Injury," which indicated Complainant was diagnosed with lower lumbar pain and prescribed Hydrocodone medication. (Tr. 371-73). As a MDP, Complainant's injury is the only injury in which Fife was involved. (Tr. 373).

Fife testified she first heard about Complainant's report of water being on the women's restroom floor at approximately 6:00 a.m. She again confirmed that Anderson first informed her that Complainant had an accident, but Fife did not hear about it when she initially reported to work. (Tr. 375).

Fife acknowledged CX-53 is her deposition that was taken in this matter. Fife deposed that she, along with Anderson, was aware that Complainant reported an accident and injury. (Tr. 376). She further deposed Anderson informed Lance Brewer about the accident and injury. (Tr. 376-77; CX-53, p. 18). Fife stated that injuries should be reported and can range from very severe injuries, such as an amputation, to injuries that may require minimal medical treatment with medication. (Tr. 377-78). Fife stated Complainant's injury occurred four hours before she came on duty. (Tr. 378). She confirmed that when an injury occurs, an ideal course of action would be to have the scheduling desk find an employee to cover the injured dispatcher's territory. (Tr. 379). In the most catastrophic situations, a desk can go "blank," meaning no one was covering the desk, but that would require shutting down the covered territory. (Tr. 379-80).

Fife testified she was familiar with Respondent's drug testing policy. She affirmed that if she believed a dispatcher was taking or abusing drugs while at work she, with the concurrence of a manager, could order the employee to take a drug test. (Tr. 380). She worked with Complainant as her supervisor, but her contact with Complainant was "pretty minimal" because she supervised many dispatcher desks. (Tr. 381-82). However, when she did have interaction with Complainant she did not notice Complainant was under the influence of alcohol or drugs, and she never ordered a drug test. (Tr. 382).

Fife recalled that Elledge reported her prescription medication had been stolen, but not specifically an Advil bottle. (Tr. 382). She acknowledged CX-14 is a ticket report from BNSF Police stating Elledge reported an Advil bottle containing Fiorinal was missing. (Tr. 383). John Davidson asked Fife to watch the surveillance video and, in doing so, she identified Complainant. (Tr. 383-84). Davidson also asked her to set up an interview with Complainant. (Tr. 384). Fife, along with Stout and Davidson, were in the conference room when they interviewed Complainant about the incident involving the missing Advil bottle. (Tr. 385). Fife confirmed she is 5 feet 5 inches tall, and without standing on her tip toes, she cannot see over the POD wall. (Tr. 386). She confirmed that during the interview, Complainant was not informed about the existing surveillance video or that Fife had viewed the video. (Tr. 386-87).

Fife asked Complainant whether she knew Elledge and if she entered Elledge's POD the previous night. (Tr. 387). Complainant reported she and Elledge were friends and that she had gone into Elledge's POD and took the Advil bottle back to her POD. (Tr. 387-88). During the interview, Fife did not reveal to Complainant what type of property was missing, only that it was personal property, nor did she reveal the identity of the employee who filed the report. (Tr. 389-90). Fife confirmed Complainant reported she attempted to contact Elledge after work, but she did not have a phone number, just a Facebook contact. Fife identified CX-15 as the write-up of Complainant's interview. (Tr. 391). On October 22, 2015, she distributed the write-up to senior managers of the South zone. (Tr. 391-92).

Fife also prepares Notices of Investigation which contain the "bare bones description of alleged conduct and the date and time," but the Notices do not go out under her signature. (Tr. 393). Fife was not involved in Elledge's interview, but to her knowledge Elledge was not charged with dishonesty or violating Rule 1.6. (Tr. 393-94).

Fife was generally aware of the situation involving Shaun Krockner who had stolen a password and used the password for his personal benefit by accessing his ex-girlfriend's email. (Tr. 394-95). She confirmed that only Complainant has been charged with frequenting an unoccupied work area (under Rule 40.23). (Tr. 395).

On cross-examination, Fife stated that, in her 22 years with Respondent, she has worked as a dispatcher, crew planner,

chief dispatcher, and a Manager of Dispatching Practices and Rules. As a M DPR, her purpose is to act as the primary contact for dispatcher rule interpretations. (Tr. 396). Fife testified she has no ill will toward Complainant. The morning of Complainant's accident, Fife asked Complainant if she was "okay" and if she needed medical treatment. (Tr. 397). Complainant stated to Fife that "she was okay . . . she used to be a nurse and knew there was nothing that they [the medical providers] could do for her other than give her Tylenol." (Tr. 397-98). Prior to their conversation, Fife was unaware Complainant was a nurse. She also confirmed Complainant did not state she asked for medical treatment, or that Stout told her the only way she could leave work was by ambulance, or that she could not leave work for medical treatment. Fife did not relate her conversation with Complainant to her supervisors (i.e., Brewer, McConaughy, or Mead). (Tr. 398). She had no reason to believe Complainant would suffer repercussions after reporting her injury. (Tr. 399). She knew of no other employee who suffered repercussions due to reporting an accident and/or injury. In the past, when an employee sought medical treatment, Fife has arranged for a shift replacement and called the BNSF police, who in turn called for medical treatment to ensure employee safety. (Tr. 400-01).

After Fife viewed the surveillance video, she concluded that Complainant had engaged in a theft because of the way she was looking around (numerous times) and then took something out of Elledge's purse and put it in her pocket. (Tr. 402). Fife summarized what occurred in the surveillance video in her write-up, which is located in CX-15. (Tr. 403). Fife confirmed that at the end of the interview, Complainant stated she had tried to "make it right" by contacting Elledge. Fife averred she never indicated to Complainant that the situation "would go away" if Elledge said Complainant had permission to take the bottle of medication. Likewise, Fife stated Mr. Davidson, who was also present at the interview, never agreed to such a proposition. (Tr. 405). Complainant did not state Elledge had given her permission to take the Advil bottle. (Tr. 406-07). Fife confirmed that Complainant stated she "felt guilty" about the situation. (Tr. 407). After the interview, Fife had no other involvement with Complainant or the investigation. (Tr. 408-09). Fife also had no personal involvement with the situation regarding Shaun Krockner. (Tr. 410).

On re-direct examination, Fife confirmed that from 2007 through 2012, there were approximately 10 M DPRs working for Respondent. (Tr. 411). She confirmed she had limited

interaction with Complainant at the "Colorado desk." (Tr. 412). She further confirmed Complainant did not report that she had requested medical care or that her medical care was denied, delayed, or interfered with in any way. (Tr. 414-15). During her employment with Respondent, Fife has called for an ambulance numerous times for things like chest pain, shortness of breath, and potential heart attacks. (Tr. 417). Fife did not consider a bruised tailbone to be in the same medical category as a heart attack, but if the employee requested medical treatment she would arrange for such treatment. (Tr. 418).

### **Derek Cargill**

Cargill testified he is currently employed by Respondent. (Tr. 421). Cargill confirmed he reviewed depositions, the investigation of Complainant, the PEPA policy, and other discipline cases. He also reviewed a list of cases for theft and dishonest conduct. (Tr. 422-23). Prior to working for Respondent, Cargill was a practicing attorney for approximately eight years. However, he never worked for Respondent in the capacity of an attorney. (Tr. 424). Cargill has served as the Director of Employee Performance and Labor Relations for Respondent since 2011. (Tr. 428). In early 2013, he received training regarding whistleblower protections pursuant to 49 U.S.C. § 20109. His duties are to oversee the discipline process under the PEPA policy and review investigations for consistency of policy. (Tr. 430). He is part of the "PEPA team" which acts to ensure the PEPA policy is applied in a uniform manner over the entire geographic regions covered by Respondent. (Tr. 430-31). He serves on the PEPA team with Henon and Smith, both of whom trained him when he joined the team. (Tr. 434-35). Cargill confirmed the PEPA team reviews on average 400 to 700 cases per year, and he personally oversees one-third of the cases. (Tr. 437). After reviewing the cases, the PEPA team will make "recommendations" to managers, but ultimately they do not make the final decision. (Tr. 438). Cargill acknowledged CX-52 is his deposition related to this matter. (Tr. 438-39).

Cargill testified he received Complainant's investigation transcript through the PEPA inbox, but the surveillance video was missing. (Tr. 444). After reviewing the transcript, he did not find Elledge was dishonest in her testimony. He did not recall Elledge stating Complainant had implied consent to take the Advil bottle. (Tr. 445). Cargill recalled Complainant testifying it was okay to go in Elledge's purse and take the Advil bottle because Elledge had allowed her to take medication

before. However, Cargill stated Elledge was present when Complainant took medication on previous occasions. (Tr. 446). Cargill identified CX-29 as an email from Mead to the PEPA team, submitting Complainant's investigation transcript and exhibits. Cargill also confirmed CX-29 contained an email he sent to Mead stating he was inclined to issue Complainant a level 30-day suspension with a 36 month review. Cargill confirmed that when he sent this email he had not viewed the surveillance video. (Tr. 447). He did not know Complainant had an accident and injury, or that she sought medical treatment. (Tr. 448).

Prior to receiving and watching the surveillance video, Cargill testified his initial impression was that a rule violation had occurred. (Tr. 449-50). He eventually reviewed the video, as well as Complainant's personnel record. (Tr. 450). He confirmed CX-25 is an email he sent to Mead following his review of the surveillance video and personnel record. In his email, Cargill wrote that "termination is warranted as a stand-alone violation." (Tr. 451). Cargill confirmed CX-30 is Complainant's "hard card" which contains her personnel record, however, it also contains additional information that was not present when he reviewed the record. (Tr. 453). The profile reflects absenteeism and a personal injury record where Complainant lost two days for an on-duty injury which was a reportable injury. (Tr. 454-55). Cargill confirmed CX-25 reflects his recommendation for "dismissal" under PEPA policy as a stand-alone violation. (Tr. 456-57). He did not rely on Complainant's prior discipline in concluding dismissal was proper because discipline is not progressive, but prior discipline may be a factor for other purposes. (Tr. 457). He testified Complainant's dismissal was not based on progressive discipline. (Tr. 458). He affirmed that Notices of Investigation or dismissal letters may be prepared by administrative personnel, rather than the decision-maker. (Tr. 458-59).

On cross-examination, Cargill confirmed RX-14 is the PEPA policy which was in effect from October 2012 to January 2013. (Tr. 461-62). Cargill testified the PEPA policy provides for three levels of violations: (1) stand-alone violations; (2) serious violations (by list); and (3) standard violations that do not subject employees or others to serious injury or fatality. (Tr. 462-63). He explained that a stand-alone violation can be implemented without any other discipline noted on the employee's record because the violation itself is considered so serious that dismissal is warranted. He confirmed theft and dishonesty are stand-alone violations. (Tr. 463).

Cargill reviewed the hearing transcript and found it to be "procedurally sound." (Tr. 463-64). He confirmed the Notice of Investigation may or may not require notice of the specific rule violation(s) depending on what rule is violated. In regard to the rules violated by Complainant, he did not believe notification of specific rule violation was required. (Tr. 464). He stated there is no requirement which dictates the order of witnesses to be called at the formal investigation. Nevertheless, he testified an employee will be called first if video or audio recordings are used as exhibits in the investigation. (Tr. 465). He confirmed there is no requirement in the collective bargaining agreement that states a hearing officer cannot be a company employee. Cargill stated if an employee is dissatisfied with an investigation or believes it is procedurally flawed the employee can appeal the decision or discipline. (Tr. 466).

Cargill testified Elledge was inconsistent in her testimony because her testimony changed regarding whether Complainant had "implied consent." (Tr. 467). Upon reviewing the investigation transcript, Cargill did not believe Complainant's testimony that she thought she had consent to go into Elledge's purse. (Tr. 468). After reviewing the surveillance video, Cargill concluded Complainant's actions were inconsistent with consent because she looked over the POD wall to see if Elledge was present; later, when Elledge left the POD, Complainant looked around and went into the POD and was observed looking over her shoulder and all around when she entered Elledge's purse. (Tr. 469-70). Cargill concluded Complainant's actions were not consistent with someone who believed consent was given. He also concluded there were issues of credibility based on Complainant's testimony. (Tr. 470).

The surveillance video of October 20, 2012, begins at 11:00.21 p.m. and ends at 11:02.01 p.m., with the following important incremental times. (Tr. 470-71). At 11:00.44, Complainant is observed looking over the POD wall into Elledge's POD (Complainant is standing tip-toed, but not on top of a desk) and Elledge is in her POD. (Tr. 471-72). At 11:00.53, after looking into Elledge's POD, Complainant leaves her POD for a few seconds and returns. At 11:01.10, Elledge leaves her POD. At 11:01.18, Complainant is observed looking over the POD wall again and then walks away for a few seconds. (Tr. 472). At 11:01.31, Complainant is observed standing just outside of Elledge's POD, who is still absent; Complainant is looking around in both directions and hesitates before she enters Elledge's POD. (Tr. 472-73). At 11:01.37, Complainant is in

Elledge's POD and looks to her side, looks over her shoulder two times and goes into a purse and takes a bottle. At 11:01.54, Complainant returns to her POD.

Cargill stated Complainant reported she immediately took the medicine when she returned to her POD, but the video did not support Complainant's testimony. (Tr. 473). Based on the foregoing, Cargill recommended dismissal of Complainant. He looked at Complainant's personnel record for her length of service and her prior disciplinary record, but he did not review the injury history. (Tr. 474).

Cargill confirmed that the FRSA prohibits retaliation for reporting a personal injury or safety concern. (Tr. 475-76). Cargill stated he attends presentations by the "Law Department." Further, all employees are certified on the Code of Conduct each year, which includes an anti-retaliation provision. Cargill confirmed he was certified on the Code of Conduct in 2012, and 2013. (Tr. 476). Likewise, he understood Respondent's policy on retaliation which is prohibited, and any employee who retaliates against other employees is subject discipline, including dismissal. (Tr. 476-77).

Cargill confirmed RX-10 is Complainant's dismissal letter which was issued on Mead's letterhead. However, he stated Mead was not the final decision-maker for Complainant's dismissal. (Tr. 478).

On re-direct examination, Cargill testified he reviews cases from all crafts. He could not recall any other disciplinary cases involving dispatchers where an employee was called as a first witness (since 2011) in a formal investigation. (Tr. 481).

### **Robert Newlun**

Newlun was recalled as a witness. He checked on the discipline meted out to David Landry. He found no documentation that Landry was terminated as a result of the water bottle incident. (Tr. 493).

On cross-examination, Newlun testified he checked various resources, databases, and asked a 15-year employee who works with the Dispatching Practices and Rules to search for information, along with questioning a 9-year employee in the Grain Department about Landry's discipline. (Tr. 494). Newlun

confirmed Landry retired in 2013, and that he was hired on August 10, 1994. (Tr. 495-96).

Newlun concluded Landry did not violate Rule 40.23 because he went to the dock, not a work area. (Tr. 496). Concerning Rule 1.6 for theft and dishonesty, Newlun did not believe Landry violated the rule because the water bottles taken by Landry were purchased by BNSF and moved by Landry from the dock to a different complex on BNSF's property. (Tr. 496-97).

On re-direct examination, Newlun acknowledged that it is not common for employees to take items off the loading docks. (Tr. 497-98). He concluded Landry did not violate Rules 1.6 or 40.23 because no evidence of charges, an investigation, or discipline was found. (Tr. 500-01).

On re-cross examination, Newlun stated he was not sure how many bottles were in the case of water that Landry removed from the dock. (Tr. 501-02). He testified Landry took the water bottles and shared them all with other dispatchers. Newlun confirmed Landry's removal of the water bottles was on video which was reviewed. (Tr. 502).

### **Robert McConaughey**

McConaughey is Assistant Vice-President of Hub Operations for Respondent. (Tr. 504). He has worked for Respondent for 37 years, but has served in a management role since 1991. (Tr. 505). He began working for Respondent as a train master and then became a manager, division train manager, terminal manager, terminal superintendent, General Director of Transportation, General Superintendent of Transportation, and Assistant Vice-President of Design. He is familiar with the FRSA and reportable injuries. (Tr. 506). He stated that if an injury results in no loss time or no medications being prescribed, it may not be reported. He confirmed Respondent has a bonus incentive plan which covers safety and injuries. (Tr. 507). He stated Respondent records all injuries, whether they are reportable or not. (Tr. 508). During the fall of 2012, McConaughey was the General Superintendent of Transportation (GST) for the South Region which covers a geographical area from Chicago to Southern California. (Tr. 508). He has held the GST position for about 18 months. (Tr. 509).

McConaughey testified he reviewed some exhibits, including an exhibit regarding the meeting with Elledge, and another regarding injury reporting policy. (Tr. 509). He identified

RX-12 as the injury reporting policy. McConaughey confirmed he did not intend to offer testimony about any other employees. (Tr. 510).

McConaughey's duties as GST included overseeing train operations in the Southern Region and providing customer service. His office was located next to the NOC at Respondent's facility. (Tr. 511). In October 2012, he was aware of Complainant's accident, injury, and report of injury. (Tr. 511-12). He was notified of the accident within 24 hours of the accident, but does not recall which one of the managers relayed the information. (Tr. 512). He did not recall specific details about Complainant's accident, only that his primary concern was to provide immediate medical attention if needed. He also did not recall talking to Complainant within 24 hours of her accident. (Tr. 513).

McConaughey did recall that Elledge reported her Advil bottle was stolen. (Tr. 513). He also knows Complainant was charged with theft. He does not recall seeing the surveillance video before the Notice of Investigation issued. He confirmed that he made the decision to charge Complainant with the rule violations. (Tr. 514).

As GST, McConaughey was only involved with disciplinary matters for members of the ATDA dispatchers. (Tr. 514). He could not recall whether he received copies of all Notices of Investigation. However, he had a general idea of the number of investigations that occurred on a monthly basis due to monthly meetings. He stated not all of the violations progress to an investigation. (Tr. 515). He testified that if an incident was serious, he would be involved to ensure the PEPA policy was followed. He recalled that on average, two to three Notices of Investigation were issued per month. (Tr. 516). He confirmed union representatives receive copies of the Notices. (Tr. 517). As GST, he was involved in five to ten cases over the 18 month period which required him to "weigh in" on whether to issue a Notice of Investigation. (Tr. 517-18).

McConaughey confirmed CX-18 is an email from Newlun dated October 22, 2012, memorializing the interview with Elledge, during which McConaughey was present. (Tr. 518-19). He vaguely remembers Elledge stating she gave Complainant permission to take her Advil, that she considered the matter resolved, and did not want to pursue the matter. (Tr. 519). McConaughey gave consideration to Elledge not wanting to pursue the matter concerning Complainant, but he also considered the fact that

Elledge gave her permission in the "past," not the night of the incident. (Tr. 520; CX-55, p. 25). He confirmed he deposed that he would not consider Elledge's request not to pursue the matter in his decision-making process because the video was compelling and stood on its own merit. (Tr. 523-24; CX-55, p. 27). He confirmed CX-18 is the interview with Elledge dated October 22, 2012, and CX-19 is the Notice of Investigation dated October 23, 2012. McConaughey reviewed the video after the notice of investigation issued. (Tr. 525). McConaughey found the video "compelling" and "something wasn't right," because it "displayed something totally different than what she was saying." (Tr. 526-27).

McConaughey testified that he never saw the letter from Elledge regarding "implied consent" about which he had no knowledge. (Tr. 528-30; CX-27). McConaughey only had one meeting with Elledge and he had no reason to doubt her or think she was dishonest. (Tr. 531).

McConaughey confirmed he was the "decision-maker" in Complainant's case, and he ultimately concluded Complainant should be terminated. He was familiar with the FRSA provisions which prohibit taking adverse action against employees for reporting a personal injury or requesting medical care. (Tr. 532). As GST, McConaughey weighed in on discipline matters a minority of the time, perhaps three to four times in 18 months. (Tr. 533-34). He decided to be the decision-maker in the matter concerning Complainant because of the seriousness of the incident. (Tr. 534). He acknowledged safety is Respondent's first priority. He confirmed it would not be safe for dispatchers to be under the influence of drugs or alcohol while working. He never ordered Complainant to submit to a drug screen. (Tr. 535). The fact that Elledge had prescription medications in the Advil bottle did not weigh in the decision to charge or terminate Complainant. (Tr. 536).

On cross-examination, McConaughey testified he held numerous non-management positions with BNSF to include track laborer, climbing poles/wire, switchman, conductor and safety chairman for the scheduled safety committee. In March 2012, he began working as GST and had 60 employees who directly reported under his supervision. (Tr. 537). The chain of command was dispatcher to chief dispatcher to corridor superintendent to Assistant General Superintendent. (Tr. 538).

McConaughey does not know Shaun Krockor or any discipline meted out to Krockor. (Tr. 538-39). Prior to the incident at

issue, McConaughey never had interaction with Complainant. He has no ill will or animosity towards Complainant. When he first heard of Complainant's accident his initial response was to inquire whether she needed medical attention. (Tr. 539). He recalled that he was told Complainant "did not want medical attention" at the time she reported the accident. After reporting her accident, McConaughey never thought she should be subject to discipline nor was she a person of interest. (Tr. 540).

McConaughey wanted to be kept advised of the internal investigation involving Complainant because of the seriousness of the incident. (Tr. 541). He viewed the surveillance video six or seven times. (Tr. 542). In the video, he observed Complainant looking to see if Elledge had left her POD. Before Complainant entered the POD she was looking around to ensure no one was watching. Thereafter, she entered into Elledge's POD and removed the bottle from the purse while looking around to ensure no one would see her or catch her going into the purse. She went back to her desk. (Tr. 542). About ten minutes later, Complainant and Elledge were seen holding a conversation.

McConaughey did not understand why Complainant would not have communicated to Elledge (in their following conversation) that she had taken her Advil bottle, if Elledge had given Complainant consent to take her medication in the past. (Tr. 543). He further stated if Complainant had consent, it was odd that she went to "great lengths" to make sure Elledge was not there before entering the POD. (Tr. 543-44, 547). Based on the surveillance video, he concluded it did not appear Complainant had permission to go in Elledge's purse and take medication. He did not agree with Elledge that the matter was closed. (Tr. 548).

The interview with Elledge was not recorded. (Tr. 549). Complainant's interview and meetings with McConaughey were also not recorded, however, union representatives were present on every occasion. During each meeting, McConaughey always asked her three questions, (1) if she needed Advil, why take the entire bottle; (2) why did she conceal her actions; and (3) why did she not tell Elledge that she took the Advil bottle. He testified Complainant could never explain her actions because she was too emotional. (Tr. 550). He asked Complainant these questions to determine whether there were other circumstances that he was not aware of that might explain her actions. He testified that he has held meetings with other employees for the same purpose, and at times, decided not to pursue a formal

investigation when logical explanations were provided. (Tr. 551).

McConaughey denied telling Complainant that there was nothing he could do, the matter was "over his head," and she was "going to be terminated, so get ready." (Tr. 551-52). If he had made such comments with union representatives present, it would have been brought up at the investigation hearing.<sup>10</sup> (Tr. 552). He testified he did not collaborate with any other person in reaching his final decision to terminate Complainant. (Tr. 553). McConaughey received email comments from Mead and the PEPA team, both of which he took under advisement and consideration. (Tr. 554-55). He decided to dismiss Complainant based on violation of GCOR Rule 1.6 for dishonesty and theft as a one-time event or stand-alone violation. He did not consider Rule 40.23 in reaching his decision. (Tr. 555). Likewise, he confirmed Complainant's injury was not considered. (Tr. 555-56).

An offer of proof was allowed by question and answer regarding discipline for Rule 1.6 violations for dishonesty and theft as a very serious violation, but no comparators. McConaughey testified that on prior occasions, he has imposed discipline under Rule 1.6. (Tr. 558). His decision to dismiss an employee pursuant to Rule 1.6 was a "very serious" decision because of the repercussions on a person's life. (Tr. 559).

McConaughey confirmed that training is conducted on Federal law prohibiting injury retaliation and Code of Conduct certification. He received Code of Conduct training every year which states retaliation is a dismissible event. (Tr. 560). He confirmed RX-12 is Respondent's Injury Reporting Policy, which also addresses retaliation for reporting an injury or seeking medical care. (Tr. 561). He testified he was aware of these policies at the time he disciplined Complainant. (Tr. 562). Complainant was dismissed for rule violations. Assuming Complainant had had no injury, there would have been no change in the discipline according to McConaughey. (Tr. 563). Similarly, he confirmed Complainant's reporting of her slip and fall accident would not have changed the discipline. (Tr. 564). McConaughey stated he was not aware of Complainant's doctor's treatment plan, but the plan would not have impacted his decision to discipline Complainant. (Tr. 565).

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<sup>10</sup> The transcript from Complainant's November 2012 formal investigation is devoid of any testimony from a union representative confirming that McConaughey made such comments to Complainant. (CX-21).

On re-direct examination, McConaughey reviewed CX-11 a BNSF medical form that noted Complainant's diagnosis and medication from her work accident, which he stated was not previously provided to him. (Tr. 567-78). He acknowledged that in 2012, he did not document surveillance video notes and times. (Tr. 569). He reviewed the formal investigation transcription and found Elledge's "implied consent" statement to be credible. (Tr. 570). Nevertheless, he testified Elledge's statement regarding implied consent did not add up to what he witnessed in the surveillance video or the initial interview with Elledge. (Tr. 570-72). He confirmed it would be wrong for him to pre-judge disciplinary issues before a formal investigation was complete. (Tr. 572). He further confirmed he met with Complainant three to four times at the request of union representatives who were always present during the meetings. (Tr. 574-75). He stated Complainant did not answer the three questions as discussed above. (Tr. 575). Complainant did not communicate to him she was going to First Choice ER on October 11, 2012. He testified that he took the PEPA team's recommendation under consideration when he reached his final decision in this matter. (Tr. 577).

#### **Kevin Porter**

Porter was also recalled as a witness to testify about the practice of calling witnesses at Respondent's formal investigations. He stated investigations with videos and audio recordings happen often. He testified the audio would be of a conversation. In Porter's experience, even where there is audio evidence, company witnesses always testify first. (Tr. 580). Likewise, with video evidence, company witnesses testify first. (Tr. 581).

On cross-examination, Porter identified two cases involving video evidence. (Tr. 582). Kareem Williams involved a work-related injury claim which was considered a false claim and an investigator conducted surveillance because the company regarded the claim as theft. (Tr. 583-84). The second case was Complainant's case. (Tr. 584). He stated there were likely others, but the majority were audio in nature. Of the 103 cases processed since Porter has been involved with formal investigations, he has been involved with 30 to 40 cases. (Tr. 584-85).

## **Shaun Krocker**

On April 11, 2016, Krocker was deposed by the parties in Houston, Texas. (CX-54, p. 1). Krocker testified he began working for Respondent in May or June 2006, as a train dispatcher at the Fort Worth NOC. (CX-54, p. 7). He worked as a train dispatcher for approximately three years. Thereafter, he was promoted to chief dispatcher at the same location. (CX-54, p. 8). In 2011, Krocker testified he was demoted to train dispatcher and relocated to Kansas City, Kansas. (CX-54, pp. 8-9). After one and one-half years, he was promoted to chief dispatcher in Kansas City. In 2014, he was promoted to corridor manager. (CX-54, p. 9). Presently, he works for Union Pacific as a senior trainmaster in Beaumont, Texas, at the BNSF Beaumont yard. (CX-54, pp. 9-10, 12).

Krocker confirmed that in May 2011, he was involved in an incident with a co-worker at "Flips," a local bar and restaurant. (CX-54, pp. 14-15). He confirmed there were issues between him and an ex-fiancée regarding child custody. He got into a physical altercation with co-worker, Joshua Stout, who was dating his ex-fiancée. (CX-54, p. 15). On the day of the altercation, Krocker was off-duty from work. He confirmed his ex-fiancée was present at the restaurant during the altercation. Krocker hit Stout with a serving tray. (CX-54, p. 16). He was not injured during the altercation, and he was not sure if Stout suffered injuries. After the altercation ended, Krocker went home. (CX-54, p. 17).

When Krocker returned to work he met with Eric Wisman in Human Resources. Wisman discussed the altercation with Krocker who was warned not to bring his personal issues to work as it could create a hostile work environment. Krocker stated Wisman found out about the incident from Danny Reynolds, who was also employed by Respondent and was a close acquaintance of Stout. (CX-54, p. 19). Since the altercation, Krocker has spoken with Stout on a professional level regarding operations. (CX-54, p. 20).

During Krocker's investigation, Respondent indicated that the incident with Stout was not a "work issue" because the incident occurred when Krocker was off-duty, it was not on Respondent's property, and was not caused by any event at work. Respondent referred Krocker to "EAP" and he followed their recommendations. (CX-54, p. 20). When Krocker returned to work, Respondent reiterated that he must be professional when in contact with other co-workers. (CX-54, pp. 21-22).

Shortly thereafter, in June 2011, Respondent determined Krocker had eavesdropped on his ex-fiancée's audio or conversation recordings, and confronted him about his conduct. Krocker admitted to eavesdropping. (CX-45, pp. 21-22). Initially, he was terminated within one to two weeks after Respondent confronted him about the issue. However, due to his seniority as a dispatcher he became a "union employee" and contested the charges against him at a formal investigation. (CX-54, p. 23). Krocker stated the collective bargaining agreement between Respondent and the ATDA permitted him to take this action. (CX-54, p. 24). He received a Notice of Investigation on June 22, 2011. (CX-54, p. 26). The Notice stated Krocker disregarded Mr. Wiseman's instructions about keeping his interactions professional with other co-workers, that he failed to follow instructions under GCOR 1.13, and was insubordinate under Rule 1.6. (CX-54, p. 29). Krocker confirmed that this situation did not arise from a custody battle, rather it was related to infidelity. (CX-54, p. 31). His ex-fiancée and child were still living with him when the formal investigation took place. Krocker was able to eavesdrop by logging into the main system with his log-in credentials. Once he was logged-in, there was a software program that allowed him, as a chief dispatcher, to listen to dispatcher radio channels. (CX-54, p. 32). His ex-fiancée worked in a different territory than the territory Krocker supervised, but he used another user name to gain access to that territory. (CX-54, pp. 33-34). Krocker was charged with violating Rule 1.6 because he had acted dishonestly. (CX-54, p. 36).

Krocker confirmed that GCOR (operating rules) did govern the actions of chief dispatchers. (CX-54, p. 38). As a chief dispatcher, one of his duties was to supervise the dispatchers and ensure they were following the operating rules. (CX-54, p. 40).

At the conclusion of Krocker's formal investigation, he signed a waiver which required him to relocate to Kansas City and work as a dispatcher. He moved to Kansas City in July 2011 or August 2011, and worked as a dispatcher for eighteen months. (CX-54, pp. 41-42). Eventually, he became a chief dispatcher in Kansas City. (CX-54, p. 42). He interviewed for the position of chief dispatcher. During the interview, he was not asked about the prior formal investigation or his disciplinary history. (CX-54, pp. 43-44).

Krocker testified he did not know Complainant and had no interaction with her. (CX-54, p. 45). After Krocker was

demoted to train dispatcher it took him one year, five months, and 19 days to be promoted, which was contrary to what the OSHA investigations stated in their report. (CX-54, pp. 45-46). He confirmed he never had an on-duty injury while working for Respondent. (CX-54, p. 46).

On cross-examination, Krockner confirmed that Respondent conducted two formal investigations of his conduct, but they were held on the same day. (CX-54, pp. 47-48).

#### IV. ISSUES

1. Did Complainant engage in protected activity under subsections (a)(4), (b)(1)(A), and (c)(1), (2) of 49 U.S.C. § 20109 when she reported a safety condition, an injury, and requested medical care?
2. Did Complainant suffer any adverse unfavorable action?
3. Was Complainant's alleged protected activity a contributing factor in the alleged adverse unfavorable personnel action?
4. If Complainant meets her 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?
5. Is Complainant entitled to compensatory and punitive damages, back pay for lost wages, pre-and post-judgment interest, as well as attorney's fees?

#### V. CONTENTIONS OF THE PARTIES

In brief, Complainant contends she engaged in protected activity when she reported an injury and a safety hazard. Specifically, she asserts she engaged in protected activity on October 11, 2012, when she reported to Respondent that she slipped and fell due to water on the women's restroom floor, and as a result, injured her tailbone. Consequently, Complainant contends her protected activity was a contributing factor to Respondent's decision to terminate her employment as evidenced by temporal proximity, disparate treatment, and Respondent's animus. Therefore, Complainant asserts she has established a **prima facie** case pursuant to 49 U.S.C. § 20109, and that

Respondent has failed to produce clear and convincing evidence that her termination would have occurred in the absence of her protected activity.

Furthermore, Complainant avers that following her on-duty injury she requested immediate medical treatment, but Employer denied such treatment until the end of her shift. Thus, Complainant argues she further engaged in protected activity when she sought and received medical treatment for her on-duty injury. Moreover, she asserts that Respondent violated 49 U.S.C. § 20109(c)(1) because it denied prompt medical treatment.<sup>11</sup>

Additionally, Complainant asserts she is entitled to \$250,000.00 in punitive damages due to Respondent's failure to reinstate her as a dispatcher pursuant to the Secretary of Labor's findings issued on November 17, 2015. Further, Complainant contends she is entitled to \$280,141.00 in back pay for lost wages, \$456.00 in compensatory damages, \$100,000.00 for mental anguish, pre-and post-judgment interest, and attorney's fees.

In brief, Respondent concedes Complainant engaged in protected activity when she reported that she slipped and fell from water on the floor in the women's restroom while at work. Nevertheless, Respondent asserts Complainant's contention, that Respondent denied or interfered with her medical or first aid treatment, is "pure fiction." On the other hand, Respondent does not contest Complainant suffered an adverse unfavorable personnel action when it terminated Complainant's employment on December 4, 2012. However, Respondent argues Complainant has failed to demonstrate through direct and/or circumstantial evidence that her protected activity was a contributing factor in Respondent's decision to terminate employment. On this basis, Respondent contends Complainant's protected activity, although close in time, was completely unrelated to her theft of prescribed medication out of a co-worker's purse which led to her termination. Moreover, Respondent avers its decision-maker, McConaughy, acted according to his good faith belief that Complainant had committed theft when he discharged her from employment. Likewise, Respondent argues Complainant has failed

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<sup>11</sup> In brief, Complainant asserts Respondent violated 49 U.S.C. § 20109(c)(2). However, Complainant does not explicitly assert she was disciplined or threatened with discipline for seeking medical treatment or first aid. By contrast, she asserts that she suffered an adverse action when she was prohibited from going to the emergency room on October 11, 2012, after requesting to do so. See Complainant's Brief, p. 28.

to demonstrate she received disparate treatment as the proffered comparators are not "nearly identical" to her circumstances.

In the alternative, Respondent argues it proved by clear and convincing evidence that it would have discharged Complainant even in the absence of her protected activity. In particular, Respondent avers Complainant's dishonesty and theft were serious violations that warranted dismissal on a "stand-alone" basis, and had absolutely no relationship to her protected activity.

Finally, Respondent asserts Complainant is not entitled to an award for emotional distress because she failed to provide proof of objective manifestation of distress that was caused by her termination. In the same way, Respondent contends punitive damages are also not warranted in the instant case because Respondent has not acted with "reckless or callous disregard" of Complainant's rights, nor has Respondent intentionally violated federal law. BNSF Ry. Co. v. United States DOL, 816 F.3d 628, 642 (10th Cir. 2016).

#### VI. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA § 20109(a)(4), § 20109(b)(1)(A), and §§ 20109(c)(1) and (2), which provide:

(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—

(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;**

(c) PROMPT MEDICAL ATTENTION.-

(1) PROHIBITION.-A railroad carrier or person covered under this section may not **deny, delay, or interfere** with the medical or first aid treatment of an employee who is injured during the course of employment. **If transportation to a hospital is requested by an employee** who is injured during the course of employment, the railroad **shall promptly arrange to have the injured employee transported to the nearest hospital** where the employee can receive safe and appropriate medical care.

(2) DISCIPLINE.-A railroad carrier or person covered under this section **may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician,** except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "**discipline**" means to **bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.**

49 U.S.C. §§ 20109(a)(4), (b)(1)(A), and (c)(1) and (2) (2008) (emphasis added).

#### **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.

Id. at 52 (emphasis added).

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 Constr. Co. 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.

In the present matter, Complainant's burden of persuasion rests principally upon her testimony. There are portions of Complainant's testimony that I found to be generally credible, most of which relate to trivial facts (i.e., job training, wages earned, and her post-termination job search). On the other hand, I found Complainant's testimony at times to be evasive, contradictory, inconsistent, and unpersuasive concerning the most significant factual issues in this case. Specifically, there are inconsistencies and contradictions in her testimony when correlated internally with statements she made to other witnesses, and when compared to documentary evidence, including the surveillance video, that detracts from Complainant's overall

credibility and call into question the probability of Complainant's "consent" to take a co-worker's personal property, the events surrounding her work-accident/injury, and her alleged denial of medical care. A brief discussion of the most significant discrepancies follows.

### **1. October 11, 2012 Work-Accident and Injury**

In regard to the events surrounding Complainant's October 11, 2012 work-accident and injury, Complainant claims she was prohibited from going to the emergency room after requesting medical treatment. Complainant testified that after she fell, her tailbone was "hurting pretty bad," so she requested to go to an urgent care facility. She averred that Stout called for another dispatcher to relieve her, but no one was available. She further averred Stout stated the only way she could leave was by ambulance. She maintains she requested to leave on multiple occasions. However, in contrast, Complainant deposed Stout offered her medical attention and would call an ambulance if she thought she needed one, but Complainant declined Stout's offer because she "thought that was ridiculous."

Conversely, Stout testified he did not recall ever telling Complainant that the only way she could leave was by ambulance. Stout stated that he would never make a statement of that nature, nor would he interfere with her medical care. Likewise, Fife, who interviewed Complainant following her work-accident, testified Complainant did not report that she requested medical care, that she was prohibited from seeking treatment, or that Stout stated the only way she could leave work was by ambulance. In fact, Fife asked Complainant if she felt okay or needed medical care. Nonetheless, Complainant told Fife that "she was okay . . . she used to be a nurse and knew there was nothing that they [medical providers] could do for her other than give her Tylenol." Significantly, Elledge testified that on the night of Complainant's work-injury, Complainant "was getting a headache because she had fallen in the restroom and we were trying to get her to leave, but she would not. She [Complainant] said, 'no I am fine. I feel okay. I just have a headache because I kind of jarred myself.'" Lastly, when Complainant spoke to Brewer and McConaughy prior to going to the urgent care facility, she failed to mention to either supervisor that Stout prohibited her from receiving prompt medical treatment, or that he stated the only way she could leave was by ambulance.

## 2. October 20, 2012 POD Incident and Subsequent Events

At the formal hearing, Complainant testified the evening of October 20, 2012, was a "very busy" night at work because she was working as a dispatcher in "dark territory" which required great precision. About one hour into her shift, Complainant got a "really bad headache." Complainant knew Elledge was in the POD in front of her work area, so Complainant took her headphones off "real fast" and "peeked around the corner" to see if Elledge was in her POD, but Elledge was not present. Therefore, Complainant "just went on in [the POD] and [she] knew in that past that [she] had been able to borrow Motrin, Aleve, whatever was in her [Elledge's] bottle." Consequently, Complainant took Elledge's Advil bottle of medication from Elledge's purse and returned to her work area. Complainant allegedly took an Advil from the bottle, but did not return the bottle to Elledge because Complainant was busy and forgot to do so. Nevertheless, Complainant did not consume the medication until 30 minutes after taking the bottle because her headache was "not bad enough."

In stark contrast to Complainant's testimony, the surveillance video taken the evening of October 20, 2012, provides a wholly conflicting account of the events as described by Complainant. Most striking, the video illustrates Complainant's body language and suspicious movements, all of which were not described in Complainant's testimony. As commonly stated "a picture is worth a thousand words," or as is the case here, a surveillance video is arguably worth ten thousand words. In particular, Complainant's demeanor and disposition in the video significantly contradicts her testimony that she had "consent" to enter Elledge's POD, go into Elledge's purse, and take a bottle of medication. The surveillance video<sup>12</sup> shows the following:

At 11:00.44, Complainant is observed looking **over the POD wall** into Elledge's POD (Complainant is standing tip-toed, not standing or kneeling on top of her desk), but Elledge is in her POD. At 11:00.53, after looking into Elledge's POD, Complainant leaves her POD for a few seconds and returns at 11:00.59. At 11:01.10, Elledge leaves her POD. At 11:01.18, Complainant is observed looking **over the POD wall**

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<sup>12</sup> The surveillance video capturing Complainant looking into and entering Elledge's POD begins at 11:00.21 p.m. and ends at 11:02.01 p.m. However, the entire surveillance video is one hour, one minute, and twenty-two seconds long. (RX-7K).

**again** and then walks away for a few seconds. At 11:01.31, Complainant is observed standing just outside of Elledge's POD, who is still absent. Complainant is **looking around in both directions** and **hesitates** before she enters Elledge's POD. At 11:01.37, Complainant is inside Elledge's POD and **looks to her side, looks over her shoulder two times**, before she goes into Elledge's purse and takes a bottle. At 11:01.45, Complainant proceeds to leave Elledge's POD. Complainant is **continuously looking around** and when she exits Elledge's POD, she walks away from the area. At 11:01.54, Complainant returns to her POD. Less than two minutes later, at 11:03.38, Elledge returns to her POD. At 11:11.43, Elledge leaves her POD. At 11:12.42, Complainant leaves her POD and re-enters the area at approximately 11:13, at which time **Complainant and Elledge have a conversation** in front of Complainant's POD. Elledge enters her POD, followed by Complainant who enters her POD at 11:13.52. At 11:50.31, a male employee enters Complainant's POD and is seen conversing with her until 11:54.55, when he leaves Complainant's POD.

(RX-7K).

In contrast to her testimony at the formal hearing and the images in the surveillance video, Complainant initially testified at Respondent's formal investigation that for her to see **over the POD wall** into Elledge's POD she would have to **stand or kneel on the top of her desk**. Nevertheless, as discussed above, Complainant did not have to stand or kneel on her desk when she peered over the POD wall (on her tip-toes) into Elledge's POD. Most troubling, is Complainant's omission to report that she first looked into Elledge's POD to see if Elledge was there, but upon discovering Elledge was present, Complainant sat back down at her desk and did not enter Elledge's POD to ask her for an Advil. Further, Complainant omitted to testify that she peered over the POD wall for a second time to see if Elledge was still at her desk. Thus, in contrast to her formal hearing testimony, she did not simply take her headphones off "real fast" and just "peek around the corner," and by chance, Elledge happened not to be in her POD. Rather, the surveillance video depicts Complainant deliberately and purposefully looking to see if Elledge was present, and only after making sure (for the second time) Elledge was not present, did she proceed to enter into Elledge's POD. Moreover, immediately before Complainant entered Elledge's POD she looked

around in a dubious manner and continues to do so when she enters the POD and goes into Elledge's purse. Thereafter, Complainant continues glancing back and forth as she leaves Elledge's POD and quickly departs from the area.

Complainant also consistently testified that she was "very busy" on the evening of October 20, 2012, and forgot to tell Elledge she took her bottle of medication from Elledge's purse. Further, she stated she was "too busy" to walk over to Elledge's POD to inform Elledge she took the Advil bottle, or to leave Elledge a note, an email, or call Elledge. Despite Complainant's claims, the surveillance video clearly demonstrates Complainant had ample opportunity to write a note, call, email, or speak to Elledge. Indeed, around 11:13 p.m., Complainant had a brief conversation with Elledge during which she did not tell Elledge she entered her POD, went into her purse, took her Advil bottle, nor returned the Advil bottle to Elledge. In addition, Complainant spent much of her time ensuring Elledge was not in the POD before she entered, as well as glancing around presumably to see if she was being watched or to see if Elledge was returning to her POD. In addition, Complainant admitted she took the Advil bottle at the beginning of her shift, and that she visited Elledge's POD "several times" the night she took the bottle. (CX-15; CX-21, p. 10). Finally, at the end of the surveillance video, at 11:50.31 p.m., a male employee enters Complainant's POD and converses with her for almost five minutes, until 11:54.55 p.m., when he leaves Complainant's POD. Given these circumstances, the undersigned finds Complainant's claim, that she was "too busy" to report her actions to Elledge, to be entirely unpersuasive.

Similarly, Complainant claimed she did not have time to go to the "community drawer" which contained over-the-counter headache medication and was a two-minute walk, round trip, from her POD. Instead, she went into Elledge's POD for medication because it was closer. Nevertheless, the undersigned is equally unpersuaded by Complainant's explanation that she did not have time to walk to the "community drawer" in light of the time Complainant expended to surveil Elledge's POD and to retrieve the Advil bottle from Elledge's purse, the numerous times she left her desk, and the time she spent speaking with another co-worker.

Complainant also testified that in the past she had asked Elledge for over-the-counter medication, but Elledge never gave her permission to take her bottle of medication. On prior occasions, Complainant would enter into Elledge's POD (who was

sitting at her desk), ask her for Motrin, and Elledge would **point to her purse** indicating she could take a Motrin.<sup>13</sup> Indeed, Elledge testified that no one had permission to go into her purse while she was not present, nor did she ever tell Complainant she could take the entire Advil bottle or her prescribed Fiorinal. Furthermore, upon watching the surveillance video, Elledge stated it gave her "pause" when Complainant hid the bottle in her pocket as if Complainant did not want anyone to see her taking the bottle. Based on the foregoing, I find Complainant and Elledge's testimony undoubtedly call into question whether Complainant had "consent" to go into Elledge's purse while she was not present and take the entire bottle of medication. Also unclear, is why Complainant on this occasion deliberately ensured Elledge was not in her POD **before** she entered and took the entire bottle, when in the past, Elledge willingly provided medication upon Complainant's request.

Also troubling, Complainant testified that **prior to October 2012** she never heard of Fiorinal, the prescribed medication in Elledge's Advil bottle. Further, Complainant testified Elledge had never communicated to her that Elledge was prescribed Fiorinal for headaches. Nevertheless, Elledge testified Complainant reported having frequent headaches **before October 2012**, and as a result, Elledge suggested to Complainant that she go to a physician who could prescribe Fiorinal for her headaches.

Complainant's explanations for taking Elledge's medication are also inconsistent. During Complainant's interview following the October 20, 2012 theft incident, Complainant admitted she took the bottle of medication because her **back** was bothering her due to her fall at work (in the women's restroom) on October 11, 2012. (CX-15). Nonetheless, she testified during her formal investigation with Respondent that she had **a headache**, but it was not "dire enough to where [she] felt like [she] need[ed] to just go ahead and pop them [the medication]." (CX-21, p. 8; RX-6, p. 8). Conversely, at the formal hearing, Complainant testified that one hour into her shift she had a "**bad headache**." However, Complainant later testified she did not take the

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<sup>13</sup> Significantly, during the formal investigation conducted by Respondent, when asked whether Complainant had the opportunity to ask Elledge for over-the-counter medication while in her POD, Complainant stated Elledge was on the radio and "[Complainant] does not disturb other dispatchers when they are on the radio," so she did not ask Elledge for medication. (RX-6, p. 6). However, as discussed above, on prior occasions it appears Elledge was on her radio when Complainant would ask for medication due to the fact that Elledge would "point to her purse" as to imply tacit approval.

medication for another half-hour because her headache was "**not that bad.**" I find Complainant's vacillating testimony disconcerting because she appeared to justify, in part, the necessity for entering Elledge's unattended POD due to her "bad headache," but later confirms she did not immediately take medication because her pain was not bad enough to warrant such action. Furthermore, she initially reported she needed medication for **back** pain, not a headache.

Finally, I found Complainant's testimony concerning her attempt to contact Elledge (after taking the bottle home) to be evasive, uncorroborated and inconsistent. At Respondent's formal investigation Complainant was asked whether she returned the Advil bottle to Elledge after she took the bottle home, and stated the following:

Well, um, I did not return the bottle to Ms. Elledge. There were several times the next day when I realized that I needed to give it back to her, but I realized she was on a rest day. So I made numerous times [sic] to try to contact her, and then she either was sleeping, or I do not know what she was doing. But she did not, um, return any of my messages. So there was an attempt to try to call her back, or try to get a hold of her and let her know that I had this bottle. And, um, I ended up not, we, [sic] we both mutually agreed that it would probably be best if like Mr. Brewer or somebody else asked me for it, to go ahead and just give it to them so they could have it. And that's what happened.

(CX-21, p. 9; RX-6, p. 9). Subsequently, at the formal hearing in this matter, Complainant testified she sent Elledge a Facebook message, but Elledge did not respond.<sup>14</sup> Notably, Complainant never produced any evidence to demonstrate that she sent a Facebook message. Complainant also testified that she met Elledge for lunch and returned the Advil bottle to Elledge, which differs from her testimony at the formal investigation that she gave it to one of Respondent's managers.<sup>15</sup>

Additionally, there are discrepancies concerning statements made by Complainant which are not corroborated by supervisors.

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<sup>14</sup> Complainant deposed she sent the Facebook message on October 21, 2012, at 11:30 a.m. (RX-16, pp. 97-98).

<sup>15</sup> At her deposition, Complainant confirmed she gave the Advil bottle back to Elledge, but she was not sure if Elledge gave it to a supervisor. (RX-16, p. 116).

For example, Complainant testified she believed her taking Elledge's Advil bottle was a "non-issue" because Fife and Davidson communicated it would be "ok" as long as Elledge confirmed Complainant had permission to take the medication. However, Fife testified that she, as well as Davidson, never indicated or agreed to such a proposition. Further, Fife stated she would have included such an agreement in her interview notes. (CX-15).

Just as with Fife, Complainant claimed McConaughey made statements which no one else testified to or corroborated. Complainant, along with a union representative, met with McConaughey on three occasions prior to her formal investigation to discuss the October 20, 2012 incident. Complainant avers McConaughey told her "there was nothing he could do, it was over his head and that she was going to be terminated, so get ready." Conversely, McConaughey denied making such a statement and maintained that the union representative, who was present at all three of their meetings, would have brought his statement to light during the formal investigation. Notably, the record is devoid of any corroborative testimony from a union representative confirming McConaughey did in fact make such a statement to Complainant. Moreover, McConaughey testified that during each meeting with Complainant he always asked her three questions, (1) if she needed Advil, why take the entire bottle; (2) why did she conceal her actions; and (3) why did she not tell Elledge that she took the Advil bottle. He testified Complainant could never explain her actions because she was too emotional, but he continued to ask these questions in the hope that Complainant had a logical reason for her actions which would prevent moving forward with a formal investigation.

Based on the foregoing, I find that statements made by Complainant were largely incredulous and unpersuasive, and her demeanor suspicious, which significantly calls into question the veracity of much of her testimony surrounding the most crucial factual issues. I find Complainant's body language elicits tremendous doubt as to whether she had consent to enter the POD, go into Elledge's purse, and take the Advil bottle. Just as noteworthy, are the factual omissions made by Complainant which were exposed by the surveillance video that further demonstrates it is **unnatural, unreasonable, and improbable** that Complainant had Elledge's consent. See Indiana Metal Products, supra at 52. Lastly, many of Complainant's claims as it relates to statements made by her supervisors are uncorroborated and at times contradicted, even by Elledge, who is characterized by

Complainant as a work-friend. Therefore, I accord little probative value to Complainant's testimony.

On the other hand, I generally found Elledge, Stout, Allen, Maucieri, Mead, Porter, Newlun, Fife, Cargill, and McConaughy to be unbiased, sincere, and credible witnesses. I observed little to no inconsistency in their respective testimony. Overall, I found Elledge's testimony to be truthful. Elledge confirmed she never gave Complainant "implied consent" and that no one had permission to go into her purse when she was not present. Elledge also confirmed that, in the past, she allowed Complainant to take a Motrin (while Elledge was present), but never gave her consent to take the Advil bottle.

In addition, what I found most compelling about the testimony from Mead, Fife, Cargill, and McConaughy were their similar impressions after watching the surveillance video. For example, upon viewing the surveillance video, Mead found Complainant was "less than credible" because she initially testified she would have to stand or kneel on her desk to see over the POD wall, however, the video showed otherwise. Likewise, Fife concluded that Complainant had "engaged in theft" due to the way Complainant was looking around numerous times, and then took something out of Elledge's purse and quickly put the object in her pocket. Further, Fife testified that when she interviewed Complainant following the theft incident, Complainant stated she "felt guilty" about the situation. Cargill also had similar impressions to that of Mead and Fife after watching the video. He concluded Complainant's actions were inconsistent with someone who had "consent" because she looked over the POD wall to see if Elledge was present; later, when Elledge left the POD, Complainant looked around and went into the POD and was observed looking over her shoulder and all around when she entered Elledge's purse. He also concluded there were issues of credibility based on Complainant's testimony because she initially testified at the formal investigation that she took the medication immediately, which was contradicted by the surveillance video. McConaughy, who viewed the surveillance video six to seven times, stated the video also made him question whether Complainant had consent. He found it was odd that Complainant went to great lengths to make sure Elledge was not there before entering the POD. Based on the surveillance video, McConaughy concluded it did not appear Complainant had permission to go in Elledge's purse and take medication, irrespective of Elledge's testimony.

## VII. 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).

Initially, to maintain a 49 U.S.C. § 20109 claim, the complainant must demonstrate the respondent is subject to the Act and that the complainant is a covered employee under the Act. See § 20109(d)(2)(A)(i). 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.

In the instant case, Complainant asserts Respondent violated Sections 20109 (a)(4), (b)(1)(A), and (c)(1) and (c)(2). As outlined in the post-hearing briefs of the parties, the issues to be decided are whether Respondent inserted itself into Complainant's medical treatment by denying, delaying, or interfering with her medical care, and whether Respondent disciplined or threatened discipline when Complainant sought medical care or first aid treatment. The other issues to be resolved are whether Complainant's reporting a safety hazard and one work-related injury in October 2012, were contributing factors in Respondent's decision to terminate Complainant, and if so, has Respondent shown by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior.<sup>16</sup>

Accordingly, the undersigned will first address Complainant's Section 20109(c) claim, followed by her claims pursuant to Sections 20109(a) and (b).

### A. Section 20109(c)(1) and (c)(2) Claims

For claims arising under 49 U.S.C. § 20109(c)(1), an employee must prove that the railroad carrier: **(1) inserted**

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<sup>16</sup> Respondent does not dispute that Complainant engaged in protected activity when she reported her work-accident/injury and a safety hazard due to water on the women's restroom floor, nor does Respondent contest that it had knowledge of the protected activity. Likewise, Respondent does not contest that Complainant suffered an adverse personnel action on December 4, 2012, when she was terminated from employment. See Respondent's Brief, p. 19.

**itself into the employee's medical treatment and (2) such involvement caused a denial, delay, or interference with medical treatment.** § 20109(c)(1); Santiago v. Metro-North Commuter R.R. Co., ARB No. 10-0147, ALJ No. 2009-FRS-00011, slip op. at 17 (ARB July 25, 2012). The ARB noted that "medical treatment" includes not only first aid treatment, but the "management and care of a patient over a period of time beyond initial injury [which] is dictated by the severity of the injury or disease." Santiago, supra, slip op. at 11. The ARB also explained that to cause medical treatment to be rescheduled denotes a "delay" in treatment. On the other hand, "interference" with medical treatment occurs when any obstacle is placed in the way of treatment, while "denial" of treatment arises when a request for medical care is refused or rejected. Id., slip op. at 16. Thus, a respondent's only affirmative duty under section 20109(c) is to transport the complainant to the nearest hospital after a work-injury occurs, **if such a request is made by the complainant**, and not interfere with a complainant's medical care throughout the entire period of treatment and recovery. Id., slip op. at 12, 16, 18. If the complainant demonstrates the aforementioned elements, the respondent may avoid liability only if it can prove by clear and convincing evidence that the **medical outcome would have been the same without the respondent's denial, delay, or interference with medical treatment.** Id., slip op. at 18-19. The fact-finder must look at the totality of direct and circumstantial evidence when determining whether the respondent has met their burden of proof. Id., slip op. at 19.

Likewise, Section 20109(c)(2) prohibits the respondent from disciplining or threatening to discipline the complainant when a request for medical or first aid treatment has been made, or when the complainant is following a physician's treatment plan. Santiago, supra, slip op. at 11. The ARB defined a physician's "treatment plan" to include not only medical visits and treatment, but also physical therapy, daily medication, and daily exercises during the work day. Id.

In the present matter, Complainant avers that on October 11, 2012, she reported to Respondent that she slipped and fell due to water on the women's restroom floor, and as a result, injured her tailbone. Complainant further avers that Stout, the chief dispatcher on-duty, stated there was no other dispatcher to relieve her and that the only way she could leave work was by ambulance. Conversely, while Respondent does not dispute Complainant suffered a work-injury, it maintains her request for medical care following her slip-and-fall is "pure fiction." On

this basis, Stout testified he would never have stated to an employee that the only way they could leave was by ambulance. Moreover, if an employee needed an ambulance, Stout stated he would call for one, or if no ambulance was requested Stout would "ask what [he] could do to help them." Significantly, Elledge testified that on the night of Complainant's work-injury, Complainant "was getting a headache because she had fallen in the restroom and we were trying to get her to leave, but she would not. She [Complainant] said, 'no I am fine. I feel okay. I just have a headache because I kind of jarred myself.'" Similarly, Fife, who interviewed Complainant shortly after her slip-and-fall, testified that Complainant stated "she was okay, that she used to be a nurse and knew there was really nothing that they [medical providers] could do for her other than give her Tylenol." Fife further testified Complainant never stated to Fife that she asked for medical treatment and a relief dispatcher, but was denied, nor did Complainant report Stout told her she could only leave by ambulance or that she could not go to the medical facility across the street.

Indeed, Complainant deposed that Stout offered her medical attention and would call an ambulance if she thought she needed one, but Complainant declined Stout's offer because she "thought that was ridiculous." Prior to her obtaining medical care, Brewer and McConaughy spoke with Complainant to obtain her description of the work-accident and injury. They asked if she planned to be seen for medical care and she responded "yes," she was going across the street. Brewer gave Complainant his cell phone number and told her to call him after being examined about any medical plan. Brewer also offered Complainant the option of taking leave from work. When Complainant asked about the procedure to receive medical attention Stout provided her with a copy of the standard operating procedures for receiving medical attention at the emergency room and for reporting an injury. She was also given a copy of her personal injury report. Notably, Complainant never reported to Brewer or McConaughy that Stout denied, delayed, or interfered with her medical treatment.

Complainant was examined at First Choice ER, prescribed Norco, and was advised she could return to work on October 13, 2012. (CX-10, p. 7). Following her medical exam, Complainant called Brewer as he requested. She testified Brewer was "nice" and expressed to her that he hoped she would be better soon. Complainant further testified that during the period from October 13, 2012, when she returned to work following her work-injury, to October 19, 2012, nothing of note at work occurred.

Given the foregoing discussion, I find Complainant has failed to demonstrate that Respondent inserted itself into her medical care in such a way that Respondent interfered, delayed, or denied medical treatment for her work-injury. Notwithstanding Complainant's allegations of Respondent's interference with her medical care, the testimony from Stout, Fife, and Elledge, all of whom I found to be credible witnesses, contradicts Complainant's incredible allegations of interference. Elledge, who Complainant describes as a workplace friend, admitted Complainant was urged to leave work after her work-injury, but refused to do so. Furthermore, when Complainant spoke to Fife, she never reported that she requested immediate medical treatment which was delayed or denied by Stout. By contrast, Complainant appeared to minimize any necessity for medical treatment when she reported to Fife that she was a nurse and she knew there was really nothing a physician could do for treatment. Perhaps most important is Complainant's own admission that Stout offered her transportation to the hospital via ambulance which she refused because it was "ridiculous." As discussed in Santiago, Respondent's only affirmative duty is to transport Complainant to the nearest hospital after a work-injury occurs, **if such a request is made by the complainant** and not interfere with a complainant's medical care. By all accounts, Respondent did offer transportation by ambulance to the nearest hospital which was refused by Complainant. Moreover, the record testimonial evidence from Stout, Fife, and Elledge preponderantly demonstrates Respondent did not deny, delay, or interfere with Complainant's medical care.

Accordingly, in consideration of the totality of evidence I find Complainant has not proven the necessary elements pursuant to her Section 20109(c)(1) claim.<sup>17</sup> Santiago, supra, slip op at 17.

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<sup>17</sup> Notably, Respondent may avoid liability under Section 20109(c)(1) only if it can prove by clear and convincing evidence that the **medical outcome would have been the same without Respondent's alleged denial, delay, or interference with medical treatment.** The record contains minimal evidence relating to Complainant's medical condition and treatment following her work-accident. In the instant case, Complainant testified she remained at work for four and one-half hours following her work-injury before seeking medical treatment. During this time she applied a heating pad and took Motrin for pain. Upon being examined by a physician, Complainant was prescribed Norco (and advised she could take Ibuprofen as well) with two days of rest. An x-ray of Complainant's lumbar spine was also administered which revealed "[n]o localizing pathology of the lumbar spine." (CX-10, p. 9). Respondent did not provide any objective medical evidence demonstrating Complainant's medical outcome would have been the same without Respondent's alleged interference. Notwithstanding the foregoing, the undersigned finds it

In brief, Complainant did not explicitly assert under Section 20109(c)(2) that she was disciplined (i.e., terminated) or threatened with discipline for seeking medical treatment or following a treatment plan. See Complainant's Brief, pp. 27-28. However, for the purpose of comprehensiveness the undersigned will address this issue.

Undoubtedly, Complainant was terminated from her employment with Respondent on December 4, 2012. Nonetheless, the record is completely devoid of any evidence, direct or circumstantial, demonstrating Complainant was disciplined for seeking medical treatment or following a treatment plan. Complainant deposed Respondent retaliated against her when they dismissed her in December 2012, because she filed a personal injury report, reported an unsafe condition, and denied her medical care. Yet, Complainant confirmed "nothing came to mind" in regard to a conversation with Respondent or an email from Respondent that indicated to her that Respondent dismissed her for the aforementioned reasons. (RX-16, pp. 32-33). Indeed, Complainant testified that from October 13, 2012, when she returned to work following her work-accident/injury, through October 19, 2012, the day before she entered into Elledge's POD, nothing of significance occurred at work.

The record evidence indicates Stout, Fife, Brewer, and McConaughy, all interacted or communicated with Complainant in regard to her October 11, 2012 work-accident/injury. However, absent from the record is any evidence demonstrating that Stout, Fife, Brewer, or McConaughy disciplined or threatened to discipline Complainant for seeking medical treatment. Rather, the evidence demonstrates that Stout offered to call an ambulance on behalf of Complainant, but she declined the offer because it was a "ridiculous" notion. Furthermore, Stout provided her with a copy of the standard operating procedures for receiving medical attention at the emergency room and for reporting an injury. She was also given a copy of her personal injury report. Fife also extended an offer of medical treatment, but Complainant said she was "okay," indicating she was trained as a nurse and knew there was not much a physician could do to treat her condition.

In addition, on October 11, 2012, Complainant met with Brewer and McConaughy to explain her work-accident/injury.

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unnecessary to reach a determination as to whether Respondent would have met their clear and convincing burden of proof because Complainant failed to prove that Respondent denied, delayed, or interfered with her medical care.

Complainant testified Brewer asked if she was going to seek medical treatment, provided his cell phone number and requested she keep him informed as to any treatment plan, and offered for her to take time off from work to recover. When Complainant reported back to Brewer that the treating physician recommended she stay home for two days, she described Brewer as being "nice" and that he wished her a swift recovery. Finally, McConaughy, the final decision-maker, stated he recalled being informed about Complainant's work-accident/injury, but he could not recall specific details about her accident or meeting with Complainant and Brewer. McConaughy testified that he had no ill will or animosity towards Complainant and never believed she should be subject to discipline for reporting a work-accident. Moreover, McConaughy testified his decision to terminate Complainant was solely based on her violating GCOR Rule 1.6 for dishonesty as a stand-alone violation. McConaughy stated, assuming **arguendo**, Complainant suffered no work-accident/injury or did not report an injury, his decision to dismiss Complainant from employment would not have changed. Therefore, I find absent from the record is any evidence demonstrating Stout, Fife, Brewer, or McConaughy disciplined or threatened discipline her when Complainant sought medical treatment or followed a treatment plan.

Admittedly, Complainant's reported October 11, 2012 work-accident/injury and her December 4, 2012 termination are close in time. Nevertheless, I find there is at best a tenuous causal connection when considering the temporal proximity between the two events that is unconvincing in demonstrating by a preponderance of the evidence that Respondent terminated complainant for seeking medical care or for following a treatment plan due to the significant intervening events that transpired on October 20, 2012, when Complainant took another co-worker's personal property.

Accordingly, I find and conclude Complainant has failed to demonstrate by a preponderance of the evidence that Respondent violated Section 20109(c)(2) by disciplining or threatening to discipline her for seeking medical treatment or following a treatment plan.

#### **B. Section 20109(a)(4) and (b)(1)(A) Claims**

Pursuant to 49 U.S.C. §§ 20109(a)(4) and (b)(1)(A), the ARB set forth a "two-step burden-of-proof framework" that must be applied to actions not only arising under AIR-21, but also the FRSA and related whistleblower provisions with the same burden-

of-proof framework. Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15-16 (ARB Sept. 30, 2016) (en banc); 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). The first step requires that an FRSA complainant demonstrate: **(1) he or she engaged in a protected activity, as statutorily defined; (2) he or she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.**<sup>18</sup> See Palmer, *supra*, slip op. at 16, n. 74; see also 49 U.S.C. § 42121(b)(2)(B)(iii); Johnson v. BNSF Ry. Co., ARB No. 14-083, ALJ No. 2013-FRS-059, slip op. at 3 (ARB June 1, 2016) (acknowledging these three essential elements); Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 5 (ARB Nov. 24, 2015) (recognizing that the complainant has the burden of proving these elements); Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013) (to prevail, an FRSA complainant must establish these three elements by a preponderance of the evidence); Luder v. Cont'l Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." Palmer, *supra*, slip op. at 17; see Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Indus., 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 her case by a preponderance of the evidence, however the evidence need not be "overwhelming" to satisfy the requirements set forth in 49

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<sup>18</sup> In Hamilton v. CSX Transp., 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 acknowledged that the final decision-maker's "knowledge" and "animus" are only factors to consider 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)); see 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).

U.S.C. § 42121(b)(2)(B)(iii).<sup>19</sup> Indeed, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). Moreover, when the fact-finder considers whether the complainant has proven a fact by a preponderance of the evidence “necessarily means to consider all the relevant, admissible evidence and . . . determine whether the party with the burden has proven that the fact is more likely than not.” Palmer, supra, slip op. at 17-18.

Step-two of the test shifts the burden of proof to Respondent when Complainant establishes that Respondent violated the FRSA. Palmer, supra, slip op. at 22. As a result, 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**.<sup>20</sup> See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii), (iv); Menefee v. Tandem Transp. 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). The ARB noted the “clear and convincing” standard is rigorous and denotes a conclusive demonstration that **“the thing to be proved is highly probable or reasonably certain.”** Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB April 25, 2014) (emphasis added).

It is worth emphasizing that the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a complainant to satisfy than the McDonnell Douglas standard, and is thus more challenging for a respondent to overcome. Cf. Palmer, supra, slip op. at 26, n. 113 (holding that the McDonnell Douglas burden shifting process does not apply to the AIR-21 two-step test); see generally, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Among the reasons for this

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<sup>19</sup> Notably, the Palmer court instructed ALJ’s not to use the phrase or concept of “**prima facie**” when analyzing the complainant’s burden under step one of the AIR-21 test because § 42121(b)(2)(B)(iii) does not apply this term, and therefore, the term “demonstrate” in clause (iii), which means “proves,” is not equivalent to establishing a “**prima facie**” case. Palmer, supra, slip op. at 20, n. 87.

<sup>20</sup> In Palmer, the ARB characterized step two as the “same-action defense” rather than the “clear and convincing” defense, noting that the ARB, courts, and administrative law judges have commonly referred to step one as the “contributing factor” step, and step two as the “clear and convincing” step. In doing so, the ARB explained “the phrase ‘same action defense’ makes clear that step two asks a different factual question from step one—namely, would the employer have taken the same adverse action?—and is not simply the same question [as step one] with the heavier ‘clear and convincing’ burden imposed upon employer.” Palmer, supra, slip op. at 22.

complainant-friendly standard is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. One of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. Although many railroad companies have since changed this system, a culture of retaliation for reporting injuries unfortunately still lingers in some instances. Araujo, supra.

As outlined in the post-hearing briefs of the parties, the issues to be decided are whether Complainant's reporting a safety hazard and one work-related injury in October 2012, were contributing factors in Respondent's decision to terminate Complainant.<sup>21</sup> Alternatively, if Complainant demonstrates her protected activity was a contributing factor in her termination, Respondent may show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior.

## **B. Protected Activity**

By its terms, FRSA defines protected activities as including acts done "to provide information regarding any conduct which the employee **reasonably believes** constitutes a violation of any Federal law, rule or regulation relating to railroad safety . . . to a person with supervisory authority over the employee" or "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." 49 U.S.C. § 20109(a)(1) and (4) (emphasis added).

The OSHA regulations regarding recording and reporting occupational injuries and illnesses provides that employers "must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." 29 C.F.R. § 1904.5(b)(5). An injury or illness is considered to be a pre-

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<sup>21</sup> See supra note 14.

existing condition if "the injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment." 29 C.F.R. §§ 1904.5(b)(2)(ii) and 1904.5(b)(5). A pre-existing injury or illness is considered to be "significantly aggravated" when the exposure at work causes:

(iii) one or more days away from work, or days of restricted work, or days of job transfers that otherwise would not have occurred but for the occupational event or exposure

(iv) medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure

29 C.F.R. § 1904.5(b)(4).

In brief, Respondent does not dispute that Complainant engaged in protected activity by reporting she slipped and fell on her tailbone due to water on the floor in the women's restroom. See Respondent's Brief, p. 19. Based on the foregoing, I find and conclude that on October 11, 2012, Complainant engaged in protected activity by reporting her slip-and-fall accident and subsequent injury, as well as the safety hazard (i.e., water on the floor) in the women's restroom.

### **C. Alleged Unfavorable Personnel Action**

By its terms, FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, **in whole or part**, to the employee's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying Respondent of a work-related illness, or denying, delaying or interfering with Complainant's request for medical treatment or care. See 49 U.S.C. § 20109.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR-21, incorporated

into the FRSA. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, supra at 57. Moreover, "adverse actions" refer to unfavorable employment actions that are "**more than trivial**, either as a single event or in combination with other deliberate employer actions alleged." Fricka, supra, slip op. at 7 (citing Williams v. American Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)) (emphasis added) (holding that a performance rating drop from "competent" to "needs development" was more than trivial and was an adverse action as a matter of law).<sup>22</sup>

Respondent does not dispute that Complainant's dismissal on December 4, 2012, rises to the level of an adverse employment action under the FRSA. See Respondent's Brief, p. 19. Therefore, I find Complainant has demonstrated by a preponderance of the record evidence that she was subjected to adverse action when she was terminated by Respondent on December 4, 2012.

#### **D. 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, supra, slip op. at 53; 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). Essentially, the question is not whether the respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor which, alone or in connection with other

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<sup>22</sup> In Fricka, the ARB concluded that the Williams definition of adverse personnel action also applied to FRSA claims. In this case, the Board determined respondent (Amtrak) engaged in "discrimination" against the complainant when it misclassified his injury as "non-work" related, which was originally reported by the complainant as "work related." Specifically, they held the respondent's reclassification of the injury was "unfavorable and more than trivial--it led to Amtrak not paying Fricka's [complainant's] medical bills totaling \$297,797.21." Fricka, supra, slip op. at 7-8.

factors, tends to affect in **any** way the decision to take an adverse action. Nevertheless, if the respondent claims the protected activity played **no role** whatsoever in the adverse action, the evidence of the respondent's non-retaliatory reasons for termination **must be considered alongside** the complainant's evidence in making such a determination. Palmer, supra, slip op. at 29, 55. On the other hand, 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.

In the event the fact-finder determines that the respondent has a true non-retaliatory 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. [Brobeski II], ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)). On this basis, the argument that respondent had a "legitimate business reason" to take the adverse action "is **by itself insufficient** to defeat an employee's [the complainant's] claim under the contributing-factor analysis . . . since unlawful retaliatory reasons [can] co-exist with lawful reasons."<sup>23</sup> Palmer, supra slip op. at 58 (quoting Brobeski 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).

The Board recently observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), supra at 16, that "proof of causation or 'contributing factor' is not a demanding standard." To establish that the protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. Indeed, the contributing factor need not be "significant, motivating, substantial or predominant," rather it need only

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<sup>23</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.

play "**some**" role. Araujo, supra at 158; Palmer, supra, slip op. 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," tends 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, supra, slip op. at 6-7; Speegle, supra, slip op. at 10; Palmer, supra, slip op. at 55, n. 227. Whether considering direct or circumstantial evidence, an administrative law judge **must make a factual determination and must be persuaded 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.

### **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. See Araujo, supra, at 161.

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). However, 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 the 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, Complainant engaged in protected activity by reporting on October 11, 2012, she slipped and fell because of water on the floor of the women's restroom and injured her tailbone. Thereafter, on October 20, 2012, Complainant was caught entering Elledge's POD, going into Elledge's purse and removing an Advil bottle from the purse, later taking the bottle of medication home. Respondent terminated Complainant on December 4, 2012, after a full investigation and hearing because she went into another co-worker's POD and took personal property without the owner's knowledge or consent, as well as frequenting

an unoccupied work area that was not pertinent to her duties.<sup>24</sup> (RX-10). I find that the temporal proximity between Complainant's protected activity and her termination may be sufficient circumstantial evidence to prove that the protected activities contributed to the adverse actions. However, I find, for the reasons discussed below, this circumstantial evidence fails to establish the requisite element of causation because there is overwhelming direct evidence of a legitimate and independent intervening cause for Complainant's dismissal, that is, her taking another co-worker's personal property without consent. See Abbs, supra, slip op. at 6; see also Stanley, supra, slip op. at 28, 32-33. I further note that the record is devoid of any animus directed toward Complainant because of her alleged protected activity. Therefore, I find and conclude that, although Complainant's protected activity is close in time to Respondent's adverse personnel action, it is wholly unrelated to Complainant's pilfering which led to her discharge, and thus, broke any inference of causation based on temporal proximity.

## **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 the complainant to show that the respondent, as an entity, was aware of her protected activity. Rather, the complainant must establish that the "decision-makers" who subjected her to the alleged adverse actions were aware of her 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); see Johnson v. BNSF Ry. Co., ALJ. No. 2013-FRS-00059, slip op. at 11, n. 8 (ALJ July 11, 2014) (noting that the final decision-maker's 'knowledge' and 'animus' are only factors to consider in the causation analyses).

Where the complainant's supervisor had knowledge of his protected activity and had substantial input into the decision to fire the complainant, even though the vice president who actually fired the complainant did not know about the protected activity, such knowledge could be imputed to the respondent.

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<sup>24</sup> Complainant's dismissal letter states she was in violation of GCOR 1.6 Conduct and TDOCOM 40.23 On Duty - Dispatchers and Probationary Dispatchers. (RX-10).

Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

McConaughey, the ultimate decision-maker in the decision to terminate Complainant, had knowledge of Complainant's accident, injury, and report of injury in October 2012. He testified he was notified about Complainant's accident within 24 hours of its occurrence, but he did not recall who relayed the information to him, nor did he recall talking to Complainant within that same time period about her accident. Further, he did not recall the specific details about Complainant's accident, other than offering medical attention. Notwithstanding McConaughey's failure to recall specific details, I find he had knowledge of Complainant's accident, injury, and report of injury.

Accordingly, I find that because McConaughey had knowledge of Complainant's October 2012 protected activity and was the sole decision-maker in deciding to terminate Complainant, such knowledge is imputed to Respondent. Gary, supra; Kester, supra.

### **3. Indications of Pretext**

Under the FRSA's contributing factor standard, the complainant does not have to prove that the respondent's "proffered non-discriminatory reasons are pretext." Coates, supra, slip op. at 4. In other words, the complainant "need not necessarily prove that the railroad's articulated reason was a pretext in order to prevail, because the worker alternatively can prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct and that another reason was the worker's protected activity." See OSHA's Final Interim Rule Summary of Section 1982.104; 29 C.F.R. § 1982.104.

Nevertheless, the complainant may demonstrate that the respondent's non-discriminatory reasons are pretextual in nature when evidence is presented which indicates the respondent did not in good faith believe the complainant violated its policies, but relied on the alleged violations in bad faith pretext to terminate employment. See Redweik v. Shell Exploration & Prod. Co., ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 9 (ARB Dec. 21, 2007). However, if the complainant is terminated because the respondent was **mistaken in its belief**, it is not pretext for retaliation, if the belief is honestly held. See Swenson v. Schwan's Consumer Brands N. Am., Inc., 500 F. App'x 343, 346 (5th Cir. 2012); see also Dailey v. Shintech, Inc., 629 F. App'x 638, 642 (5th Cir. 2015); Collins v. Am. Red Cross, 715 F.3d 994, 999, (7th Cir. 2013) (the FRSA "**does not forbid sloppy,**

**mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations.**") (emphasis added). Thus, the relevant question is not the complainant's guilt or innocence, rather it is whether the respondent terminated the complainant's employment because **it believed in good faith that the complainant violated its policies** (i.e., theft, fraud, or violated a safety policy). Villegas v. Albertsons, LLC, 96 F. Supp. 3d 624, 636 (W.D. Tex. 2015); Jauhola v. Wis. Cent., Ltd., 2015 U.S. Dist. LEXIS 109930, at \*19 (D. Minn. Aug. 20, 2015) (stating "[t]he relevant question is 'not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred[.]'""). On this basis, "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." Kuduk, supra at 792 (quoting Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 898 (8th Cir. 2002)).

Consequently, in the present matter, Complainant may demonstrate by a preponderance of the evidence that dishonesty and theft (pursuant to GCOR Rule 1.6) were not Respondent's true reasons for terminating her employment, thereby invoking an inference that Complainant's report of protected activity was pretext for retaliation.<sup>25</sup>

While the FRSA's purpose is to protect employees from adverse personnel actions who have reported a work-injury, safety hazard, or requested medical treatment, "[whistleblower provisions] are not intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999) (citing Kahn v. U.S. Secretary of Labor, 64 F.3d 271, 279 (7th Cir. 1995)). McConaughey, the decision-maker in this case, honestly and reasonably believed at the time of his decision to terminate Complainant that she had taken the Advil bottle from Elledge's purse **without consent** to do so. Indeed, McConaughey stated he relied on Elledge's testimony that "in the past" she had given Complainant consent to go in her purse, but Elledge was always present. Elledge admitted that no one had consent to go in her purse when she was not present. McConaughey considered Elledge's request not to pursue the matter against Complainant, however, he found the video surveillance (which he watched six to seven times) too compelling to disregard because it did not depict a person who was given consent to take a co-worker's personal property.

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<sup>25</sup> In brief, Complainant did not explicitly allege that Respondent's proffered non-discriminatory reasons for termination were pretext. However, for the purposes of comprehensiveness the undersigned will address this issue.

McConaughey expressed that any decision to dismiss an employee was a "serious matter" because of the repercussions on the employee's life.

Further, McConaughey met with Complainant and a union representative on three occasions before the formal investigation. During each meeting, McConaughey asked Complainant three questions, (1) if she needed Advil, why take the entire bottle; (2) why did she conceal her actions; and (3) why did she not tell Elledge that she took the Advil bottle. He testified Complainant could never explain her actions because she was too emotional. He asked Complainant these questions to determine whether there were other circumstances that he was not aware of that might explain her actions. McConaughey had held similar meetings with other employees for the same purpose and at times, decided not to pursue a formal investigation when logical explanations were provided. Ultimately, McConaughey decided to dismiss Complainant based on her violation of GCOR Rule 1.6 for dishonesty and theft as a stand-alone violation.

Given the foregoing discussion, I find and conclude McConaughey had a **good faith belief** that Complainant had taken Elledge's personal property **without consent**, and thus, he genuinely believed Complainant violated GCOR Rule 1.6. Theft and dishonesty are legitimate non-discriminatory reasons for Complainant's termination, from which the FRSA does not shield an employee. Trimmer, supra at 1104. Assuming **arguendo**, Complainant honestly believed she had permission from Elledge to go into Elledge's purse while she was not present and take the Advil bottle (to her home), it does not change McConaughey's good faith belief, based on the surveillance video and Elledge's testimony, that Complainant stole and was dishonest. Although Complainant argues she is innocent, it remains clear that her guilt or innocence is irrelevant, as long as the basis for Complainant's termination is not in retaliation for reporting a work-injury, safety hazard, or requesting medical care. Villegas, supra at 636.

Accordingly, I find and conclude Complainant has failed to present any direct or circumstantial evidence that Respondent used Complainant's report of injury and a safety hazard, or her request for medical treatment as a pretext to her discharge.

#### **4. Disparate Treatment**

Complainant argues Respondent treated her disparately when it called her as the first witness at the formal investigation

hearing, charged her with violating Rule 40.23, and did not terminate other employees for similar conduct to that of Complainant. I will address each allegation of disparate treatment in turn.

At Respondent's formal investigation, Complainant was called as the first witness, which she alleges was an "ambush." See Complainant's Brief, p. 29. I do not agree. Significantly, Complainant provides no evidence to demonstrate that Respondent could not call Complainant as the first witness during the formal investigation. Respondent's collective bargaining agreement with the ATDA, Section B of Article 24, addresses the proper procedure for formal investigations. Absent from Section B is any statement that prohibits a charged employee from testifying first, or conversely, requires the charged employee to testify last. (CX-48, p. 20). Indeed, Porter, Complainant's union representative, stated this was the first investigation he participated in where the charged employee initially testified. However, Porter admitted he never represented an employee who was charged with taking a co-worker's personal property out of the co-worker's purse. Porter also did not know of any public law board decision that stated it was improper to first call the charged employee as a witness. Moreover, Maucieri, who also acted as Complainant's union representative, acknowledged that the collective bargaining agreement had no prohibition against a charged employee testifying first. Similarly, Mead, the hearing officer who conducted Complainant's formal investigation, testified that he oversaw approximately 500 investigations and that Complainant's investigation was consistent with other investigations. Cargill, the Director of Employee Performance and Labor Relations, confirmed that the collective bargaining agreement did not contain a provision requiring witnesses to testify in any particular order.<sup>26</sup> To the contrary, Cargill stated it was not unusual for a charged employee to testify first.

Based on the foregoing, I find and conclude Complainant was not "ambushed," nor did her testifying first at the formal investigation demonstrate the existence of disparate treatment. Notably, it is not uncommon for impeachment purposes to have a witness testify first either at a deposition or hearing prior to other witnesses testifying or viewing surveillance video, otherwise a witness can simply corroborate conforming testimony. See Bis Salamis, Inc. v. Dir., OWCP, 819 F.3d 116, 122 (5th Cir.

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<sup>26</sup> Cargill is part of the PEPA team to ensure that the PEPA policy is applied in a uniform manner. Cargill confirmed the PEPA team annually reviews 400 to 700 cases, one-third of which he personally reviews. (Tr. 437).

2016) (the claimant was deposed and testified at a formal hearing, prior to viewing the surveillance video at the hearing).

Accordingly, I find and conclude that Complainant testifying first at her formal investigation cannot be characterized as disparate treatment. Therefore, I find it does not support a finding that her protected activity was a contributing factor to her termination.

Complainant also claims she was treated in a disparate manner when she was found to be in violation of Rule 40.23 because no other dispatcher has been charged under this rule and dispatchers frequently enter unoccupied work areas not pertinent to their work duties. Complainant, Elledge, and Porter all confirmed dispatchers frequently enter other work areas to check emails, make phone calls, train employees, go into the "community drawer," and get food from a desk. Newlun, who is the Director of Dispatching Practices and Rules, testified he was involved in the creation of Rule 40.23. Newlun explained the rule was created because of complaints that staplers, rolls of tape, and scissors were missing from desks. Newlun confirmed the union was informed about the rule, the purposes behind the rule, and received a draft copy of the rule. More importantly, Newlun stated Complainant was told about this rule in her dispatcher training. Newlun stated that Complainant's entry into an unoccupied POD, and taking another co-worker's property was encompassed by Rule 40.23.

Respondent has presented no evidence showing that another employee (dispatcher) has been charged pursuant to Rule 40.23. Nevertheless, just because other employees have not been charged with violating Rule 40.23, does not prohibit Respondent from enforcing the rule. Notwithstanding testimony that dispatchers frequently enter unoccupied work-areas, there was no testimony that it was common practice to enter unoccupied PODs, go into a co-worker's purse without their knowledge, and remove a bottle of medication (taking it home). It appears that Respondent created Rule 40.23 for the very purpose of discouraging behavior similar to that of Complainant. Therefore, the undersigned is not persuaded by Complainant's argument of disparate treatment due to being charged with violating Rule 40.23.

Finally, Complainant contends she was treated **differently** than other employees who violated Rule 1.6. In particular, she identified David Landry and Shaun Krockner as comparators. Landry had taken bottles of water from Respondent's loading dock

which belonged to Respondent's "grain department" and brought the water to the dispatching zone for other dispatchers. (Tr. 41, 345, 358). Newlun could not find any documentation to show whether Landry was charged with any rule violation, but he was not terminated. However, Newlun did not consider Landry's actions to be similar to that of Complainant and concluded Landry did not violate Rule 40.23 or Rule 1.6. Newlun explained that Landry took water belonging to Respondent (albeit belonging to another department) from Respondent's loading docks, which Newlun did not consider to be a POD or work-area as encompassed by Rule 40.23. Likewise, Newlun stated Landry did not take another co-worker's personal property, nor did he take such property home. Rather, Landry took water belonging to Respondent and gave it to other employees, which Newlun would not categorize as theft.

Complainant also cites to Shaun Krocker as a comparator. Like Complainant, Krocker was charged with violating Rule 1.6, but instead of being terminated Krocker was demoted from chief dispatcher to train dispatcher.<sup>27</sup> At the time of Krocker's violation he was a chief dispatcher and as such, he was considered an exempt management employee pursuant to the collective bargaining agreement. Krocker testified he was charged with violating Rule 1.6 because he acted dishonestly when he eavesdropped on his ex-fiancée's conversation at work after logging into the system (with his credentials) and gaining access to a radio channel in another territory with a username not belonging to Krocker. Krocker admitted to eavesdropping and was terminated within one to two weeks following the incident. However, due to his status/seniority as a chief dispatcher he became a "union employee" and was able to contest his termination. Krocker's Notice of Investigation stated he disregarded Mr. Wiseman's instructions about keeping his interactions professional with other co-workers, that he failed to follow instructions under GCOR 1.13 and was insubordinate under Rule 1.6. Krocker testified he was charged under Rule 1.6 due to his dishonesty.

Maucieri, who represented Krocker during the formal investigation, stated Danny Reynolds was the general superintendent (presumably the decision-maker) at the time and had since been replaced by Robert McConaughy. Nevertheless, Krocker's July 2011 investigation waiver was signed by Matt

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<sup>27</sup> The events that occurred at an off-property restaurant between Stout and Krocker did not lead to his being charged with rule violations. Therefore, the undersigned will only address the factual scenario that relates to Krocker being demoted.

Garland. Ultimately, Krocker received a "Level S 30-Day Suspension" and was demoted from chief dispatcher to train dispatcher with the requirement that he relocate to Kansas City, Kansas. Krocker was found to be in violation of GCOR Rule 1.13 Reporting and Complying with Instructions, Rule 1.6 Conduct, and HR 90.2 Workplace Harassment Policy. Notably, Krocker was not charged with theft of another employee's personal property.

Newlun confirmed Krocker was investigated for a login-violation and for eavesdropping on a co-worker's conversation. He explained that when Krocker's eavesdropping incident occurred, all chief dispatchers had access to a generic password to have the ability to listen to the recording system that records all dispatcher communications. Newlun further explained that at the time, Respondent did not have in place serious password protection, nor were there concerns with identity theft. In fact, the password for chief dispatchers to enter the recording system was "P-A-S-S-W-O-R-D." Newlun believed Krocker did not "steal" a password to eavesdrop on the conversation because of the ease of obtaining various passwords to enter the system. Newlun stated Krocker's login violation was partially Respondent's fault for creating a weak password system that allowed Krocker to look up credentials of other co-workers.

The United States Fifth Circuit Court of Appeals, under whose jurisdiction this case arises, states that to "establish disparate treatment a plaintiff must demonstrate that a **"similarly situated"** employee under **"nearly identical"** circumstances was treated differently. Wheeler v. BL Dev. Corp., 415 F.3d 399, 406 (5th Cir. 2005) (quoting Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (emphasis added). The Court further explained that to be a proper comparator the employee must have **"held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially similar violation histories."** Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009) (emphasis added). The Court noted that of **most importance**, the employee's conduct that elicited the adverse personnel action must be "nearly identical to that of the proffered comparator who allegedly drew a dissimilar employment decision." Id.; see Wyvill v. United Life Cos. Life Ins. Co., 212 F.3d 296, 304-05 (5th Cir. 2000) (finding that when "striking differences" exist between the plaintiff and comparator it more than accounts for the different treatment each person received. The Court noted that the **"most important"** difference between the plaintiff and comparator was that **different decision-makers determined each employee's fate**);

see also Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir. 1991) (finding that the plaintiff had not proffered a nearly identical comparator because the two employees did not share the same supervisor).

Given the clear guidelines espoused by the Fifth Circuit, I do not find that Landry or Krockner are proper comparators. Looking to the most important factor, that is, whether Complainant's and Landry's conduct which drew adverse personnel action are "nearly identical," I find they are not. See Lee, supra at 260. Landry took a case of water from Respondent's loading dock, which was also paid for by Respondent, and gave it to other co-workers on Respondent's property. Conversely, Complainant entered another co-worker's POD after ensuring the co-worker was absent, took a personal item from the co-worker's purse, later taking the personal item off Respondent's property to her home. Additionally, Complainant has put forth no evidence to show if, or under what rule(s), Landry was charged with violation. Further, there is no evidence that McConaughy was the decision-maker in Landry's case, as he was for Complainant. See Wheeler, supra at 406; Lee, supra at 260; Little, supra at 97. It is clear from Newlun's testimony that Landry was not terminated because Newlun testified Landry retired in 2013, but due to the aforementioned **striking differences** between Complainant and Landry, it more than accounts for the different treatment of each employee. See Wyvill, supra at 304-05.

Like Landry, Krockner is also an inadequate comparator. Arguably, Krockner used a password not belonging to him to gain entrance into the recording system of a territory that he did not supervise. However, Newlun confirmed Respondent had minimal password security. Newlun considered Respondent to be partially at fault for creating a weak password system that allowed Krockner to look up other login credentials. Although Krockner was charged with violating Rule 1.6 (for being dishonest), unlike Complainant, he was not charged with theft of another co-worker's personal property. Consequently, I do not find his use of the password, given the lack of significance Respondent placed on passwords at the time, to be **nearly identical** to Complainant going into another co-worker's POD, taking a personal item out of a purse (while the co-worker was not present) and bringing the item to her residence. See Lee, supra at 260.

Notably, Krockner was initially terminated by Respondent. Nevertheless, Krockner was a **chief dispatcher**, and as such,

Krocker was an exempt management employee which allowed him to contest his dismissal and the charges brought against him pursuant to the collective bargaining agreement between Respondent and the ATDA. Conversely, Complainant was not in management and as a result, she was not considered an exempt management employee. Pursuant to the terms of the collective bargaining agreement, Krocker's designation as an exempt management employee is a **striking difference** that, in part, accounts for the differential treatment of Complainant. See Wyvill, supra at 304-05. Additionally, Krocker's designation as chief dispatcher who supervised dispatchers like Complainant is further evidence that he is not a proper comparator because they did not hold a similar job or responsibilities. See Lee, supra at 260. Lastly, and perhaps most important, McConaughy was not the decision-maker who determined Krocker's discipline. McConaughy testified he was never involved with any decision to discipline Krocker which was purportedly decided by Danny Reynolds, whom McConaughy later replaced. See Wyvill, supra at 304-05; Little, supra at 97.

In sum, I find Complainant's proffered comparators, Landry and Krocker, are insufficient evidence of disparate treatment. Therefore, I find and conclude the lack of preponderant evidence demonstrating disparate treatment does not support a finding that Complainant's protected activity was a contributing factor to her termination.

#### **5. The Legitimacy Reasons for Employer's Actions**

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; 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)). The 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 [or her] disclosure was a contributing factor to the personnel actions." Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Respondent has presented overwhelming evidence regarding the legitimacy of the decision to terminate Complainant. Complainant admitted she removed the Advil bottle from Elledge's purse, and that she did not have permission to go into Elledge's purse on that occasion. Likewise, Elledge testified that no one had permission to go into her purse when she was not present. McConaughey testified that Complainant's actions rose to the level of a "stand-alone violation" under the PEPA policy. He noted that Complainant's actions were subject to GCOR Rule 1.6 for **dishonesty and theft** as a stand-alone violation. Further, McConaughey met with Complainant and a union representative on three occasions before the formal investigation, during which McConaughey attempted to obtain a logical explanation as to why Complainant took the Advil bottle (rather than just a Motrin), why she concealed her actions, and why Complainant failed to tell Elledge she went into Elledge's purse and took the Advil bottle. Nonetheless, Complainant never provided answers to McConaughey, instead she became emotional. McConaughey watched the surveillance video six to seven times, he concluded irrespective of Elledge providing "consent" on prior occasions, the video "displayed something totally different than what [Elledge] was saying."

Looking at the totality of the evidence, Complainant has failed to demonstrate by the preponderance of the evidence that her protected activity contributed to, in **any** way, her adverse personnel action. Admittedly, Complainant has established that McConaughey, the decision-maker, had knowledge of her protected activity and there is a degree of temporal proximity between the protected activities and the adverse action. However, there also exists a significant legitimate intervening basis for her dismissal, namely Complainant's dishonesty and theft. Because Complainant's dishonesty and theft constitutes a legitimate intervening basis for which the preponderance of the evidence is overwhelming, I conclude the temporal proximity between the Complainant's protected activities and adverse action does not establish causation supportive of discrimination. See Abbs, supra, slip op. at 6; Kuduk, supra at 792; Stanley, supra, slip op. at 32-33. Furthermore, Complainant did not demonstrate that Respondent used her report of a work-accident/injury and

requested medical treatment as a pretext to her discharge. Nor did Complainant provide competent evidence of disparate treatment. By contrast, there is evidence demonstrating Complainant's employment was terminated for legitimate reasons, namely dishonesty and theft, from which the FRSA does not shield. See Trimmer, supra at 1104; accord Abbs, supra, slip op. at 6; Kuduk, supra at 792; Stanley, supra, slip op. at 32-33.

#### **E. Same Action Defense**

As denoted by Palmer, the second step of the two-part test requires Respondent to establish that it would have **taken the same action** absent the Complainant's protected activity. Id., supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to demonstrate that the protected activity was a contributing factor in the adverse personnel action. Id. 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. Id. (stating that step-two asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka, supra, slip op. at 5.

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, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable.**" Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (emphasis added); see Speegle, supra, slip op. at 11. Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

Assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for her dismissal, Respondent has satisfied its burden of rebuttal by showing through **clear and convincing** evidence it **would have taken the same adverse employment action** irrespective of Complainant's protected activity. As discussed above, the evidence, in particular the surveillance video, overwhelmingly establishes that Complainant was terminated because she committed theft when

she entered Elledge's POD, went into Elledge's purse, and took an Advil bottle out of Elledge's purse.

Notwithstanding Complainant's incredible contention that she had Elledge's consent to take medication, the surveillance video clearly demonstrates Complainant did not have consent. The images as depicted in the video, show that Complainant went to great measures to ensure Elledge was not in her POD before entering. In the same way, Complainant made sure no one was around, including Elledge, when she continued looking around in a suspicious manner before entering the POD, while going into Elledge's purse, and when leaving Elledge's POD. Even more troubling, Complainant quickly hid the Advil bottle in her pocket before leaving the POD, which does not comport with someone who has consent. Indeed, Elledge testified that when Complainant hid the bottle in her pocket it gave her "pause." Furthermore, Complainant admitted Elledge never, at any time, gave her consent to take the Advil bottle. Elledge further testified that no one had permission to go into her purse when she was not present. Finally, although reasonable minds may differ, each individual who watched the surveillance video (i.e., Allen, Mead, Fife, Cargill, and McConaughey) were left with the same impression, namely, that Complainant did not have consent to take Elledge's Advil bottle out her purse, Complainant looked suspicious, and ultimately, Complainant was guilty of theft. I agree.

McConaughey made every attempt to thwart a formal investigation and met with Complainant on three different occasions in the hope that Complainant had a logical explanation for her actions. Nonetheless, Complainant never made an attempt to explain herself, she simply became emotional. McConaughey testified that any decision to dismiss an employee pursuant to Rule 1.6 was "very serious" because of the repercussions on a person's life. McConaughey decided to dismiss Complainant based on violation of GCOR Rule 1.6 for dishonesty and theft as a one-time event or stand-alone violation. He did not consider Rule 40.23, nor did he consider Complainant's report of an on-duty injury in reaching his decision to terminate Complainant.

The evidence demonstrably shows Complainant's reporting of a work-related injury or requesting medical treatment on October 11, 2012, did not set in motion the chain of events eventually resulting in the allegation of rules violation and is not inextricably intertwined with the eventual adverse employment action. Complainant admitted that "noting of note" occurred from October 13, 2012 to October 19, 2012, following her return

to work after her work-related injury. Respondent has set forth testimony, documentary and video evidence demonstrating that it is **highly probable** Complainant was terminated for dishonesty and theft. Colorado, supra at 316. The FRSA is "not intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." Trimmer, supra at 1104; see Stanley, supra slip op. at 32-33. Thus, Complainant's dishonesty and theft (i.e. non-retaliatory reasons for dismissal) in this matter, **by themselves**, clearly and convincingly demonstrate that Respondent would have taken the same adverse action absent Complainant's protected activity. See DeFrancesco, supra, slip op. at 8; see also Fricka, supra, slip op. at 5.

Accordingly, I find and conclude Respondent has demonstrated by **clear and convincing** evidence that it would have taken the same adverse actions absent Complainant's protected activities.

#### VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Tracie Austin because of her alleged protected activity and, accordingly, Tracie Austin's complaint is hereby **DISMISSED**.

**ORDERED** this 1<sup>st</sup> day of February, 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 fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for

electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov). Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which

the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).