

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 February 2018

Case No.: 2016-FRS-00046

In the Matter of:

CHARLES CARTER,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Respondent.

Appearances: W. Jason Odom, Esq.
Odom Law, P.A.

Randall E. Appleton, Esq.
Shapiro, Appleton & Duffan, P.C.
For Complainant

Jacqueline M. Holmes, Esq.
Thomas R. Chiavetta, Esq.
Jones Day
For Respondent

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises from a complaint filed by Charles Carter (“Complainant” or “Mr. Carter”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against CSX Transportation, Inc. (“Respondent” or “CSX”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20190, as amended by Section 1521 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

PROCEDURAL HISTORY

On October 8, 2015, Complainant filed a complaint with OSHA, alleging that while working for Respondent he suffered adverse employment action as a result of filing safety complaints. (JX-11.)¹ The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The Secretary's Findings were issued on March 16, 2016. *See* (Joint Stipulations (JX-15.))² Complainant timely requested a formal hearing before the Office of Administrative Law Judges (the "OALJ"). *See id.* The case was docketed with the OALJ on April 14, 2016, and was assigned to me on April 18, 2016.

On November 2, 2016, I held a *de novo* hearing in Columbia, South Carolina, at which Complainant and Respondent were represented by counsel. The parties were afforded a full opportunity to present evidence and argument. At the hearing, Joint Exhibits 1-15 were admitted into evidence without objection. (TR at 6.) Additionally, Complainant's Exhibits 1-26 and 31-33³ and Respondent's Exhibits 1-6 and 9-37 were admitted into evidence.⁴ (TR 7-8.)

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, Regulations, and pertinent precedent.

STIPULATIONS

The parties agree to the following stipulations of fact:

1. Respondent is a freight railroad operating over 20,000 route miles of track in 23 states, the District of Columbia, and two Canadian provinces. As such, CSX is a rail carrier subject to the provisions of the FRSA.
2. Complainant Charles Carter is and was at all times relevant to this case an employee covered under 49 U.S.C. § 20109.
3. The terms and conditions of Mr. Carter's employment with CSX are and were at all times relevant to this case governed by a collective bargaining agreement between CSX and the Brotherhood of Locomotive Engineers and Trainmen. A true and correct copy of excerpts of this collective bargaining agreement has been marked by the parties as Joint Exhibit 1.

¹ The following abbreviations are used in this Decision: CX – Complainant's Exhibits; RX – Respondent's Exhibits; JX – Joint Exhibits; and TR – transcript of hearing.

² The parties separately listed identical joint stipulations on their pre-hearing statements, and the parties also submitted the joint stipulations as Joint Exhibit 15.

³ During the hearing, Complainant withdrew Complainant's Exhibits 27-30, audio recordings that were duplicative of the audio recordings submitted as joint exhibits. (TR at 307.)

⁴ At the hearing, when asked whether Complainant had any objections to Respondent's exhibits, counsel for Complainant stated: "Not other than what was stated in the original pretrial statement, Your Honor, concerning objections to certain exhibits based on relevance. I'll withdraw any of the objections based on hearsay. I'm sorry. They pulled the records out I objected to, so I don't have any objection to any of their exhibits." (TR at 8.) To clarify, I asked: "You have no objections to any of the exhibits?", and counsel responded "No, ma'am." *Id.* I find that Complainant withdrew his objections to Respondent's evidence. To the extent that Complainant sought to preserve objections to the relevance of some of Respondent's exhibits, I overrule those objections and Respondent's Exhibits 1-6 and 9-37 are admitted into evidence.

4. On September 29, 2015, Mr. Carter was working as a locomotive engineer in Cayce Yard, which is a CSX-owned rail yard in Cayce, South Carolina.
5. At or around 7:36 p.m. on September 29, 2015, Mr. Carter and CSX Yardmaster Jason Murray communicated over the radio with each other. A true and correct copy of a recording that includes those radio communications has been marked by the parties as Joint Exhibit 2.
6. At or around 7:47 p.m. on September 29, 2015, Mr. Carter and Mr. Murray again communicated over the radio with each other. A true and correct copy of recordings that include those radio communications have been marked by the parties as Joint Exhibit 3.
7. At or around 8:52 p.m. on September 29, 2015, Mr. Carter called Mr. Murray on the telephone. A true and correct copy of that call has been marked by the parties as Joint Exhibit 4.
8. On October 8, 2015, CSX issued a letter to Mr. Carter informing him of disciplinary charges against him. A true and correct copy of this document has been marked by the parties as Joint Exhibit 8.
9. On October 21, 2015, CSX held a hearing regarding the October 8, 2015 charges against Mr. Carter. A true and correct copy of the transcript and exhibits from that hearing has been marked by the parties as Joint Exhibit 9.
10. On November 16, 2015, CSX assessed "time served," which equaled a 43-day suspension, to Mr. Carter for the October 8, 2015 charges. A true and correct copy of the letter informing Mr. Carter of his suspension has been marked by the parties as Joint Exhibit 10.
11. Mr. Carter's suspension constitutes an adverse employment action within the meaning of the FRSA.
12. Mr. Carter's lost pay for his suspension was \$10,714.55.
13. On or about October 8, 2015, Mr. Carter filed a timely complaint with OSHA alleging that CSX violated the FRSA by charging him with rule violations and removing him from service. A true and correct copy of Mr. Carter's OSHA complaint has been marked by the parties as Joint Exhibit 11.
14. On October 11, 2016, Mr. Carter sent an e-mail to OSHA regarding his FRSA complaint. A true and correct copy of that e-mail has been marked by the parties as Joint Exhibit 13.
15. On or about March 16, 2016, OSHA issued findings regarding its investigation of Mr. Carter's FRSA complaint against CSX, which Mr. Carter timely appealed.

(Joint Stipulations (JX-15.)) I accept these stipulations and find these matters as fact.

ISSUES PRESENTED

The following issues are presented for adjudication:

1. Whether Complainant engaged in protected activity under the FRSA.
2. Whether Respondent had knowledge of any protected activity.
3. Whether Complainant's protected activity was a contributing factor in his removal from service and suspension.

4. Whether Respondent would have disciplined Complainant absent his protected activity.
5. Whether Complainant is entitled to compensatory damages and punitive damages.

(TR at 6); (Complainant's Pre-Hearing Statement); (Resp't's Pre-Hearing Statement.)

PARTY CONTENTIONS

Complainant's Position

Complainant asserts that he has met his burden to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in his removal from service and suspension. Specifically, Complainant asserts that he engaged in protected activity under the FRSA when he, in good faith, reported the existence of hazardous safety conditions. Complainant argues that after he engaged in this protected activity, Respondent "immediately removed [him] from service in direct violation of the controlling labor agreement, resulting in a substantial loss of income and adverse action on his personnel file." (Complainant's Br. at 3.) Complainant argues that Respondent's stated reasons for his suspension are pretextual, and that the radio and phone conversation in question "did not warrant charges, much less a major charge." *Id.* at 5. Complainant also argues that Respondent is unable to meet its burden to show by clear and convincing evidence that it would have charged and suspended him absent his protected activity. *Id.* at 7-9. Complainant contends that because he suffered an adverse employment action after he engaged in protected activity, Respondent violated the FRSA and he is entitled to damages.

Respondent's Position

Respondent argues that Complainant is unable to establish a case under the FRSA. First, Respondent asserts that Complainant has not presented any direct evidence of retaliation. Second, Respondent asserts that Complainant is unable to prove his case through circumstantial evidence. As to the circumstantial evidence in this case, Respondent argues that its basis for suspending Complainant was not pretextual, that Complainant cannot rely solely on timing to prove his claim, and that Complainant has not shown any evidence of antagonism towards his protected activity. (Resp't's Br. at 17-25.) Respondent argues that based on this lack of evidence, Complainant is unable to show that his protected activity was a contributing factor in his adverse employment action. Alternatively, Respondent argues that if the court finds that Complainant is able to establish a case under the FRSA, Respondent is able to meet its burden to show by clear and convincing evidence that it would have taken the same action absent Complainant's protected activity. *Id.* at 25-32. Respondent asserts that Complainant engaged in serious misconduct and that circumstantial evidence shows that Respondent would have disciplined Complainant for this misconduct absent his protected activity. Additionally, Respondent argues that if the court finds that Respondent violated the FRSA, Complainant is unable to show that he is entitled to either compensatory damages or punitive damages.

SUMMARY OF RELEVANT EVIDENCE⁵

I. Formal Hearing Testimony

A. Charles Carter, Complainant (TR at 53-186)

At the formal hearing, Mr. Carter testified that he is currently employed by CSX. (TR at 54.) As of the date of the formal hearing Mr. Carter was 44 years old. *Id.* at 54. Mr. Carter explained that he has worked for CSX in various positions over the years. *Id.* at 62-64. He first worked as a conductor in Charleston, and he also worked in Florence and Philadelphia. *Id.* at 62. After working as a conductor, Mr. Carter worked as a union representative in 2002 and went to engineer school in January 2003. *Id.* As a locomotive engineer, Mr. Carter “worked Florence Yard, Florence Road, worked out of Charleston, worked out of Sumter, worked some out of Cayce,” and “then ... came to Cayce completely in 2006.” *Id.* at 63. Mr. Carter stated that “[i]n 2008, [he] became a substitute yardmaster,” and in 2012, he became a full-time yardmaster. *Id.* Mr. Carter indicated that in this position he worked the swing shift, meaning he “worked first Saturday, first Sunday, third Sunday night, second Tuesdays and Wednesdays [a]nd Thursday, Friday.” *Id.* at 64. As to how work is assigned at CSX, Mr. Carter indicated that “[y]ou can bid on jobs or you can go on an on-call extra board.” *Id.* at 68.

As to Mr. Carter’s union positions, he stated that he “was the vice local until November of 2006. In roughly 2009 [he] ... was asked to be a part of the Cayce safety team, and [he] had been a part of the Cayce safety team until August of ‘14, and then [he] was brought back in ... in July of 2015.” *Id.* at 68. As vice local chairman, Mr. Carter stated: “I handled just as many day-to-day issues as the local chairman except for investigations, improper runaround with crew callers....” *Id.* With regard to Mr. Carter’s participation on the safety committee, he stated: “I was secretary, and the number of people varied from time to time. Sometimes we had more people that wanted to participate, and other times we didn’t.... I had been Integrated safety chairman, and then I had been the UTU safety chairman also.” *Id.* at 69. Mr. Carter explained that if there was a safety complaint, “[he] would fill out a PI-82 form. On a lot of instances, we were able to work with different people and verbally resolve some issues. But, if not, PI-82’s were filled out and were turned in.” *Id.* Mr. Carter further explained that a “PI-82 is an unsafe condition report. It listed the problem, and it went to the trainmaster or the roadway or communications official or whoever that was responsible also for the issue.” *Id.* at 69. Mr. Carter stated that such reports are made by physically handing over the piece of paper, faxing the report, or e-mailing the report. *Id.* at 70.

There was a consolidation of yardmasters between the Cayce yard and the Florence yard, and Mr. Carter received notice of this consolidation on July 6, 2015. *Id.* at 66. As a result of the consolidation, Mr. Carter “elected to keep my yardmaster seniority and go back to running engines. I could drive four miles to work rather than 90.” *Id.* at 67. With regard to the last day that Mr. Carter worked as a yardmaster, he stated that it was “[s]omewhere around July the 10th, 11th” in 2015. *Id.*

⁵ This section summarizes the evidence that is relevant to Complainant’s complaint. Although certain admitted exhibits are not summarized in this section, I have reviewed all of the evidence admitted in this case and my findings are based on the evidence as a whole.

Mr. Carter had made reports of issues to management on occasions prior to September 29, 2015. Mr. Carter explained that, as an example, he had reported “problems at Cayce with trainmaster Sasser.” *Id.* at 70-71. Mr. Carter had sent an e-mail to Mr. Koster in April 2015 (submitted as CX-33). “[Mr. Koster] is the division manager for the Florence Division,” and in this position “[h]e ensures that his division is run safely and efficiently, oversees the officials and crews under his charge.” *Id.* at 70. Mr. Carter stated that the issue was as follows:

The local chairman, Mr. Holland ... had spoken with Ms. Sasser and kept speaking with Ms. Sasser about validating our payroll on time and approving days that we were trying to take off with our families and planned vacations. She wouldn't approve them, and she wouldn't approve our payroll on time. She made quotes, I like to wait until the last minute to make Chuckie squirm [T]he last resort was to take it to Mr. Koster, because Mr. Holland, the local chairman, could not do anything else with the situation.

Id. at 72. When asked about the practical effect of the delay in processing the payroll, Mr. Carter stated: “We'd have trouble taking time off to be with our families on the days we were allotted. In payroll, we were being shorted, and we were having to ask for vouchers, and that was another problem also.” *Id.* As to Mr. Koster's response to Mr. Carter's e-mail (CX-33), Mr. Carter indicated that “Mr. Koster and I spoke on the phone a day or two later on Saturday morning over this issue,” explaining that “[h]e called me.... We spoke about this issue. I told him that we had problems up here.” *Id.* at 73. Mr. Carter further stated that he asked Mr. Koster about the consolidation, and indicated that “[he] would like for him [Mr. Koster] to come up here and meet with the yardmasters because we're working in a hostile environment with Ms. Sasser.” *Id.* Mr. Carter explained: “She refused ... to pay us, and she refused to grant our time off [Y]ou just couldn't work with her.” *Id.* As to how many employees were affected by Ms. Sasser's conduct, Mr. Carter indicated that seven individuals in total were affected – two clerks and five yardmasters. *Id.* at 74.

As another example of prior reports to management, Mr. Carter described an unsafe condition report he had submitted on April 27, 2015 (submitted as CX-8). Mr. Carter explained:

I turned in a PI-82, I had, on 04/27 of '15 asking that the big potholes alongside the building be fixed, and also where we turn into the yard near the old north end crossing also there had been a water line break or something or a washout and asked for that to be paved over.

Id. at 75. Mr. Carter indicated that he viewed these issues as safety issues. *Id.* Mr. Carter stated that he gave this report to Trainmaster Sasser, and in response, “[t]he holes on the side of the building were fixed, and the driveway has still not been fixed out at the old north end crossing.” *Id.* Mr. Carter also testified regarding another unsafe condition report that he submitted in May 2015 (submitted as CX-6). Mr. Carter explained: “When I made it 05/03 of '15, just before the consolidation[,] I had been asking questions about how things were going to be conducted once the consolidation took place. I was met with hostility....” *Id.* at 77. As to Mr. Carter's specific

concerns, he indicated that he “was asking how an emergency situation was going to be handled,” such as “[s]omeone getting run over with a train.” *Id.* He testified:

[In] 2009 or 2010, the street road crossings for the cars were closed to pedestrian and vehicular traffic permanently, and they were barricaded. The Cayce safety team met with Cayce public safety at a safety meeting [including Mr. Carter] ... [and] asked the railroad to just put gates and do not take the crossings out. They stated, if there is a chemical spill, an emergency, we need to be able to get into that yard. At the time, there was only one way in and one way out.

Id. at 78. Mr. Carter stated, “that’s the reason that I filled this PI-82 out,” and gave it to trainmaster Doughty. *Id.* at 79. Mr. Carter explained that Mr. Doughty “has been road trainmaster, yard trainmaster at Cayce since 2013 or 2014. He has worked a little ... bit of everywhere around dealing with Cayce.” *Id.* When asked if it was appropriate to give the PI-82 to Mr. Doughty, Mr. Carter stated: “He was the one on duty at the time.” *Id.* at 79. Mr. Carter explained that after he submitted this report, “[t]hey put locks – I was never ever sat down with and given a response, but they did put locks, combination locks, on the gates on both ends of the crossings, the old crossings at Cayce.” *Id.* He further explained that “[t]hey had met with Cayce public safety and explained to them they could – and given them the combination if they needed to get into the yard.” *Id.* Mr. Carter stated: “Other than that, I ... haven’t been given any more detail about stuff at Cayce.” *Id.*

Mr. Carter also testified about an e-mail he sent to Darren Ferrill and Drew Doughty on July 16, 2015 (submitted as CX-22). Mr. Carter explained that this e-mail was “regarding the yardmaster consolidation and the radio situation and the qualifications around Cayce.” *Id.* at 80. Mr. Carter explained that Darren Ferrill “was the UTU division safety chairman” and was above Mr. Carter in terms of “the safety hierarchy.” *Id.* at 82. Mr. Carter further explained that he sent this e-mail “to basically create a paper trail that there’s problems ... at Cayce.” *Id.* at 83. Specifically, Mr. Carter indicated that he was concerned because “[t]he radios were weak. As I stated on this e-mail, I was not very far away from Cayce, and the Florence yardmaster could not pick up the transmission of us wanting to get back into the yard.” *Id.* at 83-84. Mr. Carter stated that “[t]hey took all of the radios out at Cayce, and that still has not been resolved,” meaning “[t]hey took the Avtecs out, and they ... took the base station out of Cayce.” *Id.* at 84. Mr. Carter explained that communication is important “[t]o make sure you’re in communication where crews are, whether it be you’ve got a high-wide or just for a safe and efficient movement of trains, know where crews are so they can talk to each other,” so they do not run anyone over or run into another train. *Id.*

With regard to the consolidation, Mr. Carter explained that Mr. Duke, a yardmaster from Florence, came to Cayce to “observe[] the day-to-day shifts and how we did things at Cayce.” *Id.* at 85. Mr. Duke was at the Cayce yard for approximately two weeks and “[h]e watched a radio communication, he watched me put in work orders, he watched me communicate with crews, dispatchers, and answer the phone.” *Id.* The other yardmasters from Florence also came to Cayce for one or two days. *Id.* at 86. Mr. Carter explained that he was concerned that the other yardmasters only came to Cayce for one or two days, because “[t]here are a lot of places that we swap crews in and out at, whether it be the tank farm at the auto ramp, the turnaround...

Florence and Cayce all have their little niches and how they do thing[s] and where to locate people and how to swap crews in and out and do things. They were just not familiar with the ins and outs of how to run the yard.” *Id.* Mr. Carter testified that there are cameras in the Cayce yard, and the yardmasters in Florence can “[f]or the most part” view the entire Cayce yard.” *Id.* at 87. In addition to the cameras, Mr. Carter stated that the Florence yardmasters can monitor the number of cars in each individual track in Cayce “[t]hrough a computer system called YES, and it will list the car movements from track to track, ... the track list and switch list.” *Id.* at 88.

As to the events of September 29, 2015, Mr. Carter stated that there was a job briefing with Mr. Betts, the trainmaster. At the job briefing, other employees complained that “Mr. Murray wasn’t answering the radios.” *Id.* at 94-96. Mr. Carter explained that “[t]hey were directed to me, and I said, you need to direct them right straight to Mr. Betts, that Mr. Murray was not answering the radios in a timely manner.” *Id.* at 96. Mr. Betts “listened” to the complaints. *Id.* Then, Mr. Carter stated, “[w]e s[a]t for three hours” because “[t]he train that had previously come in was not booked, and we sit waiting on the track to get booked.” *Id.* Mr. Carter explained that “[t]he yardmaster should have instructed the clerk to book it. It was frustrating because we’re sitting here and we can’t start our job because the yardmaster didn’t do what he was supposed to do.” *Id.* at 97.

Mr. Carter completed and sent a PI-82 report on September 29, 2015, around 9:15 p.m. (JX-6), because “[he] was frustrated with the way the yard was being run”; he was concerned because “[he] ha[s] a family, and [his] coworkers have families.” *Id.* at 113-14. Mr. Carter explained that he reported that the yardmasters were “unqualified” and the Florence yardmasters were not answering the radio in a timely manner. *Id.* at 114. After sending the PI-82 report in an e-mail on September 29, 2015, Mr. Carter followed up on September 30, 2015, with a second e-mail in which he “list[ed] the problems going on at Cayce and the safety concerns.” *Id.* Mr. Carter explained that he submitted the e-mail on September 30, 2015, because “[he] wanted to give some more details.” *Id.* at 115. In the September 30, 2015 e-mail, Mr. Carter listed six specific safety issues. *See id.* at 115-16. Mr. Carter explained that he did not receive any response to that e-mail. *Id.* at 117.

Mr. Carter was taken out of service on October 7, 2015. *Id.* at 119. He returned to work on November 19 or 20, 2015, and “trainmaster Betts did a safety skills seminar with [him].” *Id.* at 120. Mr. Carter explained that in addition to being taken out of service, the suspension is “a mark on [his] record.” *Id.* When asked whether he thought that he violated the rules, Mr. Carter stated: “No, sir, I do not.” *Id.* at 121. He explained:

I stated the facts. Mr. Murray was antagonistic in his statements in the conversation towards me. I stated the pure facts, that they’re not qualified. It wasn’t directly – that wasn’t even directly just to him. It was in general how they were trained. The radio communications, everything all together, I did not violate that set of rules.

Id. at 122.

When asked whether Mr. Carter thought that Mr. Murray was inefficient that evening, he responded: “Yes”; and when asked whether he was frustrated with Mr. Murray because he was not doing his job efficiently, Mr. Carter replied: “Yes.” *Id.* at 137. When asked whether he thought he could do Mr. Murray’s job more efficiently, Mr. Carter replied: “I have.” *Id.* When asked whether Mr. Murray asked him to do anything unsafe that evening, Mr. Carter replied: “No.” *Id.* Mr. Carter explained that he raised safety issues with Mr. Murray, explaining: “I pointed out that he had not been answering the radio, and that’s an unsafe condition.” *Id.* at 137-38.

Mr. Carter stated that he understood that CSX requires employees to treat others with respect. *Id.* at 147. As to other employees who were charged with failing to act in a respectful and courteous manner towards coworkers, Mr. Carter indicated that Bill Holland was the only other employee whom he knew about. *Id.* at 149. Mr. Carter stated that he did not know how the charges against Mr. Holland were classified, but he knew that, as to discipline, Mr. Holland was assessed time served. *Id.*

Mr. Carter testified that since returning to work, he does not believe that CSX has retaliated against him. *Id.* at 150. Mr. Carter stated that he had reported safety concerns throughout his career with CSX, and he had never been charged with a rule violation between September 2009 and September 2015. *Id.* at 152.

Mr. Carter testified that the yardmaster did not typically communicate with train crews in person, and most of the communication with crews, including at Cayce yard, was conducted over the radio. *Id.* at 153. After the yardmaster consolidation, crews sometimes lost communication over the radio with the yardmaster. *Id.* at 155. However, even when communication with the yardmaster was lost, train crews could still communicate over the radio with each other. *Id.* at 156. In Mr. Carter’s work as a locomotive engineer, he could communicate with the conductor, dispatcher, or trainmaster over the radio, even if communication with the yardmaster was lost. *Id.* When asked whether he would be able to get in touch with the yardmaster through a phone call if the radio communications were down, Mr. Carter stated: “Hopefully.” *Id.*

Mr. Carter testified that he was not retaliated against for filing a PI-82 report on May 3, 2015, in which he raised a concern regarding the ability for emergency personnel to access the Cayce Yard. *Id.* at 160. Mr. Carter indicated that another employee, Mike Bradshaw, raised a similar concern. *Id.* On July 16, 2015, Mr. Carter sent an e-mail regarding the radio communication problems, and he stated that this was the first time he expressed concerns about that problem. *Id.* at 163. Mr. Carter indicated that some managers at Cayce were familiar with the radio communication problems, and he acknowledged that in the e-mail he sent on July 16, 2015, he wrote that trainmasters Sasser and Doughty were aware of the problem. *Id.* Mr. Carter testified that after he reported the radio communication problems, he continued to report such problems any time the radios went out, which was almost on a daily basis, and that he was not retaliated against for reporting these issues. *Id.* at 164. Mr. Carter also indicated that he knew that other employees reported similar concerns. *Id.* at 166-68.

As to Mr. Carter’s September 29, 2015 PI-82 report, he scanned and attached this report to an e-mail that he sent to Mr. Betts on September 29, 2015 at 9:16 p.m. *Id.* at 168-69. In this

PI-82 report, Mr. Carter reported that the Florence yardmasters were not qualified to work the Cayce Yard. *Id.* at 169. Mr. Carter acknowledged that he had raised this issue on several occasions between July 16 and September 29. *Id.* at 169-70. Mr. Carter also reported in the PI-82 that “Florence yardmasters not answering the radio in timely manner.” *Id.* at 170. Mr. Carter acknowledged that he had raised this issue before, and that he knew other employees had raised this issue on September 29, 2015. *Id.* Mr. Carter also acknowledged that these other employees were not disciplined. *Id.* With regard to Mr. Carter’s September 30, 2015 e-mail in which he listed six safety issues, Mr. Carter indicated that this e-mail was not the first time he had raised these issues. *Id.* at 171.

Mr. Carter acknowledged that prior to his suspension in November 2015, other coworkers had complained about the way he treated them. *Id.* at 172. Specifically, Mr. Ware and Mr. Jay Wilson had complained. *Id.* at 174-75. Additionally, another employee complained to the ethics hotline about Mr. Carter’s angry behavior, and alleged that Mr. Carter was angry and broke a window. *Id.* at 177. Mr. Carter acknowledged that he broke a window by “pouring a drink out a window,” but stated it was “[n]ot by being angry.” *Id.* at 177-78. Mr. Carter explained:

I had a cup of liquid. Rather than put it in a trash can with a full cup for it to leak in the trash can, I opened the window.... When I poured the liquid in the flower bed, whenever I went to close the window, the window hung up on the track and it cracked.

Id. at 178. Another employee complained about the manner in which Mr. Carter confronted him about throwing cigarette butts on the ground. *Id.* at 179.

Mr. Carter testified about several involuntary breaks in his employment. Specifically, in December 2000, CSX dismissed him due to an altercation with a Norfolk Southern trainmaster, and he was later reinstated. *Id.* at 182-83. In April 2005, Mr. Carter was dismissed for not being at the controls of a moving locomotive, and an arbitrator reinstated him without back pay 11 months later. *Id.* at 183.

B. Gary Matthews, Locomotive Engineer and Conductor, CSX Transportation (TR at 22-39)

Gary Matthews (“Mr. Matthews”) testified that he is currently employed by CSX Transportation as a locomotive engineer and conductor in Florence, South Carolina. (TR at 22.) Mr. Matthews stated that he also works for “Smart Transportation, formerly UTU, as a local chairman for Local 942 ... [and] as a[n] assistant general chairman to the general chairman John Whitaker as a[n] engineer’s representative.” *Id.* Mr. Matthews explained that as a union representative, he “advocate[s] for the membership. If the issue is discipline, I represent them in investigations. If it’s safety, I take those concerns through the safety committee up the ladder. If it’s arbitrary claims, I handle arbitrary claims for the individuals.” *Id.* at 23.

As to the radios on the trains, Mr. Matthews testified that “[t]he radios generally have a range of about four to five miles, unless there is a repeater station where it may be with the dispatcher, and then they talk to a dispatcher at any point in time.” *Id.* at 23. Mr. Matthews

explained that the purpose of the radios “is for the engineer and the conductor, depending on who’s using the radio, to be able to contact a dispatcher, contact a yardmaster, contact coworkers, for that matter, in order to ensure efficient and safe operation.” *Id.* at 24.

When asked whether he had worked in Cayce, Mr. Matthews stated: “I’ve worked in and out of the yard on road jobs, never on a yard job per se.” *Id.* at 24. He explained that he “used to represent Cayce, and Mr. Carter actually was our local representative.” *Id.* Mr. Matthews testified that he is familiar with the IDPAP policy, explaining:

[P]rimarily it’s set up in three primary different categories. You have minor offenses, serious offenses, and major offenses.... A minor offense would be defined as rules that do not result in a derailment or damage of equipment or personal injury.... A serious rule violation would be something where the employee could have been hurt had he not followed the rule A major violation is the most serious of the rule violations. You know, that’s major incidents. That’s speeding, red board violations, main track authority violations, blue flag violations, dishonesty, late reporting of injuries, tracking a banner.

Id. at 25-26. Mr. Matthews testified that he served as one of Mr. Carter’s representatives at the October 21, 2015 investigation. *Id.* at 27-28.

At the hearing, Joint Exhibits 2, 3-A, 3-B, and 4, which are audio recordings, were played. *See id.* at 30. Mr. Matthews testified that he was familiar with the audio recording that was played at Mr. Carter’s investigation on October 21, 2015, explaining “[a]s best I can recall, it was a radio transmission that was done between Mr. Carter and the Florence yardmaster, and then later on there was a telephone conversation between Mr. Carter and the Florence yardmaster.” *Id.* at 29-30. Mr. Matthews further explained that these recordings “just record[] normal railroad radio conversations.” *Id.* at 30. With regard to Joint Exhibit 2, Mr. Matthews testified that as to the individuals on the recording: “I’m pretty sure I know the engineer was Mr. Carter, the yardmaster was Mr. Murray, and I think the conductor was Mr. E.G. Roof. I don’t know for sure on the conductor. I didn’t recognize the voice.” *Id.* at 31. As to Joint Exhibit 3-A, Mr. Matthews identified Mr. Murray and Mr. Carter as the individuals on the recording, and as to Joint Exhibit 3-B, Mr. Matthews identified the voice as Mr. Carter. *Id.* at 31-32. With regard to Joint Exhibit 4, Mr. Matthews identified the following individuals: “it was Mr. Carter, Mr. Murray, the yardmaster, and I think it was Mr. McDowell was the conductor asking for instructions how to spot.” *Id.* at 32.

When asked whether he had worked with Mr. Carter before and whether it was Mr. Carter’s normal tone on the recordings, Mr. Matthews indicated that he had worked with Mr. Carter before and “[t]hat’s pretty much his normal tone.” *Id.* at 33. Mr. Matthews explained that it was Mr. Carter’s normal tone “[w]ith everyone,” explaining:

If he’s passionate – he’s a passionate person. If he feels like he’s right about something, his voice tends to elevate a little bit more than at other times. But I’ve dealt with him for 10 years – well, 13 years, now, and in the process – I mean,

that's his normal tone. I deal with other people sometimes that have similar tones, and I don't take exception to it.

Id. As to the contents of the recordings, Mr. Matthews was asked whether Mr. Carter threatened Mr. Murray, and he responded, "No, he did not." *Id.* Mr. Matthews also was asked whether Mr. Carter used profanity, and he responded, "No, he did not." *Id.* As to CSX's investigation hearing, Mr. Matthews indicated that at the investigation, "Mr. Murray did not say that he was harassed by Mr. Carter [And] he didn't feel threatened, if I remember correctly." *Id.* at 33-34. Mr. Matthews stated:

We, in fact, laid down the transcript from the audio and also laid down his statement, and during the course of the investigation I asked Mr. Murray to identify what he claimed that Mr. Carter had said. He was unable to do so. For instance, one statement that Mr. Murray made was, Mr. Carter said, "This isn't over." Well, that statement was not at all in the transcript. There was also other similar statements, and I can't remember off the top of my head without the transcript in front of me, but there was several statements that Mr. Murray made that I asked him to find that in the transcript and read it for me, and he was unable to do so.

Id. at 34-35.

Mr. Matthews explained that Mr. Murray and Mr. Carter interacted because

Mr. Murray is the yardmaster currently of Florence and Cayce Yards.... [And] Mr. Carter was acting as the engineer on Cayce Yard ... Mr. Murray is responsible for the moves that he was making in terms of, you know, getting him in and out of the yard and him being able to perform the work. He's basically a pseudo supervisor, Mr. Murray is, to Mr. Carter.

Id. at 35. As to when the yardmaster consolidation happened, Mr. Matthews testified that it was "[p]robably within I'd say 90 days of the time this happened. Probably less than that, but I know it was within 90 days." *Id.* at 36. With regard to what effect it had on the Cayce Yard, Mr. Matthews stated: "Well, Mr. Carter was working on that same shift as a yardmaster prior to the consolidation. After the consolidation, he [Mr. Carter] went back on his seniority as an engineer." *Id.* Mr. Matthews explained:

And different yardmasters were put over Cayce Yard, primarily Bill Holland is still – he was out at Cayce and had worked Florence prior to that. He came back to Florence. Second and third shift being Mr. Murray and I think Mr. Causey or either Mr. Duke. They were not Cayce yardmasters. They had not worked in Cayce Yard. I think Mr. Duke was sent over for – I forget the period of time, maybe a week. The other two, Mr. Murray and Mr. Causey, had one day of training, if I recall correctly

Id.

Mr. Matthews testified that he has seen employees removed from service and charged with major violations “[f]or stealing . . . , which is outlined in the IDPAP policy.” *Id.* at 37. As to whether employees have been removed from service for disrespectful treatment of coworkers or supervisors, he stated: “No, I haven’t, not to my knowledge, and I’ve been doing the job for 10 years. I don’t recall that ever happening in 10 years until this case.” *Id.* at 38. With regard to whether Mr. Matthews viewed Mr. Carter’s tone as appropriate to use with someone who was his pseudo supervisor, Mr. Matthews responded:

It’s really a[n] appropriate tone for Mr. Carter. It goes from individual to individual. I deal with yardmasters on a regular basis that – for instance, Jim Hamilton in Charleston, South Carolina – nice guy, I respect him, I think he’s a good person, but he uses tones like that at times. . . . And I don’t take offense. I’m not that thin-skinned.

Id. at 38-39.

C. Todd Welch, Conductor, CSX Transportation, Local Chairman for Cayce Yard, Florence Yard, and Locomotive Engineers (TR at 40-53)

Todd Welch (“Mr. Welch”) testified that he currently works for CSX Transportation in Sumter, South Carolina. (TR at 40.) He stated that he had worked for CSX Transportation since 1998. *Id.* at 40-41. Mr. Welch explained that he works as “a conductor, local chairman for Cayce Yard, Florence Yard, and Locomotive Engineers.” *Id.* at 41. Mr. Welch further explained that as local chairman, he “[a]ssist[s] union brothers and sisters in discipline cases, payroll issues, vacations, just anything I can help anybody with on and off the job.” *Id.*

As to the radios used on the engines, Mr. Welch testified that “[w]e have Kenwood hand-held radios. We have the locomotive radios. . . .” *Id.* at 41-42. Mr. Welch explained that the radios are used for “[c]ommunication between conductor and engineer, yardmaster, trainmasters, road foremen, mechanical department, dispatchers.” *Id.* at 42. He indicated that, in his opinion, being able to get in touch with the yardmaster in a timely manner is related to safety. *Id.*

Mr. Welch indicated that eleven months prior to September 2015, A.B. Mitchell’s “leg [was] r[un] over by a train.” *Id.* at 43. He stated that “[a]t the time of the incident, Mr. Mitchell out of desperation called for help on his hand-held radio, and Mr. Hedricks was the yardmaster, and he heard the cry for help and immediately went to his rescue.” *Id.*

Joint Exhibits 2, 3-A, 3-B, and 4 (the audio recordings) were played at the formal hearing, and Mr. Welch answered questions about these recordings. Mr. Welch testified that in JX-2, he recognized the voices as Mr. Carter and Mr. Murray. *Id.* at 46. As to JX-3-A, he again recognized the voices as Mr. Murray and Mr. Carter. *Id.* As to JX-3-B, he recognized the voice as that of Mr. Carter. *Id.* at 47. As to the final recording, JX-4, Mr. Welch recognized the voices as Mr. Murray, Mr. Carter, and conductor Leroy McDowell. *Id.* When asked if he had worked with Mr. Carter before, Mr. Welch stated that he had on many occasions. *Id.* at 47-48. When asked whether that was Mr. Carter’s normal tone, he responded: “Yes.” *Id.* at 48. When asked if

he heard Mr. Carter threaten Mr. Murray, if he heard Mr. Carter use profanity, if he heard Mr. Carter harass Mr. Murray, or if he heard Mr. Carter belittle Mr. Murray, Mr. Welch responded: “No, sir.” *Id.* As to the company’s investigation on October 21, 2015, Mr. Welch testified that he was one of Mr. Carter’s union representatives in the investigation. *Id.* at 44. Mr. Welch indicated that Mr. Murray’s initial statement differed from his investigation testimony. *Id.*

Mr. Welch indicated that, in his opinion, Mr. Carter is serious about safety. *Id.* When asked whether Mr. Welch had ever raised safety concerns with management in his time as a local chairman or employee, Mr. Welch indicated that he had, and when asked whether he was retaliated against for doing so, he responded: “Not that I recall.” *Id.* at 49. When asked whether he thought someone questioning another’s qualifications might be viewed as belittling them, Mr. Welch responded: “I wouldn’t think so.” *Id.* at 50. When asked whether somebody else might view it differently, he responded: “Outside the railroad maybe.” *Id.*

D. Angela Averitte, Division Manager, CSX Transportation (TR at 188-255)

Angela Averitte (“Ms. Averitte”) testified that she currently works for CSX as Division Manager, Nashville Division, and she has held this position since July 1, 2016. (TR at 188.) In this position, Ms. Averitte is “responsible for a[n] area of territory from the outskirts of Birmingham, Alabama up to and not including Danville, Illinois We extend west to Memphis, Tennessee and southeast down to and including Chattanooga, Tennessee.” *Id.* at 189. Prior to Ms. Averitte’s current position, she worked as the assistant division manager in Florence, South Carolina, and she held this position from May 2014 to July 1, 2016. *Id.*

As assistant division manager of the Florence division, Ms. Averitte had 15 direct reports, and these individuals held the position of trainmaster. *Id.* at 191. Ms. Averitte described the position of trainmaster as follows: “A trainmaster is a manager that oversees the transportation employees.” *Id.* at 192. With regard to Ms. Averitte’s responsibility as to safety while working as the assistant division manager, Ms. Averitte explained that “as the assistant division manager, since the outlying locations reported to me, ... I made it a point to visit these locations to make sure that things were being addressed.” *Id.* at 193. As to who was involved with local safety, Ms. Averitte explained:

It is comprised of the local manager and the union. There is a safety chairman, which is a union elected position, that was kind of the spokesperson for that location. And they were the liaison that worked directly with the managers to make sure that the safety concerns and needs were addressed in a timely manner.

Id. With regard to reporting safety concerns to management, Ms. Averitte explained that “we have safety briefings where we interact with the employees. The managers have open-door policies where they encourage people to talk with their managers,” and “[a]dditionally, there is a prescribed form called a PI-82 that is ... if an employee wants to make a written documentation instead of having a conversation, that form can be filled out.” *Id.* at 194. When a PI-82 form is received, Ms. Averitte explained that “if the employee has their name [on it], we encourage them [managers] to follow up with that employee when the issue is corrected. Or sometimes the issue may not be safety-related, but you still have a form that you should follow up with the employee

and explain the whys.” *Id.* at 194-95. Ms. Averitte explained that there also was “[t]he local union safety chairman [who] ... was just a liaison to work with the local managers to ensure that the safety items were identified and corrected in a timely manner.” *Id.* at 195. Ms. Averitte stated that the Florence Division was comprised of ten safety districts, and Mr. Carter was one of ten local union safety chairmen. *Id.*

As to Ms. Averitte’s interactions with Mr. Carter, she explained that before she met him in person, she had heard from other employees that “he was erratic or volatile, boisterous, and sometimes really condescending on the radio to them, demeaning.” *Id.* at 198. When Ms. Averitte met Mr. Carter, she stated that her impression was as follows:

Mr. Carter was a very conscientious employee. He gave his heart and soul to this company. He wanted things to be done, and he wanted them to be done properly, and he wanted them to be done efficiently. And, being a yardmaster, I understand those expectations that he had. But his delivery with the other employees many times was counterproductive.

Id. at 199. Ms. Averitte explained: “Mr. Carter’s ability to deal with other employees sometimes left that person feeling that they had no value, they were less than, they had been talked down to, they had been harassed, and that the behavior that he exhibited was over the top and shouldn’t be tolerated by CSX.” *Id.* In early 2015, around March or April, Ms. Averitte interviewed Mr. Carter for management positions, and she stated that she did not recommend Mr. Carter for any of the management positions because of his answers to some questions and because he was not willing to move to a new location. *Id.* at 199-200. Ms. Averitte stated that “we strive not to put people in a location where they were working with peers and now we make them the manager. We want them to go out and have a fresh perspective.” *Id.* at 200.

Ms. Averitte testified that she was involved in implementing the yardmaster consolidation for the Florence and Cayce yards, but that the decision to consolidate was made before she became assistant division manager. *Id.* at 201. Ms. Averitte explained that she had a yardmaster background, and that “[a] yardmaster’s duties is nothing more than to direct rail traffic. They tell the train what track to come in, they tell the train what to do with his locomotives, the crew.... And they communicate with the train dispatcher to coordinate movement in and out of the yard.” *Id.* at 201-02. Ms. Averitte stated that in her opinion, a yardmaster does not have to be physically present in the yard where he works. *Id.* at 202. Ms. Averitte indicated that prior to the consolidation, Mr. Carter worked as a yardmaster in Cayce, and “he had the option to be a yardmaster in Florence if he chose to follow the work. He had an option to see his seniority. He had an option to return to his former craft and keep his seniority.” *Id.* at 204. Ms. Averitte explained that Mr. Carter “elected to return to his locomotive engineer [position].” *Id.* at 205.

As to Mr. Carter’s PI-82 report about emergency personnel’s ability to access the Cayce Yard, Ms. Averitte testified that this complaint came to her and she “thought it was [a] good idea,” and she “had the local managers get in touch with the Columbia Department of Public Safety ... [and] we finally decided that a box with a combination lock would be helpful for them.” *Id.* at 206.

The yardmaster consolidation occurred in July 2015. *Id.* at 207. As to the training that the Florence yardmasters received regarding the Cayce Yard, Ms. Averitte explained that Mr. Duke, the employee who went to the Cayce Yard for an extended period of time, provided on-the-job training to the other Florence yardmasters who were working the Cayce Yard. *Id.* at 253-54. Following the consolidation, Ms. Averitte indicated that there were some issues with the radio system that was installed. *Id.* at 207. Specifically, Ms. Averitte stated that “at sporadic times, the Florence yardmaster would not be able to communicate with the crews in Cayce.” *Id.* at 207. Ms. Averitte stated that “once [she] was aware that it was happening sporadically, [she] wanted to make sure that it was elevated because [she could] ... understand the frustration of not being able to talk to someone.” *Id.* at 208-09. Ms. Averitte explained that she did not view the radio problems as a safety issue because “we have rules in place that, if you lose communication when you’re in communication with someone, that you stop. And we talked to the people in Cayce when we realized we were having problems and reiterated that ... you know, there are options here.” *Id.* at 209. She further explained that she “didn’t view it as a safety issue. It’s a productivity issue, in my mind.” *Id.* at 210. As to the remedy for the radio communication issues, Ms. Averitte stated that “one of the lapses that we had is we weren’t properly reporting it to the proper people. So I had the trainmasters in Florence create ... a spreadsheet for it and a process for the yardmaster to make the proper call to the CSX help desk to report the issue.” *Id.* at 211.

With regard to the incident in late September 2015 between Mr. Carter and Mr. Murray, Ms. Averitte indicated that she first became aware of the incident from “a couple of phone calls,” and then received written statements regarding the incident. *Id.* at 212-13. Ms. Averitte indicated that she also listened to the recorded conversations. *Id.* at 213. Ms. Averitte notified her supervisor, Mr. Koster, and reached out to labor relations. *Id.* at 214. As to RX-15, Ms. Averitte explained that “[t]his is a document that I sent to ... labor relations.... I wanted to ... make an unbiased decision and make sure that I was looking at this clearly.” *Id.* at 214-15. With regard to the question in the e-mail in which Ms. Averitte asked, “Do you feel we have an employee behavior charge that we could make stick?”, Ms. Averitte explained that when she asked this question she was “fact-check[ing] her own opinion.” *Id.* at 215-16. After sending this e-mail, Ms. Averitte spoke with labor relations on the telephone, and then “Mr. Betts input an assessment to generate a charge letter.” *Id.* at 216. As to the classification of charges, Ms. Averitte explained that the classification is based on a decision by the field administration and division manager. *Id.* at 218. Mr. Carter’s charge was that he “failed to act in a respectful and courteous manner when dealing with a fellow employee,” and Ms. Averitte explained that this charge was classified as a major offense. *Id.* at 219-20. As to whether Ms. Averitte was involved in deciding whether to assess discipline, she stated that she was not involved, explaining “that burden falls on the division manager.” *Id.* at 221.

As to Mr. Carter’s September 30, 2015 e-mail, Ms. Averitte explained that she forwarded this e-mail to “two trainmasters that oversee the operation in Florence Yard.” *Id.* at 223. With regard to discipline imposed on other employees who engaged in conduct violations, Ms. Averitte indicated that other such employees were charged with a major violation, and were withheld from service. *Id.* at 225-27 (discussing RX-16 and RX-17.) Ms. Averitte explained that if an employee is “disciplined for time served,” this means that “once you are withheld from

service, you're not allowed to work. So, when the discipline is issued, instead of starting and tacking on additional time, it will be retroactive and back up to the date of incident or the date that you were withheld from service." *Id.* at 227.

E. Eric Betts, Road Trainmaster, CSX Transportation (TR at 255-301)

Eric Betts ("Mr. Betts") testified that he is currently employed by CSX Transportation as a line of road trainmaster in Cayce, South Carolina. (TR at 256.) Mr. Betts stated that in this position he "supervise[s] to ensure the operations of the trains on the line of road from Cayce to McBee, South Carolina and also the line of road from Cayce to Joanna, South Carolina." *Id.* at 257. Mr. Betts explained that Mr. Carter is one of the locomotive engineers that Mr. Betts supervises at the Cayce Yard. *Id.* at 258. Mr. Betts further explained that he previously supervised Mr. Carter when Mr. Carter was a yardmaster at the Cayce Yard. *Id.*

Mr. Betts testified that CSX experienced radio communication problems after the consolidation of the Cayce and Florence yardmasters in July 2015. *Id.* at 259-60. As to the procedure to follow if the train crews lost radio contact with the yardmaster, Mr. Betts explained that "if you can't get in contact with him [the yardmaster], [the procedure is to] stop movement and try to reach him on the ... phone." *Id.* at 261.

As to Mr. Carter's treatment of fellow employees, Mr. Betts stated that he has been directly involved in responding to incidents involving Mr. Carter. *Id.* at 262. Mr. Betts described an incident with Mr. Wilson, which Mr. Wilson had described as Mr. Carter "berating him in front of people." *Id.* at 262-66 (discussing RX-22). Mr. Betts indicated that he did not discipline Mr. Carter for his conduct towards Mr. Wilson because Mr. Betts "prefer[s] to give warnings or coaching and counseling on an incident, especially when I was not there, and also to help educate, for people to know that this is a warning, please redirect your behavior or change your behavior." *Id.* at 265-66. Mr. Betts described another incident in which Mr. Carter and Mr. Ware, a locomotive engineer, had a verbal altercation in front of other coworkers. *Id.* at 266-67. Mr. Betts explained that he met with Mr. Carter and Mr. Ware, and during this meeting, Mr. Carter acknowledged that he had spoken with Mr. Ware and indicated that he (Mr. Carter) would say the same things again because he "ha[d] issues with an employee not following [his] instructions." *Id.* at 268. Mr. Betts later learned that Mr. Ware contacted the ethics helpline to report that Mr. Carter had mistreated him. *Id.* at 269-70. The ethics hotline contacted Mr. Betts in response to Mr. Ware's complaint, and RX-23 – an e-mail from Mr. Carter to an employee, Mr. Ronald Stevens, who works for the ethics hotline – accurately reflected what Mr. Betts had discussed with Mr. Carter in their meeting. *Id.* Specifically, during the meeting, Mr. Betts counseled Mr. Carter as to acting in a "courteous and professional [manner] when handling employees." *Id.* at 271. Mr. Betts indicated that he had told Mr. Carter that "any more outbursts, ... you can be suspended or terminated." *Id.*

With regard to the September 2015 incident between Mr. Carter and Mr. Murray, Mr. Betts testified that he learned of this incident when Mr. Murray called him on his cell phone. *Id.* Mr. Betts was at home when he received the call; he explained that he gives his cell phone number to employees, so it was not unusual to receive a call from an employee. *Id.* During the phone call, Mr. Betts stated that Mr. Murray "sounded upset and agitated." *Id.* at 272. Mr.

Murray then provided a statement to Mr. Betts, which he sent via e-mail. *Id.* at 272-73. After receiving this complaint, Mr. Betts listened to the recordings of the conversation between Mr. Carter and Mr. Murray and he spoke with Mr. Carter. *Id.* at 273-74. Mr. Betts testified that, in his opinion, Mr. Carter's behavior towards Mr. Murray during the calls (submitted as JX-3-A, JX-3-B, and JX-4) was not appropriate. *Id.* at 278-82.

Mr. Betts testified that CSX Rule 104 applies to "[a]ll CSX employees." *Id.* at 282. Mr. Betts stated that, in his opinion, Mr. Carter violated Rule 104 "[b]ecause Mr. Carter was, number one, not respectful or courteous in dealing with Mr. Murray on the radio. Also, Mr. Carter was basically quarrelsome and starting an altercation with Mr. Murray when talking to him on the telephone over an incident that happened basically an hour ... earlier." *Id.* at 283. Mr. Betts stated that he did not think Mr. Murray's conduct towards Mr. Carter violated Rule 104, explaining:

Based on the investigation and the recordings, Mr. Carter was the antagonist. Mr. Murray on the radio simply stated that he ... thought that he had already taken the light. And on the telephone conversation Mr. Murray, not only did he agree to everything that Mr. Carter was basically saying about it, but he never did retaliate back, in my opinion.

Id. Mr. Betts stated that he entered an assessment against Mr. Carter after consulting with Ms. Averitte, the assistant division manager. *Id.* at 284. Mr. Betts explained that "[i]t is an assessment that [he] entered as a rule violation to Mr. Carter," and that "[u]nder this assessment, he [Mr. Carter] was withheld from service pending investigation." *Id.* at 285. Mr. Betts further explained that he was not involved in classifying the severity of the charges against Mr. Carter, and that at the CSX hearing regarding this rule violation, he "was a company witness." *Id.* As to the discipline imposed against Mr. Carter after the company's hearing, Mr. Betts indicated that he was not involved in the decision regarding the discipline imposed in this matter. *Id.* at 285-86.

With regard to the PI-82 report that Mr. Carter sent via e-mail to Mr. Betts on September 29, 2015, Mr. Betts testified that the first time he reviewed the report was "[t]he next day during my investigation." *Id.* at 286-87. Mr. Betts indicated that Mr. Carter had previously reported that the Florence yardmasters were unqualified, explaining that he had made similar reports "[o]n occasions. Several times." *Id.* at 287. In addition to Mr. Carter's report that the Florence yardmasters were unqualified, his September 29, 2015 PI-82 report also stated that the Florence yardmasters were not answering the radio in a timely manner, and Mr. Betts testified that prior to September 29, Mr. Carter had made similar reports about the Florence yardmasters' failure to answer the radio. *Id.* Mr. Betts stated that he sent this PI-82 report to Ms. Averitte, his direct report. *Id.* Regarding Mr. Carter's subsequent e-mail in which he listed six safety issues, Mr. Betts testified that as to item number six – issues with radio and phone communication systems – Mr. Carter had previously reported this issue. *Id.* at 288. Mr. Betts explained that other employees, including "[t]he yardmasters, [and] the crews that were on duty," had reported this issue. *Id.* at 288.

Mr. Betts testified that Mr. Carter had also reported safety issues prior to the yardmaster consolidation. *Id.* at 289. He explained that Mr. Carter made reports “[q]uite often when he sees something that’s a safety issue” and that the frequency with which Mr. Carter has reported safety concerns has not changed during the four years that Mr. Betts supervised Mr. Carter. *Id.* at 289.

When asked whether any of Mr. Carter’s safety complaints played a role in Mr. Betts’s decision to enter an assessment against Mr. Carter for violating Rule 104, Mr. Betts responded: “No.” *Id.* at 294. As to who made the decision to take Mr. Carter out of service pending the investigation, Mr. Betts testified that field administration made the decision. *Id.* at 296. Mr. Betts explained that field administration is located in Jacksonville, Florida. *Id.*

F. Lawrence Koster, Division Manager, Florence, South Carolina, CSX Transportation (TR at 309-342)

Lawrence Koster (“Mr. Koster”) testified that he is currently employed by CSX as the division manager in Florence, South Carolina. (TR at 308-09.) He has held this position since March 2015, and the Florence Division encompasses “the Carolinas, ... most of Virginia, most of West Virginia and the coal fields, as far west as Russell, Kentucky, Augusta, Georgia, and then as far south to Savannah.” *Id.* at 309-10. Prior to his current position, Mr. Koster worked as the assistant division manager in Indianapolis. *Id.* at 310. As to his current job responsibilities, Mr. Koster works on “safety and operations as well as public safety, employee safety, budgetary concerns.” *Id.* at 309. Mr. Koster reports to John Bradley, CSX’s southern region vice president. *Id.* As to which employees report to Mr. Koster, he explained that he “ha[s] 94 managers under [his] umbrella and probably 1,500 to 2,000 craft employees.” *Id.* at 310.

Mr. Koster testified that he “first met Mr. Carter when [he] came to the division sometime after March there. [He] was touring and was in Cayce, and Mr. Carter happened to be working as the yardmaster.” *Id.* at 311. Mr. Koster stated that he interviewed Mr. Carter for a management position, explaining “[n]ot long after I came here, the management trainee program was in force, and Mr. Carter had applied for that.” *Id.* Mr. Koster also stated that Mr. Carter was not selected or recommended for a management position, explaining that “[w]e went through the interview process. Mr. Carter had some positive and some negative on the interview questions.... [H]is mobility was not where we needed it to be.... [S]ome of the other managers that worked with him, ... they didn’t give him a positive rating when it came to interpersonal skills.” *Id.*

Mr. Koster testified that he became involved in some conflicts between Mr. Carter and Trainmaster Melissa Sasser. *Id.* at 312. For example, CX-33 is “an e-mail that [he] received from Mr. Carter wanting to talk,” and Mr. Koster explained that he “asked Mr. Carter for his cell phone number, and a day or two later [Mr. Koster] placed a call to Mr. Carter.” *Id.* at 312. Mr. Koster stated that Mr. Carter “had some frustration with Ms. Sasser and the way that she was interpreting the agreement and paying their days. There were some things that he was concerned with.” *Id.* Mr. Koster explained that other yardmasters had similar concerns. *Id.* To follow up with these concerns, Mr. Koster “scheduled a meeting with Mr. Carter, his local chairman and two other yardmasters along with Ms. Sasser in the yard at Cayce.” *Id.* at 313. At the meeting,

there was “a job briefing, [meaning the participants] talked about safety there to make sure that everybody ... remain[ed] respectful and as long as they remain[ed] respectful everybody will get a chance to speak.” *Id.* As to what happened at the meeting, Mr. Koster described the meeting as follows:

Issues were brought out by Mr. Holland and Mr. Hendricks. There was another yardmaster there, I can't remember his name, and Mr. Carter. As Mr. Carter began to speak, he began to get a little loud and vocal, and I had to caution Mr. Carter that we would not tolerate that type of behavior. He took his tone back down to a normal level, and we continued the meeting.

Id. at 313-14. With regard to how the meeting concluded, Mr. Koster stated:

I had some take-aways to deal with Melissa on. I felt that Mr. Carter and the yardmasters did have some valid points on the pay. I don't want anybody to be short pay. They had some issues with how the personal days or day of vacations were granted. I told Melissa that there was obviously some personality issues between her and some of the yardmasters, including Mr. Carter, and that I expected her to use the olive branch to reach out to try to work with [them] I assume that she did that. I didn't hear any more complaints from Mr. Carter or the yardmasters after that.

Id. at 314.

As to the consolidation of the Cayce and Florence yardmasters, Mr. Koster explained that “[he] stepped into it. When [he] came in March, the decision had already been made that that's what we were going to do. [He] just oversaw the process after I was brought to Florence.” *Id.* at 315. Mr. Koster further explained that “[s]ince Cayce is a line of road operation, [he] gave Ms. Averitte that task” to oversee more of the details of the consolidation. *Id.* at 315-16. With regard to any safety concerns related to the consolidation, Mr. Koster stated that “[t]here were some safety concerns about access to the yard once the yardmaster would leave there if the emergency personnel would need it. That issue was addressed. There was issues brought up about qualifications and those types of things....” *Id.* at 316. Mr. Koster explained that as to emergency personnel's ability to access the Cayce Yard, “[he] gave that to Ms. Averitte to handle” and it was addressed. *Id.* As to the radio communication issues, Mr. Koster stated that he learned “[t]hat we had had intermittent outages of the ability from the Florence yardmaster to talk to the Cayce people on the system.” *Id.* With regard to whether Mr. Koster responded directly to this issue, Mr. Koster explained that “[o]nce it got to my level, [he] took it to the vice president of communications, Carl Walker and Rae Brown.” *Id.* Mr. Koster further explained that “[he] viewed it as an operational issue. We have redundant safety with the radios that they can contact the dispatcher. Operations, it makes it much easier. We had installed a system, and I would like the system to work as intended because it makes operations that much easier.” *Id.* at 317-18. When asked if he was aware that Mr. Carter and other employees had raised concerns about radio communications, Mr. Koster indicated that he was aware of these concerns. *Id.* at 318.

Regarding the incident between Mr. Carter and Mr. Murray on September 29, 2015, Mr. Koster testified that after he learned of this incident, “[he] told Ms. Averitte to get involved and to handle it.” *Id.* As to Mr. Koster’s role, he stated: “I issued the discipline.” *Id.* Mr. Koster explained that he did not decide how the charges would be classified, explaining that field administration made the decision as to whether to classify the charges as minor, serious, or major. *Id.* at 319. Mr. Koster further explained that “[f]ield administration is a group of managers that oversee the rules. They determine when assessments come in from the field personnel whether it’s classified as a serious, minor, or a major category. They also have a group of clerks that work for them that actually issue the letters....” *Id.* Mr. Koster explained that field administration is located in Jacksonville, Florida. *Id.*

Mr. Koster stated that before issuing a decision to Mr. Carter, “[he] read the hearing transcript, the on-site transcript, and listened to the audiotapes.” *Id.* Mr. Koster explained: “I always review those [on-site hearing transcript], but I read the entire transcript. I listen to if there’s any audio available. I make my own decision.” *Id.* at 321. Mr. Koster explained his reasoning as to why he decided to discipline Mr. Carter as follows:

After listening to the audiotapes, there was, I felt, a need for some discipline. I didn’t feel that it raised to the termination level, but I know Mr. Carter had been warned before. And, after listening to the tapes, I felt that he had, indeed, violated those rules that he was charged with.

Id. As to the specific conduct that Mr. Koster thought warranted discipline, he explained: “I didn’t think that the call was professional. I thought that he was boisterous, that he was talking to Mr. Murray in an unprofessional manner.” *Id.* at 322. Mr. Koster stated that before reaching his decision regarding discipline, he also spoke with Ben Matthews, Director of Labor Relations. *Id.* Mr. Koster explained: “I sought Mr. Matthews’ input on the charge. Like I said, it was a major charge. It was up to termination. I didn’t think it rose to termination, but I wanted to check it with an independent party.” *Id.* As to why Mr. Koster did not think it rose to the level of termination, Mr. Koster stated: “There wasn’t any threats involved, there was no profanity, it was just a boisterous, quarrelsome, ... loud conversation that I didn’t think needed to take place, and I don’t want my employees talking with each other like that.” *Id.* at 322-23.

When asked whether any safety issues that Mr. Carter raised played a role in Mr. Koster’s decision to suspend him, Mr. Koster responded: “No ma’am.” *Id.* at 323. Mr. Koster indicated that he became aware in late September or early October that Mr. Carter had again raised issues as to yardmaster qualifications and other similar issues. As to yardmaster training, Mr. Koster testified:

[He] told Angie [Averitte] to put together a training process so that we would have a smooth transition during the consolidation. The plan was developed to send Mr. Duke to Cayce to train. I think he was there for four weeks. Mr. Duke would come back and then on-the-job train the yardmasters at Florence whenever he returned and the consolidation was enacted.

Id. at 324. With regard to whether Mr. Murray received any training from Mr. Duke, Mr. Koster stated: “I followed up, and Mr. Murray did receive 20 job starts of training with Mr. Duke.” *Id.*

Mr. Koster explained that he has been involved with other employees who have been disciplined. *See id.* at 325-26. Mr. Koster testified that he has received training regarding the FRSA, as well as training on CSX’s policy regarding compliance with the Act. *Id.* at 326-28.

Mr. Koster testified that he knew about the complaint that Mr. Carter filed concerning the incident with Mr. Murray on September 29, 2015. *Id.* at 329. Mr. Koster stated that “[he] told Ms. Averitte to investigate it and, if it was something that we needed to handle, then she was to take it to field administration and handle it.” *Id.* at 330. Mr. Koster explained that by “handle it,” he meant “[i]nvestigate it. If it was something that needed to be handled formally, then to handle it formally.” *Id.* As to the decision to take Mr. Carter out of service prior to the investigation, Mr. Koster stated: “That is a company policy on all major charges, that we remove from service.” *Id.* at 331. Mr. Koster explained that field administration made the decision that Mr. Carter’s charge was a major charge. *Id.* at 332. With regard to RX-17, discipline letters from seven other cases, Mr. Koster stated that all but one of the cases occurred prior to his assignment to Florence. *Id.* at 333.

As to whether Mr. Koster believed that the radio communication issues created a safety issue, Mr. Koster stated:

We have a safety function on the radios where they can – if it’s an emergency, they can tone the dispatcher in an emergency. The radios continued to work individually between employees, they just couldn’t access the yardmaster. They could access each other. They had access to the dispatcher. They just could not talk to the yardmaster at Florence.

Id. at 333. Mr. Koster explained that he viewed the issue as “an operational issue,” stating:

If we didn’t have the redundant measure that they could have contacted emergency personnel, but to me that’s the difference. The radios to talk to Florence and to be able to have the yardmaster talk to them is – it makes not having to stop when it’s not a safety item. The job briefing ... that was conveyed to the Cayce crews were, if the radios were to stop, you’re to stop, update your job briefing. If it’s safe to do so, continue to work. If it’s not, contact the yardmaster via phone and get a plan.

Id. at 334. When asked whether the performance of yardmasters in their duties with regard to controlling rail traffic in and about a railroad yard is a safety concern, Mr. Koster responded: “Yes.” *Id.* at 341.

II. Transcript of Complainant’s Deposition (RX-37)

Complainant appeared for a deposition on September 1, 2016. (RX-37.) Asked about the radio communication issues, Complainant stated that he “d[idn]’t think they [management] made

a good effort,” explaining “they are continuously going down.” *Id.* at 35. When asked whether he knew what management was doing to try to fix the problem, Complainant stated: “They say they’re working on it. That’s the last message I got from Mr. Koster was we’re working on it.” *Id.* at 35-36. With regard to what actions are taken when employees learn that radio communications have been lost, Complainant explained that “[a]ccording to the rules, when conditions change you’re supposed to have job briefings.” *Id.* at 40-41. Mr. Carter explained that the purpose of the job briefing is as follows: “[w]here we are with switching or if he’s got extra cars. Well, we’ll have to call the dispatcher and have to change channels if we have to get signals.” *Id.* at 41.

When asked whether he had reported unsafe conditions throughout his career, Complainant stated: “Yes. I was met with much hostility from Trainmaster Sasser.” *Id.* at 50. Complainant stated that he worked for Trainmaster Sasser from “June of 2014 through November of ‘15.” *Id.* When asked whether any other CSX employees were hostile when he reported safety concerns, Complainant stated: “No, not that I can recall.” *Id.* When asked whether he was generally satisfied with how CSX would respond when he reported an unsafe condition, Complainant stated: “I was met with some resistance on putting in the crossings. They got emergency accesses back to the yard. That was like pulling teeth to get the emergency accesses put back in if something were to happen.” *Id.* at 51. Complainant explained that as a result of his complaints regarding the emergency personnel crossings and “after one gentleman lost his leg,” CSX restored the crossings. *Id.* at 51-52. As to when the individual lost his leg and when the crossings were taken out, Complainant stated: “If I’m not mistaken, the crossings were taken out in 2010. He lost his leg in July or August of ‘14.” *Id.* at 53. Complainant testified that he had no reason to believe that if the crossings had not been taken out, the individual would not have lost his leg. *Id.* CSX put the access points back in after Complainant had pushed for it. *Id.*

Complainant explained that the radio communication problems happened right after the consolidation went into effect on July 14, 2015. *Id.* at 68-69. Complainant indicated that management knew about the communication problems, and explained: “I mean, they knew there were problems. I’m not there 24/7 and there were problems on other shifts. So, yes, they knew there were radio issues going on.” *Id.* at 69.

Complainant stated that he filed the May 3, 2015 PI-82 Unsafe Condition Report addressing concerns with emergency personnel’s access to the Cayce Yard because “when I asked questions, I was met with hostility. So I filed this out as to how things were going to be handled, which is why I documented it.” *Id.* at 71. Complainant explained: “I had asked these questions to Trainmaster Sasser leading up to this and could not get a direct response, and so I just put it in writing.” *Id.* at 72-73. As to whether CSX ever enacted a plan for emergency situations, Complainant stated: “I never received anything back on this one saying this is what we’re going to do and this is how we’re going to do it.” *Id.* at 73-74. When asked whether CSX changed the locks on the gates in question, Complainant stated: “They did. They put a combination lock on there [A]nd put a little flimsy chain on there so it could be probably easily cut or taken care of. But as far as anything else, I don’t know.” *Id.* As to whether Complainant thought CSX’s actions regarding the locks was in response to his complaint, Complainant stated: “I feel like it was, yes.” *Id.* at 74.

Complainant stated that he did not always receive something in writing after he submitted an unsafe condition report, “but I would at least be told, hey, we fixed the problem and I did not get a response back that we fixed the problem” regarding access to the Cayce Yard by emergency personnel. *Id.* at 75. Complainant felt the steps taken to address his concerns regarding emergency personnel’s access to the Cayce Yard “only addressed locks,” without “address[ing] a detailed safety action plan,” which he felt was necessary due to the Florence yardmasters’ unfamiliarity with the “ins and outs” of Cayce yard. *Id.* at 75. When asked whether he believed CSX retaliated against him for filing the May 2015 unsafe condition report, Complainant stated: “Not that complaint, no. But I feel like some other stuff, yes.” *Id.* at 77.

Complainant stated that his e-mail dated July 16, 2015 was “an e-mail regarding our conversation between division safety chairman, UTU, SMART, Darren Ferrell and myself” about radio communication problems. *Id.* at 77-79. When asked whether he believed that anyone at CSX retaliated against him for sending the July 16, 2015 e-mail, Complainant responded: “No.” *Id.* at 85. Complainant indicated that he knew the following employees had raised similar concerns to management about the Florence yardmasters’ qualifications for the Cayce Yard: Brooks Singfield, yardmaster at Florence; Garrett Roof, vice local chairman; Rob Christofoli; Mr. Chewar; Jay Wilson; Lance Starks; and Tim Tarlton. *Id.* at 87-90.

Regarding Complainant’s conversations with Mr. Murray on September 29, 2015, Complainant stated that he was not being sarcastic when he told Mr. Murray that it was “20 minutes to 8:00, not 20 minutes to 12:00,” explaining: “There was nothing – that was a fact. It was 20 minutes to 8:00, not 20 minutes to 12:00. There was nothing sarcastic about that. That’s a fact.” *Id.* at 100-02. Complainant further explained that when Mr. Murray stated that he “didn’t need the attitude,” it was Mr. Murray’s interpretation that Complainant was giving him attitude, stating “I didn’t agree with him. He didn’t know what he was doing.” *Id.* at 102-03. With regard to when Complainant learned that Mr. Murray had reported their conversations to management, Complainant stated: “I understand now that he did. I didn’t know it at the time.” *Id.* at 103. Complainant did not recall how he learned that Mr. Murray had reported the conversations to management. *Id.* Complainant thought that Mr. Murray “was very antagonistic. Just keep talking, his quotes in there. I just want you to keep talking. I think he was baiting the conversation. Just antagonistic.” *Id.* at 109. As to what occurred on September 29, 2015 that Complainant thought was unsafe, he explained:

The way he [Mr. Murray] ran the yard. The way we brought it up the day before that the crews reported to about him answering the radio. On that recording you hear that S789 tried to call you. Had 789 had a true problem, the crews on the yard would have had to deal with it rather than the yardmaster. So he didn’t do his job.

Id. at 109-10. Complainant further explained that by not answering the radio, Mr. Murray created an unsafe situation, stating:

Because that is his duties because we’ve had ... fatalities, we’ve had chemical[] leaks, we’ve had trespassers. There’s potential for danger at the railroad. It is his

responsibility to listen to the radio whenever – and for 40 minute or whatever I stated in there, he did not do his job when they called him.

Id. at 110.

Complainant stated that the term “pickled” in his statement (JX-5) means that the conductor “[e]xplained what he put what cars in what track.” *Id.* at 116-17. As to what Complainant meant when he wrote that “we had an assertive conversation,” Complainant explained that to him, “it was just straight and to the point,” and that he was assertive towards Mr. Murray and “Mr. Murray was just as antagonistic with his responses.” *Id.* at 117. Complainant further explained that during the last conversation with Mr. Murray on September 29, 2015, “I was just as straightforward and to the point what I needed and what we needed to do or whatever needed to be done.” *Id.* at 118.

As to the investigation – the hearing conducted by CSX – Complainant indicated that he had never worked for or met the hearing officer, Robert Brown, prior to the investigation. *Id.* at 126-27. Complainant believed the hearing officer would have known about Complainant’s complaints about radio communication failures, explaining:

I think I was charged because of everything that’s led up to, all the e-mails and all the criticisms of the consolidation and with the radios going down, yardmasters not answering the radio, and reporting the safety issues. I think it was all the perfect storm to charge me. So I think he knew everything.... [H]e knew from the management at Cayce and from division management, I feel he knew everything that had transpired.

Id. at 127-28.

With regard to the Unsafe Condition Report that Complainant sent by e-mail to Trainmaster Betts at 9:16 p.m. on September 29, 2015, Complainant indicated that he had previously reported his concerns regarding the qualifications of the Florence yardmasters and that the Florence yardmasters were not answering the radio in a timely manner. *Id.* at 133. At the start of the shift on September 29, 2015, other employees had reported that the Florence yardmasters were not answering the radio in a timely manner. *Id.* at 133-34. Additionally, several other employees had previously reported to management that the Florence yardmasters were not qualified. *Id.* at 134. As to the e-mail that Complainant sent on September 30, 2015, which listed six issues, Complainant indicated that he had previously reported these issues to management. *Id.* at 135.

Complainant indicated that he believed that Trainmaster Sasser was involved with the suspension decision, explaining:

On the morning that I was removed from service, I questioned her I worked first shift that morning and there was another crew in there. I was with the local chairman, E.G. Roof and she was [with] the other two individuals. She said, “Does anybody got any safety concerns?” And I raised my hand and I said, “I

do.” She said, “What is that?” I said, “The radios went down again. What’s being done?” And she blew up in her usual hostile response, and then I was taken out of service that evening.

Id. at 138. Complainant described Trainmaster Sasser’s reaction as “[r]eal confrontational,” and stated that he “politely said to her, ‘There’s three other witnesses in this room. If we need to go call somebody, we’ll call them.’ She got up and stormed out.” *Id.* at 138-39. Complainant stated that he thought that Trainmaster Sasser “found the tapes,” explaining that “[he] was told by Trainmaster Betts.” *Id.* at 139-40. Complainant also explained that he believed that Trainmaster Sasser was involved in his suspension “because of the previous meeting with division manager, Logan, and the phone conversation with the other division manager, Koster, where I stated she [Trainmaster Sasser] wasn’t a manager and I think ... she was resentful of that.” *Id.* at 140-41.

Complainant testified that he was aware that two employees made complaints regarding his conduct to the company’s hotline. *Id.* at 142-44. Complainant explained that one employee reported “that a window was cracked.” *Id.* at 143. As to how the window was broken, Complainant stated:

It was explained to the trainmaster and to HR, I had a full cup of liquid something similar to this and rather than put the whole thing in the trashcan to leak, we regularly opened the crew room windows on a nice day and I chose to pour the liquid in the flower bed. And when I went to close the window, the whole plateglass window swung up and it cracked. Immediately called the trainmaster, put a piece of cardboard over it, told him I broke the window, and that was the end of it until I get a phone call from HR a month or two later asking me what happened.

Id. at 143. Additionally, Complainant stated: “I think I’ve been made aware that I said something to a person who threw some cigarette butts on the ground.” *Id.* at 144. Complainant explained that he had talked with Trainmaster Doughty, who “just asked me what was said and what went on.” *Id.* at 145. Complainant testified that there was an incident in which a conductor, Jay Wilson, “did not call the yardmaster and ask for a knuckle pin and ... he didn’t install the knuckle and he did not install or call for a knuckle pin.” *Id.* at 148. Complainant stated that he had an assertive conversation with this employee, explaining that “assertive” means “[i]t’s a straight conversation.” *Id.* at 151.

Complainant also described an incident where an employee alleged that “[he] was not given a ride in a timely manner down to the auto ramp.” *Id.* at 152. Complainant explained that the employee “took a train to the auto ramp and called for a ride to be picked up to be taken to the hotel. That particular morning we had four different trains everywhere, and he was the last person that was a priority that needed a ride.... I apologized that they were going to be late getting a ride and he still took it personal.” *Id.* Complainant stated that following this incident, he met with Eric Betts and the other employee. *Id.* at 152-53. When asked whether Mr. Betts warned Complainant that any further unprofessional behavior would result in discipline, Complainant responded: “No.”

Id. at 153. As to whether Mr. Betts gave Complainant any counseling regarding the situation, Complainant stated: “He just told us both to behave.” *Id.*

III. Claim-Related Documents

A. September 29, 2015 E-mail from Complainant to Eric Betts with Attached Unsafe Condition Report PI-82 (JX-6)

On September 29, 2015, at 9:16 p.m., Complainant sent an e-mail to Eric Betts with the subject “FW: Scan from MFD.” (JX-6.) There is no text in the body of Complainant’s e-mail, and an Unsafe Condition Report PI-82 was attached to this e-mail. The Report indicates that it was completed on September 29, 2015, and the location of the unsafe condition was the Cayce Yard. *Id.* As to the type of unsafe condition, Complaint reported the following: “Unqualified Florence YM’s. Florence Yardmasters not answering the radio in a timely manner.” *Id.*

B. Complainant’s September 30, 2015 E-mail Identifying Six Safety Issues (CX-4)

On September 30, 2015, Complainant sent an e-mail identifying six safety issues to Eric Betts, Melissa Sasser, Michael Sellers, Mark Lynn, Angie Averitte, Darren Ferrell, Bill Holland, and Andrew Doughty. (CX-4.) The e-mail stated:

There are some safety issues that need to be addressed.

1, Yardmasters are not answering the radio. Example 9/28/15 both y20228 and y20328 reported they could not reach [t]he yardmaster for at least 40 minutes. When they finally reached him he stated he just stepped out of the office. F78929 when trying to depart Cayce could not reach the Florence YM for a longer period of time.

2, Due to caller id the yardmasters WILL not answer the phone when called by Cayce crews.

3, There some Florence Yardmasters that are not qualified on how to run Cayce Yard.

4, Q21029 crew reported that a crew sat at Andres calling for a Florence Yardmaster for 2 hours in the early hours of 9/29/15.

5, The 2nd shift YM on 9/29/15 failed to have the track booked that came in on F78928 by Cayce Clerk. This led to y20129 not starting work till around 1800.

6, Radio and phone issues are still causing problems with communicating with Florence.

Id.

C. Complainant's Statement Regarding Events on September 29, 2015 (JX-5) / (RX-15 at CSX001387)

On October 3, 2015, Complainant authored a written statement describing the incident on September 29, 2015. (JX-5.) Complainant stated:

While working y20120 on the south end[,] the Florence Yardmaster asked if he could have the signal on the south end for the y202. "I stated no I needed 1 more." A few minutes later, he called again for the signal and I told him "no it was 20 minutes to 8 not 20 minutes to 12." He the "YM" stated don't give me an attitude. The Q2129 was not on duty till 2230 and all the train did was sit. There was nothing behind the y202 and we were late getting started due to the YM failing to have a track booked. When we took lunch I spoke to the YM on the phone after my foreman pickled and we had an assertive conversation on how Cayce yard works. I was a yardmaster at Cayce Yard for over 5 years and still hold YM seniority and I am qualified to give feedback good or bad to the YM.

Id.

D. Jason Murray's Statement Regarding Events on September 29, 2015 (RX-15)

On September 29, 2015, at 22:00, Jason Murray authored the following statement:

Between the hours of 1930 & 2000 on 9-29-15 while working as yardmaster for Florence SC and Cayce SC, the FD dispatcher contacted me and requested that Y20109 give up the signal on the southend of Cayce Yard. I relayed this request to the engineer on Y20129. He stated that he needed the signal one more time. Some time later the Y202 ramp job called and said they were at the south end of Cayce with Q21029, ready to come by on the mainline when they could get the signal. I checked the camera at the south end of Cayce and saw that Y201 was around 20 cars north of the signal. I was unsure if they had taken the signal "one more time" or not, so I called Y201 on the radio to ask if I could take the signal for the Y202 to pass on the main. Y201 Engineer Carter took an extremely nasty and confrontational tone. He said I could not take the signal, it is 10 minutes to 8 not 10 mins to midnight. I asked that he drop the nasty attitude & just let me know when I could have the signal. He replied that he would lose attitude when I got qualified on my job. In the interest of professionalism I ended our conversation. I called Trainmaster Betts at this point & he instructed me to write a statement.

(RX-15 at CSX001385.) Jason Murray authored a second statement at 22:30 on September 29, 2015, which stated:

About 20 minutes later, Mr. Carter began calling from the computer room in Cayce. I believed his motive for calling was to continue his rant, so I did not

answer. Y201 conductor called from the crew room phone and I spoke with him about completing switchlists. My conversation with the conductor was on the speaker phone in Cayce. When he and I were finished, we attempted to end the conversation. Mr. Carter yelled that “we aren’t done!” I said I was done, and he began immediately calling me back. I answered and listened to him berate me and my performance for about 5 minutes. It was clear that his intent was to anger me to the point that I would lose my temper. I reminded him that his conversation was being recorded. He confirmed this knowledge and continued. I asked him if he was finished a couple of times and finally hung up.

Mr. Carter seizes every opportunity to be argumentative and confrontational. He is unprofessional and deserves the same amount of patience from CSX that he extends to the people who sit in this office.

Id. at CSX001386.

E. E-mails Regarding the September 29, 2015 Incident (RX-15)

On October 1, 2015, Andrew Doughty sent the following e-mail to Angie Averitte: “Based on the statements. These are the recordings Jason [r]efers to.” (RX-15 at CSX001384.) Ms. Averitte forward this e-mail to Larry Koster on October 1, 2015. On October 4, 2015, Ms. Averitte sent the following e-mail to Mr. Koster: “Are you still up for running this up the flagpole tomorrow?” *Id.* The submitted chain of e-mails does not contain any written responses from Mr. Koster.

On October 6, 2015, Angie Averitte sent the following e-mail to Michael Wanner and Glenn Shelton:

Since your group offered to help during the storm... take a look at this and let me know your thoughts about engineer Mr. Carter. Besides being a wisenheimer on the radio, he follows up with a phone conversation berating the Florence YM. This incident was reported to us by Jason Murray, Florence YM on date of incident October 3rd. The Cayce engineer, and former Cayce YM, Chuckie Carter, is the person that becomes quarrelsome on the phone with the YM. (Due to weather, we just got that recording today)

You know this history with this former YM and apparently sitting down with Mr. Carter has not worked in the past.

Do you feel we have an employee behavior charge that we could make stick?

(RX-15 at CSX001384.)

F. October 8, 2015 E-mail with Assessment Form Results from Field Administration (JX-7)

The parties submitted an e-mail dated October 8, 2015 from Field Administration with the subject “Assessment Form Results (Transportation – Florence).” (JX-7.) The Assessment indicates that employee “C. D. Carter” violated rules 104.2 and 104.3 on September 29, 2015, at 19:45. The incident is described as follows: “Employee failed to act in a respectful and courteous manner when dealing with a fellow employee and all circumstances relating thereto.” The Assessment indicates that the incident occurred in the Cayce Yard and that the employee is withheld from service as of October 7, 2015.

G. October 8, 2015 Charge Letter (JX-8)

The parties submitted a letter dated October 8, 2015, which notified Mr. Carter that a formal investigation would be held on October 14, 2015, and that he would be held out of service pending the investigation. (JX-8.) The letter stated:

The purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with information received that on September 29, 2015, at approximately 1945 hours, while working Y20129, at or near Cayce Yard, you failed to act in a respectful and courteous manner when dealing with a fellow employee and all circumstances relating thereto.

Id.

H. OSHA Complaint (JX-11)

On October 8, 2015, Complainant filed a complaint with OSHA. (JX-11.) As to why Complainant was discriminated against, the complaint states: “For filing safety complaint of radio’s always being down and cannot communicate with crews. Consolidated Yard Master from Cayce, SC to Florence, SC.” *Id.* The complaint states that the adverse action was as follows: “Retaliation, Taken out of service, Making decisions and a formal infol [sic].” *Id.* The complaint indicates that the adverse employment action occurred on October 8, 2015. *Id.* The complaint indicates that the reason given for the adverse action was “Manpower and Money.” *Id.*

I. November 16, 2015 Suspension Letter (JX-10)

By letter dated November 16, 2015, CSX notified Mr. Carter that “[a]s a result of the testimony and other evidence presented in this investigation, it has been determined that you violated CSX Transportation Operating Rules 104.2 and 104.3.” (JX-10.) The letter stated that, as to any disciplinary action for this violation, Complainant was “assessed time-served, ending at 2359 hours on November 19, 2015.” *Id.*

III. Other Evidence

A. CSX's Rules and Policies

CSX has extensive sets of rules that employees must follow. Complainant was charged with violating Rules 104.2 and 104.3. Rule 104.2 provides:

Employee behavior must be respectful and courteous. Employees must not be any of the following:

- a. Dishonest, or
- b. Insubordinate, or
- c. Disloyal, or
- d. Quarrelsome.

(JX-9 at CSX000669.) Rule 104.3 provides:

The following behaviors are prohibited while on duty, on CSX property, or when occupying facilities provided by CSX:

- a. Boisterous, profane, or vulgar language; or
- b. Altercations; or
- c. Practical jokes or horseplay; or
- d. Carelessness, incompetence, or willful neglect of duties; or
- e. Behavior that endangers life or property.

Id. at CSX000670.

B. Letter Dated July 6, 2015 Regarding Abolishment of Yardmaster Job (CX-32)

By letter dated July 6, 2015, CSX notified Mr. Carter as follows: "This letter serves as written confirmation that CSXT is abolishing the yardmaster position you currently hold, 4F960006, at Cayce, SC effective at the close of business or at the end of your shift on July 12, 2015." (CX-32.)

C. E-mails Regarding Communication Issues Dated July 16, 2015 (CX-11A-B); (CX-12); (CX-13); (RX-11)

On July 16, 2015, at 6:29 a.m., Larry Koster sent the following e-mail to Rae Brown, Carl Walker, and Angie Averitte. (CX-13.) Mr. Koster stated:

We have consolidated the[] yardmaster positions at Cayce SC into our Florence SC operations. We have yet to go more than a few hours without some type of communication issues. Cameras, phones and now the ... AVTEC system isn't functioning. We cannot continue to properly serve our customers with these types of failures. I am missing originations and causing train delays to the network.

Id.

On July 16, 2015, at 10:25 a.m., Henry Shear sent an e-mail to Randy Medlin and Greg Wagner regarding the Avtec communication system. (CX-11A–B); (CX-12.) Mr. Shear stated: “I have lost all control of all three workstation[s] at Cayce Yard and I can no longer provide maintenance or troubleshoot the scout at Cayce Yard.” The e-mail was forwarded to Melissa Sasser and Angie Averitte. On July 16, 2015, at 11:59 a.m., Ms. Averitte sent an e-mail in response to Randy Medlin, Todd Voiro, and Larry Koster. Ms. Averitte stated that “for the third time today we have lost the ability to communicate with Cayce via Avtec. The Trainmaster is trying to run the yard with a hand held portable. The third trouble ticket for the day has been created.” (CX-11A–B); (CX-12.) At 12:38 p.m., Todd Voiro replied to Sean Daly, Angie Averitte, Randy Medlin, and Larry Koster, stating “Sean just called and the Avtec is working now. They confirmed with the yardmaster. They feel we should have no further issues.” (RX-11.)

D. E-mails Regarding Communication Issues Dated August 20, 2015 and August 30, 2015 (CX-5)

Complainant submitted several e-mails that discuss communication issues. (CX-5.) The first e-mail in the chain of e-mails was sent by Brooks Sinquefield to Complainant at 4:50 a.m. on August 20, 2015. Mr. Sinquefield stated: “We have lost all ready communications here at central command at approx. 0400 on 8/20/15.” *Id.* Complainant forwarded this e-mail to Darren Ferrell and Melissa Sasser at 8:01 a.m. on August 20, 2015. On August 30, 2015, Darren Ferrell forwarded the e-mail to Larry Koster, Angie Averitte, and Robert Edwards, stating “Here is one of the emails that Mr. Carter was referring to in the meeting.” *Id.*

E. Cayce Safety Overlap Meeting Minutes (CX-17A–B)

Meeting minutes from the Cayce Safety Overlap Meeting on September 23, 2015, show safety issues discussed at the meeting. Relevant here, the meeting minutes identify one safety issue as follows: “Yardmaster Radio in Florence going down and no way of knowing.” (CX-17A–B.) The meeting minutes indicate that date of the safety issue was July 8, 2015, and that the issue was reported by Chuck Carter by “Email and safety meeting.”

F. Unsafe Condition Reports Submitted by Complainant Prior to September 29, 2015

1. Unsafe Condition Report PI-82 Dated May 5, 2015 (CX-6)

On May 5, 2015, Complainant submitted an Unsafe Condition Report to Trainmaster Doughty. (CX-6.) The report stated:

When the yardmasters are consolidated to Florence there needs to be a detailed safety action plan displayed [in place] as to how a[n] emergency situation is going to be handled. Cayce Yard is not like Sumter and Andrews ... there needs to be a

Trainmaster here 24/7 or a[s] long as there is a yard job working. In the event of an emergency CSX should have someone in place to open the N. 015 end gates, and not rely on emergency personnel to “cut the locks.”

Id.

2. *Unsafe Condition Report Dated April 29, 2015 (CX-7A); (CX-7B)*

On April 29, 2015, Complainant submitted an Unsafe Condition Report. (CX-7A.) Complainant reported: “Smoking in front and of and beside [sic] YM office.” *Id.* By e-mail dated April 30, 2015, Andrew Doughty replied to Complainant and included Melissa Sasser and Eric Betts on the e-mail. (CX-7B.) The e-mail stated:

We will continue to brief employees to utilize the designated smoking area as well as letting Pti know not to smoke in the front of the building. I would ask that instead of submitting a PI-82 for this issue, you let a manager know who is not utilizing the designated smoking area so we can address this issue with the individual employees who need to be reminded where to smoke. Thank you for bringing this issue to our attention.

Id.

3. *Unsafe Condition Report Dated April 27, 2015 (CX-8)*

On April 27, 2015, Complainant submitted an Unsafe Condition Report. (CX-8.) Complainant reported: “(1) Big pot holes alongside side of building. (2) Driveway entrance near the old N. end crossing.” *Id.*

G. *E-mail Dated April 24, 2015 from Complainant Regarding Trainmaster Sasser (CX-33)*

On April 21, 2015, Complainant sent an e-mail to Larry Koster, Melissa Sasser, Bill Holland, Bernard Gilliam, and Jimmy Hedrick. (CX-33.) As part of this e-mail, Complainant forwarded an e-mail dated April 20, 2015 from Bill Holland regarding “days requested in psa.” *Id.* Complainant stated:

I am forwarding you an e-mail from Cayce Local Chairman Bill Holland to Trainmaster Sasser concerning her deliberate refusal to timely approve yardmaster time off requests. Trainmaster Sasser has deliberately denied time off requests without just cause.

Another issue is payroll verification. Trainmaster Sasser has stated “I like to wait until the very last minute to make Chucky squirm” demonstrates a serious lack of professionalism on her part. Regardless of the consolidation that is about to take place in the near future I would like to respectfully request to meet with the Cayce

Yardmasters because we are and have been working in a hostile work environment due to her lack of leadership as a manager.

Id.

H. Ethics Complaint #6410 (RX-25) & E-mail Regarding Formal Counseling with Complainant (RX-23)

On January 23, 2015, Brian Ware contacted CSX's ethics hotline regarding an incident with Complainant on January 17, 2015. *See* (RX-25.) Mr. Ware reported that Mr. Carter was disrespectful during a meeting with Mr. Betts, Kenny Harbin, conductor, Mr. Carter, and Mr. Ware. (RX-25 at CSX002678.)

On January 30, 2015, Eric Betts sent an e-mail to Ronald Stevens regarding ethics complaint #6410. (RX-23.) Mr. Betts stated:

I have had formal counseling with Mr. Carter. He has been briefed on the expectations myself and all Cayce managers want from our yardmasters. I have included Trainmaster Melissa Sasser with the details of this complaint and we had an additional discussion with Mr. Carter. Any more verbal discussion with crews that are not professional will result in discipline being assessed. If you have any questions please contact any Cayce manager or the undersigned.

Id.; *see also* (RX-25 at CSX002680.)

I. Charge Letters Issued to Comparators (RX-16); Disciplinary Letters Issued to Comparators (RX-17); Disciplinary Records for Comparators (RX-19)

CSX submitted six charge letters issued to employees for charges that it asserts are similar to Complainant's charge. *See* (RX-16.) CSX also submitted seven disciplinary letters that it asserts were issued to employees who are comparators for the purposes of this case. *See* (RX-17.) CSX submitted disciplinary records from employees that it alleges are comparators. (RX-19.)

CREDIBILITY DETERMINATIONS

The factfinder is entitled to determine the credibility of witnesses, to weigh evidence, and to draw her own inferences from evidence, and the factfinder is not bound to accept the theories or opinions of any particular witness. *See, e.g., Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968). In weighing testimony, an administrative law judge may consider the relationship of the witnesses to the parties, the interests of the witnesses, and the witnesses' demeanor while testifying. An administrative law judge may also consider the extent to which the testimony is supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112 (ARB Jan. 31, 2006). Additionally, the Administrative Review Board (the "ARB") has held that an administrative law judge may "delineate the specific credibility determinations for each witness"; although such delineation is not required. *See, e.g.,*

Malmanger v. Air Evac EMS, Inc., ARB No. 08-071 (ARB July 2, 2009) (noting that the Administrative Review Board prefers such delineation, but does not require it). At the formal hearing, I was able to observe the witnesses during their testimony, and my findings set forth in this Decision and Order are based on my review and consideration of the entire record in this case, including my findings as to the demeanor of the witnesses and the rationality or internal consistency of the witnesses' testimony in relation to the evidence as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FRSA Legal Framework

Under the FRSA “[a] railroad carrier engaged in interstate or foreign commerce ... 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 any protected activity. 49 U.S.C. § 20109. The protected activities are set forth in the statute, and relevant here, protected activity includes “reporting, in good faith, a hazardous safety or security condition.” *Id.* § 20109(b)(1). Actions brought under the 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”). *Id.* § 20109(d)(2)(A)(i).

To establish a prima facie case, the complainant must demonstrate by a preponderance of the evidence that “(i) he engaged in a protected activity; (ii) [the employer] knew or suspected, actively or constructively, that he engaged in the protected activity; (iii) he suffered an adverse action; and (iv) the circumstances raise an inference that the protected activity was a contributing factor in the adverse action.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1982.104(e)(2)); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). “Preponderance of the evidence is ‘[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.’” *Brune v. Horizon Air Indus.*, ARB No. 04-037, at PDF *13 (ARB Jan. 31, 2006) (quoting *Black’s Law Dictionary* at 1209 (7th ed. 1999)).

“Once the plaintiff makes a showing that the protected activity was a ‘contributing factor’ to the adverse employment action, the burden shifts to the employer to demonstrate ‘by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.’” *Araujo*, 708 F.3d at 157 (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)). Clear and convincing evidence is “the intermediate burden of proof, in between ‘a preponderance of the evidence’ and ‘proof beyond a reasonable doubt,’” and to meet this burden, “the employer must show that ‘the truth of its factual contentions are highly probable.’” *Id.* (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 425 (1979)). If the employer meets this burden, it avoids liability under the FRSA. See *Kuduk*, 768 F.3d at 789 (citing 49 U.S.C. § 42121(b)(2)(B)(ii)); *Araujo*, 708 F.3d at 157 (citing 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.104(e)(3)-(4)).

II. Complainant's Prima Facie Case

As set forth above, to establish a case for retaliation, Complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) Respondent knew about the protected activity, (3) he suffered an unfavorable personnel action (adverse action), and (4) his protected activity was a contributing factor in the adverse action. *Kuduk*, 768 F.3d at 789; *Araujo*, 708 F.3d at 157.

A. Whether Complainant Engaged in Protected Activity

Complainant must first establish that he engaged in protected activity. *Kuduk*, 768 F.3d at 789; *Araujo*, 708 F.3d at 157. Under the FRSA, protected activity encompasses three categories of employee action. First, protected activity includes “the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done”: (i) to provide information to assist the investigation of potential “violation[s] of any Federal law, rule, or regulation relating to railroad safety or security,” (ii) “to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security,” (iii) “to file a complaint ... related to the enforcement of this part,” (iv) “to notify, or attempt to notify, the railroad carrier ... of a work-related personal injury or work-related illness of an employee,” (v) “to cooperate with a safety or security investigation,” (vi) “to furnish information ... as to facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation,” or (vii) “to accurately report hours on duty.” 49 U.S.C. § 20109(a)(1)-(7). Second, protected activity includes “*reporting, in good faith, a hazardous safety or security condition,*” “refusing to work when confronted by a hazardous safety or security condition,” or “refusing to authorize the use of any safety-related equipment, track, or structures ...” *Id.* § 20109(b)(1)-(3) (emphasis added). Third, protected activity includes seeking medical treatment or following treatment instructions for a work-related injury. *Id.* § 20109(c)(1)-(2).

In this case, Complainant must show by a preponderance of the evidence that he engaged in protected activity. Relevant here, Complainant submitted an Unsafe Condition Report on September 29, 2015, reporting that the Florence yardmasters were unqualified and that the Florence yardmasters were not answering the radio in a timely manner. (JX-6.) Complainant also submitted a list of six issues, which he identified as safety issues, on September 30, 2015. (CX-4.) At the formal hearing, there was some testimony as to whether the radio communication problems and the yardmasters’ qualifications were safety issues. However, in Respondent’s brief, it does not argue that Complainant did not engage in protected activity when he submitted an Unsafe Condition Report on September 29, 2015, and when he submitted the list of six safety issues on September 30, 2015. *See generally* (Resp’t’s Br.) Under the FRSA, “reporting, in good faith, a hazardous safety or security condition” constitutes protected activity. 49 U.S.C. § 20109(b)(1)-(3). In the present case, the evidence shows that Complainant reported a hazardous safety condition, and there is no evidence to suggest that Complainant did not submit the report in good faith. Based on my review of the evidence in this case, I therefore find that Complainant has established that he engaged in protected activity as set forth in the FRSA. Thus, Complainant is able to establish the first element of his prima facie case.

B. Whether CSX Transportation Knew About Complainant's Protected Activity

Complainant also must establish by a preponderance of the evidence that Respondent knew about his protected activity. When determining whether an employer had knowledge of the employee's protected activity, the relevant inquiry is whether the "respondent knew or suspected that the employee engaged in the protected activity" or whether the respondent "perceived the employee to have engaged or to be about to engage in protected activity." 29 C.F.R. § 1982.104(e)(2)(ii). As to which of an employer's employees must be shown to have had knowledge of the complainant's protected activity, the complainant must show that the decision-makers who subjected him to the alleged adverse action were aware of his protected activity. *See, e.g., Conrad v. CSX Transp., Inc.*, 824 F.3d 103, (4th Cir. 2016); *Rudolph v. Nat. R.R. Passenger Corp. (AMTRAK)*, ARB No. 11-037, 2013 DOL Ad. Rev. Bd. LEXIS 25, at *38 (ARB Mar. 29, 2013). In *Rudolph v. National Railroad Passenger Corp.*, the ARB held that "demonstrating that an employer, as an entity, was aware of the protected activity is insufficient." *Rudolph*, ARB No. 11-037, 2013 DOL Ad. Rev. Bd. LEXIS at *31. The ARB explained that the complainant must "demonstrate[e] that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity." *Id.* at *40 (internal quotation marks omitted).

In this case, Complainant sent his Unsafe Condition Report to Road Trainmaster Eric Betts in an e-mail dated September 29, 2015. (JX-6.) On September 30, 2015, Complainant sent an e-mail listing six safety issues. (CX-4.) Complainant sent his September 30, 2015 e-mail to Road Trainmaster Eric Betts, Trainmaster Melissa Sasser, Michael Sellers, Mark Lynn, Assistant Division Manager Angie Averitte, UTU Division Safety Chairman Darren Ferrell, local union chairman Bill Holland, and Trainmaster Andrew Doughty. *Id.* As to whether any of these employees were the decision-makers in this case, Assistant Division Manager Angie Averitte and Road Trainmaster Eric Betts testified as to their involvement in charging Complainant with a rules violation and the disciplinary action taken for this violation.

Ms. Averitte testified that after receiving information regarding Complainant's behavior on September 29, 2015, she notified her supervisor, Mr. Koster, and reached out to CSX's labor relations department. (TR at 214.) Ms. Averitte also testified that after consulting with labor relations, "Mr. Betts input an assessment to generate a charge letter." *Id.* at 216. As to the classification of the charge, Ms. Averitte stated that she was not involved in the classification determination, which is made by field administration in Jacksonville, Florida, and the division manager. *Id.* at 218. Ms. Averitte also stated that she was not involved in determining whether to impose discipline after the company's investigation hearing. *Id.* at 221. Road Trainmaster Eric Betts testified that after reviewing the audio recordings and statements from Mr. Carter and Mr. Murray and consulting with Ms. Averitte, he entered an assessment against Mr. Cater. *Id.* at 284. Mr. Betts explained that an assessment is when a rules violation is entered against an employee. *Id.* at 285. With regard to classifying the severity of Complainant's rules violation, Mr. Betts stated that he was not involved in the classification determination. *Id.* Mr. Betts also stated that he was not involved in assessing any discipline against Complainant following CSX's investigation hearing. *Id.*

As stated above, Ms. Averitte testified that she notified her supervisor, Division Manager Lawrence Koster, about the September 29, 2015 incident between Mr. Murray and Mr. Carter. *Id.* at 214. Mr. Koster testified that he “issued the discipline,” *id.* at 318, and he stated that the safety issues that Mr. Carter had raised did not play a role in his decision to impose discipline in this case. *Id.* at 323. Based on the testimony of Ms. Averitte, Mr. Betts, and Mr. Koster, I find that these employees were decision-makers in this case, and all three employees had knowledge of Complainant’s protected activity. Specifically, all three employees testified that they knew about Complainant’s reports of safety concerns related to the radio communication with the Florence yardmasters and Complainant’s general concern about the qualification of the Florence yardmasters. Additionally, e-mails submitted in this case show that Complainant sent his September 29, 2015 Unsafe Condition Report to Ms. Averitte and Mr. Betts. I note that Respondent does not present any argument to refute the evidence showing that the relevant decision-makers had knowledge of Complainant’s protected activity. Upon review of the hearing testimony and other evidence admitted in this case, I find that the evidence shows that Respondent had knowledge of Complainant’s protected activity. Therefore, Complainant is able to establish the second element of his prima facie case.

C. Whether Complainant Suffered an Adverse Action

Under the FRSA, a railroad employer “may not discharge, *suspend*, reprimand, or in any other way discriminate against an employee” due to the employee’s engagement in protected activity. 49 U.S.C. § 20109 (emphasis added). In the present case, the parties stipulated that Mr. Carter’s suspension constitutes an adverse action within the meaning of the FRSA. (Joint Stipulations.) The plain language of the FRSA indicates that an employer may not suspend an employee because he engaged in protected activity. *See* 49 U.S.C. § 20109. Here, Respondent suspended Complainant as a result of the rules violation it alleges occurred on September 29, 2015. (JX-10.) Based on the plain language of the FRSA, I find that Complainant’s suspension constitutes an adverse action under the FRSA. I therefore find that Complainant has established the third element of his prima facie case.

D. Whether Complainant’s Protected Activity Was a Contributing Factor in the Adverse Action

The final element in a complainant’s prima facie case for retaliation under the FRSA is contribution. To establish this final element, Complainant must show by a preponderance of the evidence “that [his] protected activity was a contributing factor in the unfavorable personnel action.” *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-0636 (ARB Sept. 30, 2016), *reissued* Jan. 4, 2017 (en banc). “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.” *Id.* at PDF *53 (emphasis in original) (citation omitted) (internal quotation marks omitted). The ARB held that this is a “low ... standard ... for the employee to meet,” explaining that “[a]ny factor really means *any* factor. It need not be significant, motivating, substantial or predominant.” *Id.* (internal quotation marks omitted). That is, “[t]he protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” *Id.* (alteration in original). “Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected

activity.” *Id.* A complainant may establish contribution through direct evidence or circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052 (ARB Sept. 30, 2011). Circumstantial evidence may include the following: “indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its action, ... 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 ... engages in protected activity.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at PDF *7 (Feb. 29, 2012).

In the present case, Complainant argues that the temporal proximity between when he reported the unsafe conditions and when Respondent initiated its investigation, as well as the e-mails authored by Complainant’s supervisors before Respondent’s formal investigation, show that Complainant’s protected activity was a contributing factor in his suspension. (Complainant’s Br. at 3-5.) Specifically, Complainant asserts that “[o]n September 29, 2015, Mr. Carter made a good faith hazardous safety report of radio communication issues and unqualified yardmasters to: 1) his pseudo-supervisor, Yardmaster Murray; and 2) TM Betts.” (Complainant’s Br. at 3.) Complainant asserts that following his “complaints concerning radio communication issues and unqualified yardmasters, Mr. Carter was immediately removed from service in direct violation of the controlling labor agreement, resulting in a substantial loss of income and adverse action on his personnel file.” *Id.* Respondent argues that Complainant presents no direct evidence of retaliation because Complainant does not present any evidence that “conclusively links the protected activity and the adverse action.” (Resp’t’s Br. at 17.) Respondent asserts that Complainant must instead prove his case through circumstantial evidence, and that in this case, Complainant is unable to meet its burden using circumstantial evidence. *Id.* Specifically, Respondent asserts that any temporal proximity between the protected activity and adverse action is not sufficient to meet Complainant’s burden, that Respondent’s basis for suspending Complainant was not pretextual, and that Complainant is not able to show any antagonism or hostility towards his protected activity. *Id.* at 17-22. This Decision and Order will address the parties’ arguments in turn.

1. Temporal Proximity

With regard to Complainant’s first argument as to the temporal proximity between his protected activity and Respondent’s adverse action against him, the ARB has held that “[w]hile not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation.” *Smith v. Duke Energy Carolinas LLC*, ARB No. 11-003, at PDF *7 (ARB June 20, 2012). Some courts have held that “causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.” *Van Asdale v. Int’l Game Tech.*, 577 F. 3d 989, 1003 (9th Cir. 2009) (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002)). However, other courts have held that without additional evidence, temporal proximity on its own does not establish that the protected activity was a contributing factor in the adverse employment action. *See, e.g., Kuduk*, 768 F.3d at 792. I note that the holdings of these courts are not binding as to this matter. Relevant here, when determining whether a complainant’s protected activity was a contributing factor in the employer’s adverse action, the ARB has held that an administrative law judge must consider the evidence as a whole. *See Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, at PDF *16-

17 (ARB Aug. 29, 2014). “[T]here are *no* limitations on the types of evidence an ALJ may consider when determining whether a complainant has demonstrated that protected activity was a contributing factor in the adverse action (other than limitations found in the rules of evidence).” *Palmer*, ARB No. 16-0636, at PDF *14-15, 51-52 (emphasis in original).

In some circumstances, “a ‘chain of events’ may substantiate a finding of contributory factor.” *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, at PDF *6-7 (ARB May 31, 2013). That is, in some cases, the complainant need only show that his protected activity triggered a sequence of events that resulted in the adverse personnel action. *See, e.g., Hutton*, ARB No. 11-091, at PDF *7 & n.17; *DeFrancesco*, ARB No. 10-114, at PDF *7. *But see Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016); *cert. denied*, 137 S. Ct. 1449 (2017) (holding that a complainant must show proximate causation to create legal liability).

In the present case, several relevant events occurred on September 29-30, 2015. At approximately 7:36 p.m. on September 29, 2015, Mr. Carter and Mr. Murray communicated over the radio with each other. (Joint Stipulations); (JX-2.) Several minutes later, at 7:47 p.m., Mr. Carter and Mr. Murray again communicated over the radio. (Joint Stipulations); (JX-3.) Approximately an hour later, Mr. Murray and Mr. Carter communicated on the telephone. (Joint Stipulations); (JX-4.) At 10:00 p.m. on September 29, 2015, Mr. Murray authored a statement describing his interactions with Mr. Carter on September 29, 2015. (RX-15 at CSX001385.) In his statement, Mr. Murray reported that while discussing signals with Mr. Carter on the radio, “Engineer Carter took an extremely nasty and confrontational tone.” *Id.* Mr. Murray authored a second statement at 10:30 p.m., and in this statement he described the conversation he had with Mr. Carter on the telephone as follows: “I answered and listened to him [Mr. Carter] berate me It was clear that his intent was to anger me to the point that I would lose my temper.” (RX-15 at CSX001386.) The rule violations that Respondent argues are the basis of the discipline assessed against Complainant occurred during these communications between Complainant and Mr. Murray on September 29.

Meanwhile, Complainant testified that at some point prior to his communications with Mr. Murray on September 29, 2015, other employees had complained that “Mr. Murray wasn’t answering the radios.” (TR at 94-96.) At 9:16 p.m. Mr. Carter sent an e-mail to Mr. Betts with an attached Unsafe Condition Report, stating that the unsafe conditions were as follows: “Unqualified Florence YM’s. Florence Yardmasters not answering the radio in a timely manner.” (JX-6.) The next day, September 30, 2015, Complainant sent an e-mail to several CSX supervisory employees reporting six safety issues. (CX-4.) Thus, the protected activity that Complainant argues is the basis of the discipline assessed against him occurred on September 29-30, 2015.

On October 8, 2015, a charge letter was issued by Respondent, and this letter notified Complainant that a formal investigation would be held on October 14, 2015, and that Complainant would be held out of service pending the investigation. (JX-8.) Following the formal investigation hearing on October 21, 2015, Complainant was notified by letter dated November 16, 2015, that as a result of the investigation, Respondent determined that he had violated CSX Operating Rules 104.2 and 104.3, and that he was assessed time-served ending on November 19, 2015. (JX-10.)

When evaluating the temporal proximity of a complainant's protected activity and the adverse employment action taken against the complainant, an administrative law judge must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *See, e.g., Kuduk*, 768 F.3d at 792. If there is countervailing evidence, a finding of no contribution may be sustained despite temporal proximity. *See Folger v. SimplexGrinnell, LLC*, ARB No. 15-021 (ARB Feb. 18, 2016). In this case, although the issuance of the charge letter was temporally close to the dates of Complainant's protected activity, other actions on September 29, 2015 – specifically, Complainant's discussions with Mr. Murray, which Respondent cited as the basis of the rules violation – occurred almost immediately before Complainant submitted the Unsafe Condition Report, followed the next day by the emailed list of safety concerns.

As the circumstances here show that both the asserted rules violations and the protected activity occurred close in time to each other and in similar proximity to the issuance of the charge letter, I find that the temporal proximity between Complainant's protected activity and Respondent's adverse employment action is not sufficient on its own to show contribution. That is, causation cannot be inferred from the timing alone in this case, given that more than one event occurred in the relevant timeframe of September 29-30, 2015. I find that the timing of events does not, on its own, suggest that Respondent was motivated by Complainant's protected activity.

Complainant asserts that because the events of September 29 and 30, 2015 are interconnected, this connection gives rise to an inference that Complainant's protected activity was a contributing factor in Respondent's adverse employment action against him. Upon review of the evidence in this case, I find that the evidence does not support this assertion. Relevant here, Complainant engaged in protected activity on September 29, 2015 when he emailed his Unsafe Condition Report to Mr. Betts. Mr. Betts testified that he did not review this email and the attached Unsafe Condition Report until the following day. (TR at 286-87.) Meanwhile, on September 29, 2015, Mr. Murray called Mr. Betts at home on his cell phone to discuss the communications between Complainant and Mr. Murray that evening (TR at 271), and Mr. Murray authored statements at 10:00 p.m. and 10:30 p.m. that evening regarding Complainant's conduct during their conversations. (Joint Stipulations); (JX-2); (JX-3); (JX-4); (JX-6); (RX-15.) Mr. Murray's report of Complainant's conduct triggered Mr. Betts' investigation, and Mr. Betts did not review Complainant's Unsafe Condition Report until the next day, "during [his] investigation" of the conduct allegation. (TR at 271-74, 286-87.) Mr. Murray's complaints about Complainant's conduct in their communications are sufficiently distinct from Complainant's safety reports, and do not give rise to an inference that the protected activity necessarily was a contributing factor in the adverse employment action.

In sum, although Complainant's protected activity occurred in close temporal proximity to the adverse employment action, there is also circumstantial evidence to suggest that Complainant's protected activity played no role in the adverse action. Thus, neither the temporal proximity of the protected activity to the adverse employment action, nor its proximity to the asserted rules violations (the "interconnectedness" argued by Complainant), establishes *on its own* that the protected activity contributed to the discipline. Therefore, timing alone does not

show contribution, and I assess the other circumstantial evidence admitted in this case to determine whether the evidence as a whole supports a finding of contribution.

2. *Whether the Adverse Action and the Protected Activity are Inextricably Intertwined*

I note that this is not a case in which the content of Complainant's protected activity provides the sole rationale for the adverse employment action. Although Complainant's protected activity and the conduct that Respondent asserts gave rise to the adverse action occurred in close proximity, this is not a case in which the protected activity and the adverse action are inextricably intertwined. *See, e.g., Palmer*, ARB No. 16-0636, at PDF *58-59; *Hutton*, ARB No. 11-091, at PDF *6-7. "[A]n adverse action [is] ... 'inextricably intertwined,' with protected activity [when] ... it is not possible, even based on the employer's theory of the facts, to explain the basis for the adverse action without reference to the protected activity." For example, a complainant's protected activity and the adverse employment action would be inextricably intertwined if:

for example, [the complainant's] injury report on June 18th had led [the employer] to investigate a potential rule violation and then to fire him because of *that* rule violation, then the protected activity (the reporting of the injury) would be "inextricably intertwined" with the adverse action (termination because of the rule violation that resulted in the very injury reported).

Palmer, ARB No. 16-0636, at PDF *58. In this case, Respondent alleges that separate and apart from Complainant's protected activity on September 29, 2015 and September 30, 2015, Complainant's actions violated CSX's Operating Rules. Respondent alleges that Complainant's suspension from service was the result of his conduct on September 29, 2015, and was not the result of his protected activity. That is, in contrast to the scenario in *Palmer*, Respondent is able to posit a theory in which Complainant's protected activity played no role in the adverse employment action. Therefore, the protected activity and the adverse action are not inextricably intertwined in this case.

3. *Whether the Stated Reasons for the Adverse Action are Pretextual*

As stated above, an administrative law judge must consider the evidence as a whole when determining whether a complainant's protected activity was a contributing factor in the employer's adverse action. *See Bobreski*, ARB No. 13-001, at PDF *16-17; *see also Palmer*, ARB No. 16-0636, at PDF *14-15, 51-52. As discussed above, Respondent has proffered a nonretaliatory reason for its adverse employment action: that Complainant's conduct during the communications with Mr. Murray violated its operating rules. Because Respondent has posited a theory in which Complainant's protected activity played no role in the adverse action, I will next discuss whether the evidence shows that Respondent's proffered rationale was pretextual.

When an employer has proffered nonretaliatory reasons for taking the adverse action, "the employee *need not disprove the employer's stated reasons or show that those reasons were pretext*"; however, "[s]howing that an employer's reasons are pretext can ... be enough for the

employee to show protected activity was a ‘contributing factor’ in the adverse personnel action.” *Palmer*, ARB No. 16-0636, at PDF *52-53. That is, “the factfinder’s belief that an employer’s claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason.” *Id.* at PDF *53. In this case, Complainant argues that Respondent’s proffered rationale for the adverse employment action was pretextual. Complainant specifically refers to an e-mail authored by Angie Averitte on October 6, 2015. (Complainant’s Br. at 5.) In this e-mail, which Ms. Averitte sent to Michael Wanner and Glenn Shelton, Ms. Averitte stated:

Since your group offered to help during the storm... take a look at this and let me know your thoughts about engineer Mr. Carter. Besides being a wisenheimer on the radio, he follows up with a phone conversation berating the Florence YM. This incident was reported to us by Jason Murray, Florence YM on date of incident October 3rd. The Cayce engineer, and former Cayce YM, Chuckie Carter, is the person that becomes quarrelsome on the phone with the YM. (Due to weather, we just got that recording today).

You know this history with this former YM and apparently sitting down with Mr. Carter has not worked in the past.

Do you feel we have an employee behavior charge that we could make stick?

(RX-15 at CSX001384.) At the formal hearing, Ms. Averitte testified that by sending this e-mail she sought to “fact-check her own opinion,” and that after sending this e-mail she spoke with labor relations, and “Mr. Betts input an assessment to generate a charge letter.” (TR at 215-16.) Complainant argues that Ms. Averitte’s October 6, 2015 e-mail shows that Respondent sought to suspend Complainant prior to Respondent’s investigation hearing, and Respondent’s allegation regarding Complainant’s behavior on September 29, 2015 was pretextual.

Upon review of the sequence of events, I find that Respondent did not investigate and submit the complaint of quarrelsome behavior as a pretext for disciplining Complainant for protected activity. Instead, I credit the testimony that Complainant had been counseled about disrespectful behavior in the past, and warned that future disrespectful behavior would result in formal discipline. I find that the email discusses the quarrelsome behavior on September 29, 2015, and the fact that informal efforts to stop the disrespectful behavior “ha[d] not worked.” Contrary to Complainant’s argument that Ms. Averitte’s email demonstrates the stated rationale for his discipline was false, I find that the email supports Respondent’s assertion that the adverse employment action was initiated in response to Complainant’s quarrelsome behavior with Mr. Murray. The fact that Ms. Averitte requested advice on the appropriate formal behavior charge does not show that the charge was a pretext for punishing Complainant for protected activity. Therefore, I find that the employer’s stated reasons for the discipline were not pretextual.

I also note that during CSX’s formal investigation hearing, Mr. Murray was asked whether he “felt [he was] being harassed by Mr. Carter at the time” of their conversations on September 29, 2015, and Mr. Murray responded: “No I don’t believe I was being harassed I feel I was being antagonized.” (RX-9 at CSX 000648.) I do not find that Mr. Murray’s statement

that he was “antagonized” versus “harassed” shows that Respondent’s explanation for the issuance of the charge letter was pretextual. Instead, I find that Mr. Murray’s testimony at CSX’s investigation hearing is consistent with the statement that he authored on September 29, 2015. Mr. Murray stated that Complainant had a “nasty attitude” during their conversations on September 29, 2015, and that Complainant wanted to “anger [him] to the point that [he] would lose [his] temper.” (RX-15 at CSX001385.) I do not find this explanation to be inconsistent with Mr. Murray’s testimony at CSX’s formal hearing, and I find no support for Complainant’s argument that the investigation and disciplinary proceeding was a pretext.

4. *Whether the Evidence as a Whole Shows that the Protected Activity was a Contributing Factor in the Adverse Action*

As set forth above, Complainant must show by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment action. “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.” *Palmer*, ARB No. 16-0636 at PDF *53 (emphasis in original) (citation omitted) (internal quotation marks omitted). “The protected activity need only play some role,” and the employee “prevails at step one if there was more than one reason and one of those reasons was the protected activity.” *Id.*

For the reasons discussed above, I have found that Complainant has not shown contribution by a preponderance of the evidence based on the temporal proximity of the protected activity to the adverse action, on the argument that the protected activity and the adverse action are “inextricably intertwined,” or on the claim of pretext.

Circumstantial evidence of contribution may also include: “inconsistent application of an employer’s policies, an employer’s shifting explanations for its action, ... 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 ... engages in protected activity.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at PDF *7 (Feb. 29, 2012). I find that none of these potential grounds establish contribution in this case.

First, the record before me shows that Respondent disciplined other employees for similar behavior. The evidence does not establish an inconsistent application of the policies here. Second, Respondent has not engaged in shifting explanations for its action; it has consistently pointed to discourteous and quarrelsome behavior in the discussions with Mr. Murray as the basis for the disciplinary proceeding. Third, Respondent has not demonstrated hostility toward protected activity from Complainant or other employees. Instead, the record demonstrates that Complainant had a long history of reporting safety issues to Respondent without adverse consequences, and that other employees had reported safety issues, including some of the same concerns at issue here, without suffering adverse action from Respondent.

Fourth, the employer’s explanation for the adverse action taken in this matter is not false. Upon review of the audio recordings and transcripts of the recordings, I find that Complainant made the statements that Respondent alleges were discourteous and quarrelsome in violation of CSX’s Operating Rules. Specifically, the following exchanges occurred:

MURRAY: I can have that signal now Chuckie?

CARTER: No, you cannot. Whenever we pull down I'll knock it down; you cannot have the signal. It is 20 to 8, not 20 to 12.

MURRAY: Okay, I don't – I don't need attitude, you can keep that. I just saw you shove back, I thought you had swung down.

...

CARTER: Florence when they get y'all fully qualified up here you won't get an attitude. Y201 engineer out.

(RX-9 at CSX000672-73.)⁶

MURRAY: Hello?

CARTER: Hey.

MURRAY: Hi.

CARTER: Now we didn't start work at six o'clock, right?

MURRAY: Yeah.

CARTER: Alright, them cars should have been booked before—if we wouldn't have been six, if we would have been six o'clock ever getting started. It was 20 to 8, not 20 to 12, as far as that 202 getting a light to come up here.

MURRAY: Okay, is there a point to all that?

CARTER: Yeah there's a point to it. I don't tell you how to run Florence Yard but I know what's expected up here at Cayce.

MURRAY: Okay, I'm listening.

[Mr. McDowell cuts in to ask about the main line and "what tracks on Owens are we showing?"]

MCDOWELL: What's a track to—what's a good track to go to, 25?

CARTER: He don't know.

MURRAY: Let me look at it.

CARTER: You do have cameras—y'all are not qualified, that's for doggone sure cause this doggone showing today and if we need to call somebody we'll call and get everybody on the line because there ain't no sense in you not knowing what to do.

MURRAY: I just want you to keep talking cause we on a recorded line—

CARTER: I know we're on a recorded line because I'm simply pointing out the inefficiency of how y'all are running this yard. Y'all aren't answering the radio and you're inefficient, so I want that to be also said on this recorded line. 789 called y'all however long time trying to get you on the radio and you didn't answer.

Last night it was a 40 minute issue on getting y'all on the radio between the 203 and the 202; so all of this can be on the recorded line. Y'all are being inefficient and you weren't properly qualified up here. So now what else do we need to say on this recorded line.

⁶ The audio recordings were admitted as JX 2, 3-A, 3-B, and 4. For ease of reference, these citations are to the transcripts of the recordings submitted in the CSX internal investigation.

Id. at CSX000584-85, 674-75. The recordings were played at the hearing and admitted into evidence, and these statements were not made in a matter-of-fact or respectful manner. They were made in an argumentative and disrespectful manner. I find that Complainant was contentious and antagonistic in his statements to Mr. Murray.

Respondent asserts that it initiated the adverse action based on behavior that was quarrelsome and not respectful and courteous (in violation of Rules 104.2 and 104.3). The preponderance of the evidence shows that Complainant made the statements relied upon by Respondent, and that he did engage in quarrelsome and discourteous behavior, as Respondent alleged in the disciplinary proceeding. Consequently, Respondent's stated reason for the adverse action was true and valid.

Fifth, the record does not establish a change in the employer's attitude toward Complainant after he engaged in protected activity.⁷ As discussed above, Complainant had engaged in safety reporting on many occasions, including the instance at issue here, and the evidence shows no change in Respondent's attitude toward Complainant in response to his protected activity.

In sum, considering these factors as guidance and not the exclusive means by which to prove contribution, I find that Complainant has not established by a preponderance of the evidence that his protected activity contributed, in any way, to the adverse employment action. I find that the charge letter and ultimate discipline assessed against Complainant were based on Complainant's quarrelsome and disrespectful behavior toward his colleague, in violation of Respondent's Operating Rules, after he had been counseled that any further disrespectful behavior would result in discipline. I find that Complainant's protected activity played no role in Respondent's decision to take adverse employment action against him.

Because Complainant has not shown contribution by a preponderance of the evidence, he has not established a prima facie case of retaliation, and he cannot prevail on this claim.

III. Respondent's Burden to Show by Clear and Convincing Evidence that It Would Have Taken the Same Adverse Action

As set forth above, I find that Complainant has not shown that his protected activity was a contributing factor in Respondent's imposition of an adverse employment action against him. Alternatively, I now address whether Respondent would be able to meet its burden to show that it would have taken the same adverse action absent the protected activity if I had found that Complainant had established all four elements of his prima facie case.

⁷ Respondent asserts that Complainant is unable to show any antagonism from CSX, meaning that Complainant is unable to show that CSX had a retaliatory motive in this case. However, courts are split as to whether an employee must show a retaliatory motive. *See, e.g., Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012); *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). In this case, I find that Complainant is not required to prove a retaliatory motive. Complainant must show contribution in some manner, however, to establish a prima facie case.

A. Legal Framework

If a complainant establishes a prima facie case for retaliation, the burden shifts to the employer “to demonstrate by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” *Araujo*, 708 F.3d at 157 (internal quotation marks omitted). “Clear evidence means the employer has presented evidence of unambiguous explanations for the adverse action in question ... [and] convincing evidence has been defined as evidence demonstrating that a proposed fact is highly probable.” *See, e.g., Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, at PDF *11 (ARB Apr. 25, 2014) (internal quotation marks omitted). The employer avoids liability under the FRSA if it meets this burden. *See Araujo*, 708 F.3d at 157.

Under the clear and convincing standard, “[t]he burden of proof ... is more rigorous than the ‘preponderance of the evidence’ standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or certain.” *Speegle*, ARB No. 13-074, at PDF *11 (citing *Williams v. Domino’s Pizza*, ARB No. 09-092 (ARB Jan. 31, 2011)). “There must be evidence in the record that demonstrates in a convincing manner why the employer ‘would have fired’ ... [the] employee [if he had not engaged in the protected activity].” *Id.* The respondent may show this through direct or circumstantial evidence. *See id.* Circumstantial evidence may include the following, among other things:

(1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee’s work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.

Id. When determining “what would have happened in the ‘absence of’ protected activity, one must also consider the facts that would have changed in the absence of the protected activity.” *Id.* at 12. The ARB has held that

the statute requires [the court] to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how “clear and convincing” the independent significance is of the non-protected activity, (2) the evidence that proves or disproves whether the employer “would have” taken the same adverse actions; and (3) the facts that would change in the “absence of” the protected activity.

Id. (footnote omitted).

B. Whether Respondent Would Have Taken the Same Adverse Action in the Absence of the Protected Activity

In the present case, to determine whether Respondent would be able to meet its burden to show by clear and convincing evidence that it would have taken the same adverse action absent Complainant’s protected activity, I discuss the three factors set forth by the ARB. Respondent

argues that Complainant's discourteous and quarrelsome behavior toward Mr. Murray on September 29, 2015 violated CSX Operating Rules 104.2 and 104.3. (Resp't's Br. at 27-28.) Respondent asserts that "CSXT need not prove that Carter actually engaged in the charged misconduct (though it has amply done so); it merely must establish that Koster reasonably believed that Carter had done so." *Id.* at 27. That is, Respondent asserts that Complainant's non-protected activity violated CSX's Operating Rules, and because the decision-makers reasonably believed that Complainant violated CSX's rules, his non-protected activity is of sufficient independent significance to meet the clear and convincing standard.

If I had found that Complainant's protected activity was a contributing factor in the adverse employment action, Complainant's case for retaliation would be as follows: first, he engaged in protected activity when he submitted reports of unsafe conditions on September 29, 2015 and September 30, 2013; second, Respondent knew about his protected activity; third, Respondent suspended him from service for a period of time; and fourth, his protected activity was a contributing factor in Respondent's decision to suspend him from service. Respondent would now be required to prove by clear and convincing evidence that "'in the absence of' the protected activity, it would have taken the same adverse action." *Palmer*, ARB No. 16-0636, at PDF *56 (quoting 49 U.S.C. § 42121(b)(2)(B)(iv)). "It is not enough for [Respondent] to show that it *could* have taken the same action, it must show that it *would* have." *Id.*

In *Cain v. BNSF Railway Co.*, the ARB held:

As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend [the employee] was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it "highly probable" that BNSF "would have" suspended [the employee] for 30 days absent the protected activity.

ARB No. 13-006, PDF *7 (ARB Sept. 18, 2014). Similarly, in this case, at the formal hearing, both parties presented testimony as to the appropriateness of Complainant's time-served suspension. However, as the ARB held in *Cain*, I do not determine whether Complainant's suspension was "wise," and instead, I look to "the evidence as a whole" to determine whether the evidence "makes it 'highly probable'" that CSX would have suspended Complainant absent the protected activity. *Id.*

Here, Respondent asserts that the record shows by clear and convincing evidence that Complainant's behavior in his communications with Mr. Murray – his non-protected activity – is independently significant. Respondent also asserts that the record establishes that it would have taken the same adverse employment action in the absence of the protected activity. I first discuss the evidence as to Complainant's non-protected activity, and then I discuss the conduct of CSX's managers as well as the rules and policies that Respondent alleges Complainant violated. I conclude by discussing whether the facts in this case would change in the absence of Complainant's protected activity.

1. Complainant's Non-Protected Activity

Respondent argues that Complainant's behavior in his discussions with Mr. Murray on September 29, 2015, violated CSX's Operating Rules, and that this behavior led to the adverse employment action. As summarized above in greater detail, Complainant and Mr. Murray had several conversations on September 29, 2015. Immediately following Complainant's and Mr. Murray's last conversation, Complainant engaged in protected activity when he submitted an Unsafe Condition Report. Therefore, the relevant inquiry is whether Complainant's non-protected activity on September 29, 2015, which occurred before his protected activity, was independently significant.

This is not a case where it is unclear whether Complainant engaged in the behavior alleged by Respondent. As discussed above, I find that Complainant communicated with Mr. Murray on September 29, 2015, and made the statements which Respondent alleges led to its decision to issue a charge letter. Here, the evidence shows that Complainant and Mr. Murray communicated three times on September 29, 2015, between 7:36 p.m. and 8:52 p.m., and during these conversations, Complainant made several statements that could be categorized as confrontational, discourteous, and quarrelsome. Because the evidence in the record establishes that Complainant engaged in the behavior that Respondent alleges as the basis for the adverse employment action, I find that Complainant's behavior during his conversations with Mr. Murray was independently significant. That is, based on my review of the evidence in this case, I find that Respondent is able to show by clear and convincing evidence that Complainant's non-protected activity (the quarrelsome behavior) was, on its own, significant to its imposition of the adverse employment action (the suspension).

2. Conduct of Managers

The following CSX employees were managers on September 29, 2015, and I discuss their conduct in this case: Angela Averitte, Eric Betts, and Lawrence Koster.

Angela Averitte, the Assistant Division Manager of the Florence division during the time period relevant to this case, testified that she was involved in implementing the yardmaster consolidation for the Florence and Cayce yards. (TR at 201.) She stated that during the consolidation, Complainant "had the option to be a yardmaster in Florence" or he had the option to return to his former craft and keep his seniority. *Id.* at 204. As to the events on September 29, 2015, Ms. Averitte testified that she first became aware of the incident from "a couple of phone calls," and that she then received written statements regarding the incident. *Id.* at 212-13. Ms. Averitte explained that she then notified her supervisor, Mr. Koster, and reached out to labor relations. *Id.* at 214-16. Ms. Averitte further explained that after speaking with labor relations on the telephone, "Mr. Betts input an assessment to generate a charge letter," and that as a result of this assessment, a charge letter was issued. *Id.* at 216. As to the classification of the charges, Ms. Averitte explained that the field administration department makes decisions regarding the classification of charges. With regard to the decision to assess any discipline, Ms. Averitte stated: "that burden falls on the division manager." *Id.* at 221.

Eric Betts, Road Trainmaster with CSX in Cayce, South Carolina, testified that he learned about incident between Complainant and Mr. Murray when Mr. Murray called him. (TR at 271.) Mr. Betts explained that during the phone call Mr. Murray “sounded upset and agitated.” *Id.* at 272. Mr. Betts further explained that Mr. Murray then provided a written statement to Mr. Betts through e-mail. *Id.* at 272-73. Mr. Betts stated that he listened to the audio recordings of the relevant conversations, and in his opinion, Complainant violated Rule 104 “[b]ecause Mr. Carter was, number one, not respectful or courteous in dealing with Mr. Murray on the radio. Also, Mr. Carter was basically quarrelsome and starting an altercation with Mr. Murray when talking to him on the telephone....” *Id.* at 283. Mr. Betts explained that he entered an assessment against Complainant after consulting with Ms. Averitte, and that as a result of this assessment, Complainant was held out of service pending the company’s formal investigation hearing. As to classifying the charges, Mr. Betts explained that he was not involved in the classification of the charges and that he was not involved in the decision to take Complainant out of service pending the company’s investigation. *Id.* at 285. Mr. Betts further explained that he was not involved in the decision to impose discipline following the company’s formal investigation hearing. *Id.* at 285-86. When asked whether any of Complainant’s safety complaints played a role in Mr. Betts’s decision to enter an assessment against Complainant, Mr. Betts responded: “No.” *Id.* at 294. In addition to Mr. Betts’s testimony regarding the events on, and following, September 29, 2015, Mr. Betts testified about other employees’ prior complaints regarding Complainant’s behavior and conduct. For example, Mr. Betts testified that after an employee contacted the ethics hotline regarding Complainant’s behavior, Mr. Betts had a meeting with Complainant and counseled him about how to act in a “courteous and professional [manner] when handling employees.” *Id.* at 271. Mr. Betts also testified that during this meeting, he told Complainant that “any more outbursts, ... you can be suspended or terminated.” *Id.*

Lawrence Koster, Division Manager in Florence, South Carolina, testified that “[a]fter listening to the audiotapes, there was, I felt, a need for some discipline. I didn’t feel that it raised to the termination level, but I know Mr. Carter had been warned before.” (TR at 321.) With regard to the specific conduct that Mr. Koster thought warranted discipline, he stated: “I didn’t think the call was professional. I thought he was boisterous, that he was talking to Mr. Murray in an unprofessional manner.” *Id.* at 322. As to why Mr. Koster did not think that Complainant’s conduct rose to the level of termination, Mr. Koster stated: “There wasn’t any threats involved, there was no profanity, it was just a boisterous, quarrelsome, ... loud conversation ... and I don’t want my employees talking with each other like that.” *Id.* at 322-23. Mr. Koster indicated that any safety issues that Complainant raised did not play a role in Mr. Koster’s decision to suspend Complainant. *Id.* at 323.

After hearing the testimony of Ms. Averitte, Mr. Betts, and Mr. Koster at the formal hearing and seeing their demeanor while testifying, I find that their testimony was credible and was consistent with other evidence in the record. I find that these employees – Ms. Averitte, Mr. Betts, and Mr. Koster – provided straightforward testimony and were knowledgeable about the relevant rules. On the whole, I also find that these employees were conscientiously attempting to do their jobs well and to follow the appropriate rules. From the testimony of these managers, I find their testimony to be credible, and I give their testimony reasonable weight. Based on the foregoing, and upon consideration of the evidence before me, I find that the relevant CSX

managers were following the company's procedures and rules, and that they pursued disciplinary action after determining that Complainant had violated CSX Operating Rules 104.2 and 104.3 through his behavior in the non-protected activity. Accordingly, I find that absent the protected activity, Respondent would have taken the same action.

3. *Whether the Facts Would Change in the Absence of the Protected Activity*

I next consider the facts that would change if Complainant had not engaged in protected activity. Here, there is no evidence in the record to suggest that the facts would change in the absence of the safety reports (Complainant's protected activity). That is, Complainant had a confrontational conversation with Mr. Murray, and CSX's Operating Rules establish that discourteous and quarrelsome behavior constitutes a violation of the company's rules. The evidence as a whole does not show that Respondent was motivated by Complainant's protected activity; rather, Respondent was motivated by Complainant's quarrelsome behavior. Thus, in the absence of the protected activity, the relevant facts leading to the suspension would not change.

Additionally, Respondent submitted evidence of other employees' charge letters to show that Respondent's decision to suspend Complainant was consistent with its internal policies. *See* (RX-16); (RX-17); (RX-19.) Although I do not find the evidence regarding these alleged comparators to be dispositive, I find that this evidence is relevant to whether the facts would change absent Complainant's protected activity. I find that the evidence of disciplinary action against other employees who engaged in similar confrontational or discourteous behavior, in combination with evidence of Complainant's confrontational behavior, shows that Respondent would have disciplined Complainant for his conduct on September 29, 2015, regardless of whether he engaged in protected activity.

4. *Whether this Evidence Would Be Sufficient to Meet Respondent's Burden*

With regard to Respondent's defense had Complainant established a prima facie case, considering the relevant factors together, I find that the evidence satisfies Respondent's burden to show that it would have suspended Complainant absent any protected activity. As stated above, the ARB has held that an administrative law judge must consider "at least three factors applied flexibly on a case-by-case basis." *Speegle*, ARB No. 13-074, at PDF *12.

As discussed above in greater detail, as to the first factor – "the independent significance of the non-protected activity" – I find that Complainant's non-protected activity on September 29, 2015 on its own would have led Respondent to pursue some form of disciplinary action. Specifically, Complainant's conduct during his conversations with Mr. Murray was confrontational, and violates the mandates of CSX Operating Rules 104.2 and 104.3. I note that the Act protects employees from retaliatory action by employers, but the Act is not meant to insulate an employee from a rules violation. In this case, immediately following Complainant's last conversation with Mr. Murray, Complainant submitted an Unsafe Condition Report. As discussed above, I find that Complainant engaged in protected activity under the Act when he submitted this report; however, Complainant's confrontational behavior immediately before this

protected activity is significant in and of itself. This is not a case in which the evidence shows that Complainant did not violate any of CSX's company rules. Instead, this is a case in which Complainant engaged in behavior that CSX found to have violated its Operating Rules, and the evidence in the record supports this finding. I therefore find that the evidence shows by clear and convincing evidence that Complainant's non-protected activity on September 29, 2015 was independently significant.

With regard to the second factor identified by the ARB – whether the evidence proves or disproves that Respondent would have taken the same adverse action in the absence of protected activity – I find that the evidence establishes that Respondent would have suspended Complainant due to his confrontational behavior on September 29, 2015, if the protected activity had not occurred. As discussed above, I find the testimony of Ms. Averitte, Mr. Betts, and Mr. Koster – the relevant decision-makers – to be credible as to why they initiated disciplinary action against Complainant. Additionally, I find that the evidence regarding Respondent's rules and policies shows that the relevant decision-makers acted in accordance with the Respondent's rules and policies. I also find that the evidence regarding alleged comparators shows that Respondent routinely disciplines employees for confrontational behavior. Therefore, I find that the evidence proves by clear and convincing evidence that Respondent would have taken the same adverse action if Complainant had not engaged in the protected activity.

As to the third factor – whether the facts would change in the absence of the protected activity – I find that the evidence shows that if Complainant had engaged in similar confrontational behavior but had not then engaged in protected activity, the facts would not change. That is, the evidence as to CSX's rules shows that an employee's discourteous and quarrelsome behavior violates CSX's Operating Rules. The evidence in this case shows that Complainant was confrontational and quarrelsome with Mr. Murray during their communications on September 29, 2015, and this behavior, absent the protected activity, would lead to the same result: Respondent's decision to initiate disciplinary action, which led to Complainant's suspension.

Upon review of the evidence in this case and applying the factors set forth by the ARB, I find that Respondent would be able to show by clear and convincing evidence that absent any protected activity, it would have taken the same adverse action. Therefore, even if Complainant had established that his protected activity was a contributing factor in the adverse employment action, Respondent would not be liable under the FRSA.

IV. Conclusion

In summary, I find that Complainant has established the first three elements of his prima facie case under the FRSA. Specifically, I find that Complainant engaged in protected activity when he reported unsafe conditions on September 29, 2015 and September 30, 2015; that Respondent knew about this protected activity; and that Complainant suffered an adverse employment action under the Act when Respondent suspended him from service. As to the fourth element of Complainant's prima facie case, I find that Complainant has not established by a preponderance of the evidence that his protected activity was a contributing factor in

Respondent's decision to suspend him from service. Alternatively, I find that had Complainant established the fourth element of his prima facie case, Respondent would be able to show by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity. Thus, Respondent is not liable under the FRSA, and Complainant's October 8, 2015 Complainant must be dismissed.

ORDER

For the reasons set forth above, IT IS ORDERED that Complainant's October 8, 2015 Complaint is DISMISSED.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/JS/jcb
Newport News, VA

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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

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