

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 09 March 2020**

CASE NO.: 2016-FRS-00044

*In the Matter of:*

**DEREK GRZEMBSKI,**  
Complainant,

v.

**GRAND TRUNK WESTERN R.R. CO.,**  
Respondent.

Appearances: Mark J. Collins, Esq.  
for Complainant

Andrew J. Rolfes, Esq.  
for Respondent

Before: Steven B. Berlin  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the whistleblower-protection provisions of the Federal Rail Safety Act (“Act”).<sup>1</sup> Complainant Derek Grzembksi alleges that the Grand Trunk Western Railroad Company violated the Act when it terminated his employment in retaliation for his reporting unsanitary toilets on his locomotive. Respondent denies the allegation and asserts that it terminated the employment because Complainant failed to inspect conditions on a passing train as required under the Company’s Operating Rules.

I conducted a hearing in Ann Arbor, Michigan on March 27 and 28, 2017. The parties were represented by their respective counsel of record. Grzembksi testified on his own behalf. Grand Trunk called four witnesses: Trainmaster Brandon Rogers, Assistant Superintendent Dean Macki, Superintendent of Operations James Golombeski, and Senior Manager Joseph Whitt. Grzembksi submitted the deposition testimony of Conductor Floyd Bass, who worked alongside

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<sup>1</sup> 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982.

Grzembksi during the inspection of the passing train. I accepted several stipulations of fact and admitted numerous exhibits.<sup>2</sup> The parties filed post-hearing briefs.

### Findings of Fact

Grand Trunk Western Railroad Company is a railroad carrier within the meaning of the Federal Rail Safety Act and is part of the CN system. Tr. 5; J.Ex. 5. Grzembksi is an employee within the meaning of the Act. J.Ex. 5.

Grzembksi began to work for Grand Trunk as a brakeman in 1994. Tr. 20; R.Ex. 6. He was certified as an engineer in 1995 and was working as an engineer at the time he was discharged in 2014. Tr. 20, 46.

*Grzembksi's safety complaints.* Grzembksi had a history of reporting unsanitary toilets; he could not estimate how many reports he'd made before the two that are at issue here. Tr. 30, 34, 47, 93. Grand Trunk employees may make complaints either to their supervisors or through an anonymous hotline. Tr. 215. In May 2014, Grzembksi made two complaints about unsanitary toilets directly to his supervisor, Trainmaster Rogers. Grand Trunk's Code of Conduct prohibits retaliation against employees who report safety concerns; Grand Trunk communicates this policy to its managers. Tr. 216.

By May 2014, Rogers had been a trainmaster with Grand Trunk for over two years. *See* Tr. 90, 129. A trainmaster manages union employees, runs operations, and coordinates train traffic. Tr. 92.

Grzembksi's and Rogers' respective accounts of the two complaints in May 2014 generally concur, though there are some differences. Tr. 92-93. Grzembksi raised the complaints when he was working as the engineer on round-trip night runs between Toledo, Ohio and Flat Rock, Michigan. The trip in each direction was either 43 or 54 miles, depending on the route, and could take as long as 12 hours, depending on train traffic. Tr. 30, 34-35.

Before leaving from Toledo on one of these runs in May 2014, Grzembksi found what he described as a "toilet leaking all over the floor with a pretty horrible smell." Tr. 30-31, 34.<sup>3</sup> The problem could not be addressed in Toledo because there was no trainmaster on duty and no service facility for toilets. Tr. 74. The nearest service facility was a fuel dock in Flat Rock, where the toilet could be serviced in about 30 minutes. Tr. 32.

Grzembksi took the train to Flat Rock, where he reported the sanitation problem to trainmaster Rogers. Tr. 30-32, 34-35. Rogers inspected and, according to him, found on the toilet floor "some blue liquid, which is a sanitizing fluid that goes in the toilet." Tr. 93. Rogers did not

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<sup>2</sup> *See* stipulations at ALJ Exhibit 1; Tr. 4; Joint Exhibit 5. Without objection, I admitted Complainant's exhibits ("C.Ex.") A, D, and N, and Respondent's exhibits ("R.Ex.") 1-10. I also admitted joint exhibits ("J.Ex.") 1-5.

<sup>3</sup> Complainant's Exhibit N contains two photographs that he took of a leaking toilet on a locomotive. Tr. 31. He did not take these photos on the days on which he reported the leaking toilets to Rogers, but he testified that the leaking toilet he saw on May 12, 2014, looked worse than the leaking toilet in the photos. Tr. 31, 44-45.

know the specifics of the governing regulations, but he did not believe the toilet was unsanitary, and he told Grzembski as much. *Id.*; Tr. 121-22. He directed Grzembski to take the train back to Toledo. Tr. 31-35.<sup>4</sup>

The same scenario occurred a second time, except this time Rogers did not inspect the toilet. Tr. 34, 93, 125.<sup>5</sup> He checked the service history and found that the toilet area had been serviced a week before. *Id.* On that basis, he found Grzembski's complaint not credible and told Grzembski to take the train back to Toledo. *Id.*

"Fed up" with "nothing . . . being done," Grzembski complained to the Federal Railroad Administration (FRA), which is the federal regulator for rail safety. Tr. 39-40. He answered the FRA's questions and supplied documentation. Tr. 40-41.

The FRA contacted Superintendent of Operations Golombeski and asked for a meeting with Rogers. Tr. 41, 118. Rogers hadn't thought the FRA regulations were implicated because he "didn't feel it was a safety defect." Tr. 93, 120-22. But at the meeting, the inspector told Rogers that he'd violated FRA regulations. Tr. 93-94, 118-19. In particular, on the second occasion, he should have inspected the toilet to be certain that it was sanitary before ordering Grzembski to do the run. Tr. 93-94.

The inspector warned Rogers and said he might fine Rogers personally if there was a repetition. Tr. 94, 119. But the FRA did not issue a notice of violation or a citation, nor did it assess a civil money penalty. *Id.*; Tr. 46, 119, 194.

As Grzembski never saw Rogers after he (Grzembski) made the complaint to the FRA, he conceded that Rogers never threatened him with retaliation. Tr. 42, 47. Nor did Grzembski hear from others that Rogers was threatening to retaliate. *Id.* Grzembski was not present when the FRA inspector met with Rogers. Tr. 45. Grzembski also never discussed the toilet sanitation issue with Superintendent (assistant superintendent at the time) Golombeski and never told Golombeski that he'd reported the matter to the FRA. *Id.*

*Efficiency testing.* The FRA requires rail carriers, including the Grand Trunk, to conduct so-called "efficiency tests." Tr. 95, 204. In an efficiency test, a manager observes employees to determine if they are complying with the FRA's and the Company's safety requirements. Tr. 95. Rogers was required at the relevant times to perform 35 efficiency tests per month. *Id.*

The selection of employees to be tested on any given day depends on their work assignments. Tr. 95-96. For example, many safety requirements relate to switching cars. Tr. 96. Workers on a mainline do not do switch cars so they are not efficiency tested for this activity. Tr. 95-96. "Roll-by inspections" provide another example. A "roll-by inspection" can occur only when a

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<sup>4</sup> If Grzembski or the conductor needed to use the toilet on the trip that could take as long as 12 hours, they "either [had] to stand in [the liquid] or take [their] chances on going outside." Tr. 35.

<sup>5</sup> Complainant dates the two incidents as May 12 and May 14, 2014. Rogers agreed that Complainant made two complaints but described them as being about a week apart. The difference is inconsequential: the two complaints were close in time and occurred in mid-May 2014.

moving train passes by another train that is stopped. *Id.* The workers on the stopped train descend to the ground, stand on either side of the moving train, and observe the condition of that train. *Id.* But if both trains are scheduled to keep moving as they pass on separate tracks, there cannot be a roll-by inspection.

If an employee who is being efficiency tested is observed violating any of the Railroad's operating rules, they have failed the test. Tr. 97. When there is a failure, the manager's response depends on the severity of the violation. *Id.* If the failure is putting someone's life at risk or otherwise endangering someone, the manager must take immediate action to correct the situation. Tr. 98. If it's something that does not require immediate correction, the manager more likely will continue to observe the employees and only later discuss with them the failures and the successes during the test. *Id.* The manager must also make a record of any efficiency test result—whether success or failure—in a designated database (PMRC). *Id.* A manager such as Rogers does not decide whether the Railroad will initiate a disciplinary investigation when an employee fails an efficiency test. *Id.*

*Roll-by inspections.* The termination of Grzembki's employment arose in the context of an efficiency test of a roll-by inspection. The Company's Operating Rule 523 provides:

523. INSPECTING PASSING TRAINS. *When duties and terrain permit, at least two crew members of a standing train and other employees along the right of way must inspect passing trains on the ground on both sides of the track. At locations where trains will meet, the train to arrive second must notify the first train when they pass the approach to the siding to allow crew members to be in position for inspection.*

The engineer of the standing train must:

- if possible, stop the train at a location that allows an employee to perform the inspection from the opposite side of the track, and
- perform the inspection on the same side as the standing train.

Look especially for the following [specified dangerous] conditions:<sup>6</sup>

Report the results of the inspection to a crew member of the passing train.

R.Ex. 1 (emphasis added).

The purpose of Operating Rule 523 is to ensure the safety of employees and the public. Tr. 99, 204. Grand Trunk requires these inspections to discover defects on the passing train and thereby prevent accidents. Tr. 204. Most observed failures will involve the moving equipment towards the rail (*e.g.*, brakes, wheels, springs, trucks, and gear). Tr. 205. That is why crews must “get down” on the ground to observe the passing train. *Id.*

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<sup>6</sup> The listed examples of dangerous conditions are: “overheated journals, sticking breaks, sliding wheels, wheels not properly positioned on the rail, dragging equipment, insecure contents, signs of smoke or fire, headlight or marker improperly displayed, and any other dangerous condition.”

Some of the language of the rule that I italicized above—“when duties and terrain permit”—gives crew members discretion to determine whether they are able to perform a roll-by inspection. Tr. 24, 127, 153-54, 192, 219. But their discretion is limited. Tr. 142, 219.

As to terrain, examples of conditions that would give a crew reason not to perform a roll-by inspection include a bridge abutment, a bridge, a close clearance with the other track, steep embankments adjacent to the tracks, or anything that puts a crew member in close proximity to moving equipment. *Id.* Tr. 206. Uneven ballast does not excuse a roll-by inspection.<sup>7</sup> Tr. 54. Nor does rain or snow. Tr. 51-52. As to conflicting duties that would excuse a roll-by inspection, examples include switching operations or necessary work the crew is performing on their own train. Tr. 205. Paperwork does not excuse a roll-by inspection. Tr. 206.

*Grzembski's efficiency test.* To arrange a roll-by inspection, Rogers reviews a dispatch screen for times and places where trains will meet. Tr. 96. He contacts the dispatcher and arranges to have one of the trains stop. *Id.* He drives to the location. If the first train has not arrived, he inspects the terrain to see if the crew members will be able to do the roll-by inspection. Tr. 96, 102-03. If he arrives after the first train, he inspects the terrain after the roll-by. Tr. 102.

On August 21, 2014, Rogers saw on a dispatcher's screen that trains moving in opposite directions would meet at Chapman Siding on the Flat Rock-Toledo run. Tr. 100. He decided to efficiency test a roll-by inspection at that location. *Id.*

Grzembski was the engineer and Bass was the conductor on the train that would stop and do the inspection. Tr. 100. At this location, the mainline and adjacent siding both run north-south, parallel to each other, with the mainline to the west of the siding. R.Ex. 2. At the east edge of the rail bed (*i.e.*, east of the siding tracks), there is a drop-off of about three or four feet, down to a graded gravel road. *Id.*; Tr. 60-61; J.Ex. 1 at 32. At the other edge of the rail bed, west of the mainline, the ballast slopes down to a drainage creek. R.Ex. 2; Tr. 60. Two east-west roads for vehicular traffic cross the tracks nearby: Ready Road to the north and Dixie Highway to the south. R.Ex. 2.

During a roll-by inspection at this siding, the engineer typically stands on the ground next to his locomotive<sup>8</sup> and looks west at the passing train; the conductor gets down to the ground, walks west across the mainline tracks, and stands there, looking east to observe the other side of the passing train. R.Ex. 2; C.Ex. A at 16; Tr. 54-56, 101-02.

On the night of the efficiency test, Grzembski and Bass were heading south to Toledo. Tr. 21. It was raining and had been raining for a couple of days. Tr. 21, 101. The dispatcher directed them to pull onto the siding to allow a northbound train to pass. Tr. 21, 54-55, 100; R.Ex. 2.

Rogers arrived before Grzembski and Bass. Tr. 102. He drove on a graded gravel service road next to the siding track and examined the terrain. Tr. 103. According to Rogers' testimony, he found no obstructions that kept him from driving, and although it was raining, he saw no

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<sup>7</sup> “Ballast” refers to the stones that form the rail bed (below and around the ties).

<sup>8</sup> If there's a “good safe spot” within two feet of the locomotive, the engineer might stand there. Tr. 54.

standing water. Tr. 103-04. He concluded that the crew could do the roll-by inspection from the east. Tr. 104. On the west, there was foliage that might be in the way. Tr. 104. But if the crew walked toward Dixie Highway, conditions (according to Rogers) were “fine” for a roll-by inspection there. *Id.* Managers performing efficiency tests often position themselves so that the workers will not see them; this is because the worker might behave differently if he or she knows a manager is watching. Tr. 97. Rogers drove on the service road to Dixie Highway, parked east of the tracks in a private drive, and concealed himself among some trees and foliage. Tr. 104-05.

Grzembski and Bass arrived. Carrying binoculars, Rogers was approximately 200 to 300 feet away from their stopped train. Tr. 127. After 20 to 30 minutes, the northbound train approached. Tr. 21-22, 105. Rogers watched through the binoculars and saw a light appear on Grzembski and Bass’ train when the cab door opened. Tr. 106, 127. After the cab door shut, it appeared to Rogers that only one person had left the cab; that person had what appeared to be a lantern. Tr. 106. From the way the lantern moved, Rogers inferred that the person who left the cab had descended to the ground. *Id.*

Rogers saw the lantern light shining on the passing train. Tr. 106. After the train passed, he observed the lantern light move and watched the crew member reenter through the cab door. *Id.* As Rogers again saw only one person, he concluded that only one crew member performed the roll-by inspection. In his opinion, this violated Operating Rule 523’s requirement that “*at least two* crew members of a standing train . . . must inspect passing trains on the ground *on both sides* of the track.” *Id.*; R.Ex. 1 (emphasis added).

Rogers continued to observe Grzembski and Bass’ train as they resumed their run; he wanted to see if they complied with an order that restricted the speed of the train ahead. Tr. 106-07. They did comply. Tr. 107. Rogers then called the yardmaster at Toledo and asked him to have Grzembski and Bass call when they arrived. He did this because he “couldn’t make out exactly who was doing the roll-by and who wasn’t doing the roll-by.” Tr. 107; J.Ex. 1 at 18.

Grzembski and Bass called Rogers together on a speakerphone. Tr. 106-07; C.Ex. A at 12. Rogers said he’d run the efficiency test near Dixie Highway. Tr. 107. He asked which of them failed to perform the roll-by inspection. Tr. 107-08. Grzembski immediately admitted that he had not done the inspection. Tr. 108.

According to Rogers, Grzembski said it was unsafe to do the inspection because of the incline of the ballast. Tr. 108. He gave no other reason, such as standing water or broken ties on his side of the train (*i.e.*, the right side).<sup>9</sup> *Id.* Grzembski asked if this was a failure of an efficiency test. *Id.* Rogers answered that it was. *Id.*

Rogers documents all efficiency test results—success or failure—in the “PMRC” database. Tr. 109. Consistent with this practice, he documented Grzembski’s failure of the efficiency test in the “PMRC.” Tr. 108.

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<sup>9</sup> At this time, crew members were not required to notify their supervisors if ground conditions were unsafe to do a roll-by inspection, and neither Grzembski nor Bass reported unsafe conditions. Tr. 26, 228. The rule was subsequently changed to require crew members to report under these circumstances. Tr. 23.

*Disciplinary process.* On August 25, 2014, a trainmaster (not Rogers) notified Grzembksi that Grand Trunk was opening a formal investigation into Grzembksi's failure of the efficiency test and whether discipline should be imposed. J.Ex. 2 at 54. On September 12, 2014, Superintendent Golombeski presided at an investigatory hearing under the collective bargaining agreement.<sup>10</sup> Tr. 109, 177; J.Ex. 1 at 5; J.Ex. 2 at 56-57.

A hearing officer listens to both sides and maintains order ("peace and control") at the hearing; he also questions witnesses. Tr. 177. He does not decide whether to impose discipline. *Id.* Usually a superintendent reviews the hearing record and decides on discipline. Tr. 177-78. But, as Golombeski had just been promoted into the superintendent position two months earlier, he conducted the hearing, and the disciplinary decision fell to Dean Macki, who was the assistant superintendent. Tr. 176-78.

Grzembksi had never mentioned the unsanitary toilets to Golombeski and never told Golombeski about the FRA complaint. Tr. 45. Golombeski knew that the FRA came to talk to Rogers about a complaint: Golombeski told Rogers to comply with the FRA inspections instructions. But the record is silent as to whether Golombeski knew any details about the complaint to the FRA, such as who made it or its details.

Grzembksi's local union chairman represented him at the hearing. J.Ex. 1. He introduced exhibits and questioned witnesses on Grzembksi's behalf. J.Ex. 1. Grzembksi testified. He also questioned witnesses and Conductor Bass as a witness. *Id.* at 9. The union was offered an opportunity to make a closing statement. J.Ex. 1 at 6, 52. Rogers testified as a company witness. *Id.* at 1.

In his testimony, Rogers said that he'd been a trainmaster for two years with no prior railroad experience. J.Ex. 1 at 10. He'd previously been in the U.S. Army for seven years. *Id.* He read a previously prepared written statement. *Id.* at 10-12. He described the events as I set them out above. *Id.* He added that he advised Grzembksi on the night of the efficiency test that Grzembksi could have walked up to the nearby road and done the inspection at that point if he thought it wasn't safe where the train was stopped. *Id.* at 19. Rogers said that Grzembksi agreed that he could have done that. *Id.* Rogers offered a copy of Grzembksi's work record because Grzembksi's disciplinary history would be relevant to the severity of any discipline if a violation was found. *Id.* at 17.

While offering some photographs taken on the day of the disciplinary hearing (*i.e.*, about three weeks after the roll-by inspection), Rogers testified that no work gangs had worked on the area since the night of the efficiency test. J.Ex. 1 at 21. He conceded that, on the night of the incident, he could not see the drainage ditch west of the mainline from his location and in the darkness. *Id.* at 14-15. But he testified that, in his opinion, it would have been safe for Grzembksi to walk south from the train to the road crossing at Dixie Highway and do the roll-by inspection there. *Id.* at 22-23.

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<sup>10</sup> Grand Trunk hired Golombeski as a track laborer in 2000. Tr. 176. He rose through the ranks to conductor, yardmaster, and other jobs, until he was given the assistant superintendent job for Flat Rock in 2010 and the superintendent of operations job in July 2014. Tr. 176-78.

In his testimony, Grzembski admitted that he knew that the northbound train would be coming. J.Ex. 1 at 41. He admitted that, as the engineer, he was required to do the roll-by inspection. *Id.* He admitted that, from where he was, he could only see the right side of the area and didn't look at the conditions on the left. *Id.* at 42. He admitted that Bass said nothing about whether it was safe to do a roll-by on the left (conductor's) side. *Id.* at 42. He testified that he and Bass discussed the roll-by inspection and that Bass said he would do it by going out on the platform on the nose of the locomotive. *Id.* Grzembski testified that he saw "a major slope going down to the creek" on the western side and "a four-foot drop-off from the step plate down into soft ground" on the eastern side. *Id.* at 41. But when asked how he knew the conditions when he never got out of his seat, Grzembski could only answer, "It was raining all night long." *Id.* He admitted that he could not see whether the gravel service road (to the right of his stopped locomotive) had been plowed. *Id.* at 44-45. In my view, that is not an explanation of how Grzembski knew the conditions to the west.

Grzembski admitted that he made no attempt to get off the engine to do the roll-by. J.Ex. 1 at 41. He admitted that he did not call any supervisor to notify them that conditions were bad and he might not be able to do the roll-by. *Id.* at 40-41. He testified that he was reading bulletins while Bass went out for the roll-by. J.Ex. 1 at 46. (As stated above, doing paperwork is not a reason to decline a roll-by inspection.) Grzembski admitted that, when he and Bass called Rogers on the night of the efficiency test, he (Grzembski) admitted that he had not done the roll-by, that he asked Rogers if this was an efficiency test failure, and that Rogers said it was. *Id.* at 42.

Grzembski agreed that, when he and Bass called Rogers, they'd discussed the possibility of walking to the road crossing at Dixie Highway, some 300 to 400 feet away. J.Ex. 1 at 27-28, 43. But Grzembski added that he'd said that to do that, he'd have had to tie down the train, and that Rogers had agreed and conceded that the tie-down could lead to delays for which Grzembski might be disciplined. *Id.* at 27-28. Grzembski added that he wasn't given a portable radio, and that if he'd left the train to walk to the roadway, he'd have had no way to communicate. *Id.* at 43. He viewed this as another reason that it wasn't safe to walk up to the nearest road crossing. *Id.*

In his testimony, Bass admitted that the dispatcher had informed them that the northbound train would be passing. *Id.* at 30. He said that, although the ground looked safe in the photographs taken on the morning of the hearing, it looked unsafe to him on the night of the roll-by. *Id.* But when asked what was unsafe, he offered no more than the conclusory statement: "It was bad standing ground." *Id.* I do not find Bass' explanation sufficient.

Bass testified that he and Grzembski told Rogers on the night of the efficiency test that the conditions were bad for walking or standing. *Id.* at 36. Bass agreed there was time to walk to the road crossing at Dixie Highway and do the roll-by there, as did Grzembski, he said that they'd have to tie down the train; he added that there were bad walking conditions. *Id.* at 31.

Bass testified that the drop-off east of their train (toward the graded gravel road) was "at least three feet" from the top of the rail down. J.Ex. 1 at 32. Answering the union's leading questions, Bass testified that, by not getting off the locomotive, they were following a rule that requires employees to be alert and attentive. *Id.* at 34. But he admitted that Flat Rock wasn't far

and that Bass and Grzembki could have asked for a vehicle to come drive them to Dixie Highway, where they could do the roll-by inspection. *Id.* at 38. They didn't do that. *Id.* Nor did they alert Flat Rock that they weren't going to be able to do a proper roll-by inspection. *Id.*

Finally, Bass testified that he did the roll-by inspection that night but did so from the nose of the locomotive and not from the ground.<sup>11</sup> J.Ex. 1 at 29-30. Recalled for questioning on this, Rogers said it was too dark, he could only see the lantern as it shone on the side of the passing train, and he'd assumed that the crew member holding the lantern was on the ground. *Id.* at 47. He did not dispute Bass' testimony that he'd done the roll-by inspection from the nose of the locomotive.

Admitted as a Company exhibit, Grzembki's disciplinary record showed a history in his 16 years of employment of 10 actual suspensions, two deferred suspensions, and three dismissals. J.Ex. 2 at 69-70; *see* R.Ex. 6; Tr. 50. One of the disciplinary incidents occurred when the Company found in 2010 that Grzembki had falsified a doctor's certificate and used it to be off work on two occasions. *Id.* at 69.<sup>12</sup>

*Dismissal.* Following the investigatory hearing, Golombeski concluded that Grzembki violated Operating Rule 523 on roll-by inspections. Tr. 178, 192-93. But it was for Assistant Superintendent Dean Macki to make the decision on whether there was a violation and, if so, what discipline to impose.<sup>13</sup> Golombeski sent Macki the hearing transcript and exhibits and directed him to review them and decide whether the Company should impose discipline. Tr. 151-52, 172-73, 178, 180. It appears that Golombeski gave Macki a summary of what he thought of the investigation, which he described as his "opinion." Tr. 192-93. But the record is silent as to whether the "opinion" he voiced included his conclusion as to whether Grzembki violated Operating Rule 523.

Macki recalled talking to Golombeski but could only remember Golombeski's asking him to review the transcript, determine the facts, and make an independent decision. Tr. 172-73. Both Macki and Golombeski testified that Golombeski did not advise Macki on how Grzembki should be disciplined. Tr. 173, 180. I conclude that Golombeski summarized what he had seen

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<sup>11</sup> Bass added that there wasn't room for both Grzembki and himself on the nose, given that Grzembki is "kind of meaty." *Id.* at 37. Neither Bass nor Grzembki volunteered that Bass had done the roll-by inspection from the platform on the locomotive rather than from the ground. Tr. 108.

<sup>12</sup> A recent discipline was for using profanity in response to being assigned to a particular train. *Id.* Claimant did not dispute the charge, and he was given a deferred suspension. *Id.* Although this occurred after Complainant made his complaints to Rogers and the FRA about the toilet sanitation, he has not contended that this discipline was retaliatory. *See* Tr. 49.

There was some dispute whether an efficiency test failure could be used for discipline. But Macki and Golombeski testified that a failure could result in discipline depending on the employee's disciplinary record, and Grzembki conceded that was correct. *See* Tr. 49, 78, 155-156, 185.

<sup>13</sup> Macki started working as a track laborer in 1990. Tr. 149. He became a conductor in 1993 and was promoted to yardmaster, trainmaster, senior chief dispatcher, and finally assistant superintendent in Flat Rock in 2014, shortly before the disciplinary hearing. Tr. 149-50, 163, 193. He took the position Golombeski had occupied before the Grand Trunk promoted Golombeski to superintendent. Tr. 176.

and heard at the hearing, but Macki understood that it was his responsibility to make an independent decision.<sup>14</sup>

On October 6, 2014, Macki issued a letter to Grzembksi dismissing him from employment at the CN rail system. Tr. 29; J.Ex. 3. After a brief summary of the alleged violation of Company rules, Macki wrote the following, which I quote in its entirety: “The record contains credible testimony and substantial evidence proving that you violated USOR—Rule 0523—Inspecting Passing Trains. In consideration of the incident, the proven rule violations, and your past discipline record, you are hereby assessed the following discipline: **Dismissal from Service.**” *Id.*<sup>15</sup>

At the ALJ hearing in 2017, Macki explained his decision in more detail. He testified that, after reviewing the transcript and exhibits, he concluded based on Grzembksi’s admission that Grzembksi did not perform the roll-by inspection. Tr. 153. Macki acknowledged that Operating Rule 523 gives a crew member discretion to determine whether the terrain permitted the roll-by inspection. Tr. 153-54. Aware of Grzembksi’s testimony at the investigation that he did not think it was safe to go down to the ground and do a roll-by inspection, Macki testified that “it’s not okay to not perform something that is safe to do.” Tr. 154. He added, “‘Discretionary’ doesn’t mean that a safe condition can just be deemed unsafe because somebody doesn’t do the proper diligence to determine if it was a safe or unsafe condition.” Tr. 170-71.

I took this to refer to Complainant’s failure to leave his seat to look at conditions on both sides of the train. Also, Macki said that his review of the photographs left him convinced that conditions were safe on the east side of the train. Tr. 154. In his opinion, there was sufficient space for Grzembksi to stand before an “extreme” drop in elevation and Grzembksi could do the roll-by inspection from there. Tr. 154-55.

As to the severity of the discipline, Macki was new to the terminal and had never worked with Grzembksi, so he relied on Grzembksi’s personal work record. Tr. 155-57; *see* J.Ex. 2 at 69-70. It revealed several violations, suspensions, and dismissal. Tr. 157; *see* J.Ex. 2 at 69-70. Rogers characterized Grzembksi’s work record as “terrible.” Tr. 181-82, 185-86. Considering that history and the investigatory hearing record, Macki concluded that the choice of a dismissal as the discipline to be imposed was a “no-brainer.” Tr. 157.

At the time he made his decision, Macki was unaware of Grzembksi’s complaints about toilet sanitation. Tr. 151, 155, 157, 173. Macki and Grzembksi had never met, and Grzembksi had never discussed with Macki either his toilet sanitation report or his FRA complaint. Tr. 45-46, 70, 151.

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<sup>14</sup> Macki testified on direct at the ALJ hearing that he did not talk to Rogers before making the disciplinary decision. Tr. 157, 172. On cross, he said he couldn’t recall, but Complainant didn’t follow up. Tr. 164-65. Complainant thus did not establish any discussion between Rogers and Macki about the discipline.

<sup>15</sup> Macki enclosed a copy of the investigation hearing transcript in the letter to Grzembksi. *Id.*

Grzembksi's union took an internal appeal at CN. J.Ex. 4. On January 28, 2015, the Railroad agreed to reinstate Grzembksi "on a leniency basis" with certain qualifications.<sup>16</sup> Tr. 29-30; J.Ex. 4-5. In particular, Grzembksi would not be paid or receive credit for leave purposes for the time he had not worked following the dismissal; the Company was not responsible for any lapse in health insurance or other benefits; the dismissal would be converted to a suspension; and there would be no future leniency. J.Ex. 4. On the other hand, Grzembksi could return to his prior job, and his seniority would be restored as if he'd worked through the suspension period. *Id.*

Grzembksi accepted the reinstatement and returned to work on January 28, 2015. The suspension amounted to three months and 18 days. The parties stipulate that Complainant's lost wages by reason of the discharge/suspension were \$36,531.57.

*Floyd Bass.* As discussed above, Rogers and Golombeski learned for the first time at the investigatory hearing that the conductor at the roll-by, Floyd Bass, did not conduct a proper inspection because he remained on the locomotive rather than descending to the ground. Tr. 114, 184. Rogers was not involved in initiating discipline and had not initiated the discipline against Grzembksi; he similarly initiated no discipline against Bass when this new evidence surfaced. Tr. 114-15. Golombeski, however, sought to open a disciplinary investigation into Bass' failure, and the Company issued a notice of investigation against Bass about two weeks after Grzembksi's investigative hearing. Tr. 184. Tr. 28, 184, C.Ex. D; C.Ex. A at 30-32; Tr. 28. But, after consulting with labor relations, Golombeski concluded that the investigation was untimely under the collective bargaining agreement. Tr. 184. For this reason, the Company did not pursue the matter. Tr. 29, 184.

*Additional evidence at the ALJ hearing and related credibility determinations.* I turn to some evidence that was admitted at the ALJ hearing but is generally irrelevant. Some of this evidence also is not credible. This includes certain testimony at the ALJ hearing about the terrain where Bass and Grzembksi stopped their locomotive on the night of the efficiency test. Both Grzembksi and a defense witness offered new evidence at the ALJ hearing that tended to bolster or refute Grzembksi's contention that the terrain was unsafe for the roll-by inspection.

The difficulty with this is that, as the decisionmaker, Macki relied on the transcript of the investigatory hearing and the exhibits admitted at that hearing. Nothing on the record before me suggests that Macki had any personal knowledge of the conditions at Chapman Siding that night or even that he visited the efficiency test site at any time before he decided on the discharge from employment. The record offers little about the summary Golombeski gave Macki about the investigatory hearing. I can conclude from all of the evidence only that Macki based his decision, as he said, on the record at the investigatory hearing.

The focus of my analysis is not whether I agree with Macki's decision that Grzembksi should be discharged from employment; rather my focus must be on whether Complainant's protected activity was a contributing factor in Macki's decision. *See Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, 2016-FRS-00082 (ARB Jan. 22, 2020), slip op. at 11-12.<sup>17</sup> There is little

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<sup>16</sup> It is not unusual for the union and Grand Trunk to settle disciplinary disputes in this way. Tr. 71.

<sup>17</sup> As the ARB held in *Acosta*: "The ALJ erred in the above analysis by focusing on his perceptions of the merits of Union Pacific's justifications for terminating Acosta. The question is not whether Acosta violated Union Pacific's

occasion to consider evidence about the efficiency test that first surfaced *after* Macki made his decision. Nonetheless, I discuss this additional evidence for completeness and because I will draw some conclusions from it about credibility.

At the ALJ hearing, Grzembki testified that, as his train pulled into Chapman Siding, he could see the ground conditions on both sides of the mainline and siding tracks by the light of the locomotive's headlight. Tr. 22, 61. On cross-examination, Grzembki admitted that he did not testify to this at the investigatory hearing. Tr. 61. He testified at the ALJ hearing that, although both sides of the mainline and siding tracks had water halfway up the ballast, what he considered unsafe was that he saw broken railroad ties and tree limbs "sticking out from the water." Tr. 21, 57-58. On cross-examination, he admitted that he never reported this to Rogers and that Rogers might have assessed the conditions differently. Tr. 65, 69. Grzembki also admitted that broken railroad ties and tree limbs all over the ground at the siding would pose a threat to other employees; that he was required to report to the Railroad any threatening conditions; and that he did not report these conditions. *Id.*<sup>18</sup>

Not only did Grzembki not testify to these conditions at the investigatory hearing; his testimony there was entirely different. At the investigatory hearing, the only ways in which he said the ground conditions were unsafe were the incline of the slope on the western side and the "four-foot drop-off from the step plate down into soft ground" on the eastern side. J.Ex. 1 at 41.

Grzembki's new evidence at the ALJ hearing is irrelevant because there is no evidence that, at the time Macki decided to terminate the employment, he or any other of Respondent's managers knew of the newly alleged dangerous conditions on the ground (railroad ties and tree limbs sticking up out of the water).

Worse, the new testimony impugns Grzembki's credibility. Grzembki is testifying for the first time three years after the incident that he could see the conditions on the ground on both sides of the train from the locomotive's headlight. But at the investigatory hearing, which was three weeks after the incident, he admitted that he could only see conditions to his right and not to his left. J.Ex. 1 at 42. He admitted that Bass told him nothing about the safety on conditions on the left. *Id.*

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rules, whether he actually was or was not point protector for the entire time, or whether Union Pacific proved that he was not actually in charge of the team's work as opposed to being a leader of the team. The ARB has stated on many occasions that the ALJ should not sit as a super-personnel advocate when viewing the employer's decisions for an adverse action. "The thrust of Complainant's argument is that it was wrong, unfair, or unjust for Respondents not to weigh the grounds that they cited against Complainant's past performance and find in favor of retaining her, and that therefore Respondents' rationale was pretext. However, [I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible ... [rather] he must show that the explanation is a 'phony reason.'" The FRSA is not a wrongful termination statute. An employer's actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for FRSA whistleblowing activity." *Acosta* at 11-12 (citations and footnote omitted).

<sup>18</sup> Senior Manager of Operating Practices and Rules Joseph Whitt confirmed that the Grand Trunk's general rules require any employee who "discovers a hazardous situation . . . to deliver that to supervision by the first available means of communication." Tr. 232-33.

In my view, conditions as dangerous as Grzembki described them at the ALJ hearing are not something one suddenly remembers after three years, having neglected to mention them either to Rogers on the same night as they occurred or at the investigatory hearing three weeks after the efficiency test. They are not conditions that a union rail worker would fail to report, thereby endangering his fellow union members who would be working at that siding. I reject Grzembki's new testimony on the terrain as not credible, and I find Grzembki generally much less credible for the same reason.<sup>19</sup>

Respondent offered evidence at the ALJ hearing that was of limited value as well. Senior Manager of Operating Practices and Rules Joseph Whitt agreed with Macki's decision. Looking at one of the photographs of Chapman Siding (R.Ex. 3), Whitt opined that the service road on which Rogers had driven earlier was a safe place for a roll-by inspection of a passing train. Tr. 207. He explained in some detail. *Id.* He concluded that "it doesn't get any better than this to do a roll-by inspection from a field standpoint." Tr. 219. He also testified, consistent with Rogers' opinion, that crew members could conduct a roll-by inspection at the road crossing at Dixie Highway. Tr. 207-08. He stated that nothing in the rules precludes crew members from walking to the crossing to conduct a roll-by inspection. Tr. 221-22. Finally, in Whitt's opinion, Grzembki and Bass could have walked up the service road or between the rails to the crossing. Tr. 222.

Again, if Whitt had testified at the investigatory hearing in 2014, I could find that Macki reasonably relied on Whitt's expertise when Macki found a violation of Operating Rule 523. But Whitt's testimony at the ALJ hearing three years after the Railroad imposed the adverse action could not have informed Macki's disciplinary decision. I find the testimony relevant only for the limited purpose that it generally tends to rebut any argument that Macki's decision was a pretext for retaliation.

### Discussion

It is a violation of the Federal Rail Safety Act if a covered rail carrier's discharge or suspension of an employee "is due, in whole or in part" to the employee's protected activity. 49 U.S.C. § 20109(a). The burdens of proof under the Act are imported from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121. *See* 49 U.S.C. § 20109(d)(2). To prevail, a complainant must demonstrate that: "(1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action." *Consol. Rail Corp. v. U.S. Dep't of Labor*, 567 F. App'x 334 (6th Cir. 2014); *see Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014).<sup>20</sup>

Thus, the complaining employee must carry the burden to show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1982.109(a); *see Palmer*, ARB No. 16-035 (Jan. 4, 2014) (*en banc* and

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<sup>19</sup> Bass gave a deposition as part of this whistleblower litigation on February 10, 2017. (C.Ex. A.) He testified generally that he no longer remembered much that would be useful.

<sup>20</sup> The Sixth Circuit is controlling in this Michigan/Ohio-based case. *See* 49 U.S.C. § 20109(d)(4).

reissued with full dissent), PDF at 16; *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, slip op. at 6 (Apr. 30, 2010). If the complainant meets this burden, the employer may avoid an order of relief only if it “demonstrates by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1982.109(b); *see* 49 U.S.C. § 20109(d)(2)(A)(i); *Acosta v. Union Pac. R.R. Co.*, *supra* at 4-5; *Palmer*, PDF at 52.

It is undisputed that Grand Trunk comes within the Act as a railroad carrier engaged in interstate commerce and that Grzembski engaged in protected activity when he made his complaints about toilet sanitation in May 2014. There is no dispute that the discharge from employment was an adverse employment action even if ameliorated by the agreement to reduce it to a suspension.<sup>21</sup> That leaves Complainant with the burden to show that the employer knew of the protected activity and that the protected activity was a factor that contributed to the employer’s decision to terminate the employment. I conclude that Complainant failed to meet his burden as to these elements.

#### I. Complainant Failed To Carry His Burden On Respondent’s Knowledge Of The Protected Activity.

Some of the precedential cases describe the employer’s knowledge of the protected activity as a separate element that Claimant must demonstrate by a preponderance of the evidence (*see, e.g. Consol. Rail Corp., supra*); others include the employer’s knowledge as relevant to the required showing of causation. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3, PDF at 2 n.5 (ARB July 17, 2015). As I discuss below, in this case the result is the same under either formulation.

The employer’s knowledge may be actual or constructive. *Kuduk v. BNSF Ry. Co.*, 768 F.3d at 789. But a complainant must show more than that his employer as an entity knew of the protected activity: she must show that the decisionmaker who subjected her to the adverse action knew of the protected activity. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, 2003-AIR-38 (ARB Jan 31, 2006) at 6 (in AIR-21 case, “complainant must prove by a preponderance of the evidence that the person making the adverse employment decision had knowledge of the protected activity”); citing *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 14 (ARB Jan. 30, 2004)14, citing *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec’y Apr. 7, 1993), *aff’d* 73 F.3d 100 (6th Cir. 1996); *see also Mercier v. U.S. Dep’t of Labor*, 850 F.3d 382, 391 (8th Cir. 2017); *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107 (4th Cir. 2016).

Here, the decisionmaker was Dean Macki. There is no dispute that, at the time Macki made his decision, he and Grzembski had never met; Grzembski had never discussed with Macki either the toilet sanitation issue or his FRA complaint; and Macki was unaware of Grzembski’s complaints about toilet sanitation. Complainant thus failed to show that the decisionmaker had actual knowledge of Complainant’s protected activity (whether that activity was the sanitation complaint to Rogers, his complaint to the FRA, or both).

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<sup>21</sup> The amelioration to a suspension would affect the extent of any relief awarded but does not negate Complainant’s proof that the employer imposed an adverse action.

As to constructive knowledge, an example potentially relevant here is so-called “cat’s paw” liability. See *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) (Uniformed Services Employment and Reemployment Rights Act).<sup>22</sup> As the *Staub* Court described the “cat’s paw” analysis: “If a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable.” *Staub* at 422. This occurs when the supervisor influences, but does not make, the ultimate employment decision. *Id.* at 413.<sup>23</sup>

Grzembksi argues that Rogers had retaliatory animus that influenced Macki’s decision, thus resulting in Complainant’s protected activity being a factor in the decision to terminate the employment.<sup>24</sup> As Grzembksi states in his closing brief: “During the three months prior to Mr. Grzembksi being brought up on charges which resulted in his . . . dismissal from service there were a number of incidents, that in the very least, show that it was more likely than not that . . . Rogers did not like that Grzembksi engaged in protected activity.”

The difficulty with Complainant’s argument is that he cites nothing on the record to support it, and my own review of the record found no evidence to support it either.<sup>25</sup> I conclude that Complainant’s argument about Rogers’ being antagonistic or hostile toward him after Complainant engaged in protected activity lacks foundation on the record, and I reject it.

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<sup>22</sup> A dissenting judge in an ARB case found the doctrine essentially at issue in a case under the Energy Reorganization Act. *Chen v. Dana-Farber Cancer Inst.*, ARB N. 09-058, ALJ No. 2006-ERA-009 (Mar. 31, 2011) (Royce, AAJ, dissenting).

<sup>23</sup> The technicalities of any application of a “cat’s paw” analysis in a case under the FRSA would differ from the application to a USERRA case in *Staub*. This is because the complainant’s required showing under the FRSA is that the protected activity was a *contributing* factor in the adverse action, not a *motivating* factor. But, as I will find that Grzembksi’s protected activity did not contribute to Rogers’ actions, I need not address these technicalities.

<sup>24</sup> As to Golombeski, Grzembksi testified at the ALJ hearing that he did not take exception to the way Golombeski’s handled the investigatory hearing and was not claiming that Golombeski did anything to retaliate against him. Tr. 69. Represented by counsel, Grzembksi did not argue in his closing brief that Golombeski influenced Macki’s decision in a manner that made Grzembksi’s protected activity a contributing factor in the termination of the employment. I therefore do not reach that question.

<sup>25</sup> When reviewing the record, I considered and rejected as irrelevant on this point Complainant’s testimony about an incident that occurred *before* he made the first protected complaint in May 2014. Complainant testified that he was the engineer on a train (that apparently was stopped) and saw Rogers “come flying out of the pump tower down the road.” Tr. 35-36. Over the radio, Complainant said, “There’s a ten mile an hour speed limit. Slow down.” Tr. 37. The conductor working with Grzembksi was on the ground at the time. Tr. 38. Complainant testified that “Rogers jumped out of his vehicle and hollered at my conductor, ‘You want a war, I’ll give you a war.’” *Id.* Complainant was unable to recall how long before the protected activity this occurred. Tr. 35-36.

I find this irrelevant to show that Rogers became antagonistic or hostile toward Grzembksi because of Grzembksi’s protected activity. First, the incident occurred *before*—perhaps well before—Grzembksi engaged in protected activity. The incident thus cannot reflect any antagonism related to the protected activity and cannot refer to a war for which one of the causes would be Grzembksi’s as yet non-existent protected activity. Second, Grzembksi’s testimony is that Rogers “hollered” *at the conductor*, not at Grzembksi. That might reveal something about how Rogers felt toward the conductor, but I cannot find that it reveals much, if anything, about how Rogers felt toward Grzembksi. Complainant did not argue in his closing brief that this incident was evidence showing that “Rogers did not like that Grzembksi engaged in protected activity.” I find that this evidence does nothing to show that Rogers became antagonistic or hostile toward Grzembksi after Grzembksi engaged in protected activity.

To the contrary, I find Rogers' actions were aimed at performing his job duties and at providing accurate information about the efficiency test. The Railroad's requirement that Rogers complete 35 efficiency tests per month amounted to an average of nearly two efficiency tests per workday. Rogers was required to take those opportunities for testing that appeared if he was to do his job. His selection of trains for efficiency testing roll-by inspections was based on neutral criteria: it depended on which trains would pass at locations where one could stop and do the inspection. It happened that Grzembki was on one of the trains that met the neutral criteria. Complainant does not dispute that Rogers selected his train for the efficiency test based on these neutral criteria on the night in question, and I find that Rogers did that.

Complainant does not dispute that Rogers accurately saw that only one of the two crew on Grzembki's train left the cab for the roll-by inspection, nor does he dispute that he was the one who stayed in the cab that night.

I find credible that Rogers believed the crew member who exited the cab (Conductor Bass) descended to the ground; it was a dark, rainy night, and Rogers was viewing the scene from around 200 or 300 feet away (even if with binoculars). When he questioned Bass and Grzembki about their roll-by inspection, Bass did not volunteer that he failed to descend to the ground. All of Rogers' actions and testimony was consistent with the conclusion that he believed in good faith that Bass had descended to the ground and properly performed the roll-by inspection.

After Rogers spoke with Grzembki and Bass, he did what Operating Rule 523 requires of him: he entered the efficiency test results in a database. Consistent with all his other conduct and testimony, Rogers' entry was that Bass passed and Grzembki failed. That was the end of his participation until called to testify at the investigatory hearing.

It was another manager's decision to initiate the disciplinary investigation. At the investigatory hearing, Rogers was quick to admit to the limitations on his ability to see that night. Grzembki's only contention at the time of the investigatory hearing was that the incline of the ballast was unsafe. Rogers disagreed based on what he could see. It was Grzembki who drastically and without explanation shifted his testimony about the conditions when he testified at the ALJ hearing; Rogers' testimony remained consistent. I therefore credit Rogers' testimony over Grzembki's.

I find nothing in Rogers' conduct or testimony to suggest that he was trying to get Grzembki disciplined, not to mention that Grzembki's protected activity was a contributing factor to Rogers' supposed efforts. I thus reject as unsubstantiated any argument that Rogers interjected Grzembki's protected activity into the Company's decisionmaking on the efficiency test failure or that his actions or statements resulted in Grzembki's protected activity becoming a contributing factor in the decision to terminate the employment.

As Macki had not actual knowledge or constructive (cat's paw) knowledge of Grzembki's protected activity, and Macki was the decisionmaker, I conclude that Grzembki failed to establish the element of the Company's knowledge of his protected activity.

II. Even If Knowledge Is Simply A Part Of The Contributing Factor Analysis, The Result Is The Same.

Even if knowledge of the protected activity is not itself an element of the claim but instead is relevant to a determination of contributing factor causation, I would reach the same conclusion. To prevail, a complainant must make a showing, “by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action.” *Palmer*, ARB No. 16-035, PDF at 15. The “level of causation that a complainant needs to show is extremely low.” *Id.* at 15. It requires only a showing by a preponderance that the protected activity played “some role.” *Id.* at 55. That role need not be a substantial, significant, motivating, or predominant factor. *Id.* at 53-55. In cases in which the employer’s theory of the facts will be that the protected activity played no role in the adverse action, “the ALJ must consider the employer’s nonretaliatory reasons, but only to determine whether the protected activity played any role at all.” *Id.* at 15.

A complainant “*may* meet her burden with circumstantial evidence.” *Id.* at 55. Circumstantial evidence is important, as employees generally “are likely to be at a severe disadvantage in access to relevant evidence.” *Id.* at 55-56.

Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.

*DeFrancesco v. Union R.R. Co. [DeFrancesco I]*, ARB No. 10-114, ALJ No. 2009-FRS-9, PDF at 7 (ARB Feb. 29, 2012); *see also Gunderson v. BNSF Ry. Co.*, No. 14-CV-0223 (PJS/HB), 2015 WL 4545390, at \*9 (D. Minn. July 28, 2015) (unpublished).

*Temporal proximity.* “The ALJ is . . . *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, ... the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.” *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034 (Jan. 6, 2017) (*en banc*), ALJ No. 2010-FRS-00030, slip op. at 9.

As the Sixth Circuit recently held in a Title VII retaliation case:

“Temporal proximity alone can be enough” circumstantial evidence of causation if the two are sufficiently close in time. “[W]here some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.”

*Redlin v. Grosse Pointe Pub. Sch. Sys.*, 921 F.3d 599, 615 (6th Cir. 2019) (citations omitted). Thus, a three-month interval between an EEOC complaint and an adverse action was insufficient, standing alone, to establish causation; other evidence of retaliatory conduct was required. *Tuttle v. Metro Gov't of Nashville*, 474 F.3d 307, 320-21 (6th Cir. 2007).

The ARB has rejected “any notion of a per se knowledge/timing rule” for AIR-21. *Palmer*, ARB No. 16-035, PDF at 56. Depending on the surrounding circumstances, temporal proximity might support an inference of retaliation but fall short of being dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). Where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on temporal proximity to establish causation. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001); accord *Acosta*, *supra* at 8-9.

Here, the three-month interval between the protected activity and the beginning of the disciplinary process is too long, standing alone, to raise an inference based on proximity in time. *See Tuttle*, *supra*. More important is that Grzembski’s failure on the roll-by inspection efficiency test is an intervening event that makes “the insufficiency of temporal proximity as a basis for proving causation is even more apparent.” *See Acosta*, *supra*.

*Pretext.* “Showing that an employer’s reasons are pretext can of course be enough for the employee to show protected activity was a ‘contributing factor’ in the adverse personnel action.” *Palmer*, ARB No. 16-035, PDF at 53-54.<sup>26</sup> “The critical inquiry in a pretext analysis ‘is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.’” *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (quoting *McCullough v. University of Ark. for Med. Sciences.*, 559 F.3d 855, 861-62 (8th Cir. 2009); *see Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008) (“The relevant ‘falsity’ inquiry is whether the employer’s stated reasons were held in good faith at the time [the adverse action was taken], even if they later prove to be untrue . . .”).<sup>27</sup>

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<sup>26</sup> An employee need not demonstrate that an “employer’s proffered non-discriminatory reasons are pretext.” *Coates*, ARB No. 14-019, PDF at 4.

<sup>27</sup> *See also Reynolds v. Fed. Express Corp.*, 544 F. App’x 611, 615 (6th Cir. 2013) (“A plaintiff may show that an employer does not honestly believe the reasons for its decision because it acted without information or consideration.”) (Title VII); *Blizzard v. Marion Tech. College*, 698 F.3d 275, 286 (6th Cir. 2012) (“[F]or an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made.”) (Age Discrimination in Employment Act); *Braithwaite v. Timken Co.*, 258 F.3d 488, 494 (6th Cir. 2001) (“In order to determine whether the defendant had an ‘honest belief’ in the proffered basis for the adverse employment action, this Court looks to whether the employer can establish its ‘reasonable reliance’ on the particularized facts that were before it at the time the decision was made”) (Title VII).

Here, there is no dispute that Rogers was following Company policy by conducting the efficiency test: It was among the 35 monthly tests that his job required him to perform, and there is no dispute that his selection of Complainant's train for the test was consistent with Company practice based on neutral criteria.

I also find that Macki formed a good faith belief based on the evidence before him that Complainant violated Operating Rule 523 and that the discharge from employment was an appropriate disciplinary action, given Grzembski's record of past discipline. I base that conclusion on the following:

Complainant admitted to the violation with the single exception of whether the terrain was so unsafe that he could reasonably decide not to do the roll-by inspection.

At the time of the investigatory hearing and on the night of the roll-by inspection, Complainant asserted no more than that the incline of the ballast was unsafe. I find that Rogers had a good view of this area to the east of the siding, along where he was driving. He was there was sufficient space to descend and stand safely. Complainant's later testimony about conditions of the terrain is irreconcilable with his statement to Rogers on the night of the efficiency test and with his testimony at the Company's investigatory hearing shortly after that night.

As discussed above, this diminishes Complainant's credibility generally and renders his testimony on these points at the ALJ hearing not credible. I find additional support for this conclusion in the photographs of Chapman Siding. Although the photographs were taken during daylight three weeks later, there had been no maintenance done in that intervening time. If there were widespread tree limbs and broken rail ties sticking up from the water along the ballast, at least some of them should have been visible in the photos. The photos show no examples of these obstacles standing up from the ballast or in the gravel road on which Rogers drove.

Grzembski's assertion first raised at the ALJ hearing that he could see the terrain conditions across the entire area from the headlight on the locomotive also detracts from his credibility for the reasons I discussed above. I reject that testimony as inconsistent with Grzembski's previous statements, including his testimony at the investigatory hearing that he could only see on the right on the locomotive.

In all, I give more weight to Rogers' testimony, especially in that the only question is whether Rogers *believed in good faith* that the conditions were safe enough to do the roll-by inspection. If Rogers believed this in good faith—even if others might disagree—his report that Grzembski failed the efficiency test was not pretextual and could not have introduced pretext into the Company's decisionmaking process. I conclude that Rogers did not introduce pretext into the Company's decisionmaking.

Complainant offers no evidence that Macki himself reached a pretextual decision. As Macki did not engage directly in pretext and Rogers did not influence Macki for pretextual or retaliatory reasons, I conclude that Complainant failed to demonstrate that Respondent's decision to terminate the employment was pretext.

*Inconsistent application of policies.* Both Grzembki and Bass failed the efficiency test. Respondent terminated Grzembki's employment yet did not discipline Bass. Bass had not engaged in protected activity; Grzembki had.

Nonetheless, I find persuasive the Company's explanation: no manager knew at any time before Grzembki's investigatory hearing that Bass did not properly perform the roll-by inspection because he did it from the nose of the locomotive rather than from the ground. When the Company discovered this at the investigatory hearing, it started a disciplinary process. The Company abandoned that process only when it concluded, as is undisputed, that it was time-barred under the collective bargaining agreement.

As it is undisputed that the discipline would have been untimely under the collective bargaining agreement, I conclude that the Company's disciplinary process would have been futile and improper. As this is a legitimate, non-retaliatory reason that fully explains the difference in treatment of the two employees, and as I find that the undisputed evidence supports it, I conclude that the Company's more favorable treatment of Bass is not circumstantial evidence that Complainant's protected activity was a contributing factor in the adverse employment action.

*Other circumstantial evidence.* Other potential circumstantial evidence as listed in *Redlin, supra*, are addressed in the following:

- Unlike Grzembki's shifting testimony, Rogers' and the other Company witnesses' testimony was overwhelmingly consistent.
- Despite Complainant's argument in his closing brief that Rogers exhibited antagonism toward Complainant after Complainant reported the toilet sanitation incident to the FRA, there is no evidence of this on the record.

Thus, even without considering Macki's lack of knowledge (actual or constructive) of Grzembki's protected activity, I conclude that Grzembki failed to show by a preponderance of the evidence that his protected activity was a contributing factor in Macki's decision to terminate the employment. Moreover, when the decisionmaker's knowledge of the protected activity is not analyzed as a separate element, it must be considered as relevant to the contributing factor element.<sup>28</sup> Here, Macki's absence of knowledge (actual or constructive) further bolsters the conclusion that Complainant failed to carry his burden on contributing factor causation.

### Conclusion and Order

As Complainant has failed to show the decisionmaker's knowledge (actual or constructive) of the protected activity, and in the alternative, has failed to show that his protected activity was a

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<sup>28</sup> That is, the decisionmaker's lack of knowledge of the complainant's protected activity is evidence that the protected activity was not a contributing factor in the adverse employment action.

contributing factor in the decision to terminate the employment, Complainant has failed to establish a violation of the Federal Rail Safety Act. Accordingly,

Complainant's claim is DENIED. Complainant shall take nothing by reason of his complaint. This matter is DISMISSED.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge

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

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

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

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

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

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

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

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

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