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Issue Date: 25 April 2019

CASE NO. 2016-FRS-84

In the matter of:

JEFFREY HELGESON,
Complainant

v.

SOO LINE RAILROAD COMPANY,
Respondent

DECISION AND ORDER

I. PROCEDURAL BACKGROUND

This matter arises under the employee protection provisions of the Federal Rail Safety Act (“FRSA” or “the Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”), Pub. L. No. 110-53 (Aug. 3, 2007) and the implementing regulations at 29 C.F.R. Part 1982.

On October 29, 2015, complainant, Jeffery J. Helgeson, (“Complainant” or “Helgeson”), filed a formal complaint with the U.S. Department of Labor, (“DOL”), Occupational Safety and Health Administration (“OSHA”) alleging his employer, Soo Line Railroad Company d/b/a Canadian Pacific (“Respondent” or “CP”), retaliated against him for (1) participating in a union safety protest and a related video, in which he raised safety concerns; and (2) submitting a report of hazardous conditions after being involved in a “near-miss” incident at work, by terminating his employment. (*See* Respondent’s Exhibit “RX” 39-40; Joint Exhibit (“JX”) 1, ¶15). After completing its investigation, on August 17, 2016, the Secretary of Labor, through the Regional Administrator, OSHA, issued its determination letter finding no reasonable cause to believe that a violation of FRSA occurred and dismissed the complaint. (*See* RX 43; JX 1, ¶16).

On September 8, 2016, Complainant, through counsel, timely filed objections to the Secretary’s findings with the Office of Administrative Law Judges (“OALJ”) and requested a hearing before an administrative law judge (“ALJ”). The matter was subsequently assigned to me. Pursuant to the issuance of the Notice of Hearing and Pre-hearing Order, I held a *de novo* hearing from June 6-8, 2017, in Minneapolis, Minnesota, at which both parties, represented by counsel, were afforded a full and fair opportunity to present evidence and argument. At the

hearing, Complainant's Exhibits ("CX") 1-2, 4, 6, 9, 11-15, 19-21, 23-30, and 32,¹ and Respondents Exhibits ("RX") 1-43, 48-58, certain pages of 59, and 62-68, were admitted into evidence.² Complainant and Respondent stipulated to certain facts, which were admitted at hearing as Joint Exhibit ("JX")1, entitled "Joint Stipulation of Agreed Facts," all of which I adopt herein.³

Seven witnesses testified at hearing: complainant, Jeffrey Helgeson, CP locomotive engineer employee Christopher Devall, state director for the Minnesota United Transportation Union ("UTU") and legislative lobbyist representative, Phillip Qualy, former CP supervisor and employee, William Brown, III, CP trainmaster Cameron Muscha, CP St. Paul Superintendent Tom Jared, and CP manager, Road Foreman of Engines and hearing officer, Jeffrey McInnis. The record remained open for Respondent to take the post-hearing testimony of CP General Manager, Steven Nettleton, by deposition, as he was unavailable at hearing. The deposition of Mr. Nettleton was completed on October 4, 2017. Subsequently, by mutual agreement, the parties simultaneously timely submitted their post hearing briefs in this matter on December 14, 2017, which were considered in this decision. Complainant seeks reinstatement with his seniority status restored, back pay at \$85,000.00 per year, with interest, non-economic or compensatory damages for anxiety and suffering in the amount of \$500,000.00, punitive damages of \$250,000.00, and attorney's fees and costs. (Complainant's Post-Trial Brief ("Compl. Brief") at 37-38).

The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, the testimony and other evidence, applicable statutory provisions, regulations and pertinent precedent. Although every exhibit in the record is not addressed below, I carefully considered each as well as all the witness testimony in reaching my decision. The relevant evidence, or portions thereof, are highlighted and detailed further below in the Findings of Fact and Analysis and Findings portions of the Decision and Order below.

For the reasons more fully provided below, I find Respondent violated the Federal Rail Safety Act when it terminated Complainant's employment due his protected activity. Consequently, Complainant's request to return to his prior employment as well as his claim for damages filed under the employment protection provisions of the FRSA is granted, to the extent discussed below.

¹ Certain other exhibits initially offered or included on the exhibit list by Complainant were withdrawn but admitted as a Respondent exhibit, therefore rendering it unnecessary to also admit as a Complainant exhibit. In some limited instances, exhibits were excluded. These findings are documented in the hearing transcript.

² Certain other exhibits initially contained on the exhibit list by Respondent were either not offered at hearing or otherwise addressed in the hearing transcript. RX 68 was not admitted at hearing but per the parties post-hearing agreement, received June 12, 2017, it is now admitted.

³ The Stipulated facts are further cited in my Findings where necessary.

II. JURISDICTION AND COVERAGE

Jurisdiction for this case is vested in the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ”) by subsection 20109(c)(2)(a), which applies to the rules and procedures set forth in 49 U.S.C. § 42121(b) relating to whistleblower complaints under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”). *See also*, 29 C.F.R. Part 1982 (Implementing regulations providing process and procedures for handling retaliation complaints in relevant part, under the Federal Railroad Safety Act (FRSA)). A party who desires review of OSHA’s findings and preliminary order related to a whistleblower complaint must file any objections or a request for a hearing on the record, in writing, with the OALJ, within 30 days of receipt of the findings and preliminary order. 29 C.F.R. §1982.106. Neither party challenged or otherwise addressed my jurisdiction in their post-hearing briefs or at any time in the proceeding. Additionally, Complainant’s claim fulfills the requirements that grant the OALJ jurisdiction under 29 C.F.R. Part 1982. Accordingly, I find I have jurisdiction to decide this matter.

The FRSA applies to any “railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier.” 49 U.S.C. § 20109(a). Respondent is a rail carrier engaged in interstate commerce, providing freight rail transportation services in Minnesota and other Midwest states. *See* Respondent’s Proposed Findings of Fact and Conclusions of Law, (“RPPFC”) ¶1. Respondent agrees, and I find, it is a rail carrier within the meaning of 49 U.S.C. § 20109(a), and is therefore a covered employer under the FRSA. *Id.* Complainant was an employee of Respondent, on the dates of the alleged protected activity included in the Complaint filed with OSHA.

III. ISSUES TO BE DECIDED

At hearing, the parties agreed that the following issues were to be decided:

1. Whether Complainant engaged in protected activity as asserted in his OSHA Complaint when (1) he participated in a union organized picketing/protest activity regarding safety issues and unsafe work environment at CP in February of 2014 and a related safety video, and/or (2) when the complainant allegedly⁴ filed an unsafe condition report following a “near fatal humping incident” occurring on January 25, 2015? (TR 13-14);
2. If Complainant engaged in protected activity as an employee of Respondent, whether Respondent was aware of or knew of the Complainant’s protected activities? (TR 14-15);

⁴ It was revealed at hearing that CP disputes whether a report was ever provided to CP from Complainant. (TR 12-13).

3. The parties agree that the termination on October 16, 2015 was an adverse action. (TR 16-17). Therefore there is no issue whether Complainant suffered an adverse action by CP when he was terminated.
4. If Complainant engaged in protected activity as an employee of Respondent and Respondent was aware of the protected activity, did the protected activity contribute to the unfavorable personnel action which was Respondent's termination? (TR 17-18).
5. If Complainant established a prima facie case of a violation of the employee protection provisions of the FRS, did Respondent demonstrate by clear and convincing evidence, that it would have taken the same unfavorable personnel action even in the absence of the protected activity⁵? (TR 19).
6. If Complainant established the elements of his claim, what injuries, if any did he suffer as a direct result of the violation? (TR 19-21).
7. If Respondent violated the Act and Complainant suffered injuries as a result, what relief is appropriate? (TR 21).
8. If Respondent violated the Act, are punitive damages appropriate? (TR 21-22).

IV. FINDINGS OF FACT

A. Respondent's Relevant Rules, Attendance Policy and Disciplinary Process

Employees are required to understand and follow Respondent's General Code of Operating Rules ("GCOR"). Employees are tested on and must achieve a passing score on the GCOR to work for Respondent. (TR⁶ 77, 261-262, JX 1, ¶2). The GCOR is the company's primary and overarching operational and safety rules book. (JX 1, ¶2). Relevant here is GCOR rule 5.3.7, "Radio Response," which provides:

When radio communication is used to make movements, crew members must respond to specific instructions given for each movement. Radio communications for shoving movements must specify the direction and distance and must be acknowledged when distance specified is more than four cars. Movement must stop within half the distance specific unless additional instructions are received.

⁵ Although not raised specifically at hearing, in its brief, Respondent's further raised as an issue: If Respondent presented clear and convincing evidence of a legitimate motive or reason for terminating Complainant, can Complainant establish by a preponderance of the evidence, that Respondent retaliated against him for engaging in protected activity, i.e. that Respondent's stated legitimate reasons were a pretext? This issue, as well as all others, although not specifically identified verbatim as in the above numbered paragraphs, are discussed herein.

⁶ "TR" refers to the official hearing transcript. Additionally, where relevant, certain facts as stipulated to by the parties are cited to herein and referred to as "JX 1" throughout.

(RX 7, p. 37).

Respondent's "GM Notice #8 Train and Engine Employee Guideline effective January 2014 ("Policy" or "Attendance Policy")," provides, "Minimum Availability: T&E employees who are absent for any reason (including but not limited to sick layoffs, unpaid personal leave day, missed calls and late reporting) on two or more available work days in the calendar month will be subject to review for attendance failure(s). ...No shows and refusals to protect service will be handled as separate and more serious offenses under the U.S. Discipline Policy 5612." (emphasis in original). (RX 8). The policy further provides that unexcused attendance failures substantiated after a fair and impartial investigation will be handled in accordance with the U.S. Discipline Policy 5612, as amended. With a change or cancellation of the prior policy, notice of the instant Attendance Policy, containing the name of Mark Redd, General Manager-Operations, U.S. West Region at the bottom, "effective January 1, 2014," was provided and posted on the CP bulletin board as a general notice. (RX 21 at CE B; RX 66, TR 166-167, 256). The Notice itself does not include a date or other indication as to when it was posted. (RX 21 at CE B).

From March 2013, as amended June 15, 2013, through May 2015, Respondent had adopted and used the "U.S. Discipline Policy 5612," applicable to US based unionized employees. (RX 13, RX 64, ¶ 4). Under the policy, discipline was assessed in a "single stream" and could progress with a 5-day unpaid suspension for a first infraction, 10-day unpaid suspension for a second infraction, and 30-day suspension for a third infraction, followed by dismissal for a fourth infraction. (RX 13). Unpaid suspension days are in addition to any time held out of service unless the employee's Collective Bargaining Agreement ("CBA") specifically states otherwise. (RX 13). Managers also maintain discretion to handle appropriate minor matters through informal coaching. (RX 13).

Under CP's U.S. Discipline Policy 5612, no discipline is to be assessed until a fair and impartial hearing has been held or the employee has waived a right to hearing by accepting responsibility. (RX 13). For attendance related cases, the Policy provides that the Company is to assess *record* suspensions only."(RX 12-13 (emphasis in original)). A record suspension means the employee will not miss work. (RX 12, p.4). The reason for using a record suspension for attendance violations is so the employee will not miss more work. (TR 574). CP is a 24/7 operation that requires its conductors maintain timely and regular attendance. (TR 168).

Under the Discipline policy, a "waiver" or the "waiver process" may be used in place of a formal investigation for attendance related investigations. For non-attendance related investigations, if appropriate, an employee may be offered the opportunity to "waive" a formal investigation and accept responsibility including a record suspension. (RX 13, p 2). When this occurs, the employee will only be required to serve a portion of the suspension, but the suspension will be shown on the employee's record as if they had served the full length of the suspension. (RX 13, p2).

Depending on the gravity of the situation and the specific circumstances, a 10 or 30 day suspension, or dismissal may be assessed for the first violation. (RX 13). Examples of certain situations where immediate dismissal may be warranted include workplace violence, theft, violation causing serious accident or injury, insubordination, drug or alcohol use, using personal

electronic devices in violation of policy, extended unauthorized absence as well as others (RX 13, pp 2-3). According to the policy, these cases further warrant the immediate withholding of the employee from service without pay pending the outcome of the hearing. (RX 13, p 3). McInnis confirmed that while the progressive discipline policy is based on the number of rule infractions by an employee, it also allows for leeway. (TR 573). The policy provides that managers retain the discretion to handle appropriate minor matters through informal coaching. (TR 573-574, RX 13). After the employee has successfully corrected behavior for 24 months they will be removed from the progressive discipline process. (RX 13, p 3).

The progressive discipline policy was cancelled, effective May 12, 2015. (TR 531). While there was no written policy in place thereafter, including as of September 2015, Respondent still administered the previous policy. (TR 644-645). After May 2015, discipline determinations were considered on a case-by-case basis, taking into account the facts and circumstances as well as other factors including the nature and seriousness of the violation, the employee's performance, counseling and discipline histories, and other relevant factors depending on the type of violation and the particular situation. (Nettleton TR 62; RX 64).

Complainant is a member of the United Transportation Union ("UTU"). The terms and conditions of his employment with Respondent were governed by a collective bargaining agreement ("CBA") between CP and the UTU. (JX 1, ¶6; TR 142). The CBA requires covered employees such as Complainant be afforded a hearing before the imposition of any discipline by CP, with the ability to offer evidence, including witness testimony and exhibits. (RX 63, ¶ 3 and Tab A; TR 143). The purpose of the hearing is to develop facts regarding, and to determine the employee's responsibility if any for, the incident in question. (RX 63, ¶ 3 and Tab A). Hearing Officers are assigned based on "availability" with the road team handling road investigations and the "yard team" handling yard investigations. (TR 598). There is also an appeal process for employees unhappy with the decision.⁷ (RX 63, ¶ 4 and Tab B).

Paragraph (d) of "Side Letter Agreement 7" between UTU and CP effective August 1, 2008, which revised the CBA, provides that, "[a]n employee will not be held out of service prior to a fair and impartial investigation and subsequent written decision as provided by this [Article] except, in certain situations and any employee held out of service contrary to the provision of this paragraph (d) shall be paid for time lost on the job from which removed for time so held out of service." (RX 5 at pp. 30-31; RX 21 at Exhibit UTU C). The same side letter agreement also requires that employees in service or not censured pending an investigation, "[b]e notified within ten days after a company Officer having authority to order an investigation has information of the offense of the charges pending. Within ten days thereafter, an investigation shall be held and a decision rendered within ten days after the investigation." (RX 5 at p.30; RX 21 at Exhibit UTU C).

⁷ Complainant appealed his termination by CP. After his appeal was denied by CP, Complainant sought arbitration, which as of the date of the hearing and submission of briefs by the parties, remained pending. (RX 63). Since that time, and just prior to the issuance of this decision, I was notified that Complainant's appeal was denied. I am however not bound such a decision.

B. Complainant's Employment Background with Respondent

Complainant Jeffrey Helgeson began his employment with CP on February 6, 2004. (JX 1, ¶1⁸). Helgeson started with the company as a student conductor trainee, following a multi-week conductor training program which required classroom training, on-the-job training and passing the requisite examinations, including achieving a 90% or higher score of on the GCOR test. (TR 77, 261-262, JX 1, ¶¶ 1-2). He [Helgeson] then began work as a conductor. (JX 1, ¶2).

About a year into his employment, he bid into a union yardmaster trainee position. As with the conductor trainee program, Helgeson participated in several months of training to work as a yardmaster, which he began in and around 2005. (JX 1, ¶3). As yardmaster, Complainant was responsible for controlling car movement in the St. Paul switching yard, where CP disassembled incoming trains and assembled outgoing trains, using a gravity system to classify them on different tracks, with computer operated switches. (TR 77). Helgeson was in charge of supervising the hump crew who actually separated the cars on the hill. (TR 78). He was given direction as to which tracks to classify and was to "achieve that goal" by classifying whatever trains necessary in to hump, or as it was called, "the bowl" where they ended up. (TR 78). The bowl had a series of tracks controlled by switches. When a car "free rolls" down the track, the computer picks up on the car, senses its speed and uses a system of retarders to gauge the speed down to a safe rolling speed and put it down the correct track. (TR 78).

Physically, as hump yardmaster, Helgeson monitored the computer, with cars to be humped, where they were to go and the status of each track. (TR 78). If a track was occupied by a crew or somebody else, they would call and ask for a "block" which is where the yardmaster manipulates the computer to physically take that switch out of service. (TR 79). There were approximately thirty-nine tracks, all of which were computer monitored. (TR 78).

He continued in the role of union yardmaster until in and around May 2010, at which time Helgeson moved into an at-will position. (JX 1, ¶3). He worked in a non-union role for less than a year, until March 2011, at which time he voluntarily resigned and returned to his union position as a yardmaster. (JX 1, ¶3; RX 3, 19, 64). Helgeson remained in the position of yardmaster until he resigned from it effective July 30, 2013. (JX 1, ¶3; RX 3, 19, 64). Helgeson was recognized as employee of the month several times as a general yardmaster and as hump yardmaster. (TR 123).

At that time of his resignation as yardmaster, Helgeson returned to working as a conductor and remained in such capacity until his dismissal by CP in October 2015. (JX 1, ¶3, TR 77). The conductor position is a safety-sensitive position. (JX 1, ¶4). As a conductor, Helgeson was required to know, understand and follow the GCOR. (JX 1, ¶5; TR 259-260). He was typically located at CP's Glenwood Yard or St. Paul Yard during his time as a conductor.

⁸ Complainant Jeffrey Helgeson ("Complainant" or "Helgeson") and Respondents Soo Line Railroad Company d/b/a Canadian Pacific ("Respondent" or "CP") stipulated to sixteen (16) facts, which were admitted at hearing as Joint Exhibit ("JX") 1, and all of which I adopt. The facts are utilized in the decision and cited throughout the Findings of Fact, where most appropriate.

(TR 108). Conductors are responsible for all paperwork on inbound and outbound trains, for directing the movement of CP trains by providing related instructions, by radio or hand signal, to a CP engineer, discussing the instructions with the engineer if he or she has any questions, and has the final say regarding movement of the train. TR 84. As a conductor, Helgeson was physically on the ground and responsible for “protecting the shove,” or movement of the trains, while the engineer sat in the locomotive cab, with the conductor often serving as the eyes and ears for the engineer to protect the shove and ensure safe operation of the train. (TR 260-261).

C. Incidents and Activities Prior to Complainant’s Dismissal from Service

1. July 12, 2013 Failure to Apply a Block while Complainant was Yardmaster

CP utilized a gravity based system that free-rolls rail cars into 39 separate tracks in the switching yard at a hill known as “the hump.” The switches for these tracks were operated by a computer system known as the “Pro Yards System,” which Helgeson monitored as part of his duties as yardmaster. If a particular track is already occupied, the crew will call the yardmaster and ask for a “block.” The yardmaster then blocks the track on the computerized Pro Yards System. (TR 77-79)

On July 12, 2013, while working as a yardmaster, Helgeson was involved in an incident that resulted in the failure to apply a block and letting a car run down the wrong track in the switching yard. (RX 16, TR 123-125, 143). Helgeson testified that he put a block on the track and the computer routed the car on the track that was supposed to be blocked. (TR 79-80; 143). Although no one was injured and he was able to warn persons what had happened before the track was occupied, Helgeson acknowledged it was a serious incident. (TR 144-145). According to Helgeson, this was his first, or only, rule violation as a yardmaster.⁹ (TR 82, RX 18).

By letter dated July 16, 2013, CP notified Helgeson pursuant to the contractual terms of the CBA, to attend a formal hearing on a designated date “to determine the facts and circumstances and to place his responsibility, if any, in connection with his alleged failure to properly put a block on CT30 using the Pro Yards System at approximately 2015 hours on Friday, July 12, 2013 while working Job 4744 hump yardmaster.” (TR 141-142; *id.*, at ¶ 9, RX 16). Helgeson was taken out of service immediately pending the investigation. (TR 145). On July 19, 2013, a hearing was held pursuant to the notice. (JX 1, ¶7, RX 17). Following the hearing, Helgeson spoke with his then manager Brandon Smith, Superintendent of St. Paul Yard, who advised Helgeson that if he was willing to sign a waiver, he would not lose his job. (TR 81-82; 146). Helgeson agreed to the waiver, in which he acknowledged and accepted responsibility for his failure to put a block on the CT30 on that day and accepted CP’s assessment of a 30-day

⁹ Although Helgeson did not remember seeing it, nor did he admit he violated a rule, according to CP documents, on December 30, 2011, under its former discipline policy, Helgeson received “formal coaching” through a “Positive Action Plan” (“PAP”) for mis-marshalling trains and exceptions related to automated equipment identification (“AEI”) tags. RX 15; Helgeson acknowledged he spoke with a manager regarding his performance this day, but denies that he committed a violation and denies having seen the PAP. (TR 153-155). This however predates any complaints or asserted protected activity by Complainant here, and more importantly, does not appear to have been a consideration by CP in any subsequent discipline of Helgeson here, therefore it is not relevant for purposes of this decision.

record/15 day actual unpaid suspension. (JX 1, ¶8, RX 18). The 30 day suspension assessed by CP for the violation was an acceleration (skipping a 5 day and 10 day suspension) in discipline under the policy in effect at the time and under the same policy CP could have terminated him for the violation. (TR 147, 156-157).

Shortly after the incident, Complainant's then supervisor, Brandon Smith, indicated CP was going to combine two yardmaster positions, that of the general yardmaster and hump yardmaster, into one new position, and he wanted Helgeson to fill the new prototype position. (TR 83, 147-148). The general yardmaster oversees the rest of the yard, is in charge of building outbound trains and supersedes the hump yardmaster in all things because he basically controls the entire yard, with responsibility for all day to day switching operations as well. (TR 83). Helgeson declined the position because, as he told his supervisor, he "didn't believe it was a safe way to go based on the type each job was. It was too much for one person" (TR 83; 148-151). On July 29, 2013, Helgeson notified Brandon Smith¹⁰ via email that he decided to resign his position as yardmaster and instead return to work as a conductor. (RX 19; CX 26; *see also* TR 83, 150-151). Helgeson resigned from his yardmaster position effective July 30, 2013 and returned to the conductor ranks. (JX 1, ¶9, citing RX 19; TR 83; CX 26).

After Helgeson's resignation as yardmaster, CP created the newly combined yardmaster position and after doing so, CP had instances of cars rolling, cars out of tracks and hitting the side of active switching trains on an almost weekly basis. (TR 90).

Phil Qualy ("Qualy") is the state director for the Minnesota United Transportation Union (UTU), serving as the state legislative director and chairman of the legislative board and a legislative lobbyist representative, which represents CP union members as well as members from other railroads in the area, which includes 10 locals. (TR 174, 333). He and/or his members work with the railway carriers to resolve any problems. (TR 333). Qualy is also a member of the Switching Operation Fatality Analysis (SOFA) working group which includes members of the Federal Railroad Administration (FRA) and other railway associations and carriers and interfaces with FRA inspectors as well. (TR 334-335). He is a railroad conductor, yardmaster, footboard yardmaster, switchman and locomotive control operator for Union Pacific Railway. (TR 332). Qualy testified at the instant hearing in his capacity as UTU representative with knowledge of both certain incidents involving Helgeson while employed at CP and certain practices at CP, as relevant here, in 2013-2015.

Qualy sent a letter to CP as early as January 24, 2013 with supporting documents including emails, of which Helgeson was part of the user group, expressing concern, and a willingness to work with them, regarding hump operations. (TR 337, 350). Qualy testified that he also wrote a letter to the FRA formally, in the summer of 2013, 2014 and again in 2015, asking that they investigate the unsafe conditions in the hump yard at St. Paul raised by Helgeson. (TR 339, 350-351; CX 20, CX 29). Helgeson was not identified to CP management as complaining about the conditions at St. Paul Yard but was part of the user group included with the letter to CP. (TR 350-351). The letters to the FRA do not identify Helgeson by name, although the January 25, 2015 "near miss" incident he was involved in is described in a February 9, 2015 letter. (CX 20; TR 341). Qualy said they usually do not include member's names in letters to the

¹⁰ CP Superintendent St. Paul Yard/ Helgeson's supervisor at this time, Brandon Smith, did not testify at hearing.

FRA, but pointed out that although it included other incidents, it referenced the incident involving Helgeson. (TR 369-370). Qualy also indicated that he heard from Helgeson directly, and is Helgeson's legal representative under the Railway Labor Act, which is the basis of the information contained in the letter to the FRA. (TR 370-371). According to Qualy, as a result, there was an investigation and onsite visit. (TR 350; CX 19). The FRA later responded that they could not find a specific violation but were working with CP to effectuate positive change there. (TR 350).

2. Complainant's Participation in a Union Organized Safety Picket or Protest of CP and Related Video in February 2014.

Phil Qualy testified that in December 2013 the union voted to do an "informational picket line" which resulted in demonstrations in front of CP over two days in February 2014. (TR 341-342, 172). It was organized in part because complaints generally of CP were so numerous starting in 2013, they weren't seeing any "positive change," it did not appear the carrier was reacting or hearing them, and unsafe practices were continuing on several facets of the railroad including St. Paul hump, so the UTU had the idea to do an informational picket line in front of CP. (TR 341-342). The demonstration was done to effect change at CP. (TR 361). At the time of the demonstration, Cory Plath was the Union President at CP. (TR 457).

The picket demonstrations took place in front of CP Plaza in downtown Minneapolis and were held on two different days, February 4th and 12th, 2014, and lasted about 2 hours. (TR 342-343, 345; 360-362). Qualy notified a CP security manager of the picket upon his arrival on the first day, February 4, 2014, but did not provide any advance notice. (TR 342). Qualy testified that 20 people attended, including some from non-CP railroads. (TR 174). While Qualy testified that he was told CP managers were watching the demonstrations, he does not recall if he was told they were watching the first day or the second day, nor did he personally recognize any CP managers during the picket. (TR 344, 360-362). Additionally, CP's Police Service ("CPPS"), "Dispatch Call Report," ("Dispatch Report") from February 6, 2014 shows that there were approximately 15-30 picketers, with signs, an internal picketer filming and noted that the Goal/Reason for the protest "has to do with Rail Safety, unknown which aspect."¹¹ The CP Dispatch report from the February 6, 2014 picket, revealed that CP police met with Dale McPherson, LR/HR for CP, Amanda Cobb, CP attorneys, CP attorney Bill Tittle and Jenny Mann, Labor relations. The report also showed that the picketers were all UTU members, they planned to return "next Wednesday," with possibly more unions, and that CPPS and building security will be on hand. (CX 2).

On February 12, 2014, Helgeson participated in the second day of the union organized safety protest or demonstration outside, in front of CP headquarters in Minneapolis, Minnesota, which was not his usual work location. (TR 89-90, 172, 252, 360-362). The demonstration was about safety. (TR 174). Helgeson said he attended to protest the unsafe conditions at St. Paul hump yard in particular because there were many instances of cars rolling up on top of people after they had combined the two yardmaster jobs and he was concerned. (TR 89-90; 173-174).

¹¹ It appears that testimony as to the date of the first picket being February 4, 2014 differs from the February 6, 2014 CP Police Dispatch Call report. The discrepancy however is not significant, given there is no dispute that there two union organized pickets at CP Plaza and that Helgeson participated in the second one.

He felt that it was unsafe at St. Paul yard. (TR 229; 173). He did not carry a sign at the protest, but walked with those that did. (TR 90). While there are public skywalks connecting various businesses in downtown Minneapolis, including with CP headquarters such that CP personnel could have watched the demonstration from the skywalk, Qualy did not know who, if anyone, from CP saw the demonstration on the day Helgeson participated. (TR 362).

The picket attended by Helgeson was held one day after CP generated a report showing employee absences, including one showing Helgeson with a total of two, "sick 1, missed call 1." (TR 256-258; RX 66). Helgeson was notified of the investigative hearing for the January attendance violations on February 12, 2014, with the hearing held February 14, 2014. (RX 20-21).

At the time of the UTU union picket demonstration in February 2014, CP Manager Jeffrey McInnis was working as a Road Foreman of Engines, and was not based out of CP Plaza in Minneapolis. (TR 546). McInnis testified that he was unaware of the UTU picket demonstration and of Helgeson's participation in it, having only learned of it as a result of this litigation. (TR 548-550). During the same time period, Tom Jared was working nights as CP's General Superintendent for U.S. Operations in Minneapolis, MN, in CP Plaza, but testified that he too was unaware of Helgeson's participation in the union informational activity on February 12, 2014. (TR 624). He also said he was off during both dates of the UTU picketing demonstrations, including February 12, 2014. (TR 624-625). Jared testified that he never became aware of the union activity prior to Helgeson's dismissal. (TR 625). CP Superintendent, Steve Nettleton, was likewise unaware of Helgeson's participation in the union informational picketing activity on February 12, 2014 or that there was ever such activity, prior to Helgeson's dismissal in October 2015. (Nettleton 11-12; 64). Nettleton however, did not work for CP in February 2014 and had only began employment with CP in August 2015. (Nettleton 5-6).

William Brown, III, worked at CP from 2004 until December 2016. His past positions include conductor, engineer, and trainmaster, a management position at CP, from January 2011 to August 2014, until he resigned his trainmaster position to become a conductor again. (TR 419-420). As of the hearing, Brown worked for a different railroad. (TR 419). Brown testified that in February 2014 he was a manager and participated in daily phone calls with CP management, led by Robert Johnson, with Mark Redd "second in command" and all superintendents also participating. (TR 425). Brown recalled that they talked about the union protest during the call(s). (TR 426). He also said, CP Union President, Cory Plath was specifically mentioned during a calls as being part of the demonstration, but no others were named during the call. (TR 457). He recalled that it was discussed on a call that "crew management" would be there and keep an eye on the situation. (TR 457). Brown testified that as a result of the calls, there was no doubt in his mind that CP management knew the protest was going on. (TR 426-427).

At Brown's deposition, he recalled the protest was about unsafe practices the UTU felt were at CP and at its St. Paul Yard, with the hump being performed too fast and that it was unsafe for one person to run entire yard. (CX 6 at 17-18). He also remembered reading an article in the newspaper or on the internet about the protest, but that UTU President Corey Plath was mentioned in it and not Helgeson. (CX 6 at 19-20). Additionally, during discussions over a purported newspaper article regarding the union picket, it was agreed that CP knew of the

protest.¹² (TR 43-44; 481). In sum, while CP knew of the protest, there is no direct evidence that anyone at CP knew of Helgeson's participation in it.

Helgeson also appeared in, and was heard in, a video made as a result of the protest. (TR 390). In the video, he discussed unsafe practices in the hump yard and his concerns and opinions about CP. (TR 122-123). While he discussed changes over the last 10 months including some, according to Helgeson, resulting in inefficiencies, he mentioned concerns seeing mis-routed cars, increased speeds for humping, being told to dump hazardous materials down clear alleys, changes in the retarder systems and use of skates being inefficient in stopping cars. (Compl. Brief, at appendix, citing video 1:46-2:34). In the video, he also mentioned receiving the notice of an investigation the day before the video was made and being taken out of service, for missing a call by 30 minutes, even though he went on to work the entire 12 hour shift on the same day. (*Id.*, citing video at 10:29-11:15). Helgeson also stated his belief that persons were being disciplined and discharged for frivolous reasons on the video, which was also a concern to him. (TR 176). Helgeson himself never received a copy of the video or provided a copy of the video to CP management nor had he seen the video until it was shown during the hearing. (TR 173). According to Qualy, the video is about safety. (TR 372).

At the hearing, Qualy confirmed that a video entitled "*Hunter Harrison's Canadian Pacific Railway-What a Way to Run a Railroad*" was made during the union picket demonstration. (TR 347, 356-357). Qualy testified that on October 4, 2014, he personally hand-delivered a copy of the video to then CP Vice President of U.S. Operations, Robert Johnson's office, with whom he had an appointment on the same day. TR 356-357. When he arrived with the video that day, he spoke briefly to Johnson, but Johnson was called away before Qualy could personally give him the video. (TR 357-358). As a result, he left the video with Mr. Johnson's assistant, Linda Serrano. (TR 346-347; 356-357). Qualy also wrote Johnson in a letter dated September 8, 2015 and referenced the DVD. (CX 29). Qualy does not know whether Johnson or any other CP management employees viewed the video. (TR 358). The video was not released to the public. (TR 346).

Jared testified that he never saw the video entitled, "What a Way to Run a Railroad." (TR 625). CP Superintendent, Steve Nettleton, was likewise unaware of the related safety video, prior to Helgeson's dismissal in October 2015. (Nettleton 5-6; 11-12; 64).

3. Helgeson's Violation of CP's Attendance Policy and Suspension prior to CP's Investigation and Hearing on the Charge in February, 2014.

¹² At the onset of the hearing, I indicated I would revisit CX 22, a newspaper article about the union protest activity, which the parties agreed had no reference to Helgeson in it, when Complainant used it or that it could be used for impeachment purposes, in light of Complainant's position that it was relevant to show the existence of the Picket such that Respondent could not deny knowledge it took place. Respondent objected that the article didn't contain reference to Complainant, but agreed that CP's knowledge of the picket was not an issue, rather only CPs knowledge of Helgeson's participation in it was. (TR 42-44). The parties agreed that certain persons at CP were aware of the protest, but there was no agreement that those managers involved in the decision to terminate Helgeson had such knowledge. (TR 42-44; 481-483). Complainant however did not revisit CX 22 or use it at hearing, presumably because of Respondent's admission, through counsel, that CP does not deny knowledge of the picketing activity, which was the stated reason CX 22 was initially offered.

Two days after his participation in the safety protest, Helgeson was the subject of a disciplinary hearing, on February 14, 2014, charged with failure to comply with CP's General Manager ("GM") Notice #8 Train & Engine Employee Availability Guideline ("Availability Guidance"), for two alleged absences, including "sick" on January 22, 2014, and a "missed" call on January 30, 2014, which was considered excessive by CP. (JX 1, ¶ 10, RX 20-22). An email from John Carlidge to Mark Redd, Robert Johnson and Wally Sieruga dated February 11, 2014 attached a January Absenteeism report "for discussion on the morning's call." (RX 66). The report was redacted such that there is no indication who or how many employees were absent in January 2014. (*Id.*) The absentee report upon which the charge or violation stemmed was dated February 11, 2014, which Helgeson confirmed was one day before the union safety picket he attended on February 12, 2014. (TR 252, 257-258; RX 66). Prior to the investigative hearing, Helgeson was notified that he was taken out of service pending an investigation, via a phone call from his then supervisor, Brandon Smith.¹³ (TR 87, 92-93, 162-163). After serving his suspension without pay, Helgeson returned to work on February 27, 2014. (RX 22, TR 92-93).

Following the CP investigative hearing on February 14, 2014 and by letter dated February 24, 2014 (RX 22), Helgeson received an additional 30-day suspension, fifteen (15) days served for violation of GM Notice #8-Train & Engine Availability Guideline for the month of January 2014. (JX 1, ¶10). The February 24, 2014 letter further stated:

In consideration of the decision stated above and with your current standing within the discipline process, the next step in progressive discipline would have been dismissal. However, without precedent or prejudice, you are hereby assessed a thirty (30) day suspension, fifteen (15) days served which includes time held out of service with CP to be effective from 0001 hours on February 12, 2014 until 2359 on February 26, 2014, You should regard this as a "last chance" opportunity.

(RX 22; JX 1, ¶11). The letter was signed by Brown. (RX 22). Helgeson could have been dismissed at this time based on his current disciplinary standing, but Respondent instead issued him another suspension with indication that this was a "last chance opportunity." (*Id.*, ¶11, RX 22). Helgeson therefore stood at a last chance opportunity as of February 24, 2014, due to the attendance violation. (JX 1, ¶ 11, TR 172).

Brown testified at hearing that he was the CP hearing officer at Helgeson's hearing regarding the attendance violation. He said that as a result of the investigation and hearing, while he would have recommended counseling or a 5 day suspension, he recommended a five day suspension because of where [Helgeson] stood in the discipline policy at the time. (TR 440-441). Brown wrote an email after the hearing, on February 18, 2014 at 5:06:24 PM, to Mark Redd and James Hommerding, copying Steve Fry and John Carlidge, regarding "Jeff Helgeson's hearing recommendation," which states, "I reviewed transcript, unsure where to go in assessing discipline. Shows PAP 7/29/11 and an informal on 12/20/11, both of which are past the two year mark. Then on 7/23/13 had a 30 day waiver where he served 15 days. There were no 5 day or 10 day suspensions. By following discipline policy he would stand for termination. **"I don't think this hearing warrants termination. I am recommending a 5 day suspension with time served."** (RX 68, TR 451) (emphasis added).

¹³ Mr. Smith did not testify at hearing.

Brown testified that CP didn't like his disciplinary recommendation, which was "deflected by Mr. Redd." (TR 450-451, 455). Brown was told what to write, it was "demanded" that he change the recommendation to termination, he did, and submitted it to Mr. Johnson. (TR 450-451, 455). Brown further testified that while his initial recommendation of a 5 day suspension was in writing, he said the direction or changes that came from others at CP were orally, and that "they were smart in that they didn't put stuff on paper. I'll give you that." (TR 456; 463-464). As a result, there was no written "discussion" or indication in writing as to how or why his initial recommendation was changed to a 30 day suspension with 15 days served and last chance opportunity. *Id.*

On February 18, 2014, approximately 43 minutes after sending his initial recommendation at 5:06:24 PM of only a 5 day suspension for Helgeson's violation of the absenteeism policy, at 5:49:46 PM there's a subsequent e-mail from Brown to the same persons he initially notified of his recommendation, providing them with a copy of an attached letter he'd like to send Helgeson indicating that the hearing transcript established his responsibility in connection with the notice of charges for excessive absenteeism and that states in relevant part, "[f]ailure to be unavailable for work is a serious infraction... "Do [sic] to where Mr. Helgeson stands in the progressive discipline policy I am recommending termination." (RX 67).

After the February 18, 2014 email exchange, there is a separate e-mail string dated February 19, 2014 at 7:54 AM, from Brown to Jennifer Manz and Christine Marier with Robert Johnson, Mark Redd, James Hommerding, John Carlidge and Steven Fry copied, regarding Recommendation for Termination, in which Brown attached his recommendation for termination of Helgeson (CX 9). Shortly thereafter at 8:16 AM Mr. Johnson responded to all on the email, "Agree. We will need concurrence from LR once transcript reviewed." (*Id.*)

Later the same date, February 19, 2014, at 10:31 AM, Christine Marier, Labor Relations Officer sent a "new" email to Johnson and Myron Becker, copying Mark Redd, James Hommerding, Carlidge, Jennifer Manz and Dale McPherson with the subject "Helgeson Discipline Recommendation," purportedly attaching the Hearing Officer recommendation and transcript from Helgeson's hearing on the attendance violation. (CX 9). The email further indicated they were a few unanswered questions remaining and recommended discipline. (CX 9). Brown is not copied on this email or any of the subsequent responsive emails, including a reminder on February 24, 2014 from C. Marier to all those on her prior 2/19/14 e-mail, reminding them discipline is due that day. (CX 9).

Later that day, Mark Redd asked "Robert" if he was ok, would issue the same 30 day suspension with 15 days served as his "last discipline" noting [Helgeson] was removed from service and had been off 13 days. (CX 9). Johnson ultimately responded that Mark has what we want, "but in addition we need it written he has need [sic] afforded managerial leniency." (CX 9). Johnson's email again included all the same recipients as in the C. Marier's February 19, 2014 10:31 AM email, to which Brown was not part. (CX 9). None of the management officials included in the email chain regarding Helgeson's discipline testified at the instant hearing, with the exception of Brown.

Ultimately, by letter dated February 24, 2018, Helgeson was notified of the decision to assess him a "...thirty-day (30) suspension, fifteen (15) days served which includes time held out of service with CP..." from 2/12/14 until 2/26/14 and that he should regard this as a "last chance" opportunity. (RX 22). The letter was signed by Brown and James Hommerding, Superintendent St. Paul Road, Matt Marschinke – L/C-UTU were copied on the letter as well as "Crew Management," "Labor Relations," and "HR US-Administration". (RX 22). Helgeson appealed his suspension through the applicable CBA process, which was denied first by Tom Jared, then CP Superintendent-US West, on August 20, 2014. (RX 23-24).

Brown testified that it was both highly unusual and against CP's own rules to take Helgeson out of service and deprive him of his livelihood for two weeks for a simple attendance violation. He was aware that the policy provided for "record" suspensions only and said that meant they'd assess a "paper suspension," since the employee had already missed work and they would not want to "give them more time off work." (TR 458). Brown said that he had in the past given lesser discipline than the policy would call for, but generally he did not do so, until this time frame (February 2014), when he was "agitated with the way the discipline process was going." (TR 459). Regardless, Brown said, for two days attendance violation, he did not recommend termination. (TR 459-460). Brown thought that a 5-day suspension should have been assessed, because he also considered that [Helgeson] was never given a "5 day" chance since his first discipline was a 30 day suspension. (TR 459-460). He said those decisions were above him, with the only reason a person is held out of service is for drug or alcohol or a serious safety violation where they could cause harm to themselves or others. (TR 466). According to Brown, employees were "never held out of service for an attendance violation." (TR 466). Brown however admitted that the 30 day suspension of Helgeson for the attendance violation was based on, and consistent with, where he stood in the applicable disciplinary policy at the time. (TR 455; RX 22).

Helgeson said that as of that time, in his then 10 year career with CP, he had never missed a call, never missed work and was never late for work. (TR 88). With respect to the "missed call," Helgeson admitted that he missed the call by 15 minutes, but once saw the call, he immediately returned the call, and made it to his specified location within the two-hour permissible time frame in which he is to arrive at work after receipt of such a call. (TR 85-86; 88-89). He then proceeded to work a full shift (TR 86).

Jeff McInnis, a supervisor at CP, agreed that holding an employee out of service in the manner Helgeson was, was against CP's own rules, nor was he aware of an employee who missed a call and was held out of service before a hearing. (TR 571-572). Under CP's progressive discipline policy, when it was in effect, an employee received only a record suspension for missing a call. (TR 571-572). McGinnis confirmed that the reason for the record suspension is so that the employee will not miss more work. (TR 574). McInnis also testified that while the progressive discipline policy is based on the number of rule infractions by an employee, it also allows for leeway. (TR 573). The policy provides that "managers retain the discretion to handle appropriate minor matters through informal coaching." (TR 573-574; RX 13).

While Helgeson was removed or suspended from service by CP prior to his hearing/investigation related to the absenteeism charge, he was not held out of service for any of the reasons listed in the Side Letter of his Union/UTU Agreement, including drugs, alcohol, theft, or threatening the safety of other employees. (RX 21, pp 24-25; Exhibit UTU C attached to RX 21). This discipline occurred approximately 12 days after Helgeson's participation in the union picket activity. (TR 318).

Helgeson testified that he missed two days of work in December 2014 due to medical treatment, including a scheduled MRI, and submitted related documentation regarding his treatment from his doctor to CP's Health Services Department. (TR 320-321). While he received two Notices of Investigation over the two missed days for medical reasons, on January 20, 2014, CP cancelled the investigation "for reasons deemed sufficient." (RX 25, TR 218-219, RX 3, TR 327-328).

Similarly, on February 3, 2014, Assistant Superintendent, Twin Cities Terminal, Jacob Hommerding, issued a Notice of Investigation/hearing to Helgeson to appear February 11, 2014, regarding an "alleged failure to protect service" on January 30, 2014 (the missed call). (RX 21 at UTU A; TR 88, 158). On February 5, 2014, Hommerding issued another letter cancelling the investigation. (RX 21 at UTU B; TR 88, 158). Based on his receipt of these two letters from Hommerding, Helgeson testified that he thought since the hearing for the missed call was cancelled, "that was the end of it....It's common for managers to look into a person's record and withdraw or cancel an investigation." (TR 88, 161). According to Helgeson, Hommerding was the superintendent governing the territory Helgeson worked on and had the authority to conduct and/or cancel the hearing. (TR 160-161). Hommerding did not testify at the instant hearing and there was no reason provided to Helgeson from CP as to why the initial hearing notice from Hommerding was cancelled. (TR 160-162; RX 21 at 11-14).

Although two prior hearings related to attendance violations were cancelled one in January and the other in February, 2014, as discussed above, Helgeson was subsequently charged in part, with the same violation as that in the second, February 3, 2014 notice, when he was noticed for investigation/hearing from William Brown, rather than Hommerding, for failure to protect service/excessive absenteeism due to the January 30, 2014 missed call and a January 22, 2014 missed day. (RX 21; TR 158-159).

After participating in the protest and receiving the last chance for the attendance violation, Helgeson noticed a difference in the way he was treated by his supervisors. (TR 94). He said there was a marked increase in scrutiny with them watching everything he did, following or shadowing him in the yard, second-guessing him, and rushing him out of the yard before he could properly go through his paperwork. (TR 94). An example of being shadowed is when Helgeson was switching tracks and "not even 10 feet away" was a manager in a vehicle pacing him as he walked to and from the switches; if he looked they would put the vehicle in reverse, making it plain they were watching him. (TR 94-95). According to Helgeson "this occurred on many occasions" although he could not provide any additional details. (TR 95). Helgeson said this type of scrutiny did not occur before he participated in the safety protest. (TR 95). Helgeson could not provide any detail such as names of any manager that followed him. (TR 137). Nor did

he report that he felt he was being followed or threatened at CP, to anyone at OSHA or at CP, although he testified that he did report it to his Union. (TR 137-138).

4. Report of January 25, 2015, “Near Miss” incident involving Complainant to CP.

On January 25, 2015, while inspecting a car on a designated “do not occupy track” and setting a “skate,” to prevent movement of the car, a group of cars suddenly rolled down the track and collided with the car Helgeson had just inspected and placed the skate, causing it to push forward about 15 feet. (TR 96-98). Helgeson was not hit, but in the process of getting out of the way, his safety vest was caught on one of the cars and tore away. (TR 97-98). At the time of the incident Helgeson was on assignment 499-25. (TR 228).

After the incident Helgeson radioed the yardmaster and advised him to cease all hump movement, although two more cars were coming down the track. (TR 99). Helgeson said this is the same situation as the one in which he was disciplined for when working as a yardmaster in 2013. (TR 100). Helgeson, remembering only their first names, told the two managers, “Drew” and “Mike” standing in the distance, what happened. (TR 100-101). He also told them he wanted to file an unsafe condition report. (TR 102). Helgeson said he was told to make his calls and departure, but Helgeson initially declined, indicating that he wanted to fill out the report. (TR 102). After some time passed and he calmed down, Helgeson made the departure and decided he would complete the report after their return from Glenwood. (TR 103).

Upon his arrival at Glenwood depot after the incident, Helgeson completed an “Unsafe Condition Report.” (TR 103, CX 4). The incident is described on a CP form titled “Canadian Pacific Railway Employee Report of Hazardous Condition.” from employee Jeff Helgeson to supervisor, Jake Hommerding, dated January 25, 2015, and reported a hazardous condition. The details indicate Complainant had a block on certain tracks and that 2 cars were humped into his truck.¹⁴ (CX 4). Helgeson testified that he discussed the incident and the submission of the Unsafe Condition Report with his then supervisor/superintendent Hommerding by telephone during which he was told to give the completed report to the manager on duty in St. Paul Yard, which Helgeson did. (TR 103-104, 223-225, 234-235; CX 4). Helgeson kept a copy of the completed report as well. (CX 4; TR 316).

Helgeson testified that he also reported the same incident to the FRA, using their online process. (TR 136, 220-221). He did not provide a copy of the FRA complaint to CP nor did he receive a response from the FRA, but believes it was being handled thru Mr. Qualy. (TR 220-222). Helgeson stated that he notified OSHA that he filed the complaint with the FRA too, when he made his complaint with OSHA, although it does not appear anywhere on the OSHA Complaint. (TR 331).

Qualy confirmed that after receiving a call from his legislative safety rep about the January 25, 2015 incident and then a call about it from Mr. Helgeson the next day, he wrote a letter to the FRA requesting that they come to the property and basically requested an audit of CP. (TR 352). Qualy also said that as a rule, they do not name workers in these letters, but said

¹⁴ As the copy provided is light in certain places, the full detail of the reported condition is illegible. Complainant however testified to the report and the related condition at hearing.

that the letter “was specifically following the most recent event reported to our office.” (TR 352). As a result, according to Qualy, the date, time and specifics of the incident are included in the letter to the FRA. (TR 352). With respect to the hump yard operations, including Helgeson’s January 25, 2015, incident, Qualy was told by the FRA that they met with CP management, had been on the property and had looked at the specific data, but they did not disclose the outcome to him, nor was he aware who the FRA spoke with at CP. (TR 354-355). Qualy said that he met in St. Paul with the FRA Regional Administrator Illich in late February or early March 2015, when he said they had been on CP property and were looking at its whole [hump yard] operation. (TR 354-355). At the time of the hearing, he believed the FRA’s review was still ongoing. (TR 354-355).

Jared is the CP management official that conducted the disciplinary hearing for the CP yardmaster employee responsible for the “near miss” incident. (TR 626). The responsible employee was ultimately assessed a 30 day suspension for violation of work rules related to the incident, but Jared said he never knew or came to know that Helgeson or any others were involved in the incident. (TR 626).

Jared also testified he was unaware of the hazardous condition form Helgeson completed and submitted on January 25, 2015, nor did he have any knowledge of the actual form, which is CX 4. (TR 618, 625; CX 4). Nettleton, not employed by CP until August, 2015, stated that he too was unaware of the hazardous condition form Helgeson submitted to CP on or about January 25, 2015, as reflected in exhibit CX 4. (Nettleton 5-6, 11-12). McInnis too, was unaware of the hump incident that occurred in St. Paul Yard in January 2015 or that Helgeson submitted a hazardous condition report in connection with the incident. (TR 549-550). He learned of the incident as a result of this litigation. (TR 548-550). Hommerding was not called as a witness at hearing.

Helgeson testified that after he filed the hazardous condition report, he was under increased observation or “amped up” scrutiny by CP, being repeatedly rushed out the door as soon he arrived at work, with a manager asking for his paperwork and telling him to get it and get on the train and telling him he was being insubordinate. (TR 105-106). He testified he was shadowed by a vehicle anytime he was on the ground switching movement. (TR 107). Helgeson said that from January to September 2015 it was like they [CP] were trying to trip him into making a mistake, but he was strict in following the rules. (TR 108). Helgeson could not however provide any specifics or details such as the names of persons involved or dates in which any of the incidents occurred.

D. Helgeson’s Charge and Dismissal by CP for Violation of GCOR 5.3.7

On September 11, 2015, after completing their work for the day, Helgeson, working as a conductor, with engineer, Chris Devall, were advised by the yardmaster that another crew was waiting to take the train to the next destination and were ordered by the yardmaster to shove back to the depot so the next crew could take over the train. (TR 109, 112-113). Helgeson then explained that their shove was protected and instructed the engineer “to shove back to the depot.” (TR 113). Although then CP trainmaster Cameron Muscha heard the communication in real time, over the radio, when Helgeson gave the instruction, he did not say anything to either Helgeson or Devall or anyone over the radio about the instruction at that time. (TR 511, 652). Rather, he

waited until their arrival back at the depot, when Helgeson and Devall were told by Muscha that he took exception to what he did because he didn't give a distance or direction. (TR 115-116; 652-653). Muscha indicated that he did not give a distance and should have used feet or car lengths to describe the move, rather than the terms "to the depot." (TR 115-117). According to Helgeson, his instruction provided a distance and a direction. (TR 126).

Muscha was a new trainmaster at the CP Glenwood depot when the incident occurred. Muscha had not heard of anyone getting terminated for instructing to "shove back to the depot." (TR 527). He said that this was not a severe or serious infraction by anyone's testimony, and under the circumstances, verbal coaching was appropriate. (TR 524, 539). According to Muscha, overall the crew did a good job and were performing their work safely and effectively, but there was the one exception of how they give car counts and the fact that they didn't. (TR 524). Muscha recommended verbal coaching for "this minor offense," per his email "...given recent exception rate and all prior moves had direction and distance. Believe this was a one-off with his crew." (TR 524-525, 539). "The recent exception rate" references the number of exceptions Helgeson had in the prior 12 months, and which upon review by Muscha, showed "158 passes," indicating he passed 158 tests. (TR 534-535).

CP officials are provided with the exception reports so they can see if there are any trends or items that are starting prevail that they might need to get in front of and address; it's a way to communicate and improve safety at CP. (TR 60; RX 26).

Nettleton testified that in giving the instruction as he had, Helgeson (and Devall) committed what is known as an "E-test failure" rather than an incident which had adverse consequences. (TR 56-57). Nettleton became aware of the "E-test failure" of Helgeson and Devall via the report he required managers, to submit when they observed such a failure. (Nettleton 15). Once weekly, Nettleton reviews the e-test failures report and makes a determination from his review whether it warrants a CBA investigation and disciplinary hearing or not. (Nettleton 15).

On the day of the incident, trainmaster Muscha prepared such a report following his observation of the violations by Helgeson and Devall. (RX 27). According to Nettleton, RX 27 is a report showing all e-test failures that happened during that week. (Nettleton 16). Nettleton said he reviewed the e-test failures for Helgeson and Devall, reviewed the incident, looked at the tenure of each employee and prior work record and then determined a formal hearing for both employees was warranted. (Nettleton 15-16; RX 28, RX 49). For both Helgeson and Devall, it was documented that Muscha recommended verbal coaching. (RX 26). Nettleton said he gave Muscha's recommendation "very little" weight because, "...whether it was a pass - the main point was to give the employees feedback, to enforce safe behaviors or take exception to the ones that were not compliant." (Nettleton 18).

When asked why this violation went to hearing despite Mr. Muscha's recommendation for verbal coaching, Jared said in 98-99% of the cases there's a verbal coaching recommendation by the field officer, unless it's egregious. In this case however, Jared said he would have taken the exception. He also said he reviewed the record and made the determination. (TR 629). Jared

said he's looking for behavior and trying to determine what the behavior of the employee is. A hearing is also part of the CBA. (TR 629-630).

Jacob Hommerding, and Tom Jared were two of three superintendents that directly reported to Nettleton at the time he made the decision to investigate the September 2015 incident. (Nettleton 58). At that time, Jared served as Superintendent, St. Paul Road. The St. Paul Road includes the satellite terminal in Glenwood, Minnesota. (TR 616). Hommerding and Jared were included as recipients of an e-mail sent by Nettleton regarding the exception or related e-testing report and decision to investigate Helgeson for the September 2015 incident that led to Helgeson's termination. (Nettleton 57-59; RX 27). The e-mail dated September 17, 2015 from Steve Nettleton, copying Jacob Hommerding (as well as K. Muscha, T. Jared, M. George and others), specifically contains a subject line "re: Devall/Helgeson Investigation Notice and/or US West Region-Pending-Employee Exceptions-9/16/15 (RX 27). Hommerding was also the CP management official that Helgeson notified about the near-miss incident of which he complained of, and who, according to Helgeson, advised him to submit his written report of hazardous safety conditions regarding the incident in January 2015. (TR 03-104, 223-225, 234-235; CX 4; *see also* RX 64 – report of hazardous conditions).¹⁵

On September 21, 2015, CP, through Mindy George, Manager Support Services Operations-US West Region, sent Helgeson a letter requiring him "to appear at formal hearing for the purpose of ascertaining the facts and determining responsibility, if any, in connection with your alleged failure to give direction and distance while instructing shoving movement at Glenwood Yard while working assignment 499-11 at approximately 0800 hours on September 11, 2015." (JX 1, ¶12; RX 30). RX 32 is a copy of the hearing transcript and exhibits of the Hearing held on October 7, 2015 pursuant to the September 21, 2015 Notice (citing RX 32). (JX 1, ¶13). Helgeson was not held out of service pending the outcome of the investigation. (TR 119).

McInnis was assigned to conduct the CP investigative hearing. (TR 598). At the disciplinary hearing regarding the incident, Muscha indicated that while Helgeson told the engineer to shove back to the depot, the "depot" is not an acceptable indication of distance under the rule. (TR 501). He said the method for providing a distance is to express it as a number of train cars and that giving the engineer a landmark is not a distance. (RX 32 at 31). Helgeson maintained that telling the engineer to shove back to the depot was the distance. (RX 32 at 19-20). Also at the disciplinary hearing, Helgeson indicated that the distance to the depot from where the train was on the day of the incident, was 25 to 30 cars, which was consistent with Muscha's stated distance during the same hearing. (RX 32 at 15, 19). According to CP, GCOR Rule 5.3.7, contemplates that distance is to be stated as a number of car lengths because the same rule states that the distance given must be acknowledged when the distance specified is more than four cars. (RX 32 at 13; RX 7 at 37; RX 35).

¹⁵ Hommerding is also the CP manager that issued the initial February 3, 2014 Notice of Investigation/hearing regarding the alleged failure to protect service charge for the January 30, 2014 missed call by Helgeson and the February 5, 2014 letter cancelling the same investigation. (RX 21, UTU A and UTU B).

Given the focus on the requirements and meaning of GCOR 5.3.7, McInnis' summary of the disciplinary hearing shows that whether Helgeson's instruction was even a rule violation was a major issue. (RX 35). As a result of the investigative hearing, McInnis, the hearing officer, said that he determined that a violation occurred, stating at the instant hearing that the constancy of both Helgeson and Muscha stating the same instruction of "shove back to the depot," made it clear to him that no distance was given, although this does not appear in his hearing "recap." (TR 555-556; RX 35).

McInnis did not know who made the decision to terminate Helgeson. (TR 582). In his "Recap," or hearing summary, McInnis pointed out certain parts of the testimony that "strengthens" Muscha's testimony asserting that landmarks **should** not be used. (RX 35) (emphasis added). He also included a review of Helgeson's past disciplinary record, noting only that Helgeson stood at a last chance following the February 24, 2014, 30-day suspension for the alleged excessive absenteeism violation and noted that discipline was due October 17, 2015. (TR 555; RX 35). In his recap, McInnis did not however provide a recommendation as to discipline for Helgeson, (RX 35).

It appears McInnis emailed his hearing recap to Jared based on an email dated October 16, 2015 at 9:40:16 AM from Jeff McInnis to Tom Jared, subject: "Helgeson Recap" with only the word "Recap" in the body of the email. (RX 35). There is another message from Tom Jared to Mindy George, on the same date, at 9:42 AM with the subject, "Fwd: Helgeson -Recap." (RX 35) There is nothing in the body of the email. (RX 35). Finally, there's a third email in the string of emails, from Mindy George, on October 16, 2015 at 2:42:53 PM to Steve Nettleton with Tom Jared and Jeffrey McInnis copied, Subject, "Fwd: Helgeson Recap;" "Attachments: Hearing Recap-J. Helgeson..." The body of the email says she is "sending on behalf of Tom...once Mr. Helgeson gets tied up today, we will issue letter and notify employee of dismissal." (RX 35).

St. Paul Road Superintendent Tom Jared testified that he then reviewed McInnis' recommendation along with his summary portions of the hearing record. (TR 633, 635-637). Based on his review, Jared determined Helgeson violated GCOR Rule 5.3.7 by failing to give a distance. (TR 636-637). Jared testified that it's a serious violation and that there have been many offenses where accidents occurred when the rule was not applied properly. (TR 622-623) Jared said because Helgeson's discipline record showed he had already been assessed a 30 day last chance opportunity, his recommendation was for termination. (TR 637). Jared then gave his recommendation to his superior, CP General Manager Nettleton. (TR 637; RX 35).

Nettleton testified that he reviewed the hearing summary and record, and as a result, concurred with the conclusion that Helgeson violated Rule 5.3.7 on the date in question because he did not give car counts. (Nettleton 19-20). Nettleton also said that the failure to provide a distance and protect the shove through car counts to one's engineer can have detrimental consequences. (Nettleton 42-43).

Upon review of the incident by CP management and following the CBA hearing, CP through Nettleton, advised Helgeson by letter dated October 16, 2015 that his employment was terminated (JX 1, ¶14 (citing RX 36)). CP's decision to terminate Helgeson was based on multiple levels of review by management, including hearing officer Jeff McInnis, who conducted

the investigative hearing and prepared his findings and summary upon review of the hearing transcript; Superintendent, St. Paul Road, Tom Jared who reviewed the transcript and McInnis' recommendation which Jared said supported the dismissal and General Manager-U.S. Steven Nettleton who issued the termination. (TR 545, 637; Nettleton 20). At the time of Helgeson's termination, Nettleton had only worked at CP for about two-and-a-half months. (Nettleton 9). Helgeson appealed his termination pursuant to the CBA, the decision of which was upheld by CP. (RX 63 Tabs C-D). Helgeson also sought arbitration under the FRLA where the case remains pending before the Public Law Board pursuant to the Railway Labor Act. (RX 63 at ¶ 7).

Helgeson was terminated for violating CP's GCOR 5.3.7 by failing to direct the conductor's movement of the train in terms of distance and location, rather than instructing him to shove back to the depot on September 11, 2015. (RX 7; RX 36). GCOR rule 5.3.7, "Radio Response," provides:

When radio communication is used to make movements, crew members must respond to specific instructions given for each movement. Radio communications for shoving movements must specify the direction and distance and must be acknowledged when distance specified is more than four cars. Movement must stop within half the distance specific unless additional instructions are received.

(RX 7, p. 37). Helgeson acknowledged at hearing that he was familiar with GCOR rule 5.3.7. (TR 26). Helgeson was further advised that in addition to the facts and evidence at his investigative hearing, the decision to terminate him was based on the severity of the incident and his discipline history. (RX 36).

Helgeson testified in the instant matter that he used this same instruction in the past and it was custom and accepted practice to use the language "shove back to the depot" at CP's Glenwood yard to pick up a new crew. (TR 114-15, 267-270). Helgeson also testified that prior to the incident, he had never been told it was wrong to use the depot as a landmark, nor was he aware of anyone being accused of misconduct or disciplined for instructing an engineer to shove back to the depot. (TR 117-118).

Chris Devall has worked for CP since January of 2008 and has been a locomotive engineer there since September 2009. (TR 183). Devall was the engineer working with Helgeson on September 11, 2015, the day of the incident, and was the recipient of Helgeson's instruction. (TR 185, 188). Devall testified that "shove the train back to the depot" is a proper instruction given from the conductor to engineer. (TR 185). He was aware of the GCOR requirement that the conductor is to specify direction and distance. (TR 185). Devall agreed that "to shove the train back to the depot" is a common movement. (TR 187). Devall was not aware of anyone at CP having been disciplined for instructing an engineer to shove the train back to the depot, nor was he ever in any safety meeting or train sessions where he was told using the phrase "shove back to the depot" was wrong. (TR 187).

Devall testified that on September 11, 2015, he received the radio communication "shove the train back to the depot" from Helgeson, repeated it back to him and then shoved the

train to the depot. (TR 187-188). Devall testified that after he received the instruction from Helgeson, if he had thought it was an improper instruction he would have called him for clarification or pointed out that it was wrong, but he did neither. (TR 188). Devall said that he was aware of the plan that they would be shoving back to the depot when he heard the yardmaster over the radio tell Helgeson that was what they were going to do. (TR 197). According to Devall it was then, and still is, proper for a CP conductor to say “shove the train back to the depot,” and is not a violation of the GCOR. (TR 187). He said it was customary for conductors to use the instruction in 2015 and it was still the custom (as of the hearing, in 2017). (TR 187).

When CP counsel pointed out that there was no discussion of how far in car lengths the depot was away from where Devall sat, Devall clearly answered “the depot is the distance.” (TR 201). Similar to Helgeson, Devall disagreed with CP counsel’s apparent interpretation that the “depot” was not a distance for purposes of GCOR 5.3.7 and that the rule requires the conductor to state a distance for movement in car lengths. (TR 202-203). Likewise, when asked whether the rule at issue states that measurements can be established by landmarks, Devall answered, “It doesn’t say that I can’t.” Devall also pointed out that the rule “does not say car lengths” is required to indicate distance. (TR 201-202)

As a result of the incident, Devall was charged with a violation of “GCOR 5.3.7 –Radio Response” “for failure to stop movement within half the distance when there wasn’t any additional instruction received at Glenwood Yard...,” on September 11, 2015. (TR 203-204; RX 49-50). Devall pointed out the hypocrisy of the charge, brought against him, stating, “[y]ou are trying to get me for not stopping at half the distance when you’re trying to say that he (Helgeson) didn’t even give me a distance. (TR 207, 214). Devall explained that they fit in the clear to begin with, the depot pulled out 54 cars and he shoved back half of that to get to the depot so he knew they were together intact in the track. (TR 207-208). Additionally, after repeated cross-examination by CP, Devall reiterated, “I can tell you, this is what we’ve done, it’s what we’ve always done. It’s what still goes on today.” (TR 211-212). Devall further admitted that he has thought about potential reprisal from CP for his testimony provided at hearing. (TR 215).

Devall’s charge did not ultimately go to investigation/hearing because he was offered and accepted a waiver. (TR 204, RX 50). As a result, on October 7, 2015, he signed the waiver and acknowledged his responsibility for failing to stop shoving movement as further detailed in the waiver. (TR 204-205; RX 50). The waiver further provided that he violated GCOR 5.3.7 –Radio Response. (TR 205, RX 50). Through the waiver, Devall received a letter of reprimand in his personnel file for his role in the incident involving Helgeson on September 11, 2015. (TR 207, RX 50). Devall said while he signed the waiver admitting he committed the alleged violation, he also told CP he did not believe he did anything wrong, but he couldn’t afford the time off and did not want to suffer any reprisal. (TR 207, 215).

Former CP employee and supervisor Brown, testified at hearing that when he worked at CP, including at Glenwood Yard, instructing an engineer to “Shove it back to the depot” was standard procedure for the yard. (TR 437-438). According to Brown, the instruction does not violate the GCOR since it gives direction and distance and he used the command as a locomotive engineer, conductor and in management at CP. (423, 437-438). He testified that he saw it done in

management and did not take any exception to the rule. (TR 423). Brown said he never heard of anybody being told they can't say "shove it back to the depot" and in his entire career, he never heard of anyone being disciplined for making this train movement command. (TR 422). During his time working with CP, including while at Glenwood Yard, it was standard operating practice to say "bring it back to the depot." (TR 437-438). He said it also happened on the River Territory where he was a manager and he took no exception to it "whatsoever." (TR 438). Jared said Brown's testimony that it was custom practice at Glenwood to say "bring it back to the depot" is false. (TR 656).

E. Other Disciplinary Actions taken by CP for the Same or Similar Violation as that which led to Helgeson's Dismissal.

In addition to Helgeson, Devall was disciplined for his part in the September 11, 2015 incident that resulted in Helgeson's termination. (TR 203-206). For his role, CP offered and Devall accepted a waiver, whereby he did not have an investigative hearing, admitted he violated GCOR 5.3.7 and as a result, received a written reprimand. (RX 50, TR 203-206). As an engineer, Devall had a "clean" disciplinary record prior to this incident. (TR 212).

Prior to the September 11, 2015 incident involving Helgeson and Devall, Muscha was not aware of anyone in Glenwood being disciplined for using the instruction "shove back to the depot." (TR 514). Similarly, McInnis was not aware of anyone disciplined for violation of GCOR 5.3.7. (TR 566). Jared too was not sure anyone has been "guilty" of a violation of 5.3.7. (TR 658).

CP management officials testified to several others receiving discipline for actions *similar* to that for which Helgeson was disciplined which led to his termination. First, going back to the January 25, 2015 "near-miss" incident reported by, and involving Helgeson, the yardmaster involved, Mr. Ganger was assessed a 30-day suspension for his failure to properly provide blocking protection. (RX 52-55). McInnis testified to an incident that occurred on April 18, 2014, involving several employees including Matson, Frederick and Hewitt, each of whom were disciplined for their role in an April 18, 2014 incident where a shove movement resulted in two cars going over a derail. (RX 53-55; TR 560-561). Each of the employees were charged with violation of GCOR 6.5 "Shoving Movements" and 8.20 "Derail Location and Position" for their role in the same incident, and after having determined each violated the GCOR, they were assessed with a 30 day, 10-day and 5-day suspension respectively, based on their standing in the discipline policy. (TR 563-565; RX 53-55). The GCOR provisions allegedly violated by these employees, differs from the one allegedly violated by Helgeson and did not involve a violation related to radio communication in terms of direction or distance. (TR 567). Although McInnis indicated they were disciplined in accordance with whether each stood in the disciplinary policy at the time, there is nothing in the record showing each's disciplinary history at CP. (RX 53-55).

Similarly, Jared testified to an employee, (Koops) dismissed May 5, 2016, after a CBA hearing determined he failed to protect a shove movement that resulted in him shoving into a customer's facility and damaged door. (RX 52; TR 638-639). Jared said this incident involved a moving violation and that the conductor didn't give any car counts, resulting in a blind shove by the engineer. (TR 638-639). Jared testified that the engineer "was having issues with rule

violations – there was about 3 or 4 issues he had that resulted in discipline” hearing, but could not remember any of the prior violations or his discipline history, nor was there any evidence or other information regarding the employee’s prior discipline history. (TR at 638-640) According to Jared, after hearing, it was determined that the employee violated GCOR 1.1 “Safety”; GCOR 1.1.1-“Maintaining a Safe Course”; GCOR 6.5 – “Shoving Movements”; and GCOR 7.1- “Switching Safely and Efficiently”, and was dismissed from service due to the severity of the incident and his past disciplinary history. (TR 638-639, RX 52).

Upon cross-examination, Brown indicated he did not know why Helgeson had been assessed a 30 day suspension, skipping multiple lower levels of discipline, for the initial July 12, 2013 incident. (TR 470-472). As a result of the 2013 discipline, Helgeson stood for dismissal at the time of the attendance violation for which Brown was the hearing officer for, according to CP’s then disciplinary policy. (TR 470-472). Upon learning it was for failing to place a block on the hump, which resulted in a car going down the hump, Brown said it was not serious enough for a 30 day suspension as the initial discipline. (TR 471-472). Brown said it’s happened multiple times, including as recent as July 2016, when a yardmaster sent him and another train down the same tracks resulting in a head-on collision and damage to property. In this instance, the yardmaster received no discipline, but Brown, one of the engineers involved, received a 30 day suspension, following the yardmaster’s instructions, so according to Brown, the prior incident involving Helgeson was not as serious. (TR 471-472)

F. Alleged Injury to Helgeson and Requested Relief

1. Lost Wages and Benefits

Helgeson testified he is the “sole breadwinner for his wife and children, ages 9 and 12.” (TR 126, 128). Prior to his termination from CP, Helgeson said he made somewhere in the high 80’s, including overtime, or between \$85 to \$90,000.00. (TR 127). His yearly earnings varied year to year, based on the amount of overtime he worked. (TR 127). In 2015, he worked for 10 months for CP, before he was terminated. (TR 127). Following his dismissal from CP, he took a job as a long-haul truck-driver with California Overland in November 2015. (TR 127, 280). He was not willing relocate, so he did not apply to work for other railroads. (TR 281).

Helgeson earned \$0.38 per mile while driving for California Overland, (“CO”), with the amount earned varying based on the length of the trip, while living in the truck. (TR 128). He had medical and dental benefits with CO, but there was a “little bit of a lapse” from when his CP benefits ended to when benefits started at CO. (TR 282). He had his UTU benefits for 90 days after leaving CP. (TR 282-283). He worked at CO from November 2015 until the beginning or middle of August. (TR 281). At CO, he accrued one day off for every 10 days he was out on the road. To make it worthwhile to go or be at home, Helgeson said he would stay out on the road for 2 to 3 weeks before coming home for a day or two. (TR 285). He slept in his truck and had to pay his own expenses for food or laundry, without reimbursement from CO. (TR 285). Being on the road was stressful on the family, expensive, didn’t offer health insurance and Helgeson found he could not pay his bills. (TR 128, 130, 284). He then found another, local job, at Waste Management. (128-129).

At Waste Management (“WM”), Helgeson drives a garbage truck. (TR 129). Based on his rate of pay of \$16.50 per hour, Helgeson estimated that he made about \$33,000 to \$35,000 per year. (TR 129). This is about a \$50,000 to \$55,000 loss in earning based on his prior CP salary and earnings at WM. (TR 130). He received a 2 % raise at WM for merit on March 26, 2017, making his hourly rate \$16.83 per hour. (RX 62 at 51). While Health and Welfare and Retirement benefits were available to Helgeson, his election of Benefits and withholdings from his weekly pay statements show he did not elect to participate in WM’s retirement savings plan. (RX 62 at 64-65, 68-113). Helgeson’s commute to WM is only about 4-6 miles; while when he worked at CP, it was 37 miles one way. (TR 286). He is paid overtime for work over 40 hours and holidays. (TR 287). Helgeson also has medical and dental, as well as a 5 days vacation and 5 days sick leave, with the potential of the number of vacation days growing over time, but not sick days. (TR 287).

Helgeson cashed in his 401(k)s from the Union and small salary to pay bills, including his mortgage. (TR 131), He thinks the total was about \$27,000 but received less due to the penalties and taxes paid on both. (TR 131).

2. Emotional Distress

Helgeson’s testified that his termination affected him emotionally, resulting in him speaking to counselors when he can afford to do so and lately, as of the hearing, to a member of clergy. (TR 132-133). He also said that the stress is not helping his diabetes and blood pressure. (TR 133).

Helgeson testified that he sought counseling treatment through the Baldwin Area Medical Center, “a couple of times,” including seeing Mr. Youngman, on February 13, 2014. (TR 295-296; RX 59). Mr. Helgeson could not recall exactly what he told Mr. Youngman and could not read the writing on the counseling notes CP Counsel presented him at hearing. (TR 297). Helgeson did say however that he “poured his heart out to him.” (TR 298). The next date of treatment appeared to be February 18, 2014. These sessions were at about the time Helgeson was under investigation for attendance violations. (TR 299; RX 59). Helgeson acknowledged that “termination” from CP was on his mind at that time. (TR 300). On February 24, 2014, Helgeson received the letter from CP indicating as a result of the investigation he was being given a last change agreement. (TR 301). It appears that Helgeson did not return to counseling and on January 9, 2015, he was discharged for treatment by Mr. Youngman for lack of client contact. (TR 302; RX 59).

Helgeson returned to Mr. Youngman one additional time, on October 13, 2015, which was in the same time frame as Helgeson’s investigative hearing which led to his termination. (TR 303-304; RX 59). While Helgeson did not remember the exact words, he agreed that he said words to the effect of, “I work for absolute evil. It’s been layer upon layer of oppression. They have tightened the screws down on us.” (TR 304-35; RX 59). The counseling note indicated that Helgeson was concerned about losing his job or having to go to a lesser paying occupation and that he was “angry and concerned” about it the last time Mr. Youngman saw him. (TR 305, RX 59). Mr. Youngman also noted that Helgeson “seems much more convinced that the end of this job is coming his direction.” (TR 305, RX 59). At this point, as Helgeson admitted, he was on a last chance opportunity. (TR 305-306). The counselor noted he would like to see Mr. Helgeson

regularly, but it depended on how Helgeson's schedule worked out since he was gone for his railroad duties much of the time. (TR 306-307; RX 59). Based on the counseling records, it does not appear Mr. Helgeson returned for treatment and was discharged from treatment on April 5, 2016. (TR 309, RX 59).

Helgeson testified he did not feel comfortable with Mr. Youngman, so sought treatment from various clergymen instead. (TR 303, 311). He did not have any formal appointments with priests, rather he simply asked to talk to a priest after service or visiting a family priest. (TR 311-312). Helgeson said he feels more comfortable speaking to people anonymously and getting their counsel rather than developing a relationship with them, so he didn't go to the same church or clergy each time he sought counseling. (TR 312-313).

V. 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 ARB 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.

Overall, I found Complainant to be credible as his testimony is supported but the record. Helgeson was able to recall much detail about many facts and allegations of this case, including his interactions with various CP personnel, Qualy, relevant dates and/or timeframes, and his work duties at CP during his career, which are supported by the record. I note Helgeson could not provide the same level of detail or specificity with respect to his testimony regarding seeking counseling from various clergy and his treatment by CP after he engaged in purported protected activity. Despite the lack of detail, Helgeson gave reasonable and credible explanations for the lack of detail, did not appear to embellish, and he acknowledged the lack of specifics. Overall Helgeson's demeanor throughout all questioning was calm and neutral, answering questions both on direct and cross in a clear and an overall consistent manner, providing sufficient detail throughout which I found to be overall credible.

I found Devall to be the most credible witness of all that testified. Devall was the most credible because at the time of the hearing he was a current, non-management employee, who worked in the field as an engineer, and actually worked with Helgeson. Devall testified in this whistleblower case, knowing the allegations against CP and even admitting he was concerned

about possible retaliation due to his participation, and as a result, had potentially the most to lose, i.e. his job or other discipline, as a result of his participation. Yet, Devall never wavered on cross-examination or direct questioning with respect to what happened on the day which ultimately led to Helgeson's dismissal and his own discipline, nor did he waiver with respect to his understanding of the rule at issue, the practices at CP or any other part of his testimony. This is despite the fact that he too was disciplined as a result of the incident in which Helgeson was fired, and testified that employees continue to use the same instruction or practice in the same manner. Rather, his entire testimony remained consistent throughout, regardless of the questioner or the potential for discipline, and is supported by the record.

I found Qualy and Brown likewise credible too. Qualy was a neutral witness, with a calm demeanor, answering questions on both direct and cross in a consistent manner. His testimony is supported by, and consistent with, the record and I found him to be entirely credible. Likewise, Brown, although no longer employed by CP, provided consistent testimony, clearly answering all questions on direct and cross. Brown appeared neutral in his testimony, not showing bias or ill-will to either CP or Helgeson and his testimony too was consistent with the record overall. Brown was therefore credible, too.

I found CP witnesses McInnis and Muscha generally credible as well. Both testified consistently and their testimony is further supported by events and matters in the record. Neither displayed any obvious animus toward complainant at hearing.

There were some gaps in Nettleton's testimony in terms of the receipt of the e-test failure report and how he reviews and/or determines who to discipline based on the report, which may be due to lack of questioning rather than credibility or being fairly new to CP, but there was also some inconsistency in his testimony regarding his decision to discipline Helgeson, which somewhat undermines his credibility on this issue. With these exceptions, I found Nettleton generally credible too.

I cannot however say the same for Tom Jared, who at the time of Helgeson's dismissal, directly reported to Steve Nettleton, the final decision maker here. Jared also appears to be the only CP management official to testify that actually worked at CP, and had any authority over Helgeson, at least in 2014 and 2015. I observed Jared's demeanor throughout his testimony and found him to be somewhat squeamish or timid throughout. He often looked down during questioning on both direct and cross. His voice was soft and mumbled at times, and was asked by me at least once, if not more, to speak up, despite the fact that he was sitting next to me. (TR 627). This demeanor during questioning made his credibility suspect, and coupled with his testimony and some inconsistencies, leads me to determine he was the least credible of all of the witnesses.

I found parts of Jared's testimony not credible and inconsistent with the record. For example, Jared testified initially that he was unaware of Helgeson's January 2015 unsafe condition report and "could not recall" if the report was discussed on a daily conference call with other CP managers. (TR 624-625, 665-667). However, Jared admitted he was the hearing officer who presided over the formal investigative hearing of the yardmaster employee who was subject to investigation and possible discipline for his role in the "near miss" incident involving

Helgeson, on January 25, 2015, which was the very subject of the safety report filed by Helgeson. (TR 625-626; *see also* RX 51 Letter from Jared to employee for 1/25/15 failure to provide blocking protection to St. Paul Yard Track Ct 19... and imposing 30 day suspension). While knowledge of the incident and knowledge of Helgeson's filing of the report are different, it is not objectively unreasonable that at the very least, given his position and role in the investigation of the yardmaster, that Jared knew of the report or at least, constructively should have known. Moreover, if it was not as a result of Helgeson's verbal or written hazardous condition report, there was no explanation provided as to how either Jared or others at CP came to know about the incident such that Ganger was subject to an investigation by CP for his/her role in the same incident. In fact, Jared said that at the time, Jacob Hommerding was the superintendent or acting superintendent and was "involved" in the investigation. (TR 627). As a result CP needed an "unbiased" hearing officer, so Jared was brought in to conduct it. (TR 627). Such actions undermine his testimony that he did not know about Helgeson's report of a hazardous condition.

Similarly, Jared apparently had some role, or at least, knowledge of Helgeson's discipline for the February 2014 attendance violation, given that he is the CP official who signed the August 20, 2014 letter from CP denying Helgeson's appeal of the CP imposed discipline for the violation. (RX 24). Yet, despite the detailed letter, Jared indicated at the instant hearing that at the time of his recommendation for dismissal of Helgeson, while he would have known that Helgeson stood at a last chance for the prior attendance violation, he would not know the details. (TR 643). This also flies in the face of the hearing recap offered by McInnis, which clearly listed Helgeson's prior attendance violation, including both the missed call and sick day and the respective dates on which each occurred, that were the basis of the prior charge.

VI. APPLICABLE LAW

FRSA protects employees when they report safety concerns to their employers. 49 U.S.C. § 20109. 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, include the employee's lawful, good faith act done, or perceived by the employer to have been done, or about to be done [...] to file a complaint [...] applicable to railroad safety or security," or "...report in good faith, a hazardous safety or security condition." 49 U.S.C. §§ 20109(a) and (b).

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") and the two-part burden-shifting test incorporated from AIR 21 whistleblower cases. *Id.* § 20109(d)(2)(A)(i); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); 49 U.S.C. § 42121(b)(2)(B)(i)-(ii). 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*, 708 F.3d at 157. “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, PDF 13 (ARB Jan. 31, 2006) (quoting *Black’s Law Dictionary* at 1209 (7th ed. 1999)). If the employee does not prove one of the elements, the complaint fails. *Coryell v. Arkansas Energy Services, LLC.*, ARB No. 12-033, ALJ No. 2010-STA-42, slip op. at 3 (ARB Apr. 25, 2013).

Once the employee establishes his prima facie case, 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.” *Id.*; 49 U.S.C. § 42121(b)(2)(B)(ii); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010); *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)).

VII. LEGAL ANALYSIS AND FINDINGS

A. 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.

1. 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). Verbal complaints, may be protected as good-faith reports of a hazardous safety condition. *See, e.g., Head v. Norfolk Southern Ry. Co.*, Case No. 2:15-cv-02118-RDP at 31, (N.D. Ala., Sept. 13, 2017). Third, although not relevant here, protected activity includes seeking medical treatment or following treatment instructions for a work-related injury. 49 U.S.C. § 20109(c)(1)-(2).

Complainant’s OSHA complaint includes two distinct allegedly protected activities. The first is Helgeson’s participation in the February 2014 safety protest of CP, participation on film discussing unsafe practices at CP rail in a related safety video; the second is his filing of the unsafe condition report with CP rail and the FRA over the “near miss” incident that occurred January 25, 2015. (CX 23 at ¶¶ 25-26).

a. Complainant’s Participation in the Union Safety Picket and Related Safety Video

Complainant must show by a preponderance of the evidence that he engaged in protected activity. Relevant here, Complainant’s first allegation of protected activity includes his participation in a union organized safety protest or demonstration against CP over safety issues and unsafe practices and his subsequent appearance in a related video that documented the unsafe conditions and discussed certain unsafe work practices at CP. (CX 23; RX 40).

The protest was the result of a December 2013 UTU vote to do an “informational picket line,” resulting in demonstrations over two days, including February 12, 2014, the day Helgeson attended. (TR 172, 341-343, 345, 360-362). It was organized in part, because of numerous complaints regarding unsafe practices at CP, starting in 2013 which were continuing on several facets of the railway including St. Paul Hump, with no reaction from CP. (TR 341-342; *see also* CX 6, 17-18). The protest was for all UTU members, which included non-CP railroads. (TR 174).

CP’s Police Service (“CPPS”), “Dispatch Call Report,” from the first day of the protest, February 6, 2014 reveals that there were approximately 20-30 picketers with signs, an internal picketer filming and that the goal or reason for the protest had to do with Rail Safety, although it was unknown which aspect. (CX 2). On the same day, CP police met with CP officials: Dale McPherson, LR/HR, Amanda Cobb, attorney Bill Tittle, and Jenny Mann, Labor relations. The report also showed that the protesters planned to return “next Wednesday,” and that CPPS and building security would be on hand. (CX 2). Thus CP officials were aware of the picketing activity on the 6th and the same activity planned for the following week.

Helgeson participated the following week, on February 12, 2014, in the union organized safety protest or demonstration outside and in front of CP Plaza’s headquarters in downtown Minneapolis, MN. (TR 89-90).¹⁶ Helgeson participated in the picket to protest unsafe conditions

¹⁶ The OSHA Employee information form and OSHA complaint show a date of February 9, 2014; there is other evidence of a date of February 12, 2014. The parties agree that there were two days of picketing and that Helgeson

in the hump yard at CP in particular, because there were many instances of cars rolling up on top of people after they had combined the two yardmaster jobs. (TR 89-90). He felt that it was unsafe at St. Paul Yard. (TR 229). Helgeson did not carry a sign at the protest, but walked with others that did. (TR 90).

Whether this is deemed protected activity is complicated by the fact that “picketing,” “protesting” or participating in a demonstration regarding safety complaints or concerns, as Helgeson did here, is not specifically provided for by statute or regulation. Additionally, even if it were, here the demonstration was a group gathering, organized by the UTU, which included persons from other non-CP railroad carriers, and took place outside of CP’s offices, thus on its face, it may not appear to be a specific complaint or report regarding safety or hazardous conditions made to CP. The law and other pertinent facts cannot however be ignored, which favor a finding that Helgeson indeed engaged in protected activity.

At the time of his participation in the demonstration, Helgeson was an employee of CP. Helgeson specifically testified that at the demonstration, he protested unsafe conditions in the hump yard at CP. The demonstration was because of numerous complaints regarding safety at CP that had gone unheard and without action by the railway company. The location of the demonstration was in front of CP’s headquarter offices and thus it is apparent CP was the primary intended target audience for the UTU member’s demonstration. With CP’s Police Dispatch report noting that the goal or reason for the protest had to do with rail safety at CP and that the picketers would be back, it is easily inferred that that the second day of the picket, the one in which Helgeson participated, would have the same stated reason or goal for the protest. (CX 2).

The plain language of the statute does not include picketing as a protected activity. *See* 49 U.S.C. § 20109(a)-(c). However, with similar activity as Helgeson’s here, picketing or protest activity has been assumed to be protected activity in at least one whistleblower case arising under the Energy Reorganization Act. *Garn v. Toledo Edison Company*, 88-ERA-21, fn. 2 (Sec’y May 18, 1995) (citing *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. 1981)). In *Garn v. Toledo Edison Company*, the Secretary of Labor specifically assumed for purposes of the decision that Complainant’s picketing or protest activity, which was designed to inform Respondent and the public of his belief that that Respondent was committing safety violations, was protected. *Garn*, 1995 WL 848123 (DOL Off. Adm. App.); 88-ERA-21, fn. 2 (Sec’y May 18, 1995) (citing *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1137 (5th Cir. 1981) (statutorily protected expression included boycott and picketing activity by Complainant in opposition to conduct by Respondent that was unlawful under Title VII). Moreover, the FRSA protects employees’ good faith acts that are done or “perceived by the employer to have been done or about to be done,” which applies here too. 49 U.S.C. § 20109(a). Additionally, verbal complaints may be protected as good-faith reports of a hazardous safety condition. *See, e.g., Head v. Norfolk Southern Ry. Co.*, Case No. 2:15-cv-02118-RDP at 31, (N.D. AL, Sept. 13, 2017). “It is worth emphasizing that the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the McDonnell Douglas standard.” *Araujo*, 708 F.3d at 158. Accordingly, similar to the conduct in *Garn*, I find

participated in the second day and either date (i.e. the 9th or 12th) is close in time, such that the exact date is therefore not material here.

Helgeson's participation in the UTU demonstration protest, in front of CP headquarters, in which he participated to protest the unsafe conditions or practices at CP's hump yard, where Helgeson worked, is protected activity under 49 U.S.C. § 20109.

Helgeson also appeared in a video made the same day as a result of the demonstration. CP documented that there was indeed filming of at least the first demonstration, thus it is reasonable to infer filming took place during the second demonstration, too. (CX 2). The video is about safety. (TR 372). Like his participation in the demonstration, in the video, Helgeson discussed unsafe practices in the hump yard and his concerns and opinions about CP and safety. (TR 122-123; CX 1). More specifically, Helgeson mentioned seeing mis-routed cars, increased speeds for humping, being told to dump hazardous materials down clear alleys, changes in the retarder systems and use of skates being inefficient in stopping cars at CP. (Compl. Brief at appendix, citing video 1:46-2:34).¹⁷ Overall, Helgeson's remarks on the related video include complaints or reports about safety or hazardous conditions specific to CP, similar to the related picketing activity, I find it too is protected activity under the FRSA. In sum, I find Helgeson's February 12, 2014, participation in both the safety picket and related video to be protected activity under the FRSA.

b. Complainant's Report of a Hazardous Condition

Complainant also alleged he engaged in protected activity when he reported a hazardous condition to CP over a "near miss" incident he encountered during work on January 25, 2015. Specifically, Helgeson testified that on January 25, 2015, while inspecting a car on a designated "do not occupy track" and setting a "skate," to prevent movement of the car, a group of cars suddenly rolled down the track and collided with the car Helgeson had just inspected and placed the skate, causing it to push forward about 15 feet. (TR 96-98). Helgeson was not hit, but in the process of getting out of the way, his safety vest was caught on one of the cars and tore away. (TR 97-98).

Upon arriving at Glenwood depot, Helgeson completed a CP "Unsafe Condition Report" form. (TR 103, CX 4). The incident is described on a CP form titled "Canadian Pacific Railway Employee Report of Hazardous Condition" from employee Jeff Helgeson to supervisor, Jake Hommerding, dated January 25, 2015, and reported a hazardous condition. The details indicate Complainant had a block on certain tracks and that 2 cars were humped into his truck. (CX 4). Helgeson testified that he discussed the incident and the submission of the Unsafe Condition Report with his then supervisor/superintendent Hommerding by telephone during which he was told to give the completed report to the manager on duty in St. Paul Yard, which Helgeson did. (TR 103-104, 223-225, CX 4). Helgeson kept a copy of the completed report as well. (CX 4; TR 316).

Complainant engaged in protected activity when he reported the unsafe condition following a "near miss" incident as hump master, on January 25, 2015 both verbally to his

¹⁷ I watched the video at hearing which was admitted as CX 1. The video clearly shows and identifies Helgeson as well as several other CP employees when speaking about their concerns about safety at CP. However, I cite to only CX1 here and rely on Complainant's brief for the specific citation as to the location of Helgeson on the video.

supervisor, Hommerding and in writing to CP management, as it constitutes “reporting, in good faith, a hazardous safety or security condition.” 49 U.S.C. § 20109(b). Accordingly, with the report of the hazardous condition to Hommerding verbally and providing a written copy as instructed by Hommerding to the manager on duty, with no evidence to the contrary, Complainant has established by a preponderance of the evidence that he engaged in protected activity.

Helgeson also alleges that he engaged in protected activity when he reported the same January 25, 2015 incident to the Federal Railroad Administration (“FRA”). CP maintains that such activity, if true, is barred because it was not included in his complaint filed with OSHA. The OSHA Whistleblower Complaint process however is informal in nature, it is initiated by a form requiring certain employee information, completed by the Complainant, which is then later developed into the Complaint.¹⁸ Review of the employee information form Helgeson used here to submit information for his complaint to OSHA, shows he indeed notified OSHA of the complaint to the FRA, although it does not appear on his “final” Complaint. (CX 23 at ¶ 25; RX 40). That the “final” OSHA complaint does not reference Helgeson’s report to the FRA, is not therefore dispositive. (RX 40). Thus, whether Helgeson’s report of the same unsafe condition to the FRA is protected activity is properly before me.

Helgeson’s report to the FRA was contemporaneous with the unsafe condition report submitted verbally and in writing to CP on January 25, 2015, creating a sufficient nexus between the two such that it too, is protected. Helgeson reported the incident to the FRA, using their online process. (TR 136, 220-221). He did not however provide a copy of the FRA complaint to CP, nor could he keep a copy of the online complaint form. (TR 220-222). Helgeson did not receive a response from the FRA, but believed it was being handled thru Mr. Qualy. (TR 220-222). While there is no direct evidence of the complaint being submitted by or on behalf of Helgeson, specific to CP, a review of the evidence indicates the January 25, 2015 incident of which Helgeson complained, was indeed provided to the FRA.

Qualy confirmed that after receiving a call from his legislative safety rep about the January 25, 2015 incident and then a call from Mr. Helgeson the next day about it too, he wrote a letter to the FRA requesting that they come to the property and audit CP. (TR 352). Qualy also said that as a rule, they do not name workers in these letters, but said that the letter “was specifically following the most recent event reported to our office,” which was the “near miss” incident involving Helgeson. (TR 352). As a result, according to Qualy, the date, time and specifics of the incident are included in the letter to the FRA. (TR 352). With respect to the hump yard operations, including Helgeson’s January 25, 2015, incident Qualy was told by the FRA that they met with CP management, had been on the property and had looked at the specific data, but they did not disclose the outcome to him, nor was he aware who the FRA spoke with at CP. (TR 354-355). Qualy said that he met in St. Paul with FRA Regional Administrator Illich, in late February or early March 2015, when he said they had been on CP property and were looking at its whole [hump yard] operation. (TR 354-355). At the time of the hearing he believed the FRA’s review was still ongoing. (TR 354-355).

¹⁸ Pursuant to 49 U.S.C. § 20109(d)(2)(A)(ii), the statute of limitations runs from the date of the adverse action, so it is more important that the original complaint identify the adverse action. Here, the adverse action alleged by Helgeson, his October 16, 2015 termination, was indeed timely and included in his OSHA complaint.

Review of the February 9, 2015 letter to the FRA Deputy Regional Administrator, at paragraph 1 appears to detail the subject incident involving Helgeson, with the date noted as January 26, 2015. (CX 20). The letter also describes eleven additional conditions or safety concerns related to CP. (CX 20). It does not show whether a copy was given anyone at CP, nor does Helgeson's name appear on the letter. (CX 20). By letter dated February 20, 2015, to Qualy, the FRA confirmed receipt of a letter dated February 2, 2015 regarding the subject "Hump and General Yard Operations, and further indicated it would conduct an investigation and advise him of the results.¹⁹ (CX 19).

Upon review, despite the omission of Helgeson's name, the details of the incident in paragraph 1 of the letter to the FRA, is entirely consistent with Helgeson's report of the same incident that occurred on January 25, 2015 and was indeed reported to CP. Helgeson's uncontroverted testimony that he contemporaneously reported the incident to the FRA himself utilizing its online process, and through Qualy, is further supported by the undisputed testimony and actions of Qualy. Moreover, Qualy explained that it is practice that they do not provide an employee's name to the FRA, but more importantly, that he reported the incident involving Helgeson to the FRA which is ascertainable upon review of his February 9, 2015 letter to the FRA. Accordingly, Helgeson's report of the unsafe condition to the FRA, which stems from the same incident reported to CP, is likewise protected activity, as it could be construed both as providing information to assist the investigation of potential "violation[s] of any Federal law, rule, or regulation relating to railroad safety or security," as given to the FRA and a complaint of a hazardous condition or safety report to be or about to be provided or filed with CP. 49 U.S.C. §§20109(a) and (b).

2. Whether CP Knew About Complainant's Protected Activity

Although not required by the Administrative Review Board ("ARB"), Federal Courts have required and the regulations suggest that Complainant must also establish by a preponderance of the evidence that Respondent knew about his protected activity.²⁰ When

¹⁹ It appears that the FRA letter from Qualy at CX 20 is dated February 9, 2015, with receipt acknowledged by the FRA on February 20, 2015. (CX 19-20).

²⁰ Case law differs on whether this factor requires an independent showing or if it is subsumed in the causal showing that a complainant must make. Consistent with the regulations and federal courts generally, including the Eighth Circuit, I address the knowledge requirement as a separate element here; the Administrative Review Board (ARB) however has repeatedly found that knowledge is not a separate requirement, but rather knowledge and animus are only factors to consider in the causation analysis. *See* 29 C.F.R. § 1982.104(e); *see also 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) (knowledge considered as a separate requirement); *But see also, Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 11, fn 2; *Coates v. Grand Trunk Western R.R.Co.*, ARB No. 14-019, slip op. 2, n. 5, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 29, 2011) (*Bobreski I*)); *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013) (knowledge is not a separate element but instead forms part of the causation analysis). Accordingly, I address the knowledge requirement in great detail here and will further address knowledge again, as part of my causation analysis below. Thus, if knowledge were omitted as an element, it is still part of the contribution showing.

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. *Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 11-037, 2013 DOL Ad. Rev. Bd. LEXIS 25, at *38 (ARB Mar. 29, 2013). In *Rudolph*, the ARB held that "demonstrating that an employer, as an entity, was aware of the protected activity is insufficient." 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).

a. CP Knowledge of Complainant's Protected Activity Consisting of his Participation in the UTU Safety Demonstration and Related Video.

Here, Complainant must therefore establish that CP knew of his participation in the UTU demonstration protest and the related video by a preponderance of the evidence. It is not sufficient that someone at CP knew of Helgeson's participation in the demonstration or related video, or saw him during the protest or in the related video, but rather, it must be a person involved in the final decision to terminate Helgeson that knew of his participation and the complaints or reports regarding safety or hazardous conditions he made in each event.

Helgeson's OSHA complaint alleges CP knew of his participation in the safety picket and related video because a copy of the film was hand delivered to Robert Johnson. (CX 23 at ¶ 27). Helgeson further alleges that CP General Manager, Robert Johnson was the person responsible for what he was reporting. (CX 23 at ¶ 20). Robert Johnson did not however, testify at hearing,

As detailed below, there is no direct evidence that CP or any of the CP employees involved in the decision to terminate Helgeson, knew of his participation in the UTU demonstration and/or the related video voicing complaints about safety and/or hazardous conditions at CP. However, circumstantial evidence leads to an inference that CP management, minimally Robert Johnson, knew of Helgeson's involvement in the video and thereby his involvement in the safety demonstration.

CP terminated Helgeson following the investigative hearing conducted by CP management official and hearing officer, Jeff McInnis, Superintendent, St. Paul Road, Tom Jared's review of McInnis' write-up from the hearing, and Jared's recommendation of dismissal, which he provided to General Manager, U.S., Steven Nettleton, who issued the termination. (TR 545-546, 635-637; Nettleton 20). In February 2014, McInnis was working as a Road Foreman of Engines, and was not based out of CP Plaza in Minneapolis. (TR 546). McInnis testified that he was unaware of the UTU picket demonstration and of Helgeson's participation in it, having only learned of it as a result of the litigation. (TR 548-550). During the same time period, Tom Jared was working nights as CP's General Superintendent for U.S. Operations in Minneapolis, located in CP Plaza, but like McInnis, testified that he too was unaware of Helgeson's participation in

the union picket demonstration on February 12, 2014 and did not see the related video entitled, "What a Way to Run a Railroad." (TR 624-625). Jared also testified he was off during both dates of the UTU picketing demonstrations. (TR 624-625). CP Superintendent, Steve Nettleton, only began employment with CP in August, 2015. (Nettleton 5-6). He was unaware of Helgeson's participation in the union informational picketing activity on February 12, 2014 or that there was ever such activity, prior to Helgeson's dismissal in October, 2015. (Nettleton 11-12; 64). In sum, there is no direct evidence that Nettleton, McInnis or Jared were aware of Helgeson's participation in the union picket demonstration or the related video.

However, there is persuasive evidence that CP management was aware of the protest from CP's own CPPS Dispatch report and from former CP manager and employee, William Brown, who in February of 2014, was in management at CP. Brown testified that in February 2014, as a manager he participated in daily phone calls with CP management, led by Robert Johnson, with Mark Redd "second in command" and all superintendents also participating. (TR 425). Brown recalled that they talked about the union protest during the call(s). (TR 426). He also said, CP Union President, Cory Plath, was specifically mentioned during a call as being part of the demonstration, but no others were named. (TR 457). Brown recalled that it was discussed on a call that "crew management" would be there and keep an eye on the situation. (TR 457). Likewise, at his deposition, Brown remembered reading an article in the newspaper or on the internet about the protest, but only UTU President Corey Plath was mentioned in it and not Helgeson.²¹ (CX 6 at 19-20). There was no doubt in Brown's mind that CP management knew of the protest. (TR 426-427).

The CP Dispatch report from the February 6, 2014 picket, revealed that CP police met with Dale McPherson, LR/HR for CP, Amanda Cobb, CP attorneys, CP attorney Bill Tittle and Jenny Mann, Labor relations. The report also showed that the picketers planned to return "next Wednesday," and that CPPS and building security will be on hand. (CX 2). CP's Dispatch Report further supports that CP at the very least knew of the Union Picketing activity, but provides no direct evidence that anyone at CP knew of Helgeson's participation in it.

As a result, I agree that there's sufficient evidence of CP's knowledge of the protest activity. Although there is no direct evidence that anyone at CP knew of Helgeson's participation in the protest, there is circumstantial evidence that supports such a finding. Admittedly, neither Helgeson himself, nor Qualy were aware who, if anyone at CP, saw Helgeson at the UTU demonstration. While Qualy said he was told CP managers were watching the demonstrations, he does not recall which day they purportedly watched, nor did he personally recognize any CP managers watching during the picket. (TR 344, 360-362). Similarly, while there are public skywalks connecting CP headquarters with other downtown Minneapolis businesses such that CP personnel could have watched the demonstration from the skywalk, Qualy did not know who, if anyone, from CP saw the demonstration on the day Helgeson participated. (TR 362). Qualy, like Brown, also testified that the event was covered by local newspapers, (TR 345) but at best,

²¹ During discussions over CX 22, a purported newspaper article regarding the union picket, counsel for Respondent, although not a witness, agreed that the issue was not whether there was the picketing activity or whether CP knew of the protest, but whether CP knew Helgeson participated in the protest, acknowledging that CP was aware of the picket. (TR 43).

this is again evidence of the existence of the picketing event, and not Helgeson's participation in it or of his complaints made about CP during the event.

Although there is no direct evidence that CP management knew of Helgeson's participation in the protest, here the circumstantial evidence is sufficient to infer that then CP Vice-President of Operations, Robert Johnson, knew of Helgeson's participation in the video. Thus, alternatively CP had constructive knowledge of the protected activity. The February 6, 2014 CPPS Dispatch report form shows that CPPS was aware that a picketer was filming during the demonstration, but does not provide any detail. (CX 2). Qualy confirmed that a related safety video was made during the union protest or picket demonstrations, but indicated it was not released to the public. (TR 346-347). Additionally, Qualy testified that although he personally hand delivered a copy of the video, entitled "Hunter Harrison's Canadian Pacific Railway-What a Way to Run a Railroad," to then CP Vice President of US Operations, Robert Johnson's office on October 4, 2014, he spoke only briefly to Johnson before Johnson was called away and more importantly, before he could give him the video. (TR 356-358). As a result, Qualy left the video with Mr. Johnson's assistant, Linda Serrano. TR 346-347; 356-357. Qualy does not know whether Johnson or any other CP management employee viewed the video. (TR 358). Johnson himself did not testify at hearing, despite Complainant's assertion that he was integral in the termination of Complainant's employment at CP and his position at CP during the relevant events here. Based on the circumstances of Qualy hand delivering the video to Robert Johnson's secretary, after an in person brief meeting between Johnson and Qualy, it is highly credible that Johnson viewed the video.

Additionally, Qualy met with CP Vice-President Robert Johnson on multiple occasions to address safety issues at CP, some of which were referenced on the video. Qualy also wrote Johnson a letter dated September 8, 2015, which specifically references the two's "prior conversation and the recorded DVD correspondence," regarding reduced training programs at CP, and the need for effective training, retraining and remediation, "essential for railroad safety." (CX 29). Helgeson's then supervisor, Muscha, took exception to the instruction given, just three days after the letter, and Helgeson was ultimately fired a month later. Helgeson's complaint to OSHA identified Johnson as the CP management person responsible for the subject retaliation. (CX 23 at 3). Johnson decided the discipline to impose on Helgeson for the prior attendance violation, and appears to have had some involvement in the decision to investigate Helgeson for the e-test failure which led to his termination (CX 9, RX 27).

It belies credulity that Johnson, the then CP general superintendent, could ignore viewing a video hand-delivered to his office by the State Union Legislative Representative (Qualy), and not share it with others at CP. Johnson however was not called as a witness by either party at hearing, despite his critical role here. The timing of Helgeson's termination is also suspect when considered against the September 8, 2015 letter with a direct reference to the video. This, coupled with Qualy's undisputed testimony regarding discipline of other CP employees that appeared in, and verbally participated in the video, certainly suggest Johnson himself and/or others in CP Management knew of the safety video, its contents and the identities of those that participated in it, including Helgeson. Similarly, as the video was made during the safety protest or picketing events, it follows that Johnson and/or others in CP management would therefore know of Helgeson's participation.

Based on the circumstances as a whole, I find that Johnson had knowledge of Helgeson's participation in the safety video made at the informational safety picket because circumstantial evidence demonstrates that it is unbelievable that he would not have watched the video hand delivered to him by Qualy. As Johnson knew Helgeson participated in the video and knew that the video was filmed during the informational safety picket, Johnson therefore also knew that Helgeson participated in the protest.

b. CP Knowledge of Helgeson's Reports of a Hazardous Condition on January 25, 2015.

Again, given the lack of continuity in CP management here, it is not surprising that the CP decision makers here all deny knowledge of Helgeson's submission of the unsafe condition report regarding the January 25, 2015 "near miss" incident. Nevertheless, a review of the evidence reveals pertinent CP management officials indeed had knowledge or constructive knowledge of the incident and report.

McInnis was unaware of the hump incident that occurred in St. Paul Yard in January, 2015 or that Helgeson submitted a hazardous condition report in connection with the incident. (TR 549-550). He learned of the incident as a result of this litigation. (TR 548-550). McInnis however, as Road Foreman of Engineers since 2013, was responsible only for engineers working under him, while conductors, such as Helgeson, reported to Trainmasters. (TR 544-545). Nettleton stated that he was unaware of the hazardous condition form Helgeson submitted to CP on or about January 25, 2015, as reflected in exhibit CX 4. Nettleton 11-12). As stated above, however, Nettleton was not employed by CP until August 2015, well after the incident occurred and the report submitted. (Nettleton 5-6).

Jacob Hommerding, and Tom Jared however were two of three superintendents that directly reported to Nettleton at the time he made the decision to investigate the September, 2015 incident (Nettleton 58). Jared and Hommerding were also included as recipients of an e-mail sent by Nettleton regarding the exception and related e-testing report and decision to investigate Helgeson for the September 2015 incident that lead to Helgeson's termination. (Nettleton 57-59; RX 27 email). Thus, while there is no evidence to what extent, if any, of Hommerding's involvement in the decision to terminate, significantly, he (and Jared) was at the very least included as an email recipient in Nettleton's September 16, 2015 email, with the subject, "US West Region – Pending- Employee Exceptions-report which included "Devall/Helgeson Investigation," and the relevant exception report as it pertained to both Devall and Helgeson and that ultimately led to Helgeson's termination. (Nettleton 57-59; RX 27). The remainder of the email report was redacted. (RX 27).

Hommerding, as an email recipient, is particularly relevant here because he was also the very CP management official that Helgeson reported the January 25, 2015 near-miss incident to, and who, according to Helgeson, advised him to submit his written report of the hazardous safety condition/incident to the manager on duty. (TR 103-104, 223-225, 234-235; *see also* CX 4 and RX 64 – Report of hazardous conditions). As Hommerding did not testify at hearing, there is no evidence disputing he was aware of Helgeson's report of the hazardous safety condition.

Employer's only contrary evidence appears to be an assertion through Jared that CP may not have received the actual "paper form" of the report of hazardous condition. (TR 618, 625; CX 4).

Jared's testimony however, lends further support that Helgeson reported the incident to Hommerding, and more importantly, that Hommerding (and likely Jared, too) was indeed aware of it. Jared initially testified he was unaware of the CP hazardous condition reported by Helgeson on January 25, 2015, but Jared then admitted he was the hearing officer who presided over the formal investigative hearing of the yardmaster employee who was subject to disciplinary investigation for his role in the very same "near miss" incident involving Helgeson, January 25, 2015. (TR 618, 625; CX 4). The incident was the subject of the safety report submitted by Helgeson to Hommerding and CP. (TR 625-626; *see also* RX 51 Letter from Jared to employee for 1/25/15 failure to provide blocking protection to St. Paul Yard Track Ct 19... and imposing 30 day suspension). Yet, despite his involvement in the investigation, Jared testified that he never knew or came to know that Helgeson or any others were involved in the incident. (TR 626). Such testimony is simply not credible, especially when he gave no indication as to how CP became aware of the need to investigate the yardmaster involved. While knowledge of the incident and knowledge of Helgeson's filing of the report are different, it is not objectively unreasonable that at the very least, given his position and role in the investigation of the yardmaster, that Jared knew of the report or at the very least, constructively should have known. Helgeson's report of the incident to Hommerding, his supervisor at the time, is sufficient to impute employer knowledge here.

Moreover, if it was not as a result of Helgeson's verbal or written hazardous condition report, there was no explanation provided as to how either Jared or others at CP came to know about the incident, such that Ganger was subject to an investigation by CP for his/her role in the same incident. In fact when asked why he was the hearing officer, Jared said that at the time, Jacob Hommerding was the superintendent or acting superintendent and was "involved" in the investigation. (TR 627). As a result CP needed an "unbiased" hearing officer so Jared was brought in to conduct it. (TR 627). At the very least, Jared's testimony coupled with Helgeson's, supports a finding that Hommerding knew of Helgeson's report and somewhat undermines Jared's testimony that he did not know about the report. The evidence supports that Jared constructively knew about the report.

Given Hommerding's role as the recipient of Helgeson's January 25, 2015, safety complaint, the lack of any evidence to the contrary, and Jared's admitted role as the CP Hearing Officer in the yardmaster's investigative hearing over the same incident Helgeson reported, and that Hommerding was already involved in the investigation, such that Jared too, had at least constructive knowledge of Helgeson's complaint, I find Complainant has established knowledge by CP of this protected activity of Complainant.

c. Complainant's Assertion of the Cat's Paw Theory

The cat's paw theory requires proof that a lower level or other supervisor "perform[ed] an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action ... if that act is a proximate cause of the ultimate employment action." *Kuduk*, 768 F.3d at 790 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011)) (emphasis in original).

Complainant asserts that CP witnesses called at hearing to address requisite knowledge of Helgeson's protected activity are either not credible or not relevant. More specifically, Complainant asserts first, Tom Jared's testimony at least with respect to whether he knew of Helgeson's unsafe condition report regarding his near-miss incident on January 25, 2015, was not credible given his testimony that he could "not recall" whether Helgeson's unsafe condition report was ever discussed during daily CP management conference calls he participated in, and testimony that he was unaware of the report, yet later, he admitted he was the management official that conducted the investigation into the incident. (*See* Complainant's Post-hearing brief at 8-9). As I discussed above, I agree that his testimony with respect to whether he was aware of Helgeson's January 25, 2015 safety report is not credible here.

Secondly, Complainant suggests that Nettleton, a relatively new hire at the time Helgeson was terminated, and more importantly, who was not employed at CP during any of his protected activities, was CP's "cat's paw," or put another way, the designated CP official to make the decision to terminate Helgeson so as to isolate CP from the "knowledge" requirement here. (*See* Compl. Brief at 9). There appears to be some merit to this argument given a review of the evidence in the record and notable lack of evidence from key personnel involved here, including most importantly, Jacob Hommerding, and Robert Johnson, without any explanation for their absence as witnesses.²²

"A complainant is not required to prove direct knowledge on the part of the employer's final decision maker because the law will not permit itself to insulate it by creating layers of bureaucratic ignorance between a whistleblower's direct line of management and the final decision maker." *Zinn v. American Commercial Lines*, 2009-SOX-25, slip. op. 18 (Nov, 19, 2012) (citing *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 166 (D.C. Cir. 1982)). Thus, recognizing that improper influence may occur early on in the decision-making process, the Supreme Court has found that an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus. *Staub v. Proctor Hosp.*, 562 U.S.411 (2011).

There is significant circumstantial evidence that CP management knew of complainant's protected activities, despite the lack of direct evidence, especially in light of the evidence as a whole. First, both Hommerding and Jared were included as recipients of an e-mail sent by Nettleton regarding the exception or related e-testing report and decision to investigate Helgeson for the September 2015 incident that led to Helgeson's termination. (Nettleton 57-59; RX 27). Nettleton confirmed that both Hommerding and Jared received the reports. (Nettleton at 58; RX 27).

²² Hommerding was deposed during discovery as his deposition testimony was used by the parties in their respective summary judgment motions and response. During a pre-trial conference call, Claimant indicated its intent to offer the deposition testimony of Hommerding at hearing, to which Respondent objected asserting it was unaware of the deposition testimony to be used as trial testimony when it was taken during discovery. At that time, I told Claimant the preference was to have live testimony and that the deposition testimony may only be offered if there was a basis for it in lieu of live testimony. At hearing however, Hommerding was not called as a witness by either party and Claimant did not offer the deposition transcript. No explanation by either party was offered for Hommerding's absence.

The e-mail dated September 17, 2015 from Steve Nettleton, copying Jacob Hommerding (as well as K. Muscha, T. Jared, M. George and others), specifically contains a subject line “re: Devall/Helgeson Investigation Notice and/or US West Region-Pending-Employee Exceptions-9/16/15 (RX 27). While these key members of CP management were copied on the email from Nettleton, in a subsequent related letter and emails, the same individual names are no longer included, but instead the emails contain mostly group names such as “Crew management,” “labor relations” and “HR US Administrators,” and otherwise identify few recipients by name. (See RX 28 (9/21/15 letter from Mindy George, Manager Support Services Operations, US West Region, to Helgeson notifying him of the investigation/hearing to occur over the 9/11/15 exception, copying Chris Danula, Kamron Muscha, Crew Management, Labor Relations and HR US Administration); see also RX 30, 9/21/15 email from “Keith Bartlett,” “Subject HL Invest Notice-Helgeson, J # 934325-Alleged fail to give direction & distance...9-11-15” (containing a line identifying an attachment with the same name as the subject line and the body of the email stating, “CMC Please notify those concerned,” but not identifying any recipient(s) of the email and attachment); see also RX 31, 9/28/15 letter from Mindy George to Helgeson (postponing the hearing date and copying Jeff McInnis, Kamron Muscha, Crew Management, Labor Relations, HR US Administration and Jason Trent-VL/C UTU). There is nothing in evidence indicating who received the email or to whom it was sent when the recipients were changed to group names including crew management, labor relations and HR US Administrators, or why.

Even more telling is that after these emails and letter, which were all prior to the investigative hearing, there are at least three emails or letters solely between McGinnis and Jared (RX 33, 10/16/15 email , subject “Helgeson Recap”), Jared and Mindy George²³ (RX 34, 10/16/15 email (Jared forwarded McInnis email of 10/16/15) and George, Nettleton and Jared, (RX 35, 10/16/15 email from George to Nettleton, copying Jared, Subject “Helgeson Recap”- the body of which indicates Mindy George is “sending on behalf of Tom...we will issue letter... notify employee of dismissal.”), which ultimately culminated in the decision to terminate Helgeson. (RX 33-35). Once the decision to terminate appears to have been made, although little is documented on the emails exchanged between the three CP officials, a number of persons or groups included in the same emails prior to the conclusion of McInnis investigation are again copied, this time in the 10/16/15 letter from Nettleton to Helgeson, copying Jared, labor relations, crew management, HR-US Administration and Lucas Baughman-L/C UTU, notifying Helgeson that he is dismissed from the service of the company (CP). (RX 36).

These actions in combination with Nettleton, new to CP, and Jared, being the lower level supervisor with knowledge of prior events, support a cat’s paw theory in that CP is attempting to insulate its decision-makers or other persons with knowledge from involvement here. This is especially evident in light of Brown’s testimony and supporting documentary evidence that he recommended a lighter discipline for Helgeson after conducting the investigative hearing into the excessive absenteeism charge via an email, but was then called via telephone and made to change the discipline to the 30 day suspension and last chance, which was not otherwise documented anywhere, until just prior to and in the final decision letter given to Helgeson.

²³ Although there was some testimony as to Mindy George and her position at CP, she did not testify at hearing. Additional personnel involved in certain events with Complainant include CP managers Mark Redd and Brandon Smith. Although their testimony is not as essential, neither were called as witnesses.

Brown testified that such practice was common at CP and the above series of emails and exchanges are consistent with his testimony.

Notably absent from the chain of emails beginning with the e-test failure report and ending with the direction to dismiss Helgeson is who was involved, and more importantly how they arrived at the decision. For example, a review of the hearing “recap,” from McInnis included at RX 35, does not include any disciplinary recommendation, nor did McInnis know who made the decision to terminate Helgeson. (TR 582). The series of emails after McInnis forwarded his “recap” solely to Tom Jared, is limited to only Jared, Mindy George and Nettleton with either the word “recap” or nothing at all appearing in the body of the email until the third and final email from Mindy George to Nettleton with Jared and now McInnis copied, indicating she’s “sending on behalf of Tom” and the intent to notify Helgeson of his dismissal. (RX 35).

Although circumstantial in nature, the evidence is also suggestive that CP may have attempted to insulate Nettleton as the ultimate decision-maker here. Such evidence includes the fact that neither Johnson, nor Hommerding, who had supervisory authority over Complainant, knowledge of his 1/25/15 hazardous condition report, and an apparent position reporting to Nettleton, were called as witnesses here. Further, as circumstantial evidence demonstrates that Johnson saw the video and thereby knew of Helgeson’s participation in the video and protest, it is reasonable to conclude that other management likely also saw the video, given Johnson’s position at CP at the time, especially in light of Qualy’s undisputed testimony that he hand-delivered the video to Johnson’s Secretary in October, 2014, referenced it in a September 2015 letter to Johnson, and that two other CP employees that appeared and verbally participated in the video have, like Helgeson, since been terminated by CP. The evidence as a whole, certainly suggests that CP took steps to isolate its decision maker, Nettleton, from the knowledge requirement here. Accordingly, there is support for Complainant’s assertion that Nettleton was indeed the “cat’s paw” here.

3. 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. Helgeson’s termination on October 16, 2015 was an adverse action. (TR 16-17; see also JX 1, ¶ 14). Helgeson’s suspension also constitutes an adverse action within the meaning of the FRSA. The plain language of the FRSA indicates that an employer may not discharge an employee because he engaged in protected activity. *See* 49 U.S.C. § 20109. Here, Respondent discharged Complainant after investigation of and as a result of the rules violation it alleges occurred on September 21, 2015. Based on the plain language of the FRSA, I find that Complainant’s termination constitutes an adverse action under the FRSA. I therefore find that Complainant has established the third element of his prima facie case.

4. 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.* Similarly, a complainant need establish only that the protected activity affected in any way the adverse action taken, notwithstanding other factors an employer cites in defense of its actions. *DeFrancesco v. Union R.R. Co.* ARB No. 13-057, ALJ No. 2009-FRS-9 (ARB Sept. 30, 2015).

"[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). 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). 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).

a. Employer Knowledge

As the ARB does not consider the knowledge requirement as a separate element of proof, implicit in the contributing factor analysis is whether a respondent had actual or constructive knowledge of a complainant's protected activity when it decided to take the adverse action. *See Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 17 (ARB June 29, 2011). Case law demonstrates how the final-decision-maker's "knowledge" and "animus" are factors to consider in the causation analysis but not always dispositive factors and requires the evidence be considered as a whole. *See, e.g., Staub v. Proctor*, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation); *Bobreski*, slip op. at 17 (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices). Conversely, the evidence as a

whole may demonstrate that none of the decision-makers knew about the employee's protected activity and thereby break the causation chain between the protected activity and the final adverse action. *Bobreski*, slip op. at 14. As discussed in great detail above, which I do not repeat here, there is evidence of that Jared knew or constructively knew of Jared's January 25, 2015 safety report, in which he was involved in a "near miss" incident.

While I addressed Complainant's assertion of employer's knowledge under the Cat's Paw theory in *Staub* above, Respondent, relies upon the same Supreme Court decision in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011), as well as the 8th Circuit decision in *Kuduk v. BNSF RY. Co.*, 768 F.3d 786 (8th Cir. 2014), for its position that Complainant is required to show an element of "discriminatory animus" which I address here. (Respondent's Brief ("Resp. Brief") at 31, citing *Kuduk*, 768 F.3d at 792) (other citations omitted). As the ARB recently explained why "intentional retaliation" in *Kuduk*, does not apply to the FRSA contributing standard, I reject such a requirement here.

More specifically, in *Riley v. Dakota, Minnesota & Eastern Railroad, d/b/a Canadian Pacific*, ARB Case Nos. 16-010, 16-052 at fn13; ALJ Case No. 2014-FRS-044 (ARB July 6, 2018), the ARB analyzed *Kuduk's* holding that "the contributing factor an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Riley* at FN 13, citing *Kuduk* at 791. In doing so, the ARB recognized that the Court in *Kuduk* failed to explain why "intentional retaliation" was required, or how it differs from retaliatory motive, noting that its holding was "both conclusory and contrary to the weight of precedent interpreting the contributing factor element of the statutory protections of whistleblower laws". *Id.*, citing *Kuduk* at 791; *see, e.g. Halliburton v. ARB*, 771 F.3d 254, 262-263 (5th Cir. 2014); *Araujo v. N.J. Transit Rail Ops., Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009); *Allen v. ARB*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Kewley v. U.S. Department of Health & Human Svcs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998). Thus, *Kuduk's* holding is not only contrary to the ARB, but contrary to multiple circuit courts, too.

The ARB further explained that the Court in *Kuduk* did not properly account for the differences between the "motivating factor" causation requirement under Title VII and the Uniformed Services Employment and Reemployment Act (USERRA), upon which it relied in its decision and the "contributing factor" standard applicable under the FRSA. *Id.*, citing *Staub*, 562 U.S. at 420. "We have long held that "retaliatory motive" is not required to show causation under the whistleblower statutes, like FRSA, containing the "contributory factor" standard." *Id.* The ARB further explained its reasoning behind the distinction, including in SOX cases with the same causation standard as FRSA, stating, "[N]othing in section 806 requires a showing of retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer." *Id.*, citing *Menendez v. Halliburton, Inc.* ARB Nos. 09-002-003; ALJ No. 2007-SOX-005, slip op. at 31 (ARB Sept. 13, 2011) *aff'd*. *Halliburton v. ARB*, 771 F.3d 254, 262-263 (5th Cir. 2014); *see also Beatty v. Inman Trucking Mgm't, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-020, -02; slip op. at 8 (ARB May 13, 2014) (includes in-depth reasoning in Surface Transportation Act case behind distinction in the two causation standards). Therefore, proof of an employer's retaliatory motive or discriminatory animus is not necessary to a determination of causation under the FRSA. Rather, whether a respondent had actual or constructive notice or knowledge of a complainant's protected activity

when it decided to take the adverse action is what is required here, because without it, the adverse action cannot be rationally be connected in any way to the employee's protected activity.

My full discussion of employer knowledge was discussed supra as its own separate element above and I do not address my findings again here. Given the circumstantial evidence and when considered with the other evidence as whole, as discussed above, I find CP knew of Helgeson's protected activity. Accordingly, I further find, Helgeson's participation in protected activity, contributed to his termination.

b. Temporal Proximity

An ALJ is "permitted to infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity." *Palmer v. Canadian Nat'l Railway/Illinois Central R.R. Co.*, ARB Case No. 16-035, slip op. 56, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016). Temporal proximity between the employee's protected activity and the unfavorable personnel action "can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013); *see also, Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. 12 (Oct. 26, 2012) (temporal proximity between protected activity and adverse action can raise an inference of causation).

While only a few days to a couple months between the protected activity and the adverse action have been found sufficient to raise an inference in causation, so too, in other related whistleblower cases has periods of up to at least eight months. *See, e.g. Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. 12 (Oct. 26, 2012) (four days between the protected activity and investigation and complainant fired two months later); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 161 (3d Cir. 2013) (only a few days between an injury report and disciplinary action was sufficient); *County v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (thirty days deemed sufficient to support an inference of retaliation); *but see also, Barker v. UBS AG*, 888 F. Supp. 2d 291 (D. Conn. 2012) (in Sarbanes-Oxley case, five months found sufficient); and *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036 (Sec'y Apr. 7, 1992) (seven to eight months in Energy Reorganization Act (ERA) case was sufficient), reversed on other grounds sub nom., *Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993).

Conversely, two months or more between a complainant's protected activity and the adverse actions have been deemed insufficient to show the protected activity contributed to the adverse action, without more factors. *See Kuduk v. BNSF Ry. Co.*, 980 F. Supp. 2d 1092, 1101 (D. Minn. 2013), citing *Kipp v. Mo. Hwy & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002), *aff'd Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014) (Complainant could not establish a prima facie case of retaliation alone when the termination occurred two months after the alleged protected conduct); *see also, Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, slip op. 10, ALJ Case No. 2010-FRS-030 (Jan. 6, 2017) (ARB upheld an ALJ determination that complainant failed to establish reporting an injury contributed to his termination when there was a sixteen month gap between the complainant's protected activity and the adverse action, along with other factors). Nearly two years has also been held to be too distant to support that an

adverse action contributed to an employee's termination. *Ortiz v. Grand Trunk W. R.R. Co.*, No. 13-13192, 2014 U.S. Dist. LEXIS 132666, at *19 (E.D. Mich. Sep. 17, 2014).

In the present case, Respondent argues that the lack of temporal proximity between when Complainant's participation in the UTU safety picket demonstration and related videotape as well as when he reported the unsafe condition as a result of the "near miss" incident and his termination undermine and negates any finding that Complainant's protected activity was a contributing factor in his termination. (Resp. Brief at 39). Complainant's burden here however, may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, *or at the first opportunity available to the respondent*, giving rise to the inference that it was a contributing factor in the adverse action. *Riley v. Dakota, Minnesota & Eastern Railroad*, ARB Nos. 16-010, 16-052, at FN 13, ALJ No. 2014-FRS-044 (ARB July 6, 2018), citing *see also Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013) ("Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributory factor test."). Here, the adverse action against Helgeson took place at the first opportunity available to the respondent.

Helgeson participated in the UTU picketing demonstration in front of CP and the related video on February 12, 2014 and he reported the hazardous condition to CP on January 25, 2015. He was terminated by CP on October 16, 2015. Therefore there is a gap of approximately 20 months and 9 months respectively between Helgeson's protected activities and his termination. On its face, this gap appears too attenuated to infer that Complainant's protected activity contributed to his termination, without additional evidence. Causation therefore cannot be inferred from the timing alone in this case. Accordingly, the timing of events does not, on its own, suggest that Respondent was motivated by Complainant's protected activity. Despite the attenuated proximity, it appears that the first opportunity CP had to take action against Helgeson since his protected activity of January 25, 2015, they did, by means of the purported rule violation on September 11, 2015 that resulted in his termination, further discussed below.

c. Whether the Stated Reasons for the Adverse Action are Pretextual

As discussed above, Respondent has proffered a non-retaliatory reason for its adverse employment action: that Complainant's direction to "shove back to the depot," 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. It is this factor which I find to be most compelling in my analysis.

Circumstantial evidence of causation may be established if the employer's stated reason for the adverse action is determined to be pretext. *Speegle v. Stone & Webster Construction, Inc.* ARB No. 06-041, 2005-ERA-006, slip op. at 9 (Sept. 24, 2009). 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. Proof that an employer’s explanation is unworthy of credence is persuasive evidence of retaliation because once the employer’s justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)); *see also*, *BNSF Ry. Co.* 867 F.3d at 947 (citations omitted)(If the evidence offered of the employer’s non-retaliatory reason suggests those reasons are “unworthy of credence” then “intentional discrimination may be inferred).

Inconsistent application of an employer’s own rules is an “indication of pretext that can raise an inference of retaliatory motive.” *Johnston v. BNSF*, 2017 WL 4685012 at *18 (D. Minn. Oct. 16, 2017) citing *Loos v. BSNF*, 865 F.3d 1106, 1112 (8th Cir. 2017); *see also*, *Negron v. Viegues Air Link, Inc.* ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (Dec. 30, 2004) (An employer’s shifting or contradictory explanations for the adverse personnel action may show pretext). Likewise, not following its rules and/or the rules of the applicable CBA is also suggestive of pretext and bad faith by an employer. *Id.*, citing *see, e.g. Jauhola v. Wis. Cent. Ltd.* Civ. No. 14-1433, 2015 U.S. Dist. Lexis 109930, 2015 WL 4992392 at *7 (D. Minn. Aug. 201, 2015) (Employer’s pressing of an untimely rule violation requiring investigation within 10 days after the date the employee is withheld from service, but which was not held until 11 days thereafter, flouted the very procedures it agreed to in the CBA); and *see also*, *BNSF Ry v. U.S. DOL ARB*, 867 F3d 942, at 947(8th Cir.) (Evidence of lack of candor and failure to adhere to company policy may support a retaliatory motive).

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), citing *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861-62 (8th Cir. 2009). Moreover, if the discipline was wholly unrelated to protected activity, whether it was fairly imposed is not relevant to the FRSA causal analysis." *Id.* “An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer's belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action." *Id.* at 969-970, citing *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008).

In this case, Complainant argues not only that Respondent’s proffered rationale for the adverse employment action was pretextual, but that there is strong circumstantial evidence of retaliation by CP in the form of pretext and shifting explanations. (Compl. Brief at 11-13). Such argument appears to have merit.

I start by addressing what appears to be the “clearest,” albeit circumstantial, evidence of pretext here – that being Helgeson’s discipline and resultant dismissal for a purported rules violation for which it appears no other employee at CP has ever been disciplined (except Duvall), let alone terminated. Nor did the newly transferred first level supervisor who advised management of the “exception” himself think it was a serious violation. Importantly, CP’s stated reason for Helgeson’s dismissal, based on where he stood in progressive discipline at the time,

was his discipline for failure on September 11, 2015, to direct the conductor's movement of the train in terms of distance and location, in violation of CP's GCOR 5.3.7.

GCOR rule 5.3.7, "Radio Response," provides:

When radio communication is used to make movements, crew members must respond to specific instructions given for each movement. Radio communications for shoving movements must specify the direction **and distance and must be acknowledged when distance specified is more than four cars**. Movement must stop within half the distance specified unless additional instructions are received.

(RX 7, p. 37) (emphasis added). Helgeson was aware of the rule and fully admits that he instructed the conductor "to shove back to the depot," on September 11, 2015, but maintains that the instruction was not in violation of the GCOR. (TR 122). Rather, it was common practice to use this terminology in directing movement and he believes he was terminated because of his stance on safety at CP. (TR 122). CP maintains that such instruction does not provide a specific distance in car lengths, as required by the relevant rule, relying on the portion that reads in part, "[r]adio communications for shoving movements must specify the direction and distance and must be acknowledged when distance specified is more than four cars, for its position that the distance was to be given in terms of car counts. (RX 7; RX 36).

On September 11, 2015, the day of the incident, upon their arrival back at the depot, Helgeson (and Duvall) were told by then trainmaster Cameron Muscha that he "took exception" to what Helgeson did because he didn't give a distance and should have used feet or car lengths to describe the move, rather than "to the depot." (TR 115-117). According to Helgeson, his instruction provided both the requisite direction, and specifically, distance, with the depot, a fixed and known location, as the distance. (TR 126). Duvall agreed the depot was the distance. (TR 201). Thus, there was a clear dispute between the employees' understanding and application of the rule's distance requirement and that of CP's, which I do not decide. *See Gunderson* 850 F.3d at 969, citing *Kuduk*, 768 F.3d at 792 (quotation omitted). (Declining to review the merits of the discipline because "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions.").

It is instead, the credible and consistent testimony of Helgeson, Devall and Brown in terms of the known and actual practice at CP that is critical to my finding here, as well as the lack of comparative evidence that others were ever disciplined for the same violation. This, coupled with Muscha's testimony that such "violation" was minor, CP's own lack of discipline policy in place at the time of the September 11, 2015 incident and Jared's and Nettleton's inconsistent testimony is sufficient to support my finding of pretext here." *See, e.g. Johnston v. BNSF*, 2017 WL 4685012 at *18-19 (D. Minn. Oct. 16, 2017) (Complainant provided written statements from 4 co-workers indicating they used employer rule in the same manner as he, without challenge and without any consequences, but Employer ignored in investigative hearing and by contrast, discharged complainant for the same conduct, such that the facts could indicate the railroad engaged in retaliation based on the inconsistent application of employer's rules.).

Helgeson used the instruction in the past and it was custom and accepted practice to use the language “shove back to the depot” at Glenwood yard, where they worked, to pick-up a new crew. (TR 114-15, 270). Helgeson testified that prior to the incident, he had never been told it was wrong to use the depot as a landmark, nor was he aware of anyone being accused of misconduct or disciplined for instructing an engineer to “shove back to the depot.” (TR 117-118). Brown’s and Duvall’s testimony further supports Helgeson’s position; they too testified that the same instruction was regularly used without repercussions or incident, nor were they aware of any one being disciplined for giving such an instruction, until Helgeson.

Devall was the engineer working with Helgeson on September 11, 2015, the day of the incident. (TR 185, 188). Devall testified that on September 11, 2015, he received the radio communication “shove the train back to the depot” from Helgeson, repeated it back to him and then shoved the train to the depot. (TR 187-188). Devall testified that after he received the instruction from Helgeson, if he had thought it was an improper instruction, he would have called Helgeson for clarification or pointed out that it was wrong, but he did neither. (TR 188). Devall did not need to get clarification because he testified that “shove the train back to the depot” is both a common movement and a proper instruction given from the conductor to engineer. (TR 185, 187). He was also aware of the GCOR requirement that the conductor is to specify direction and distance. (TR 185). According to Devall it was then, and still is, proper for a CP conductor to say “shove the train back to the depot,” and is not a violation of the GCOR. (TR 187). He said it was customary for conductors to use the instruction in 2015 and it was still the custom (as of the hearing in 2017). (TR 187). Devall was not aware of anyone at CP having been disciplined for instructing an engineer to shove the train back to the depot, nor was he ever in any safety meeting or train sessions where he was told using the phrase “shove back to the depot” was wrong. (TR 187).

Devall’s testimony is highly persuasive here because, as of the time of the hearing, Devall remained employed as an engineer by CP. Under repeated cross-examination, Devall’s testimony was consistent. For example, when CP counsel pointed out that there was no discussion of how far in car lengths the depot was, Devall clearly answered that “the depot is the distance.” (TR 201). Similar to Helgeson, Devall disagreed with CP counsel’s questioning and apparent interpretation that the “depot” was not a distance for purposes of GCOR 5.3.7 and significantly, also disagreed that the rule requires the conductor to state a distance for movement in car lengths. (TR 202-203). Likewise, when asked whether the rule states that measurements can be established by landmarks, Devall answered, “It doesn’t say that I can’t.” Devall pointed out that the rule “does not say car lengths” is required to indicate distance. (TR 201-202). In sum, Devall’s testimony was consistent and credible.

Further supporting the credibility of Devall’s testimony is that, as a result of the incident, Devall was charged with a violation of “GCOR 5.3.7 – Radio Response,” “for failure to stop movement within half the distance when there wasn’t any additional instruction received at Glenwood Yard...” on September 11, 2015. (TR 203-204; RX 49-50). Devall’s charge did not ultimately go to investigation/hearing because he was offered and accepted a waiver that acknowledged his responsibility for failing to stop shoving movement in violation of GCOR 5.3.7. (TR 204-205, RX 50). Through the waiver, Devall received a letter of reprimand in his personnel file for his role in the incident. (TR 207, RX 50). Devall did not have any prior

discipline on file with CP at this time. While Devall agreed that he signed the waiver which admits he committed the alleged violation, he maintained he also told CP he did not believe he did anything wrong. (TR 207). He explained that he signed the waiver because he couldn't afford the time off as he is the only income for his family and he did not want to suffer any reprisal. (TR 207, 215). Yet despite receiving the letter of reprimand and being still employed at CP at the time of the hearing and testifying before CP management officials, with respect to the subject instruction, Devall reiterated, "I can tell you, this is what we've done, it's what we've always done. It what still goes on today."²⁴ (TR 211-212).

Like Devall and Helgeson, former CP employee Brown testified at hearing that when he worked at CP, including at Glenwood Yard, instructing an engineer to "shove it back to the depot" was standard procedure for the yard. (TR 437-438). He also said it does not violate the GCOR since it gives direction and distance. Brown used the command as a locomotive engineer, conductor and in management. (TR 423, 437-438). He testified that he saw it done in management and did not take any exception to the rule. (TR 423, 438). Brown said he never heard of anybody being told they can't say "shove it back to the depot" and in his entire career, he never heard of anyone being disciplined for making this train movement command. (TR 422).

Although Jared called Brown's testimony that it was custom and practice at Glenwood to say "bring it back to the depot," "false," not only is Brown's testimony consistent with Helgeson and Devall's testimony, but there is very little other evidence contradicting the testimony of Helgeson, Devall and Brown. (TR 656). Even CP's own management's testimony is supportive of the employee testimony. First, CP trainmaster Muscha, who had only transferred into his then CP position and location as of late August or early September 2015, admitted he did not know how such instruction was given in the past. (TR 506). Moreover, while he heard Helgeson give the instruction over the radio, he further admitted he did nothing verbally over the radio or by other means, to stop the command or otherwise intervene for the engineer not to "shove back to the depot." Instead, he waited until later, after he boarded the locomotive, to notify Helgeson and Devall he took exception to the instruction. (TR 538, 653-654). Muscha also admitted that he had not heard of anyone getting terminated for instructing to "shove back to the depot." (TR 527).

Muscha suggested that he did not or could not have "singled out" Helgeson because he did not know who the crew was when he heard the radio communication and only learned it was Helgeson after he boarded the locomotive. The opposite however, is more easily construed. Rather, than not "singling out" Helgeson, Muscha's actions raise an inference that when he heard the command over the radio, either he did not think it was a violation, or he thought it was not serious enough to intervene, waiting until only after he boarded the locomotive and learned the crew's identity, to decide to take the exception. Such an inference may also be supported by Jared's testimony that, "my understanding is he (Muscha) said *once he realized* it was a violation, he talked to the employees about it..." further suggesting that Muscha did not know the instruction was a violation, or at least deemed it not serious. (TR 653). More importantly, Muscha himself indicated it was a minor offense.

²⁴ Devall further admitted that he has thought about potential reprisal from CP for his testimony provided at hearing. (TR 215).

Secondly, like Muscha, McInnis admitted that he was not aware of anyone disciplined for violation of GCOR 5.3.7, he had no hearings in which any persons were charged with the same violation, nor knowledge of anyone charged with the same violation, and Jared's admission that Helgeson was the first, and only, employee charged with violation of GCOR 5.3.7, supports that such instruction was used regularly at CP without consequence. (TR 506, 566; 658-659). Jared, like McInnis, was not sure anyone has been "guilty" of a violation of 5.3.7. (TR 658).

Lastly, and perhaps most compelling, Jared further admitted in the course of his career he's heard the same or similar instruction, "shove it to clear," which further supports the testimony of Helgeson, Devall and Brown, and as well as pretext. (TR 657). While Jared also said that the instruction is unacceptable and that he doesn't know if it's been the custom and practice "for years and years" at CP to give such direction, he said "I (Jared) do know that's a rule violation to not give direction and distance." (TR 657). Yet, such testimony is entirely inconsistent with Jared's and CP's actions. That is, Jared acknowledged the same past practice at CP, admitted he's heard the command given by crews at CP and further admitted that he was not aware of anyone being guilty or charged with a violation for doing so (except Helgeson). His testimony, suggests either he did not believe it was a violation, or he was complicit in the prior violations, such that despite hearing the instruction used at CP, he took no action to investigate any other employee who's instruction would've, according to CP, failed to comply with GCOR 5.3.7. It is further difficult to reconcile his testimony and prior inaction with respect to prior employees and practice at CP, which is further complicated by his testimony that Helgeson's violation was "serious" and that it's a violation not to give direction and distance. Accordingly, it does not appear that CP in good faith believed Helgeson was guilty of the conduct for which he was charged and resulted in his discharge. *See Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017), citing *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861-62 (8th Cir. 2009). This is the clearest evidence of CP's inconsistent application of its own rules and evidence that this rule violation was used as a pretext to fire Helgeson. There is simply no credible reason of record that I can find for CP to take exception to Helgeson's instruction, other than because of his protected activity, because evidence demonstrates that this instruction was common practice, CP knew it was in practice, and no other CP employee in the past had ever been investigated or disciplined for the same purported rule violation for giving the same instruction as Helgeson.

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." *Id.* Moreover, if the discipline was wholly unrelated to protected activity, whether it was fairly imposed is not relevant to the FRSA causal analysis. "An employee who engages in protected activity is not insulated from adverse action for violating workplace rules, and an employer's belief that the employee committed misconduct is a legitimate, non-discriminatory reason for adverse action." *Id.* at 969-970, citing *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008). Here, given the customary practice at CP to use the same instruction without consequence, along with CP official, Jared's admission he's heard the same instruction used in the past, yet knew of no one charged with or found guilty of a violation until Helgeson, certainly undermines any purported "good faith" belief by CP here.

1. Lack of Evidence that CP Disciplined Others for the Same or Similar Violations Further Supports Pretext

Likewise, Jared's testimony, along with the other comparative evidence simply does not support that Helgeson would have been disciplined and consequently terminated had he not engaged in protected activity. Jared testified that Helgeson's instruction to shove it back to the depot, not giving a distance, was a "serious" violation and that there's been "many" offenses where accidents occurred when the rule was not applied properly. (TR 622-623). As discussed above, this testimony as to "seriousness" is however undermined by Jared's own testimony that he's heard the "shove back to the depot" instruction used in the past at CP and was not aware of anyone other than Helgeson having ever been disciplined for using it. Nevertheless, Jared gave one example in which an employee, (Koops) was dismissed May 5, 2016, after a CBA hearing determined he failed to protect a shove movement that resulted in him shoving into a customer's facility and damaged a door. (RX 52; TR 638-639). Jared said this incident involved a moving violation and that the conductor didn't give any car counts, resulting in a blind shove by the engineer. (TR 638-639). Jared also testified that the engineer "was having issues with rule violations – there was about 3 or four issues he had that resulted in discipline," but could not remember any of the prior violations or discipline history, nor was there any evidence or other information regarding the employee's prior discipline history. (TR at 638-640) Based on the findings for that employee, according to Jared, after hearing, it was determined that the employee violated GCOR 1.1 "Safety," GCOR 1.1.1-"Maintaining a Safe Course," GCOR 6.5 – "Shoving Movements," and GCOR 7.1, "Switching Safely and Efficiently," and was dismissed from service due to the severity of the incident and his past disciplinary history. (TR 638-639, RX 52). Contrary to the radio violation Helgeson was charged with, significantly, in Jared's example, it appears an accident occurred, the engineer had several other rule violations that had resulted in discipline, and the violation, or at least charged violation, was not under the same rule as that of Helgeson.

In addition to Jared's testimony regarding the discipline of Koops, CP went back to the January 25, 2015 "near-miss" incident reported by, and involving Helgeson, to show the yardmaster involved, Mr. Ganger, was assessed a 30-day suspension for his failure to properly provide blocking protection. (RX 52-55). Ganger's disciplinary history was not, however, provided, so it is uncertain where he stood in CP's disciplinary process and whether it was comparable to Helgeson. McInnis testified to an incident that occurred on April 18, 2014, involving several employees including Matson, Frederick and Hewitt, each of whom were disciplined for their role in the April 18, 2014 incident, where a shove movement resulted in two cars going over a derail. (RX 53-55; TR 560-561). Each of the employees were charged with violation of GCOR 6.5 "Shoving Movements" and 8.20 "Derail Location and Position" for their role in the same incident, and after having determined each violated the GCOR, they were assessed with a 30 day, 10-day and 5-day suspension respectively, based on their standing in the discipline policy. (TR 563-565; RX 53-55). The GCOR provisions allegedly violated by these employees involved moving violations and therefore differ from the one allegedly violated by Helgeson. Nor did any involve a violation related to radio communication in terms of distance, or direction. (TR 567). Although McInnis indicated they were disciplined in accordance with where each stood in the disciplinary policy at the time, there is nothing in the record showing

where each stood in CP's disciplinary policy. (RX 53-55). The April 18, 2014 incident also resulted in a derailment of two cars, distinguished from Helgeson's incident, which resulted in no derailment.

As a result, contrary to Respondent's assertions, the record before me shows that Respondent did not discipline other employees for similar behavior. (Resp. Brief at 53). Additionally, despite knowledge of CP employees using the same instruction that resultant in disciplinary action against and Helgeson's resultant dismissal, the record shows CP never charged employees with the same or similar violation. Some jurisdictions require a Plaintiff to show that a proposed "Comparator" is "similarly situated to the plaintiff in all relevant respects" and that the "quantity and quality of the comparator's misconduct must be nearly identical." *Head v. Norfolk Southern Ry. Co.*, Case No. 2:15-cv-02118-RDP, Mem. Op. at 19 (N. Dist. AL, S.D.), citing *Stone v. Webster Const., Inc. v. U.S. DOL*, 684 F.3d 1127, 1135 (11th Cir. 2012) (citations omitted). "The court must determine whether the comparator was involved in the same or similar conduct as the plaintiff yet disciplined in a different way." *Id.* In reviewing the evidence, the key question is not what each was charged with, but whether their respective conduct was nearly identical. *Id.* That is, the focus is on the actual conduct, rather than any label. *Id.*, at FN 17.

With the exception of Devall, CP offered no evidence of other employees disciplined for the either the same or similar conduct as that which led to Helgeson's termination. Rather, it relied upon charges and discipline of four other employees from two separate incidents, one which resulted in damage to a facility and the other that resulted in derailment of two cars. (RX 52-55). As stated above, in the first incident, an employee was terminated for violating different GCOR rules than the rule Helgeson was disciplined for violating and the employee's violation of failing to protect a shove movement resulted in a collision with an overhead door of a customer's facility. (RX 52). According to CP, the terminated employee also had multiple disciplinary issues prior to the rule violation resulting in his termination, although this discipline history is not otherwise of record. (TR 638-639).

The other incident involved three different employees in various positions, charged with violating two other GCOR rules and for each's role in an incident that resulted in two cars derailling off of tracks. (RXs 53-55). The three employees involved received discipline including a 30 day, 10 day and 5 day suspension, respectively, based on where each stood in CP's disciplinary process. (TR 564-65). RX 53-55). Despite CP's assertion that each of the 3 employees were disciplined based on where they stood in the discipline process, again, the disciplinary record was not provided for any of the three employees.

Finally, the remaining incident which Jared testified to involving Ganger, was the result of the "near miss" involving Helgeson and it too included a moving violation.

In addition to the lack of disciplinary records of the respective employees, the other problem with the proffered comparator evidence here is that it is not for the same or similar conduct to that of Helgeson's here. *See, e.g. Head v. Norfolk Southern Ry. Co.*, Case No. w:15-cv-02118-RDP (N.D. AL, Sept. 13, 2017) (In admitting comparator evidence Court acknowledged that the key question is not what Defendant charged employees offered as

comparators with, and what it charged Plaintiff with, but rather the question is whether their respective conduct was nearly identical as labels are not controlling-the court instead compares conduct; and noting that the disciplinary records note that Plaintiff and the employees did not have a history of infractions with the 12 months prior to the respective incidents). Rather, the incidents offered by Respondents here resulted in arguably more serious consequences than that in which Helgeson was involved, and the actual conduct involved in each appears to be different than that engaged in by Helgeson. In the incidents offered as comparative evidence by CP, the employees apparently committed multiple rule violations and their conduct resulted in harm to property.

Here, Helgeson (and Devall) were charged with one violation for the radio command and the incident resulted in no harm. CP witnesses further confirmed it was not considered a serious violation, but indicated it could result in one. It is not therefore sufficient comparator evidence or evidence that CP disciplined others for similar conduct or behavior, but further supports my finding of pretext here.

2. CP Review of the Exception Report and Decision to Dismiss Helgeson

Further support that the discipline was a pretext is found in CP's handling of the charge and Helgeson's dismissal. At hearing and prior thereto, Muscha said that this was not a severe or serious infraction, and under the circumstances, verbal coaching was appropriate. (TR 524, 539). He said overall, the crew did a good job and were performing their work safely and effectively, but there was the exception of how they give car counts and the fact that they didn't. (TR 524). Consistent with his testimony, Muscha recommended verbal coaching for "this minor offense," and per his email "...given recent exception rate and all prior moves had direction and distance."

Helgeson's exception rate was noted at 158 passes and only 2 exceptions (1.25% exception rate) for twelve months by Muscha. (TR 534-535; RX 26). Despite the 12 month period noted, Nettleton said he wasn't sure if it was over 12 months or 3 years, because "it's hard to believe" Helgeson had been tested 158 times in a year and the database upon which they relied went back 3 years. Regardless of whether it was a 1.25% over 1 year or 3 years, Nettleton admitted the rate was "not bad," and such an exception rate was low. (TR 39-41). I further note that assuming the 12 month period is not a typographical error, and given that Nettleton was new to CP and merely speculating to the contrary, if in fact Helgeson was tested 158 times in 12 months and this number of tests is unusually high, as indicated by Nettleton, it lends support for Helgeson's assertion that he was being scrutinized more than is expected by management and further lends support to the inference that CP was looking for an infraction for which to fire Helgeson, following his participation in protected activities.

Nettleton testified that in giving the "shove back to the depot," instruction Helgeson (and Devall) committed what is known as an "E-test failure" rather than an incident which had adverse consequences. (TR 56-57). Nettleton became aware of the "E-test failure" of Helgeson and Duvall via a report he required managers that observed such a failure to document in a program form. Once weekly, Nettleton reviews the e-test failures report and makes a determination from his review whether it warrants a CBA investigation and disciplinary hearing

or not. (Nettleton 15). On the day of the incident, trainmaster Muscha prepared such a report following his observation of the violation by Helgeson and Duvall. (RX 27). According to Nettleton, RX 27 is a report showing all e-test failures that happened during that week. (Nettleton 16). Nettleton confirmed that both Hommerding and Jared received a copy of the report as well.²⁵ (Nettleton at 58; RX 27).

From the report, Nettleton said he reviewed the e-test failures for Helgeson and Devall, reviewed the incident, looked at the tenure of each employee and prior work record and then determined a formal hearing for both employees was warranted. (Nettleton 15-16; RX 28, RX 49). Noticeably absent is any explanation how the factors considered led him to conclude an investigation was warranted and whether any other CP employees from the same e-test failure report were investigated as well.

For both Helgeson and Devall, it was documented that Muscha recommended verbal coaching. (RX 26). Nettleton said he gave Muscha's recommendation "very little" weight because, "...whether it was a pass – the main point was to give the employees feedback, to enforce safe behaviors or take exception to the ones that were not compliant." (Nettleton 18). Nettleton's explanation however is entirely inconsistent with Muscha's actions and recommendation. Mainly, that (1) Muscha never intervened when he heard the radio instruction from Helgeson to shove back to the depot and instead waited until after and boarding the locomotive to address it with him and Devall; and (2) that Muscha noted that both Helgeson and Devall had worked safely; (2) had actually been compliant during the entire shift until the incident in question; and (3) considered their respective exception rates; all of which supports that the purported violation (if any), was not serious.

Additionally, Jared testified that he reviewed Muscha's "write up" over the incident resulting in the e-test failure and from that he reviewed the employee's records and determined, based on the severity of the incident, it warranted investigation. (TR 628). Jared's testimony is inconsistent with Muscha's testimony that this was a non-serious offense, and Nettleton's testimony that Nettleton reviewed the e-test failure report and determined a formal hearing was necessary for both employees – never mentioning that Jared reviewed too and/or provided any recommendation. This further lends some credence to Complainant's assertion of the cat's paw theory here, with Jared, the only CP official with any constancy involved here, being the advising official, and Nettleton as the decision-maker, in hopes to insulate Nettleton.

Nevertheless, when asked why this violation went to hearing, despite Mr. Muscha's recommendation for verbal coaching, Jared said in 98-99% of the cases there's a verbal coaching recommendation by the field officer, unless it's egregious. In this case however, Jared said he

²⁵ While I appreciate and somewhat share Complainant's concern over Mindy George's response to the September 11, 2015 email from Muscha's regarding, "Helgeson/Devall exceptions", to which she wrote, "Yay, you get a gold star," she did not testify therefore we cannot know why she wrote this. (RX 26). Muscha and Jared, the recipients of the email, could not explain what George meant, although Muscha speculated by saying he assumed it was because he filled out the report correctly. (TR 523). I note, George worked for Jared as his administrative assistant for some time, and thus understood Complainant's position that it could perhaps mean Muscha received a gold star for catching Helgeson, which may indeed be the case here, but there is no indication what George knew or did not know or her intent since she was not called as a witness.

would have taken the exception. He also said he reviewed the record and made the determination. (TR 629). Jared said he's looking for behavior and trying to determine what the behavior of the employee is. A hearing is also part of the CBA. (TR 629-630). His explanation that Helgeson's conduct was egregious here however is undermined by the fact that: the trainmaster never intervened by radio, after hearing the radio command from Helgeson; the conductor understood the instruction and did not request clarification; Jared's admission that he heard the same command in the past but could point to no prior exceptions taken or prior discipline for it; and Jared's admission that Helgeson is the first and only person disciplined for such a violation.

As a result of the investigative hearing, McInnis, the hearing officer, in his recap, found that "...[a]t the instant hearing that the constancy of both Helgeson and Muscha stating the same instruction of "shove back to the depot," made it clear to him that no distance was given." (TR 555-556; RX 35).

McInnis did not know who made the decision to terminate Helgeson. (TR 582). In his "Recap," or hearing summary, McInnis pointed out certain parts of the testimony that "strengthens" Muscha's testimony asserting that landmarks should not be used. (RX 35). He also included a review of Helgeson's past disciplinary record, noting only that Helgeson stood at a last chance following the February 24, 2014, 30-day suspension for the alleged excessive absenteeism violation and noted that discipline was due October 17, 2015. (TR 555; RX 35). In his recap, McInnis did not however provide a recommendation as to discipline for Helgeson. (RX 35).

It appears McInnis emailed his hearing recap to Jared, based on an email dated October 16, 2015 at 9:40:16 AM from Jeff McInnis to Tom Jared, subject: "Helgeson Recap" with only the word "Recap" in the body of the email. (RX 35). There is another message from Tom Jared to Mindy George, on the same date, at 9:42 AM with the subject, "Fwd: Helgeson -Recap." (RX 35) There is nothing in the body of the email. (RX 35). Finally, there's a third email in the string of emails, from Mindy George, on October 16, 2015 at 2:42:53 PM to Steve Nettleton with Tom Jared and Jeffrey McInnis copied, Subject, "Fwd: Helgeson Recap;" "Attachments: Hearing Recap-J. Helgeson..." The body of the email says she is "sending on behalf of Tom...once Mr. Helgeson gets tied up today, we will issue letter and notify employee of dismissal." (RX 35).

Although neither McInnis' email nor his recap contained any recommendation or express finding that Helgeson violated the GCOR, Tom Jared testified that he "reviewed McInnis recommendation" along with his summary portions of the hearing record. (TR 633, 635-637). Based on his review, Jared determined Helgeson violated GCOR Rule 5.3.7 by failing to give a distance. (TR 636-637). Jared testified that it's a serious violation and that there have been many offenses where accidents occurred when the rule was not applied properly. (TR 622-623). Jared said because Helgeson's discipline record showed he had already been assessed a 30 day last chance opportunity, his recommendation was for termination. (TR 637). Jared then gave his recommendation to his superior, CP General Manager Nettleton. (TR 637; RX 35).

Nettleton testified that he reviewed the hearing summary and record, and as a result, concurred with the conclusion that Helgeson violated Rule 5.3.7 on the date in question because

he did not give car counts. (Nettleton 19-20). Nettleton also said that the failure to provide a distance and protect the shove through car counts to one's engineer can have detrimental consequences. (Nettleton 42-43). CP through Nettleton, advised Helgeson by letter dated October 16, 2015 that his employment was terminated.²⁶ (JX 1, ¶14, citing RX 36).

As Helgeson stood at a "last chance," his dismissal was consistent with the next step under CP's prior disciplinary policy. Significantly however, CP had no disciplinary policy in place at this time. The previous progressive discipline policy was cancelled, effective May 12, 2015. (TR 531). While there was no written policy in place thereafter, including as of September 2015, Respondent was still administering the previous progressive discipline policy. (TR 644-645). Although CP purportedly continue to administer it, according to Nettleton, after May 2015, discipline determinations were considered on a "case-by-case basis," taking into account the facts and circumstances as well as other factors including the nature and seriousness of the violation, the employee's performance, counseling and discipline histories, and other relevant factors depending on the type of violation and the particular situation. (Nettleton TR 62; RX 64.) Regardless of his testimony to the contrary, Nettleton appears to have only considered the recap and Jared's recommendation in making his decision to terminate.

In addition to the facts set forth above, I make this finding considering the consistent and undisputed testimony that the instruction, "Shove back to the depot" was regularly used and continued to be used at CP without exceptions taken or consequences and lack of evidence that others were disciplined for the same or similar violation; the only reason of record, I can find is because of Helgeson's protected activity. Finally, the prior discipline policy, CP U.S. Discipline Policy 5612, which CP maintains it continued to administer on a "case by case" basis, allowed for leeway, such that managers retained the discretion to handle appropriate minor matters through "informal coaching." (TR 573-574; RX 13). Thus, Brown's and certainly Muscha's recommendation of lesser discipline for the attendance and e-test failure respectively, were consistent with the CP discipline policy, when it was in place.

Accordingly, CP's inconsistent application of its own rule and explanation is indication of pretext that raises an inference of retaliatory motive here. *See Loos v. BSNF*, 865 F.3d 1106, 1112 (8th Cir. 2017); *see also Johnston v. BSNF*, 2017 WL 4685012 (D. Minn. 2017) (Finding by not following its rules and the rules of the CBA, the railroad's conduct was "suggestive of bad faith);" *see also BNSF Ry. v. U.S. DOL ARB*, 867 F3d 942, 947 (8th Cir. 2017) (Evidence of lack of candor and failure to adhere to company policy may support a retaliatory motive).

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

²⁶ Helgeson appealed his termination pursuant to the CBA, the decision of which was upheld by CP. (RX 63, Tabs C-D). Helgeson also sought arbitration under the FRLA where the case remained pending before the Public Law Board pursuant to the Railway Labor Act as of the date of this hearing. (RX 63 at ¶ 7). Prior to the issuance of this decision, however, Respondents submitted a copy of the Public Law Board's decision in which the appeal was denied. I am however, not bound by such a decision.

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.

For the reasons discussed above, I 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. I do however find Complainant has shown contribution by way of knowledge and pretext and CP's inconsistent application of its own policies are sufficient to satisfy his burden here. *See DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, at PDF 7 (Feb. 29, 2012) (Circumstantial evidence of contribution may 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."). I also found knowledge on the part of CP, mainly constructively thru Jared and Hommerding, as well as Johnson with respect to Helgeson's protected activity. Because Complainant has shown contribution by a preponderance of the evidence, he has established a prima facie case of retaliation, and may prevail on this claim.

A review of the video "Hunter Harrison's Canadian Pacific Railway-What a Way to Run a Railroad" reveals that Helgeson and other CP employees indeed appeared and spoke specifically about certain practices at CP. (CX 1). The fact that multiple named participants in the video have subsequently been fired raises an inference that the firing of the employees, including Helgeson, was due to their participation in the video, i.e., Helgeson's participation in the protected activity contributed to the adverse action against him.

Next, Respondent has inconsistent explanations for its action; on the one hand, CP consistently pointed to Helgeson's rule violation for directing Devall to shove back to the depot, coupled with his prior disciplinary record as the basis for the disciplinary proceeding that lead to his termination. On the other hand, CP's own officials as well as Complainant and other employee and former employee witnesses knew of no other employee who had ever been disciplined for the same rule violation, despite either using it themselves or as a manager having heard it used.

The employer's explanation for the adverse action taken in this matter on its face does not initially appear false. However, when reviewed in conjunction with other evidence, including the testimony of certain CP witnesses, including Muscha and McInnis, as well as Helgeson, Devall and Brown, my review of the transcript and CP's GCOR rules, and the comparator evidence offered by CP, it appears CP's explanation is indeed false. First, giving a landmark, or a fixed point, such as the depot, was common practice to CP and Helgeson and he indicated it serves as the distance, noting GCOR Rule 5.3.7 does not specify how a distance is to be described.

Respondent asserts that it initiated the adverse action based on Helgeson's direction to the engineer to "shove back to the depot" for failing to provide a distance for the movement required, in violation of GCOR 5.3.7. More specifically, CP maintains that the rule requires the

conductor to provide the distance in terms of car length or number of car lengths. Review of the rule explicitly states in part, "...Radio communications for shoving movements must specify the direction and distance and must be acknowledged when distance specified is more than four cars," but there is not express requirement how in what manner must be conveyed, other than it requires a distance when the distance is more than four cars. While a logical extension is that distance be conveyed in number of car lengths, the rule does not specify how the distance must be conveyed. The preponderance of the evidence shows that while Complainant instructed the engineer to shove back to the depot, as Respondent alleged in the disciplinary proceeding, such instruction does not appear to be a violation of the rule especially when considered in light of his testimony as well as the other witnesses testimony described above. Consequently, Respondent's stated reason for the adverse action was false and a pretext and I therefore infer that retaliation is the most likely explanation for Respondent's adverse action against Complainant. *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009).

B. Respondent's Rebuttal

Respondent demonstrate by clear and convincing evidence, that it would have taken the same unfavorable personnel action even in the absence of the protected activity.²⁷ (TR 19). As Complainant has established his prima facie case, the burden now shifts to Respondent to demonstrate "by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010); *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)).

1. Whether Respondent Would Have Taken the Same Unfavorable Personnel Action even in the Absence of Protected Activity

Respondent asserts that it would have dismissed Helgeson regardless of his protected activity, based on where Helgeson stood in the progressive discipline process. (Resp. Brief at 50). Indeed, he was at a "last chance" at the time of the incident leading to his dismissal. Helgeson stood at a last chance having received a thirty-day suspension in July 2013, for his failure to apply a block, when he worked as Yardmaster; and another thirty day suspension, with time-served, and a last chance, for the prior January 2014 attendance violations. Thus, in following its progressive discipline policy, at the time of Helgeson' September 11, 2015 rule violation, he stood at dismissal. According to CP therefore, Helgeson would have been terminated absent his protected activity because, when found to have violated GCOR 5.6.7 for

²⁷ Although not raised specifically at hearing, in its brief, Respondent's further raised as an issue: If Respondent presented clear and convincing evidence of a legitimate motive or reason for terminating Complainant, can Complainant establish by a preponderance of the evidence, that Respondent retaliated against him for engaging in protected activity, i.e. that Respondent's stated legitimate reasons were a pretext. The issue is discussed herein.

the instruction given on September 11, 2015, Helgeson's dismissal was warranted its progressive discipline policy.

The analysis here, is in part, somewhat similar to the analysis of pretext above. However, despite CP's position as to where Helgeson stood in progressive discipline, at the time of Helgeson's dismissal, there was no discipline policy in place. CP's previous progressive discipline policy was cancelled, effective May 12, 2015, although Respondent states it was still administering the previous progressive discipline policy as of September 2015. (TR 531, 644-645). Seemingly at odds, Nettleton also testified that after May 2015, discipline was considered on a "case-by-case basis," taking into account the facts and circumstances as well as other factors including the nature and seriousness of the violation, the employee's performance, counseling and discipline histories, and other relevant factors depending on the type of violation and the particular situation. (Nettleton TR 62; RX 64.)

CPs application of the policy also appears inconsistent here. Other than the fact that Helgeson stood at a last chance, it appears no one at CP can give any other reason as to why he was disciplined for an admittedly non-serious violation under a rule which CP has admittedly not disciplined any other employee for violating, it knew other employees violated, and for which it offered the other employee involved here, a waiver resulting in a letter of reprimand. While CP maintains that Devall received the letter of reprimand based on lack of any prior discipline and his history with the company, if the infraction was so serious as to warrant termination of one employee, it follows that a more progressive level of discipline should have been imposed on the other involved employee as well, especially considering that discipline was, according to Nettleton, considered on a "case by case basis" at the time.

In further support of its position, Respondent states that Complainant testified that he reported safety issues to Respondent without adverse consequences in the past. (Resp. Brief at 51). Respondent points to the January 25, 2015 incident where Complainant received a 30 day suspension, as described in the applicable CBA, and received no further discipline. Respondent also asserts that comparator evidence further supports its defense that it would have dismissed Complainant absent his protected activity. (Resp. Brief at 52).

With the exception of Devall, CP offered no evidence of other employees disciplined for the same or similar conduct as that which led to Helgeson's terminations. Rather it relied upon charges and discipline of four other employees, from two separate incidents, one which resulted in damage to a facility and the other that resulted in derailment of two cars. (RX 52-55). In the first incident, an employee was terminating for violating three other GCOR provisions and the failure resulted in a collision with an overhead door of a customer's facility. (RX 52). According to CP, the terminated employee had multiple disciplinary issues prior to the rule violation resulting in his termination. (TR 638-639).

The other incident, involved three other employees charged with violating two other GCOR provisions for each's role in an incident that resulted in two cars derailing off of tracks. (RXs 53-55). The three employees involved received discipline including a 30 day, 10 day and 5 day suspension, respectively, based on where each stood in CP's disciplinary process. (TR 564-65; RX 53-55). Despite CP's assertion that each of the 3 employees were disciplined based on

where they stood in the discipline process, the disciplinary record was not provided for any of the three employees.

In addition to the lack of disciplinary records of the respective employees, the other problem with the proffered comparator evidence here is that it is not for the same or similar conduct to that of Helgeson's which lead to his termination. *See, e.g., Head v. Norfolk Southern Ry. Co.*, Case No. w:15-cv-02118-RDP (N.D. Ala. Sept. 13, 2017). Rather, the other incidents resulted in arguably more serious consequences than that in which Helgeson was involved because the other incidents resulted in damage to property and train derailment. The actual conduct involved in each appears to be different than that engaged in by Helgeson. Moreover, none were for the same or a similar radio command violation as Helgeson and each of the four employees were charged with multiple rule violations. Here, Helgeson was charged with one violation for the radio command and the incident resulted in no harm. CP witnesses further confirmed it was not considered a serious violation, although it could result in one. It is not therefore sufficient comparator evidence or evidence that CP disciplined others for similar conduct or behavior for Respondent to meet its burden here.

As CP's discipline to Helgeson is inconsistent with its own rules and practice and the comparator evidence is insufficient to establish that Helgeson would have been disciplined absent his protected activity, the evidence is insufficient to find that CP proved by clear and convincing evidence that Helgeson would have been disciplined absent any protected activity.

VIII. INJURY TO HELGESON AND APPROPRIATE RELIEF

If an employee prevails, the employee is entitled to "all relief necessary to make the employee whole." 49 U.S.C.A. § 20109(e)(1). Such remedies include reinstatement with the same seniority status that the employee would have had, but for the discrimination, any backpay, with interest, compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees, and relief may include punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e)(2). The goal of the relief is "to compensate the wronged whistleblower for losses caused by the unlawful conduct and restore him to the terms, conditions, and privileges of his former position that existed prior to the employer's adverse action." *Michael A. Jackson v. Union Pacific Railroad Co.*, ARB Case No. 13-042, ALJ Case No. 2012-FRS-017 (Mar. 20, 2015) (citing *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 13 (ARB Jan. 31, 2012)).

Complainant seeks reinstatement with "the same seniority status (2-plus years) he would have had, but for the discrimination," backpay in the amount of \$85,000 per year with interest, damages for anxiety and suffering in the amount of "at least \$500,000" and maximum punitive damages of \$250,000. (Compl. Brief at 38). Complainant testified that he cashed in his IRA in the amount of \$25,168.01. (*Id.* at 37-38).

Respondent asserts that evidence of record shows that Complainant's assertion of wages of \$85,000 to \$90,000 per year is unsupported in the record; instead, the record supports lower yearly wages, as Complainant made \$63,820 in 2015 with his employment at CP. (Resp. Brief at

55). Respondent further states that: (1) back wages must be further reduced because he secured other full time employment following his dismissal; (2) Complainant has not established a sufficient basis for an award of compensatory damages, as the evidence shows Helgeson only sought and received any treatment or counseling for emotional distress very few times and shows no ongoing treatment; and (3) reinstatement is inappropriate relief in this case, as Helgeson has asserted that CP is “absolute evil” and employment with CP was “a slow form of suicide,” and Helgeson has secured other full-time employment that he admitted he prefers due to the shorter commute, lack of travel and predictable work week. (*Id.* at 55-57). Lastly, Respondent disputes punitive damages, stating that evidence does not demonstrate that CP engaged in reckless or indifferent conduct, as CP has a Workplace Harassment policy, an EEO/Affirmative Action policy and a Code of Business Ethics prohibiting retaliation and harassment for protected characteristics, conduct and whistleblowing. (*Id.* at 57). Respondent further states that Helgeson was afforded a “fair and thorough hearing process under the applicable CBA.” (*Id.*).

As a result of the violation, Complainant suffered injuries including losses of employment, seniority status, benefits, wages, and emotional distress. To make him whole, Helgeson is entitled to lost wages, restoration of all benefits and seniority status, compensatory damages, punitive damages, and reinstatement with the same seniority status and benefits.

A. Back Wages

When appropriate, back wages with interest may be ordered by the ALJ.²⁸ 29 C.F.R. § 1982.109(d)(1). “Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.” 29 C.F.R. § 1982.109(d)(1). Back pay is due from the date Complainant’s employment was terminated until he is reinstated. *Carter v. BNSF Railway, Co.*, ARB Nos. 14-089, 15-016, 15-022, ALJ No. 2013-FRSA-082 (ARB June 21, 2016) citing *Ferguson v. New Prime, Inc.*, ARB No. 12-053, ALJ No. 2009-STA-047, slip op. at 3 (ARB Nov. 30, 2012) (“Back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement.”).

Claimant requests back pay or lost wages in the amount of \$85,000 per year, with interest. (Compl. Brief at 38). Respondent contests this wage and states that \$85,000 per year is unsupported by the record and the record supports lower yearly wages, as Complainant made \$63,820 in 2015 with his employment at CP. (Resp. Brief at 55). Respondent also states that Complainant’s back wages should be reduced further because Complainant secured other full time employment following his dismissal. (*Id.*)

Complainant testified he made somewhere in the high 80’s, including overtime, or between \$85 to \$90,000.00 and his yearly earnings varied year to year based on the amount of overtime he worked. (TR 127). Complainant’s W-2 from 2015 shows he earned \$63,820.76 from CP in 2015, through his dismissal in October of 2015. (RX 57 at 3). Complainant was dismissed

²⁸ The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. 29 C.F.R. § 1982.109(d)(1).

on October 16, 2015. (JX no. 14). Complainant worked for CP for 41 weeks of 2015. Taking the year to date value of his wages in 2015 at CP and dividing it by the number of weeks Complainant worked at CP in 2015, I find Complainant earned \$1,556.60 per week. Based on a year consisting of 52 weeks, his yearly salary in 2015 at CP therefore would have been \$80,943.20. Although Complainant's testimony was credible, mathematics is a more precise method to determine Complainant's yearly salary. I will therefore consider Complainant's yearly salary with CP to be \$80,943.20.

Following his dismissal from CP on October 16, 2015, Complainant started a new job driving a truck of California Overland, soon after, in November 2015.²⁹ (TR 127, 280). In 2015, his wages with California Overland totaled \$7,402.40. (RX 57 at 4). He also earned \$149.40 from Swift Transportation Services in 2015. (RX 57 at 5). Therefore, his wages for the remainder of 2015 total \$7,551.80.

Adding \$63,820.76 and \$7,551.80, Complainant made \$71,372.56 in 2015.³⁰ Comparing this value to the earnings he would have expected from CP in 2015, Complainant is entitled to \$9,570.64 in back pay or lost wages for 2015.

Complainant testified at the June 2017 hearing he worked at California Overland, from November 2015 until the beginning or middle of August. (TR 281). He then found another, local job, at Waste Management. (TR 128-129). At Waste Management ("WM"), Helgeson drives a garbage truck. (TR 129). Based on his rate of pay of \$16.50 per hour at WM, Helgeson estimated that he made about \$33,000 to \$35,000 per year. (TR 129). Complainant's 2016 W-2 from California Overland shows \$33,644.65 in wages and his 2016 W-2 from WM shows \$17,830.53.³¹ (RX 57 at 9-10). This totals \$51,475.18. Comparing this value to the earnings he would have expected at CP for 2016, based on the wage of \$80,943.20 per year, his 2016 earnings were \$29,468.02 less. Therefore, Complainant is entitled to \$29,468.02 in back pay or lost wages for 2016.

As of the date of the hearing, Complainant was still working for WM. (TR 129). At WM, Complainant started out making \$16.50 per hour and his hourly rate increased to \$16.83 per hour beginning March 26, 2017. (RX 62 at 1389).³² He received \$16.83 per hour beginning on the paycheck dated April 7, 2017. (*Id.*). Based on the overtime hours noted on his pay stubs for work from January 1, 2017 through May 27, 2017, Complainant worked 40 hours per week, worked an average of 7 hours of overtime per week and was paid his normal hourly rate for overtime. (RX 62 at 1374-1397). Based on 12 weeks of work from January 1, to March 25, at a rate of \$16.50 per hour and 47 hours per week, Complainant made \$9,306. Based on 9 more weeks of work, from March 26 through May 27, 2017, at a rate of \$16.83 per hour and 47 hours per week

²⁹ Helgeson was not willing relocate, so he did not apply to work for other railroads. (TR 281).

³⁰ I note Complainant's Form 1040 has \$71,453 in line 7, "Wages, salaries, tips, etc. Attach Form(s) W-2" and the \$80 discrepancy is explained by a W-2 for Complainant's wife. (RX 57 at 1, 7).

³¹ The remaining W-2s from 2016 are for Complainant's wife. (RX 57 at 11-14).

³² WM's internal records are numbered CP_Helgeson0001285 through CP_Helgeson0001398. (RX 62). I will only list the last four digits to identify the page number.

working, Complainant made \$7,119.09. This totals \$16,425.09. At a rate of \$16.83 per hour and 47 hours per week working, Complainant would have made \$791.01 per week at WM. Extrapolating that Complainant would have maintained the same wages and hours for the remaining 19 weeks of 2017, Complainant would have made a total of \$40,946.40 in 2017. Comparing this value to the earnings he would have expected at CP, based on the wage of \$80,943.20 per year, his 2017 earnings were \$39,996.80 less. Therefore, Complainant is entitled to \$39,996.80 in back pay or lost wages for 2017.

As further salary information is not of record, I find it appropriate to assume Complainant maintained the same wages and hours in 2018 as he did in 2017 following his raise, \$16.83 per hour and 47 hours per week, for a weekly wage of \$791.01. His yearly wage, based on 52 weeks of work, would be \$41,132.52. Comparing this value to the earnings he would have expected at CP, based on the wage of \$80,943.20 per year, Complainant earned \$39,810.68 less in 2018 than he would have at CP. Therefore, Complainant is entitled to \$39,810.68 in back pay or lost wages for 2018.

His weekly wage at CP, based on 52 weeks per year and a yearly wage of \$80,943.20, was \$1,556.60 and he makes \$791.01 per week at WM. This is a difference of \$765.59. Complainant is therefore entitled to back wages in the amount of \$765.59 per week beginning January 1, 2019 and continuing until Complainant is reinstated at CP.

Thus, Complainant is entitled to \$118,846.10 in back pay or lost wages through December 31, 2018, plus interest as indicated in 29 C.F.R. § 1982.109(d)(1), and continuing at a rate of \$765.59 per week, from January 1, 2019 until he is reinstated.

B. *Compensatory Damages for Emotional Distress*

Damages for emotional distress have been determined to be available compensatory damages under the FRSA. *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-00003, 4, PDF at 8 (ARB Sept. 29, 2011). To recover damages for mental suffering or emotional anguish, a complainant must prove such injury by a preponderance of the evidence. *Testa v. Consol. Edison Co. of N.Y.*, ARB No. 08-029, ALJ No. 2007 STA-027, PDF at 11 (ARB Mar. 19, 2010); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7 (ARB Aug. 21, 2011); *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 307-08 (1986) (a party may “recover compensatory damages only if he proved actual injury”); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 723 (8th Cir. 2017) (a claim for emotional distress damages must be supported by competent evidence of genuine injury). A Complainant’s credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-035 at 8 (ARB Jan. 31, 2008)

Complainant seeks damages for anxiety and suffering in the amount of “at least \$500,000.” (Compl. Brief at 38). He argues that his mental anguish is apparent from his statements on the safety video, following being taken out of service without explanation in February 2014. (*Id.* at 37). He further stated that he saw a preacher for counseling and lack of further treatment “does not mean he is not still suffering,” as “his trial testimony and demeanor made this obvious.” (*Id.*)

Respondent contests that Complainant has not established a basis for compensatory damages based on emotional distress, as Complainant sought very limited treatment for emotional distress, as the record reveals only two or three treatment visits. (Resp. Brief at 55-56).

Helgeson testified that his termination affected him emotionally, resulting in him speaking to counselors when he can afford to do so and lately, as of the hearing, to a member of clergy. (TR 132-133). He is the “sole breadwinner” for his wife and children, ages 9 and 12. (TR 126, 128). He also said that the stress is not helping his diabetes and blood pressure. (TR 133).

Following his termination, he found a commercial truck driving job beginning November 2015 until the beginning or middle of August. (TR 281). He accrued one day off for every 10 days he was out on the road, so to make it worthwhile to go or be at home, Helgeson said he would stay out on the road for 2 to 3 weeks before coming home for a day or two. (TR 285). Being on the road was stressful on him and his family, expensive, the job didn’t offer health insurance and Helgeson found he could not pay his bills. (TR 128, 130, 284). He then found a local job at Waste Management. (TR 128-129). The salary was lower than his salary with CP, as discussed above, and Helgeson cashed in his 401(k)s from the Union and small salary, about \$27,000 although he received less due to tax and penalties, to pay bills, including his mortgage. (TR 131).

Helgeson testified that he sought counseling treatment through the Baldwin Area Medical Center, “a couple of times,” including seeing Mr. Youngman, on February 13, 2014. (TR 295-296; RX 59). Records show Helgeson sought and received counseling two times in February 2014. (RX 59 at 5, TR 299). These sessions were at about the time Helgeson was under investigation for attendance violations and Helgeson acknowledged that termination from CP was on his mind at that time. (TR 299-300; RX 59). He could not recall exactly what he told Mr. Youngman and could not read the writing on the counseling notes CP Counsel presented him at hearing, but testified that he “poured his heart out to him.” (TR 297-298). On January 9, 2015, he was discharged from treatment by Mr. Youngman due to lack of client contact since February 2014. (RX 59, at 11; TR 302-303). Helgeson returned to see Mr. Youngman one additional time, on October 13, 2015. (TR 303-304; RX 59). The counseling note indicated that Helgeson was concerned about losing his job or having to go to a lesser paying occupation and that he was “angry and concerned.” (TR 305, RX 59). The counselor noted he would like to see Mr. Helgeson regularly, but it depended on how his schedule worked out since he was gone for his railroad duties much of the time. (TR 306-307; RX 59). Based on the counseling records, it does not appear Mr. Helgeson returned for treatment and was again discharged from treatment on April 5, 2016. (TR 309, RX 59). It is noteworthy, however that Helgeson found a new truck driving job shortly after his dismissal from CP and his return to counseling, which he stated required him to travel and be away from home for longer periods of time. Thus it is reasonable that he did not continue ongoing treatment with a professional counselor.

Helgeson also said he did not feel comfortable with Mr. Youngman, so sought treatment from various clergymen instead. (TR 303, 311). He did not have any formal appointments with priests, it was simply asking to talk to a priest after service or visiting a family priest. (TR 311-312). Helgeson said he feels more comfortable speaking to people anonymously and getting their

counsel rather than developing a relationship with them, so he didn't go to the same church or clergy each time he sought counseling. (TR 312-313).

As I discussed above in section V, Credibility Determinations, I found Helgeson generally credible, and noted he did not provide the same level of detail or specificity with respect to his testimony regarding seeking counseling from various clergy as most of his other testimony. Despite the lack of detail, I find Helgeson gave reasonable explanations for the lack of detail and did not appear to try to compensate for the lack thereof or embellish his testimony. Thus, although Helgeson could not identify any clergy he met with or the name of a church he went to in order to receive counseling over a one-year period, Helgeson explained it was emotional for him and he felt like lesser person for having to seek help. (TR 307). This and his work schedule reasonably explain why he might not have continued regular counseling.

Based on the evidence he provided, I find Helgeson established he is entitled to compensatory damages for emotional distress. In cases where no compensatory damages have been awarded, the complainants have been subject to stress, but not significant enough for damages. For example, a complainant who testified that he suffered emotional distress, but described "workplace inconveniences" including losing a position he enjoyed, learning a new skill set, and working with new people, and sought no medical treatment, was awarded no compensatory damages. *Holmquist v. Wisconsin Central R.R. d/b/a Canadian National Railway (CN)*, ALJ No. 2014-FRS-00057 (ALJ Aug. 3, 2018). Helgeson, to the contrary, suffered significantly more than "workplace inconveniences," including distress relating to potential termination, actual termination, and that he was the sole provider for his family, including two young children. Although he found a job shortly after his dismissal from CP, the pay was less than at CP, he was on the road, driving a truck and away from home for 2-3 weeks at a time, did not have health insurance and indicated it was stressful, and he could not pay bills. Moreover, it would be rare for someone terminated from their job to not feel some emotional distress.

However, an amount of \$500,000 in compensatory damages is unsupported both by case law and the facts at hand. High amounts of compensatory damages are linked to very serious and lasting damage, for example, a \$75,000 award in a case where the complainant lost his house through foreclosure and required public assistance and a \$250,000 award where the complainant suffered such damage to his reputation that he would be unable to ever work in his chosen field again. *Michaud v. BSP Transport*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997); *Hobby v. Georgia Power Co.*, ARB Nos. 1998-166, -169, ALJ No. 1990-ERA-030 (ARB Feb. 9, 2001). Here, while Helgeson faced financial difficulty and associated stress and anxiety, he did not suffer foreclosure, nor does evidence show that this incident left lasting harm, either reputational or emotional, that will prevent him from working in the railroad industry again.

This case is similar to the complainants' situations in *Harvey v. Union Pacific Railroad Co.* and *Rudolph v. National Railroad Passenger Corp. (Amtrak)*. In *Harvey*, the complainant was investigated and terminated by a railway. Harvey testified that he suffered fear, anxiety and stress and worried that he would lose his family's health insurance and be unable to support his family. However, in *Harvey*, the complainant sought no professional help. There, the complainant was awarded \$25,000 in compensatory damages. *Harvey v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-00039 (ALJ Feb. 12, 2015). In *Rudolph*, the complainant sought

\$325,000 to \$500,000 in damages for emotional distress, credibly testified he suffered stress, anxiety, sleep and appetite disruption, and the stress contributed to his divorce and he was awarded \$25,000 in compensatory damages. *Rudolph v. National R.R. Passenger Corp. (Amtrak)*, ALJ No. 2009 FRS-15 (ALJ Apr. 24, 2014), *upheld* ARB Nos. 14-053, 14-056 (ARB Apr. 5, 2016).

Helgeson sought professional counseling and met with clergy, testified that he suffered emotional stress from financial insecurity due to a lower paying job and needing to use retirement savings to pay bills, and suffered emotional stress from working in a job where he had to travel for weeks at a time; the record supports an award of emotional distress, but not of sufficient severity to support a \$500,000 award. Complainant has established credible emotional distress caused by his termination, but it is not of sufficient magnitude that it has dissuaded him from seeking reinstatement. Complainant has further not provided evidence to demonstrate that he has suffered lasting emotional or other damage from this experience. Accordingly, I find that Complainant has established \$45,000 in compensatory emotional distress damages.

C. Punitive Damages

“Relief may include punitive damages in an amount not to exceed \$250,000.” 49 U.S.C.A. § 20109(e)(2). An ALJ must first consider whether the evidence is sufficient to award punitive damages and then must consider what amount is necessary for punishment and to deter such conduct in the future. *Carter*, ARB Nos. 14-089, 15-016, 15-022; *Jackson v. Union Pacific Railroad Co.*, ARB Case No. 13-042, ALJ Case No. 2012-FRS-017 (Mar. 20, 2015), (citing *Smith v. Wade*, 461 U.S. 30, 51 (1983)). Punitive damages are appropriate where there has been a “reckless or callous disregard for the plaintiff’s rights” or willful violations of federal law. *Michael A. Jackson*, ARB Case No. 13-042; *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, PDF at 5 (ARB Nov. 20, 2014); *Youngerman v. UPS, Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, PDF at 6 (ARB Feb. 27, 2013). “Gross or reckless indifference to the law” can establish the intentional component. *D’Hooge v. BNSF Railways*, ARB Case Nos. 15-042, 15-066, ALJ Case No. 2014-FRS-002 (Apr. 25, 2017), (citing *Kolstad v. Am. Dental*, 527 U.S. 526, 535-36 (1999)). “Written anti-retaliation policies without more,” such as efforts to implement and enforce the policies, “do not insulate an employer from punitive damages liability.” *Carter*, ARB Nos. 14-089, 15-016, 15-022, (citing *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999)). An employer has the burden of proof to establish that it has made a good-faith effort to comply with the law. *D’Hooge*, ARB Case Nos. 15-042, 15-066, citing *Youngerman*, ARB No. 11-056.

The amount of punitive damages is a fact-based determination. *Youngerman* at PDF 10. Plaintiffs face a “formidable burden” to establish punitive damages are warranted. *BNSF Ry. Co. v. U.S. DOL Admin. Review Bd.*, 867 F.3d 942, 949 (8th Cir. 2017). The ARB has upheld an award for as little as \$1,000 in punitive damages up to the statutory maximum of \$250,000. *See Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 11-056, ALJ CASE NO. 2010-FRS-018 (Dec. 21, 2012) (\$1,000 punitive damages upheld following an investigation and threatened discipline after an employee’s injury report); *D’Hooge*, ARB Case Nos. 15-042, 15-066 (ARB upheld \$25,000 in punitive damages when complainant lost favorable working conditions and a small amount of pay after reporting a suspected safety problem on a train); *Carter*, ARB Nos.

14-089, 15-016, 15-022, *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017 (ARB Nov. 20, 2014), *Griebel v. Union Pacific R.R. Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011 (ARB Mar. 18, 2014) (ARB upheld \$50,000, \$100,000 and \$100,000, respectively, in punitive damages after complainants were terminated for reporting a work-related injuries); *Raye v. Pan Am Railways, Inc.*, ARB Case No. 14-074, ALJ Case No. 2013-FRS-084 (Sept. 8, 2016) (ARB upheld \$250,000 of punitive damages where an ALJ noted especially egregious conduct by an employer in a case where employee was terminated for a safety rule violation after reporting an injury caused by a safety hazard he had also reported weeks earlier). The ARB has also upheld decisions to award no punitive damages where the employer did not show “callous disregard” of the complainant’s rights. *Bailey v. Consolidated Rail Co.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-012 (ARB Apr. 22, 2013); see *Ben Graves v. MV Trans., Inc.*, ARB CASE NO. 12-066, ALJ CASE NO. 2011-NTS-004 (Aug. 30, 2013).

Complainant seeks the maximum punitive damages of \$250,000. (Compl. Brief at 38). Complainant asserts,

If ever there was a case for maximum punitive damages, this is the one. High-level company executives engineered this situation through deceit and subterfuge, and \$250,000 in punitive damages will serve the purpose intended by the legislature in enacting this remedial statute.

(*Id.*)

Respondent argues that punitive damages are not warranted here, as “there is no evidence that CP engaged in any reckless or indifferent conduct with respect to Helgeson.” (Resp. Brief at 57). It further argues that it already has in place rules and codes of conduct prohibiting retaliation, including a Workplace Harassment policy, and EEO/Affirmative Action policy and a Code of Business Ethics, and the ARB has stated that an employer may avoid liability for punitive damages by showing it made good faith efforts to comply with the FRSA with such policies. (*Id.* at 56-57). Finally, Respondent asserts Helgeson was “was accorded a fair and thorough hearing process under the applicable CBA and the results were reviewed by multiple levels of management.” (*Id.* at 57).

Here, Respondent’s conduct does not show a “reckless or callous disregard for the plaintiff’s rights” egregious enough to support the statutory maximum in punitive damages, but it does support an award in a lesser amount. *Michael A. Jackson*, ARB Case No. 13-042. The situation here is distinguishable from that in *Raye*, where \$250,000 punitive damages was upheld. *Raye*, ARB Case No. 14-074. In *Raye*, after the respondent received notice of the Raye’s FRSA complaint, it charged him with “baseless,” “serious and terminable offenses” and terminated complainant. *Id.* The ALJ also noted that as part of the same cause of action, Raye had reported a workplace injury, was disciplined for the injury, and had reported the safety hazard that caused his injury several weeks before, but respondent had not rectified the hazard after Raye’s safety report. *Id.* The ALJ found the respondent’s actions to be egregious and blatant acts of retaliation that required the maximum punitive damages to deter similar future conduct. *Id.*

Here, Respondent's conduct is also not as innocuous as in *Bailey*, where the ALJ found the Bailey's safety complaints contributed to his employer's adverse action, but the railway's actions were "not so reprehensible or culpable as to warrant punitive damages." *Bailey*, ARB Nos. 13-030, 13-033. Rather, the railway was "irritated" by the safety complaints and viewed Bailey "as a nuisance for frequently raising safety complaints." *Id.*

I find that Respondent's actions violated the FRSA and by using pretext to charge and then dismiss Helgeson for violation of a rule that evidence shows no other CP employee was disciplined for violating, despite it being common practice to "violate", and despite CP's knowledge it was "violated" in the past, it has been demonstrated Respondent's callous disregard for Complainant's rights, such that punitive damages are warranted. Additionally, punitive damages are warranted here to deter Respondent from violations of the FRSA in the future. Considering the damages awarded in other, similar cases, Respondent's actions were worse than in *Vernace*, where the employer threatened discipline and the complainant was not terminated. ARB No. 11-056. Here, Complainant suffered worse consequences than in *D'Hooge*, where the employee lost a favorable work schedule. *D'Hooge*, ARB Case Nos. 15-042, 15-066. Punitive damages there were \$1,000 and \$25,000, respectively. *Vernace*, ARB No. 11-056; *D'Hooge*, ARB Case Nos. 15-042, 15-066. In several cases involving an employee's termination following protected activity, the ARB upheld punitive damages of \$50,000 and \$100,000. *Carter*, ARB Nos. 14-089, 15-016, 15-022; *Petersen* ARB No. 13-090; *Griebel* ARB No. 13-038. Those are somewhat distinguished from this situation, as those cases involved reporting workplace injuries, but because the adverse action is similar, I will consider those cases to guide the award of punitive damages here. Thus, \$60,000 will be sufficient to punish and deter Respondent. I therefore award \$60,000 in punitive damages.

D. Reinstatement and Other Relief to Make Helgeson Whole

An employee is entitled to "all relief necessary to make the employee whole." 49 U.S.C.A. § 20109(e)(1). Relief includes reinstatement with the same seniority status that the employee would have had, but for the retaliation. *Id.*, 29 C.F.R. § 1982.109(d)(1).

Complainant seeks reinstatement with "the same seniority status (2-plus years) he would have had, but for the discrimination." (Compl. Brief at 38). He also wants to work until he is vested in his pension.

Respondent asserts that reinstatement is inappropriate relief in this case, as Helgeson has asserted that CP is "absolute evil" and employment with CP was "a slow form of suicide." (Resp. Brief at 56). CP maintains Helgeson can't reconcile the desire for reinstatement with his feelings about CP, nor have it "both ways." (*Id.* at 29). Further, Helgeson has secured other full-time employment that he admitted he prefers due to the shorter commute, lack of travel and predictable work week. (*Id.* at 56).

At hearing, Helgeson testified that while he did not remember the exact words, he agreed that he said words to the effect of, "I work for absolute evil. It's been layer upon layer of oppression. They have tightened the screws down on us." (TR 304-35; RX 59). The

contemporaneous medical records with the counselor reveal he described CP as “absolute evil” and that working for CP is like “a slow form of suicide.” (TR 313).

I find it difficult to reconcile Complainant’s statements that he was oppressed by his work for CP, it is “absolute evil” and “a slow form of suicide,” with his desire to be reinstated. Nevertheless, the statements appear contemporaneous with Helgeson facing discipline in the workplace at a time he was under distress, facing discipline, and appear solely in the counseling records. Helgeson, also explained the statements as they appeared in the records. (TR 304-306; RX 59). Such statements do not appear to be so antagonistic between the parties such that reinstatement is rendered ineffective here. See *O’Neal and Smith v. Norfolk Southern R.R. Co.*, 5:16-CV-519; 5:16-CV-520, at 3 (M.D. Ga. 2018) (Granted reinstatement after retaliation for employee’s report of hazardous safety condition, where Respondent did not “[p]oint to the ‘sort of discord and antagonism’ which could ‘render reinstatement ineffective as a make-whole remedy’”) (citing *EEOC v. W&O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000)). As a result, to make Complainant whole, he is entitled to reinstatement without loss of benefits or other privileges and with the same seniority status he would have had, but for the retaliation, retroactive to the date of his termination from CP.

With his reinstatement, to further make Helgeson whole, CP is to also expunge Helgeson’s disciplinary record including any reference to the charges stemming from the incident leading to his termination as discussed above. Under the FRSA, expungement is available when necessary to make an employee whole. *O’Neal and Smith* at 4 (citing *James v. CSX Transp., Inc.*, 2017 WL 2535726 at *1 (M.D. Ga. 2017)). As reference to the charge and termination in the personnel file could potentially be harmful to Helgeson in the future and was the result of Respondent’s violation of FRSA, expungement here is necessary to make him whole. Expungement of CP’s charge letters, any related union letters, disciplinary hearing and outcome, letters regarding the charge and Helgeson’s termination and all other references to the charge and termination in CP’s employment files are to be expunged. To the extent Complainant is to be reinstated retroactive from the date of his dismissal from CP, all disciplinary charges prior to September 2015, consistent with CP’s own progressive discipline policy and applicable CBA, should be removed from Helgeson’s employment record due to the passage of well over three years.³³

E. Attorney Fees

Relief also includes costs, expenses and reasonable attorney fees. 49 U.S.C.A. § 20109(e)(2). Complainant’s counsel is entitled to submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses stating the work performed, the time spent on such work, and the reasonable basis for counsel’s rate within 60 days from the issuance of this Decision and Order. Respondent’s counsel has 30 days from receipt of the fee petition to file an objection, if warranted. Complainant’s counsel shall reply to

³³ After a CP employee has successfully corrected behavior for 24 months they will be removed from the progressive discipline process. (RX 13, p 3).

any objection made by Respondent to Complainant's Petition for attorney's fees and costs, within 15 days of receipt of the objections.

IX. CONCLUSION

Having considered the above and upon review of the entire record, I find Claimant established, by a preponderance of evidence, his prima facie case under the FRSA. Specifically, Claimant demonstrated that he engaged in protected activity,³⁴ he suffered an adverse action and his protected activity was a contributing factor to the adverse action. I further find that the record does not establish by clear and convincing evidence that Respondent would have taken the same adverse personnel action against Complainant in the absence of the protected activity. Pursuant to FRSA, respondent, CP, is therefore liable for, and Helgeson is entitled to, all relief described above.

ORDER

Based on the above, and consistent with this Decision, it is **ORDERED** that:

1. Respondent shall pay Complainant \$118,846.10 in back wages through December 31, 2018, and continuing at a rate of \$765.59 per week, from January 1, 2019 until the date Complainant is reinstated and paid, plus interest, as indicated in 29 C.F.R. § 1982.109(d)(1);
2. Respondent shall Pay Complainant \$45,000 in compensatory emotional distress damages;
3. Respondent shall pay Complainant \$60,000 in punitive damages;
4. Complainant shall be reinstated without loss of benefits, seniority status or other privileges, retroactive to the date of his termination from CP; and
5. Respondent is to expunge Complainant's record of any reference to the charge leading to his termination and the termination.
6. Complainant's counsel shall file a petition for attorney's fees and costs no later than 60 days from the issuance of this Decision and Order;
7. Respondent shall file any objections to Complainant's counsel's petition for attorney's fees and costs within 30 days of receipt of the petition; and
8. Complainant's counsel shall reply to any objections made by Respondent to Complainant's petition for attorney's fees and costs, within 15 days of receipt of the objections.

³⁴ Whether considered separately or as part of the "contribution" analysis above, I further find Respondent had knowledge of Complainant's protected activity.

SO ORDERED.

NATALIE A. APPETTA
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

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, the Associate Solicitor, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).