



Issue Date: 20 August 2019

Case No.: 2016-FRS-00034

In the Matter of:

CLAY MCDONALD,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (“FRSA” or “the Act”), 49 U.S.C. § 20109 (2012), and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1982. Clay McDonald (“Complainant”) alleges that Union Pacific Railroad Company (“Respondent”) terminated him for his protected activity in violation of the FRSA.

PROCEDURAL HISTORY

On September 23, 2015, Clay McDonald (“Complainant”) filed a timely complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Union Pacific Railroad Company (“Respondent”) violated the FRSA by terminating his employment in retaliation for protected activity under 49 U.S.C. § 20109(a)(1)(c), (b)(2), and (b)(1). (CX 1). OSHA issued a decision on February 22, 2016, dismissing the complaint and finding no retaliation on the part of Respondent. (EX 2). On March 23, 2016, Complainant filed objections to OSHA’s findings and requested a hearing. (EX 1).

The Office of Administrative Law Judges held a hearing on this matter on April 4, 2017, in Dallas, Texas. Both parties appeared, submitted evidence, and testimony. Thereafter, both parties submitted post-hearing briefs. The record is now closed and the case ripe for decision.

ISSUES

The following issues require adjudication under 49 U.S.C. § 20109:

1. Whether Complainant engaged in protected activity under §20109(b)(1)(A) when he notified supervisors that coworkers called him a “rat”;

2. Whether Complainant engaged in protected activity under § 20109(b)(1)(B) and (b)(2) when he refused to work in the yard after coworkers called him a “rat”;
3. Whether Complainant suffered an adverse employment action;
4. Whether Complainant’s protected activity, if proven, contributed to the adverse employment action;
5. Assuming Complainant can meet his burden of demonstrating the above elements, would Respondent have taken the adverse action in absence of any protected activity; and,
6. The damages, if any, to which Complainant may be entitled.

The parties stipulated that Respondent is a railroad carrier engaged in interstate commerce and is subject to the Act, that Complainant is a covered employee under the Act, and if Respondent continued to employ Complainant, he would have been furloughed and not entitled to damages between November 21, 2015 and November 28, 2016. (See joint stipulations and post hearing briefs). The parties agree that Respondent hired Complainant in July 2015. (Post hearing briefs).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Evidence

1. Documentary Evidence

In support of his case, Complainant submitted:

- CX 1 - Complaint filed with OSHA
- CX 2 - Respondent’s response to OSHA Complaint
- CX 3 - Respondent’s Responses to Complainant’s Requests for Admissions
- CX 4 - Termination Notice of Complainant
- CX 5 - Notes from Complainant’s calls to the Value Line
- CX 6 - Emails between Complainant and Ms. Walker regarding Complainant’s requests for a transfer before and after his alleged protected activity. Complainant requested a transfer prior to the alleged protected activity on August 13, 2015. Complainant then emails again stating he is concerned for his safety and requesting a transfer again on August 23, 2015. Ms. Walker notified Complainant that no transfer was available. August 26, 2015, Complainant emails stating he does not want to resign, but cannot work with the members of the facility. Ms. Walker responds that there is not a transfer available. Complainant continues to request a transfer on September 14, 2015.
- CX 8 - Articles regarding compensation for damages

Respondent submitted the following exhibits in support of its claim:

- RX 1 - Complainant's timely objections and request for a hearing
- RX 5 - Training Policies
- RX 6 - Unexcused Attendance Form
- RX 7 – Call log showing Respondent notified Complainant of his scheduled classroom training.
- RX 8 – Termination form and paperwork for Complainant
- RX 9 – Termination form for another employee
- RX 11 – Email from Complainant to Ms. Walker requesting a transfer on August 13, 2015
- RX 12 – Email from Ms. Walker notifying Complainant there are no transfer options and asking if he still wanted to resign
- RX 13 – Email from Ms. Walker notifying Complainant a transfer is not available
- RX 16 – Notes from Value Line showing Complainant's complaint and transfer requests
- RX 17 – Personnel records of Complainant
- RX 18 – Roster of additional employees

2. Hearing Testimony

The following witnesses appeared at the hearing and testified as follows.

Latanya Walker's Testimony (Tr. 13-54)

Ms. Walker has worked for Respondent since April 11, 2011. (Tr. 12). She worked as the Terminal Operations Manager at the Hollywood, Reisor, and Riverfront yards between August of 2014 and May of 2016. (Tr. 13). Her duties include overseeing the daily operators of the facilities, employees, conductors and engineers in the Shreveport terminal and customer service related issues. (Tr. 13).

She discussed the duties of the individual employees in Shreveport. She noted a conductor is the head person on the train and responsible for all issues that arise on the train. (Tr. 13-14). The engineer is responsible for the actual operation of the train, by physically operating the controls. (Tr. 14). Employees must be certified under the Federal Rail Administration ("FRA") regulations to perform these duties. (Tr. 14).

Complainant worked as a trainee during his time at Respondent. (Tr. 14). Trainees must work closely with the conductors. (Tr. 14-15). They cannot work alone. (Tr. 15). Ms. Walker first met Complainant after he experienced an incident with a conductor named Brian Edwards. (Tr. 15). Complainant submitted a complaint about Edwards to management. (Tr. 15).

Chris Pappion and Quentin Hudspeth notified Ms. Walker about the incident between Edwards and Complainant. (Tr. 16). Mr. Pappion mentioned that an incident occurred on the

yard where Complainant reported an unsafe working condition by Edwards. (Tr. 17). Complainant reported Edwards failing to follow safety requirements on August 14, 2015. (Tr. 22). Management immediately investigated the situation. (Tr. 17). Management observed Edwards in the field without his knowledge, to determine whether he was working unsafely. (Tr. 17). Management found Edwards working unsafely and took corrective action against him. (Tr. 17). They took Edwards out of service and sent him home. (Tr. 17). Respondent considered the violation critical as it could have resulted in injury or damage. (Tr. 18). Ms. Walker spoke with Edwards about the rule violation, but not about Complainant. (Tr. 18). She informed Edwards the requirements of the job and safety moving forward. (Tr. 18). Edwards did not seem upset and was receptive to the discussion. (Tr. 19). However, Edwards received additional discipline in the fall of 2015, when he performed a blind shove. (Tr. 19). A blind shove is when the conductor is not in a position to protect the equipment going down a rail to where he could see where the end would be. (Tr. 19). Edwards also had issues with other crewmembers. (Tr. 20). Edwards' father-in-law notified Ms. Walker that he did not feel comfortable working with Edwards due to a pending divorce action. (Tr. 20). She saw no need to discuss Edwards with Complainant at the time, as she was unaware of any other issues between Complainant and the crew. (Tr. 20).

After the incident with Edwards, Complainant went back to work. (Tr. 21). Complainant, however, did not work with Edwards again. (Tr. 21). Complainant moved to a different job with a different crew. (Tr. 21). Edwards remained in his original capacity. (Tr. 21). Complainant moved to another position due to his training schedule. (Tr. 21).

Thereafter, Ms. Walker received a call from Trainer Keith Burgess stating Complainant turned in his equipment and quit. (Tr. 23). She informed Burgess to have Complainant wait until she arrived at the yard so she could talk with him. (Tr. 23). Both Complainant and Edwards were working at the Hollywood yard at that time. (Tr. 24). She asked Complainant why he wanted to quit and what was going on. (Tr. 23). He informed Ms. Walker that he did not feel like the crew would have his back. (Tr. 23). He informed her about the incident with Edwards and stated that thereafter a crewmember called him a "rat". (Tr. 23). Complainant did not say who called him a rat. (Tr. 48). Complainant stated he did not want to get the person in trouble and would not state the person's name. (Tr. 48). Without additional information there was not a lot she could do regarding the "rat" comment. (Tr. 48). She asked Complainant not to quit and to give her an opportunity to find something else for him. (Tr. 23). She did not give him resignation papers during the meeting. Complainant expressed that he felt unsafe working in the Shreveport/Longview area, not just the Hollywood yard because he felt no one had his back. (Tr. 27). This was the first time Ms. Walker heard about employees calling Complainant a "rat". (Tr. 45). Complainant was scheduled to start additional classroom training at the Hollywood location the next week. (Tr. 25). Complainant essentially informed Ms. Walker that if he could not get a transfer he was going to resign. (Tr. 26). She planned to check on transfers out of the Shreveport/Longview area. (Tr. 26). Complainant packed all his belongings in his truck and left the Shreveport area after talking with Ms. Walker. (Tr. 45). She tried to help him because she did not want Complainant to give up a good job. (Tr. 45).

Ms. Walker agreed that the railroad is a very safety sensitive workplace with multiple rules. (Tr. 27). The phrase, safety rules are written in blood, is often used. (Tr. 27). She agreed

that crewmembers have to be able to keep each other safe. (Tr. 28). Inattention can get someone hurt or killed. (Tr. 28). Coworkers take a courage to care pledge to specifically agree they will have each other's back. (Tr. 28). All new hires receive extensive training and instruction on the courage to care policy. (Tr. 28). As a result, she took Complainant seriously when he expressed feeling unsafe. (Tr. 29).

She could not say whether Complainant was exaggerating or lying about his concerns so he could move to a work location closer to home. (Tr. 29). She did take his complaint seriously and looked for a transfer to other locations, not just in the Dallas/Fort Worth area. (Tr. 29). At the time, the Shreveport/Longview area was the only area with room for new hires. (Tr. 30). Complainant wanted to leave the Shreveport area. (Tr. 30).

After Ms. Walker's conversation with Complainant, she further investigated the situation with the crewmembers. (Tr. 31). Since Complainant did not say with whom he had the issue and who called him a "rat", she talked to the whole crew in general terms. (Tr. 49). None of the crewmembers agreed to hearing anyone say anything inappropriate to Complainant or about Complainant. (Tr. 31). Even though no one corroborated Complainant's complaint, management still made a point to talk about hostile work environments and the need to have each other's backs at the next safety meeting. (Tr. 31). Ms. Walker reiterated the courage to care policy and the importance of work place safety. (Tr. 31). She spoke to all the crewmembers on first and second shift about the allegations. (Tr. 31, 32). Ms. Walker asked whether crewmembers had issues with Complainant or if crewmembers shunned him or gave him attitude. (Tr. 32). No one brought up or agreed there were issues with Complainant. (Tr. 32). Therefore, she just reiterated the hostile work environment policy. (Tr. 32). During the safety meetings, she did not get a sense from crewmembers that they did not have Complainant's back. (Tr. 46). Ms. Walker agreed that calling someone a "rat" is not respectful and the company wants employees to respect one another. (Tr. 32). During her discussions with the crew, they asked many questions about why she was investigating and why they were having the additional safety meetings. (Tr. 46). Most crewmembers had no idea about the situation between Edwards and Complainant. (Tr. 33). After talking with the crew, Ms. Walker felt they had Complainant's back and found no safety issues. (Tr. 47). She did not believe Complainant's concerns to be reasonable, but understood why he would not divulge the name of the person who called him a "rat". (Tr. 52, 53).

Prior to the August 14th incident, Complainant requested a transfer to the Dallas/Fort Worth area or a furlough. (Tr. 33; CX 6; RX 11). During that time, furloughs were occurring across the company, including the Shreveport area. (Tr. 34). Respondent does not furlough trainees until after they complete the training program. (Tr. 34). Respondent expected to furlough individuals in Complainant's class after completion of the training. (Tr. 35).

Complainant informed Ms. Walker that he was no longer going to work in Shreveport. (Tr. 39). Ms. Walker asserts that Complainant quit prior to talking to her and she urged him to wait until she could look into things. (Tr. 36). She agreed, however, that in her email on August 23, 2015, she informed him that if he still wanted to resign she would send him the paperwork. (Tr. 36; CX 6). Ms. Walker then agreed that as of August 23rd and 26th Complainant had not resigned. (Tr. 36). Ms. Walker later informed Complainant that a transfer was not available.

(Tr. 37). Complainant informed Ms. Walker during their first meeting that he would only continue to work for Respondent if he was transferred from the Shreveport area. (Tr. 37). When she learned a transfer was unavailable, there was nothing more she could offer Complainant. (Tr. 37).

Trainees typically cannot receive transfers for the first two years. (Tr. 43). Complainant acknowledged this in his first email prior to the Edwards incident. (Tr. 43). It is a long process to receive a transfer. (Tr. 43). The Union and the Company have to agree to the transfer. Trainees are not members of the Union until after they complete their training. (Tr. 43). Therefore, trainees can only move if another trainee can switch with them or there is room at another training yard. Otherwise, for a transfer to occur, an employee at one location with less seniority is moved to the employee requesting the transfer's location. (Tr. 43). Then the Union and the superintendents have to agree to the move. (Tr. 44). Therefore, to transfer Complainant, Respondent would have had to move him to a higher-class position since another training class was not available. (Tr. 44, 50). However, he could not transfer based on seniority because as a trainee, he did not have seniority over anyone. (Tr. 44).

Once Ms. Walker exhausted all of her options, she informed Complainant to call the Values Line. (Tr. 37). The purpose of the Values Line is to make and address complaints regarding unethical behavior and other valid workplace issues. (Tr. 37; CX 6). Kim Cutcra, Director of Operations, informed Ms. Walker that Complainant filed a Values Line complaint. (Tr. 40). Ms. Cutcra wanted to know the background on the situation. (Tr. 40). Ms. Walker agreed that Complainant contacting the Values Line on August 27, 2015 is inconsistent with someone who resigned. (Tr. 41).

She later learned that Complainant failed to attend a training session from Mr. Powell. (Tr. 49). When Complainant missed training, Mr. Powell processed a no-show termination and went to see Ms. Walker. (Tr. 49). Mr. Powell informed Ms. Walker, "I want to let you know this guy didn't show up for class and we processed him." (Tr. 49). Ms. Walker has no input into how HR handles the processing of terminations and trainees. (Tr. 49). She did not inform Mr. Powell prior to the training that Complainant would not be there, because she did not feel the training was a safety related issue. (Tr. 51). Complainant would have been in a classroom, not in the yard, during this training. (Tr. 51). The training did not include individuals who would have been involved in the "rat" calling incident. (Tr. 51). She did not see Complainant as working in a possible hostile work environment. (Tr. 51). Ms. Walker further stated that she never received a formal resignation from Complainant, so she saw no need to inform others he would not be at work. (Tr. 52). She assumed Complainant would still come to work pending the possible transfer. (Tr. 52). Ultimately, Respondent terminated Complainant for failure to attend training on August 25-26, 2015. (Tr. 52).

Quentin Hudspeth (Tr. 54-90)

Mr. Hudspeth is the Manager of Operating Practices at Union Pacific. (Tr. 54). He works out of the Shreveport area. (Tr. 54). Mr. Hudspeth is assigned to the Hollywood, Riverfront, and Reisor yards. (Tr. 54). His duties include ensuring safety and enforcing federal and company policy. (Tr. 55).

On August 14, 2015, Mr. Hudspeth received a call from the yardmaster at the Hollywood yard about a crew issue. (Tr. 55, 56). Complainant had reported an incident to the yardmaster regarding conductor Edwards. (Tr. 55). The yardmaster informed Mr. Hudspeth that Complainant did not want to work with Edwards due to unsafe working habits. (Tr. 56, 57). Mr. Hudspeth immediately called the crew into the office to investigate the situation. (Tr. 55). He separated the crewmembers and interviewed them individually to get to the root of the problem. (Tr. 55). Along with a manager and Mr. Pappion, Mr. Hudspeth interviewed the crewmembers separately. (Tr. 55). When interviewing Edwards, he complained about Complainant working slowly and wanted Complainant sent back to the yard house. (Tr. 59). Mr. Hudspeth and Mr. Pappion decided to separate Edwards and Complainant. (Tr. 55). They swapped crewmembers around for the day. (Tr. 55). Complainant asserted Edwards worked unsafely so they moved Complainant for the rest of the day. (Tr. 55). Complainant did not give them specifics on the unsafe acts. (Tr. 58). Complainant said he was fine switching to another conductor that day. (Tr. 77-78). Mr. Hudspeth believed he had remedied the situation for Complainant. (Tr. 78).

Mr. Hudspeth later conducted an efficiency test on Edwards. (Tr. 63). Mr. Hudspeth and Mr. Pappion observed Edwards working unsafely, found a rule violation, and they disciplined Edwards. (Tr. 56, 63). He pulled Edwards out of service immediately. (Tr. 65). Hudspeth observed Edwards working too fast and failing to check switches. (Tr. 64). The switches change the direction for the car movement in the yard. (Tr. 64). When changing switches the conductor should physically look at the rails to make sure there is nothing preventing the rails from moving properly. (Tr. 64).

Mr. Hudspeth agreed that employees need to trust and rely on each other. (Tr. 60). Respondent has a courage to care pledge that employees are supposed to follow. (Tr. 60). All employees should have each other's backs. (Tr. 60). If an employee does not have the back of another, someone could get hurt. (Tr. 61). Crewmembers must be mindful of others at all times. (Tr. 62). Trainees must follow the orders of the conductors unless those actions are unsafe. (Tr. 62, 79). Respondent expects crewmembers to stop the line if they see an unsafe situation, just like Complainant. (Tr. 79). After the meeting with Mr. Hudspeth, Complainant no longer worked with Edwards from that point forward. (Tr. 62). The other crewmembers did not oppose switching trainees and the day continued smoothly. (Tr. 63). He was proud that Complainant felt comfortable enough to come forward with issues. (Tr. 78). Mr. Hudspeth did not believe he was putting Complainant in an unsafe situation and felt had remedied the situation. (Tr. 79).

Complainant came to Mr. Hudspeth the next day stating another employee called him a "rat" when in the locker room. (Tr. 67). Complainant complained about only one crewmember. (Tr. 80). Mr. Hudspeth does not tolerate such actions and ordered a safety meeting. (Tr. 67). Mr. Hudspeth ensured the crewmembers working alongside Complainant were at the meeting and he talked to them all about safety and having each other's backs. (Tr. 67, 73). Mr. Hudspeth also questioned the other two conductors in the yard, Pallisio and Guthrie, and both denied calling Complainant a "rat". (Tr. 74). He asked both if they had any issues with any trainees and if they were aware of any name-calling. (Tr. 74). Even though neither of them admitted to calling Complainant a "rat", he still made them aware that those types of statements and actions are not acceptable. (Tr. 74). Mr. Hudspeth left Complainant's name out of the questioning. (Tr.

75). Mr. Hudspeth believed he remedied the situation by talking to the crew and having the safety meeting. (Tr. 82). None of the employees acted in a way that led him to believe differently. (Tr. 82). He did not believe Complainant's working environment was unsafe. (Tr. 83).

Mr. Hudspeth later notified Ms. Walker that Complainant informed him that he did not want to work for Respondent any longer because the crew did not have his back. (Tr. 67). Mr. Hudspeth urged Complainant to speak with Ms. Walker about the situation. (Tr. 67). Complainant informed Mr. Hudspeth that he was quitting. (Tr. 67). Complainant did not specifically use the word "quit" and instead stated he did not want to do this anymore. (Tr. 68). Complainant never said he did not feel safe. (Tr. 70). Mr. Hudspeth previously heard Complainant wanted to transfer out of Longview. (Tr. 71). After he sent Complainant to Ms. Walker, Mr. Hudspeth had no other interaction with Complainant. (Tr. 72). Through talking with other managers, Mr. Hudspeth believed Complainant just wanted a transfer to the Dallas area since he lived there in that area. (Tr. 81).

Complainant never informed Mr. Hudspeth that he would not attend training. (Tr. 87). Mr. Hudspeth had no knowledge of whether Complainant called and said he would not be attending training classes. (Tr. 87). When an employee fails to attend a training session, the transportation manager handles the situation. (Tr. 88). Mr. Hudspeth manages the engineers, not the trainees so he does not handle issues surrounding classroom training. (Tr. 88).

William Burgess (Tr. 91-106)

Mr. Burgess is employed by Respondent as a conductor. (Tr. 91). He is certified in FRA regulations. (Tr. 91). He also works as a peer trainer and is responsible for new hires, scheduling, and teaching classes. (Tr. 91). He had worked as a peer trainer for three years as of 2017. (Tr. 92). He covers the Shreveport area. (Tr. 92).

Through his employment as a peer trainer, he had a couple of interactions with Complainant. (Tr. 92). The first time, Complainant brought up issues with Edwards to Mr. Burgess. (Tr. 92). Complainant informed Mr. Burgess that Edwards was working unsafely. (Tr. 93). Complainant and Edwards had a confrontation and Edwards told Complainant to go sit on a bucket out of the way. (Tr. 93). Mr. Burgess talked with Edwards about the situation. (Tr. 94). Trainees are expected to be at arm's length to the conductor. (Tr. 95).

The second time he spoke with Complainant, he informed Mr. Burgess that the work was not for him. (Tr. 92, 97). Complainant said he felt like he wanted to go back near home. (Tr. 97). Mr. Burgess told Complainant to come back and talk to Ms. Walker. (Tr. 97). Complainant said he wanted to a transfer to Dallas or closer to Sherman where he lived. (Tr. 97). Complainant also mentioned that a crewmember called him a "rat" and that people do not talk to snitches. (Tr. 97). Complainant did not state he feared for his safety. (Tr. 98). Complainant gave Mr. Burgess his radio. (Tr. 98). Mr. Burgess did not have resignation paperwork so he told Complainant to talk with Ms. Walker. (Tr. 99). He thought Complainant was resigning and assumed Complainant would not be back. (Tr. 106).

Mr. Burgess spoke with Ms. Walker the next day and she confirmed Complainant was resigning and she tried to talk him out of it. (Tr. 100). Complainant had three months of training left. (Tr. 101). At the time Complainant left, he was getting ready to start two weeks of classroom training. (Tr. 102). After classroom training, Complainant next had on-the-road training doing overnight stays and short hauls to Longview and back. (Tr. 102).

When working in the yard there are coworkers that disagree. (Tr. 104-105). There are coworkers that tease each other. (Tr. 105). At times coworkers call each other names. (Tr. 105). Mr. Burgess has experienced these things and they did not make him feel unsafe or that people did not have his back. (Tr. 105).

Complainant, Clay McDonald (Tr. 107-150)

Respondent hired Complainant in July 2015. (Tr. 108). He wanted to work for Respondent for the job experience, retirement, benefits, and job security. (Tr. 110). When he first started training, he traveled about an hour and a half to Sherman from Dallas. (Tr. 111). When hired, Respondent informed him that he would be working in Longview, Texas. (Tr. 111). Longview is about three hours from Dallas. (Tr. 112). He had no problem with the distance. (Tr. 112). It was consistent with his prior jobs' travel requirements. (Tr. 112). After his initial training, he went to the Shreveport location for his on-the-job training at the Hollywood yard. (Tr. 112).

He worked with Edwards on August 14, 2015, who he asserts worked erratically by not checking switches, not paying attention, moving cars, and pushing cars. (Tr. 113). Complainant did not feel comfortable working with Edwards and was concerned for his safety. (Tr. 113). Complainant approached Edwards and informed him that he was working unsafely and not following procedure. (Tr. 114). Complainant said, "I don't want to work with you." (Tr. 114). Edwards responded, "Sit on a bench". Complainant left and went to the office. (Tr. 114). Complainant contacted Mr. Hudspeth and met with the managers in the office. Management ordered the crew to the office. (Tr. 114). Management discussed the safety rules. (Tr. 114). Complainant informed Mr. Hudspeth that Edwards failed to check the switches. (Tr. 115). Complainant refused to continue working with Edwards. (Tr. 115). Mr. Hudspeth said he would investigate the situation. (Tr. 115). Complainant worked with another conductor or brakeman the rest of the day. (Tr. 115). Edwards later left the location for which Complainant assumed was due to failure to follow procedures. (Tr. 116). Complainant did not feel safe around Edwards because of his failure to follow procedures, not because of something he said to Complainant. (Tr. 130). He never worked with Edwards again. (Tr. 132).

The following Tuesday Complainant worked with a different crew. (Tr. 117). Someone informed him that he was labeled as a "rat", because he reported the Edwards incident to management. (Tr. 117). He thought it was either the conductor or the engineer. (Tr. 117). Complainant testified that "nobody had my back," and "I've never seen anything like it." (Tr. 118). He stated he believed all the training about the rules and courage to care, but when he did the right thing, he got shamed for it. (Tr. 118).

In addition to being labeled a “rat,” Complainant asserts other instances also led to his fears. (Tr. 119). Complainant states crewmembers would say, “There he is. Are you going to work with him tonight? Are you going to do that? Be careful around him. Don’t say nothing round him.” (Tr. 119). It was important for his coworkers to have his back so he could go home to his family. (Tr. 119). No one informed him that they were not going to have his back, but that is the way he felt. (Tr. 134). He worked only one shift with the crew that called him a “rat.” (Tr. 134).

Complainant raised his concerns with Mr. Hudspeth. (Tr. 119). He informed Mr. Hudspeth that the crew labeled him a “rat” for going to management. (Tr. 119, 120). Complainant asserts he never told Mr. Hudspeth that he quit or resigned. (Tr. 120). Complainant informed Mr. Hudspeth that he no longer wanted to work in the Hollywood yard, but states he did not quit. (Tr. 120). He then talked to Mr. Burgess and stated he was not going to work at the Hollywood yard anymore because he had been labeled a “rat”. (Tr. 121, 122). Complainant states he did not inform Mr. Burgess that he quit. Complainant agrees that he informed Mr. Burgess that he would not work at Hollywood yard anymore. (Tr. 136). Complainant decided he would continue working for Respondent only if he received a transfer. (Tr. 136).

Complainant then met with Ms. Walker. (Tr. 122). Complainant explained the recent incidents and that the crew labeled him a “rat,” so he felt unsafe. (Tr. 122). He agreed Ms. Walker tried to help him with a transfer. (Tr. 122). Complainant states he never told Ms. Walker he quit. (Tr. 122). However, he told Ms. Walker he was not going to work in the Hollywood yard anymore. (Tr. 122). Prior to the meeting, he already had his truck packed because he intended to go back to Sherman that night. (Tr. 137). Complainant states he did not demand a particular location for a transfer, but would only return to work if he received one. (Tr. 123, 137). He did not submit resignation paperwork. (Tr. 123). He then reported the issues to the Value Line per Ms. Walker’s suggestion. (Tr. 125). Complainant went home that night and waited to hear from Ms. Walker. (Tr. 142). Ms. Walker informed him that Respondent did not have a transfer available. (Tr. 140). He believed Ms. Walker tried to help. (Tr. 141).

Complainant agrees that he missed two days of training class. (Tr. 123). He did not attend class because he felt unsafe. (Tr. 123). Complainant stated that if the “rat” incident had not occurred he would have attended training. (Tr. 123). Complainant agrees that he knew the attendance rules and if you fail to show up for a job and do not have an excuse you will be fired. (Tr. 129). Complainant does not remember getting a call reminding him about the class, but agrees the system shows he received a reminder voicemail. (Tr. 143; EX 7). Complainant states he understood the need to be at training, but he thought he was still working with the Value Line for a transfer. (Tr. 144). He did not call his trainer because Ms. Walker knew he would not be at training. (Tr. 144).

Jason Shepherd (Tr. 152-165).

Mr. Shepherd is employed by Respondent as a conductor. (Tr. 152). Respondent hired Mr. Shepherd the same time as Complainant in July 2015. (Tr. 152). They took the training classes together. (Tr. 152). He did not work directly with Complainant a lot as they had different schedules. (Tr. 153). Mr. Shepherd bumped into Complainant from time to time. (Tr.

153) Complainant informed Mr. Shepherd that he was ready to give up. (Tr. 154). Complainant did not say why, but that he needed to talk to management about something that happened in the yard. (Tr. 154). Complainant had his radio in his hand at the time. (Tr. 154). Mr. Shepherd thought Complainant quit. (Tr. 154). Complainant said he was going to turn in his stuff and talk to Ms. Walker. (Tr. 162). He told Complainant to think about things before doing anything. (Tr. 154).

Mr. Shepherd did not know the details of the Edwards incident, but heard Complainant had an issue with a foreman in the yard. (Tr. 155). He heard from others in the yard that someone “was being unsafe and was called on it.” (Tr. 161). He never heard anyone call Complainant a “rat”. (Tr. 155). Mr. Shepherd did not know Complainant felt unsafe. (Tr. 155). Mr. Shepherd testified that management and Mr. Hudspeth often talked about courage to care and safety at meetings. (Tr. 155). Management held meetings twice a week about safety. (Tr. 156). Mr. Shepherd did not believe it was unsafe for someone to just say something to him. (Tr. 164). He agreed that the guys rag on each other, tease each other. (Tr. 164). He believed the crew has his back at Respondent. (Tr. 164).

On the first day of training Complainant missed class. (Tr. 156). Mr. Powell asked if anyone knew where Complainant was and members of the class responded that he quit. (Tr. 156). Mr. Shepherd finished the training program. (Tr. 156). Respondent furloughed him in November 2015. (Tr. 156).

Charles Powell (Tr. 166-201).

Mr. Powell works for Respondent as a Human Resources Technical Trainer in the Transportation Department. (Tr. 166). He instructs new hire, conductor, engineer, and other training classes. (Tr. 166). He started as a trainer in April 2011. (Tr. 167). He first started with Respondent as an Engineering Maintenance trackman back in 2001. (Tr. 167). He has worked as a trackman, truck driver, welder, machine operator and then a foreman. (Tr. 167). He also worked as a switchman/brakeman conductor between 2003 and April 2011. (Tr. 168).

He is originally from Arkansas, but has never been able to get a transfer closer to home. (Tr. 169). Mr. Powell stated that transfers are very hard due to the agreements with seniority and the union. (Tr. 169). He would have to find someone willing to swap with him for a transfer. (Tr. 169). On the seniority roster for the Hollywood yard it lists 489 crewmembers and Complainant was number 486 in terms of seniority. (Tr. 171; EX 18).

Mr. Powell taught the training class on August 24, 2015. (Tr. 172). Complainant failed to show-up for class. (Tr. 172). Attendance is always taken prior to class. (Tr. 172). Complainant did not call Mr. Powell and notify him that he would be absent. (Tr. 173). He had never met Complainant before. (Tr. 173). Complainant received a call reminding him about class. (Tr. 175; EX 7). Mr. Powell asked the class about Complainant and a number of the guys stated Complainant quit. (Tr. 176). Mr. Powell then called to have Complainant removed from the training roster database. (Tr. 177). He also spoke with Mr. Burgess who informed Mr. Powell that Complainant turned in his equipment. (Tr. 177). Mr. Powell also contacted Ms. Walker about Complainant. (Tr. 177).

The attendance rule is if you miss two classes then “you’re history.” (Tr. 180). Mr. Powell had a prior student who called and informed him that he could not make it to class. (Tr. 180). He gave the student an option to resign so that he could reapply later in a different position. (Tr. 180). He had another student who was hospitalized and missed class. (Tr. 181). The employee called and explained the situation and Respondent allowed him to come back to class as they considered the absence excused. (Tr. 181). Mr. Powell agreed that if Complainant had called him and provided a valid reasoning for not attending class he would have worked with him. (Tr. 182). When Complainant failed to call or show-up for class, Mr. Powell issued a Transportation Employment Termination Notice for Complainant. (Tr. 183; EX 8). Mr. Powell testified that had the incident with Mr. Edwards never occurred, he still would have terminated Complainant for failure to attend class. (Tr. 185). If Complainant had attended class, he would not have been terminated. (Tr. 187). Mr. Powell has no knowledge about why Complainant failed to attend class. (Tr. 189).

B. Legal Standard

The purpose of the FRSA is “to promote safety in every area of railroad operations.” 49 U.S.C. § 20101. Under the 2007 amendments to the FRSA, a railroad carrier “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part” to the employee’s engagement in one of numerous protected activities. 49 U.S.C. § 20109(a). The FRSA incorporates the rules, burdens of proof, and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”) whistleblower cases. 49 U.S.C. § 20109(d)(2)(A) and (b)(2)(B)(iii) and (iv) (2014); *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, 2016 DOL Ad. Rev. Bd. LEXIS at 69 n. 166 (ARB Sept. 30, 2016) (*en banc*).

To demonstrate unlawful activity under the FRSA, a complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity was a contributing factor in the adverse employment action. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Samson v. Soo Line R.R. Co.*, ARB No. 15-065, ALJ No. 2014-FRS-091, slip op. at 3 (ARB July 11, 2017). A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer’s decision to take adverse action—any amount of causation will satisfy this standard. *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-154, slip op. at 14–15, 51–55 (ARB Jan. 4, 2016). An ALJ may consider all evidence relevant to this issue, including the employer’s proffered reasons for the adverse action. *Id.* If the complainant satisfies her burden, then the burden shifts to the Respondent to demonstrate “by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1982.109(b); *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 98-99.

Should the Complainant succeed, then the burden shifts to the Respondent to demonstrate by clear and convincing evidence that it would have taken the same adverse employment action

in the absence of the Complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); *Araujo*, 708 F.3d at 157. Clear and convincing evidence shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof for clear and convincing evidence resides in between "preponderance of the evidence" and "proof beyond a reasonable doubt." See *Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco*, ARB No. 13-057 at 7–8.

C. Analysis

Complainant alleges that Respondent terminated him for his protected activity in violation of the FRSA. The undersigned disagrees. For the reasons explained below, the undersigned finds that Complainant did not engage in protected activity when he notified Respondent that coworkers called him a "rat" and refused to work in the yard or attend training. Even if Complainant could prove protected activity, he has failed to establish that his protected activity was a contributing factor in Respondent's decision to terminate his employment.

1. Protected Activity

It is undisputed Complainant engaged in protected activity under § 20109 when he notified management on August 14, 2015 that conductor Edwards failed to follow safety procedures and operated the train unsafely. It is also undisputed that Complainant engaged in protected activity when he refused to continue working with Edwards that day.

The questions of fact, however, center around Complainant's additional allegations of protected activity. Complainant also alleges that he participated in protected activity under 49 U.S.C. § 20109(b)(1)(A) when he notified his supervisors that coworkers called him a "rat" and under 49 U.S.C. § 20109(b)(1)(B) when he refused to continue working in the Hollywood yard. This decision analyzes each of these subsections separately.

a. Protected Activity Under 49 U.S.C. § 20109(b)(1)(A)

Complainant cannot establish protected activity under § 20109(b)(1)(A) based on his complaints of coworkers calling him a "rat". This section states that protected activity includes, "reporting, in good faith, a hazardous safety or security condition." § 20109(b)(1)(A). Although, the term "good faith" is inherently ambiguous, case law has employed a standard requiring that an FRSA complainant both subjectively and objectively believe that the circumstances at issue presented a hazardous safety condition in order to prove protected activity. The Court defined the subjective and objective components respectively when it cited the standard it previously applied in other whistleblower statutes: "A plaintiff must 'show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation.'" *Hernandez v. Metro-North Commuter R.R.*, 576, 580 (2nd Cir. 2015). "Objective reasonableness in such a case is 'based on the knowledge

available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (internal citations omitted.)

i. Subjective Belief

Whether Complainant exercised good faith and had a subjective belief are low standards. Essentially, if Complainant believed, himself, that the situation constituted a hazardous condition then he has met this prong. Complainant continuously testified that he believed working at the yard was unsafe. He based his fears on an employee calling him a “rat” and whispers from others. (Tr. 117, 118-119). He believed the crew did not have his back and would not help him if he needed them. There is no evidence in the record to refute Complainant’s testimony about his subjective fear. Therefore, I find Complainant has shown he subjectively believed he was reporting a hazardous condition.

ii. Objective belief

Although Complainant has proven a subjective belief, he must also prove by a preponderance of the evidence that a reasonable person in his position would have believed they were in imminent harm based on the statements of the other crewmembers. In evaluating the protected activity at issue, the fact-finder must determine whether, among other things, a complainant’s belief that a hazardous condition existed was objectively reasonable; that is, whether a person in the same circumstances with the complainant’s knowledge, training, and experience would have made the same decision. Subjective belief, by itself, will not suffice. *See Jacek v. Samson*, ALJ No. 2014-FRS-091, slip op. at 4 (May 29, 2015); *aff’d* ARB No. 15-065 (July 11, 2017).

I am not convinced that a reasonable person in Complainant’s situation would find the “rat” comment and the other whispers from coworkers a hazardous condition. I find that the statements constituted neither a hostile work environment nor a hazardous work condition. The record is devoid of evidence to support the allegations of a hazardous condition and imminent harm. While Complainant believed an unsafe condition existed as he interpreted the statements as no one having his back, Walker, Hudspeth, Burgess and Shepherd all testified that they believed Complainant’s “fears” were unreasonable. (Tr. 53, 83, 105, 164). Complainant presented no witnesses that supported his allegations. There is no corroborating evidence in the record. Furthermore, management investigated all of the complaints, Complainant did not work with Edwards or the individual who called him a rat again, and management held multiple safety meetings reiterating the need to come forward when issues arise and to have the back of coworkers. Complainant was also getting ready to start classroom training for two weeks and would not be on a train with the other crewmembers. I can see where there could be situations where offensive or threatening statements by coworkers could rise to the level of a hazardous condition, but the facts do not support a finding in this case. There is not enough evidence here to support the connotation that calling someone a “rat” is a hazardous work condition, based on the facts before me, or that a reasonable person in that situation would find it one.

I do not find that Complainant met his burden of showing that his alleged belief was objectively reasonable. Because Complainant must demonstrate both a subjective and objective belief and failed to meet his burden, the undersigned finds that Complainant did not engage in protected activity as defined by 49 U.S.C. § 20109(b)(1)(A).

b. Protected Activity Under 49 U.S.C. § 20109(b)(1)(B)

Finally, Complainant's refusal to work does not constitute protected activity under § 20109(b)(1)(B). Employee refusals to work must meet the conditions of § 20109(b)(2) to receive protection under the FRSA. § 20109(b)(1)(B)¹.

Sections 20109(b)(1)(B) and (2) of the Act, and 29 C.F.R §§ 1982.102(b)(2)(i)(B) and (ii), prohibit a railroad carrier from taking adverse action against an employee because he refused to work when confronted by a hazardous safety condition related to the performance of the employee's duties, provided: a) the refusal was made in good faith with no available reasonable alternative to refusal; b) a reasonable person in the circumstances then confronting the employee would conclude – the hazardous condition presented an imminent danger of death or serious injury and the urgency of the situation did not allow sufficient time to eliminate the danger without refusal; and c) the employee, where possible, notified the railroad carrier of the existence of the hazardous condition; and his intention not to perform further work unless the condition is corrected immediately.

The facts show that a coworker called Complainant a "rat" and thereafter he heard whispers from others. Complainant testified that he felt no one had his back. Complainant then took his radio and told management that he could not do it anymore and demanded a transfer. He notified multiple people that he would not work at the Hollywood yard and wanted to a transfer. He then left and never returned despite the fact that he was scheduled for classroom training.

¹ Section 20109(b)(2) provides: A refusal is protected under paragraph (1)(B) and (C) if—

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; (ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

First, as I have already discussed above, I find the events leading up to Complainant's refusal to work, i.e. being called a "rat" and whispers from other crewmembers, do not rise to a level of imminent harm providing protection under the Act. Furthermore, I find that an objectively reasonable person also would not have concluded that they had no other recourse available other than refusing to work.

Complainant complained to management about the comments and Respondent promptly investigated the situation. Mr. Hudspeth immediately held a safety meeting with the crew, talked to crewmembers individually, and questioned the engineer and conductor that allegedly made the comment. While some of the employees acted inappropriately, they did not act in a way that would cause a reasonable person to believe a harmful situation existed. Mr. Hudspeth did not find the environment to be unsafe. (Tr. 83).

Complainant, however, decided he no longer wanted to work at the Hollywood yard and demanded a transfer. Complainant did not work with the crewmembers who called him a "rat" again. In fact, Complainant was scheduled to begin classroom training. He was not going to be on a train for the next couple of weeks. The facts do not show that Complainant had no other alternative but to refuse to work in the Hollywood yard. There is no evidence of threats of harm directed at Complainant that would have prevented him from attending the classroom training.

Accordingly, I find that Complainant is unable to prove that a reasonable person in circumstances then confronting Complainant would have concluded both that a hazardous condition presented an imminent danger of death or serious injury, and the urgency of the situation did not allow sufficient time to eliminate the danger without refusing to work. His refusal to work did not constitute protected activity under § 20109(b)(1)(B). Since Complainant is unable to establish that his conduct was protected activity under the FRSA, his claims related to these issues must be dismissed. Therefore, the only protected activity proven by Complainant is his initial complaint involving Edwards. Furthermore, even if he had established the existence of protected activity, Complainant cannot demonstrate that the protected activity contributed to an adverse action.

2. Adverse Action

a. Whether Being Called A "Rat" Is an Adverse Action

Complainant alleges that he suffered two adverse actions. He asserts calling him a "rat" constitutes an adverse action in addition to his actual termination. Adverse actions under the Act refer to "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, No. 14-047, 2015 WL 9257754 at *3 (ARB Nov. 24, 2015) (citing *Williams v. Am. Airlines, Inc.*, No. 09-018, 2010 WL 553815 at *8 (ARB Dec. 29, 2010)). "[T]ermination, discipline, and/or threatened discipline" are sufficient to establish an adverse action under the Act. *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, 2017WL 4466937 at *6 (ARB Sep. 29, 2017) (citing *Vernace v. Port Auth. Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 n. 4 (ARB Dec. 21, 2012)). While the triviality of an act is a question of fact, acts that are

sufficient to dissuade a reasonable worker from raising a retaliation claim are assuredly non-trivial. *See Fricka*, 2015 WL 9257754 at *3 (internal citations omitted) (noting adverse actions under the FRSA are more expansive than adverse actions under Title VII); *Stallard*, 2017 WL 4466937 at *6 (noting the Title VII standard is higher than that required by the FRSA).

On review of the situation, however, I am not convinced that calling Complainant a “rat” is sufficient to be an adverse employment action under the Act. No discipline was threatened, his position was not changed, and he was moved so he did not have to work with Edwards or the other crewmembers who called him a “rat”. Respondent took action to remedy the situation. Management held a safety meeting and supported Complainant’s right to make a complaint. Complainant had no material adverse change in his terms and conditions of employment. Therefore, I find calling someone a “rat” in this instance does not constitute an adverse action.

b. Termination or Resignation

Complainant asserts that Respondent terminated his employment. Respondent asserts that Complainant resigned. Respondent hired Complainant to work in the Shreveport area as a trainee. (Tr. 14). On August 13, 2015, Complainant emailed Ms. Walker and requested either a transfer closer to Dallas or a furlough. (EX 11; CX 6). Thereafter, on August 14, 2015 Complainant observed Edwards working unsafely. (Tr. 113). Complainant notified management and he was assigned to another conductor for the rest of the shift. (Tr. 113). Complainant did not have to work with Edwards again. (Tr. 55). Then on Tuesday August 18, Complainant’s next scheduled work day, he states crewmembers called him a “rat” and he felt unsafe because no one had his back. (Tr. 133). On August 20, Complainant informed Mr. Hudspeth about the events that occurred two days prior and that he felt no one had his back. (Tr. 66). Mr. Hudspeth informed him that he would not tolerate those types of actions and held a safety meeting. (Tr. 67, 82). Complainant informed Mr. Hudspeth that he no longer wanted to work at the Hollywood yard.

Complainant then took his radio and turned it in to Mr. Burgess, stating he was no longer going to work at Hollywood yard since he had been labeled a “rat”. (Tr. 121, 122). Mr. Burgess urged him not to do anything and to talk to Ms. Walker. At the time Complainant had his truck packed and ready to go back home. (Tr. 137). Complainant urges that he never said he quit, but agrees he told everyone he was not going to work in the Hollywood yard anymore, the location Respondent hired him to work. Ms. Walker asserts that she urged Complainant not to quit and she would look into a transfer. (Tr. 36). Ms. Walker emailed Complainant on August 23 to notify him a transfer was not available and asking if he wanted resignation paperwork. (EX 12). Then on August 26 Complainant emailed Ms. Walker telling her he does not want to resign. (CX 6). She then emailed Complainant again telling him a transfer is not available. (EX 13). Ms. Walker essentially tells Complainant there is nothing else she can do for him and urges him to reach out to the Value Line. (CX 5; EX 13, 16). Complainant requests a transfer again on September 14th. (CX 6). During this time, Complainant did not show-up for his scheduled training.

In the meantime, on August 24, 2015, Complainant was scheduled for training with Mr. Powell. (Tr. 172). When Complainant did not attend training, Mr. Powell asked the trainees if they had information regarding Complainant's whereabouts. They responded that he quit. Mr. Powell talked to Mr. Burgess who stated Complainant turned in his equipment. (Tr. 177). Mr. Powell then talked to Ms. Walker. It is unclear exactly what Ms. Walker told Mr. Powell about Complainant. The next day when Complainant failed to show up for class again, Mr. Powell issued a notice of termination. (Tr. 183; Ex 8). Two unexcused absences constitute an automatic termination. (Tr. 180). Complainant never called saying he could not attend class. 183).

The situation here is not typical. All of the facts at first, point to a conclusion that Complainant quit and is claiming a constructive discharge. He informed his supervisors he was no longer going to work in the yard, he turned in his radio, packed his truck, he left work, never returned, and was a no-call no-show on his next scheduled days of employment. If these were the only facts, then I would find Complainant resigned and based on his lack of protected activity, find no constructive discharge occurred.

However, the actions of Respondent's management following Complainant's actions reveal Respondent terminated Complainant. If Complainant quit when he turned in his equipment and when speaking with Ms. Walker, why did she continue to interact with him about a transfer? Ms. Walker agreed that as of August 23 and 26, Complainant had not resigned. (Tr. 36). Respondent notes in its post hearing brief that Respondent terminated Complainant on August 26, 2015. (Respondent's brief, p. 2). In addition, if he resigned, why did Mr. Powell still have Complainant listed on the class roster and expect him to appear for class. While I agree employees cannot just fail to show up for work and give employers ultimatums on where they get to work, the actions by management illustrate that Respondent continued to treat Complainant as an employee after he left Ms. Walker's office and then terminated his employment when he failed to show up for class. Accordingly, I find Complainant suffered an adverse employment action.

3. Contributing Factor

To succeed on an FRSA claim, Complainant must also prove that his protected activity was a contributing factor to the adverse employment action. 49 U.S.C. §§ 20109(a), (b); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). I have already determined that Complainant's complaints about the "rat" comment and refusing to work due to the comment are not protected activity. Therefore, I must address only whether Complainant's complaints regarding Edwards and his refusal to work with Edwards, were a contributing factor in his termination.

A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action; any amount of causation will satisfy this standard. *Palmer*, ARB No. 16-036 at 14-15, 51-55. An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. *Id.* As the Board in *Palmer* explained, in a

case of retaliatory dismissal under the Act, the administrative law judge must first answer the following question: “did the employee’s protected activity play a role, any role, in the adverse action?” *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 91. On that question, the Board specified that the Complainant has the burden of proof, by a preponderance of the evidence, to show “based on a review of all the relevant, admissible evidence, that it is more likely than not that” the Complainant’s “protected activity was a contributing factor in the employer’s adverse action.” *Id.* This is a very low standard for the Complainant to meet; the factor need not be significant, motivating, substantial, or predominant, it just needs to be a factor. *Id.* at 92-93.

Complainant, moreover, may meet his burden with direct or circumstantial evidence. Direct evidence is evidence that conclusively links the protected activity and the adverse action. *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5 (ARB Jan. 30, 2008). Alternatively, Complainant may provide circumstantial evidence by proving by a preponderance of the evidence that retaliation was the true reason for his termination. For example, Complainant may show that the Respondent’s proffered reason for termination was not the true reason, but instead “pretext.” *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If Complainant proves pretext, it may be inferred that his protected activity contributed to the termination. (*Id.*)

Under the first approach, Complainant must produce evidence that directly links his protected activities and termination. The ARB has described direct evidence as “smoking gun” evidence that “conclusively links the protected activity and the adverse action and does not rely on inference.” *Williams v. Domino’s Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). Having reviewed the record, I cannot find any evidence of this nature. Nor, it should be pointed out, does the Complainant assert any evidence of this nature.

Proof of animus towards protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers, supra*, slip op. at 27. “[R]idicule, openly hostile actions or threatening statements,” may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996.). While Complainant has asserted coworkers called him a “rat,” there are no statements or evidence of harassment on the part of management or that management allowed a situation of harassment to continue. The opposite occurred here. Management investigated the situation, removed Edwards from service, Complainant did not have to work with Edwards again, and management continued to investigate Complainant’s additional complaints and work with him even after he left work and did not return.

Temporal proximity may also support an inference of causality. The use of temporal proximity as circumstantial evidence to establish retaliatory intent was well established prior to the Board’s decision in *Palmer, supra*. Even though well established, temporal proximity was never considered dispositive of the issue. Before *Palmer*, the Board held that although an inference of causation based on temporal proximity could be decisive, it was not dispositive, as the complainant was still required to prove each element of a *prima facie* claim by a preponderance of the evidence. *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39 (ARB Feb. 23, 2011). Further, the Board had held that an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ

No. 2005-STA-24 (ARB Jan. 31, 2007). For example, where a complainant violated the respondent's safety rules on the day of his termination, the Board held that the intervening safety-rule violation had negated the inference of causation raised by temporal proximity. *Id*

In *Palmer*, the Board revisited the issue of temporal proximity as part of its general reworking of the AIR 21 analysis, which is to say, jettisoning the concept of a *prima facie* case. The language is worth quoting at length.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, generally, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a *per se* knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Palmer, 2016 DOL Ad. Rev. Bd. LEXIS at 96-97.

Here, there is an element of temporal proximity. Complainant complained about Edwards' unsafe actions on August 14, 2015. Twelve days later Respondent terminated Complainant's employment. However, based upon a review of all the relevant evidence presented by the parties, Complainant has failed to establish that temporal proximity is sufficient to support an inference of retaliation. Complainant's intervening failure to attend scheduled classes resulted in his termination. Complainant knew about the training, did not attend, and failed to call anyone and let them know he would not attend. Mr. Powell terminated Complainant based on the attendance policy. While he investigated Complainant's whereabouts, he had already decided to terminate Complainant. I have already determined that Complainant's failure to appear for training was not protected activity, as he had no threat of harm during classes. Therefore, while his complaints about Edwards occurred close in time to his termination, I do not find his termination suspect based on this factor.

Complainant has presented no other evidence connecting his actual protected activity to his termination. Complainant agreed that he knew failure to attend training without an excuse would end in termination. (Tr. 129). Complainant understood he was supposed to attend training. (Tr. 144). There is no evidence in the record that Mr. Powell took any of the events surrounding Edwards or thereafter into consideration when terminating Complainant. Mr. Powell testified that had Complainant attended class, he would not have terminated him. (Tr. 187). Mr. Powell had no knowledge of why Complainant failed to attend class at the time. (Tr. 189).

Accordingly, I find Complainant has failed to prove that his protected activity was a contributing factor in his termination.

4. Respondent Would Have Terminated Complainant Absent Protected Activity.

Even assuming, *arguendo*, that Complainant had demonstrated by a preponderance of the evidence that his protected activity contributed to the Respondent's decision to terminate him, the Respondent could still succeed on its motion if it presents clear and convincing evidence that it would have terminated him regardless. As the Board has explained, "[t]he second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?" *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 91-92.

Respondent has proven that it would have terminated Complainant regardless of whether he engaged in protected activity. It is undisputed that Mr. Powell would not have terminated Complainant if he had attended class or at least called in with a valid excuse. (Tr. 187). The evidence shows that Respondent has terminated other employees for similar reasoning who have not complained about safety issues. It is Company policy that two unexcused absences result in termination. The evidence further shows that Respondent had a legitimate, nonretaliatory reason for terminating Complainant.

CONCLUSION

For the reasons explained above, Complainant has failed to demonstrate that Respondent violated the FRSA by taking adverse employment action against him on the basis of his protected activity.

ORDER

Complainant is not entitled to relief under the FRSA. Complainant's complaint is hereby **DISMISSED**.

SO ORDERED.

JOSEPH E. KANE
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, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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