



**Issue Date: 03 August 2018**

CASE NO.: 2016-FRS-00085

*In the Matter of:*

**ROBERT POWERS,**  
*Complainant,*

vs.

**UNION PACIFIC RAILROAD  
COMPANY,**  
*Respondent.*

## **DECISION AND ORDER DENYING COMPLAINT**

This is a claim arising under employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“FRSA” or “9/11 Act”). Robert Powers (“Complainant”) seeks recovery from Union Pacific Railroad (“Union Pacific” and “Respondent”) for retaliation resulting in his termination on July 24, 2014.

### **I. PROCEDURAL HISTORY**<sup>1</sup>

I held a formal hearing on this case in Eugene, Oregon on March 5, 2018, at which both parties were afforded a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

At the hearing, Mr. Powers and Union Pacific offered Joint Exhibits (“JX”) 1 through 31, which I admitted into evidence without objection. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

### **II. ISSUES**

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<sup>1</sup> In this Decision, I use these references: “TR” for the official hearing transcript; “CX” for a Complainant’s exhibit; and “RX” for a Respondent’s exhibit.

The issues to be addressed include:

1. Whether Mr. Powers engaged in protected activity within the meaning of the FRSA.
2. Whether Union Pacific knew Mr. Powers engaged in protected activity within the meaning of the FRSA.
3. Whether Mr. Powers meets the burden of proving his protected activity was a contributing factor in the decision to terminate his employment.
4. Whether Union Pacific establishes by clear and convincing evidence that it would have terminated Mr. Powers' employment in the absence of any protected activity.
5. The damages, if any, to which Mr. Powers may be entitled.

### **III. SUMMARY OF THE EVIDENCE**

#### **A. Alleged Protected Activity**

##### *a. 2007 Injury*

Mr. Powers began working for Union Pacific in December of 1996 (TR 26). On May 18, 2007, Mr. Powers reported a personal injury to his supervisor (TR 27 to 28). He strained his hand and thumb while removing a saw arm. Mr. Powers continued to work for Union Pacific with restrictions during treatment for his injuries (TR 28). Five to six months after the injury, Union Pacific placed Mr. Powers on medical leave (TR 28).

##### *b. 2008 FRSA Action*

By May 2008, Mr. Powers was on extended medical leave and pursuing a Federal Employers Liability Act ("FELA") claim against Union Pacific. He told a Union Pacific Claims agent he was doing some gardening and "nothing major" while he was unable to work. Union Pacific suspected Mr. Powers was not being honest about his restrictions, and hired John Iguchi from ALI, Inc., to follow and record Mr. Powers (TR 29). Video surveillance showed Mr. Powers building a planting bed, digging with a shovel, operating a hand drill, and hauling heavy ammunition boxes to a gun show. Union Pacific terminated Mr. Powers for dishonesty under Rule 1.6 in September, 2008, and Mr. Powers brought an action under the FRSA with the Office of Occupational Health and Safety ("OSHA") arguing he was being terminated for filing his injury report in May 2007. *Powers v. Union Pacific, R.R. Co.*, ALJ Case No. 2010-FRS-00030 (Jan. 15, 2013). He had no discipline on his record up to this point (TR 27).

Mr. Powers' union appealed his termination decision under the Collective Bargaining Agreement ("CBA"). On August 25, 2009, a National Mediation Public Law Board found Union Pacific failed to prove a violation of Rule 1.6 by substantial evidence and ordered Union Pacific to reinstate Mr. Powers and remove that discipline from his record. He received back pay

for missed time, (TR 30), and returned to work in January of 2009 (TR 31). In 2010, Mr. Powers won his appeal through the CBA, and returned to work.

As to Mr. Powers' FRSA case, Administrative Law Judge Steven B. Berlin found in favor of Union Pacific. Mr. Powers appealed, and ultimately lost before the ARB. *Powers v. Union Pacific, R.R. Co.*, ALJ Case No. 2010-FRS-00030 (Jan. 15, 2013). Mr. Powers has appealed the ARB's decision to the United States Court of Appeals for the Ninth Circuit and the case is still pending.

## B. 2014 Termination

### a. *Timesheets*

In September, 2013, Union Pacific posted a job for water service foreman. Mr. Powers bid on the job and received it, but his supervisor, Keith Wagner, determined no one available was qualified for the position, which requires extensive plumbing experience (TR 156 to 158). A water service foreman is a higher-paid position requiring much more experience than a water service mechanic (TR 73, 74). Mr. Willard Smith, a witness, took 25 years to obtain foreman status (TR 76). Mr. Powers had no professional plumbing experience (TR 65 to 66). Mr. Wagner told Mr. Powers he did not have the necessary experience (TR 67 to 68). He removed the posting and Mr. Powers won a bid as a water service mechanic, which requires minimal plumbing experience (TR 157).

Mr. Powers began his job as a water service mechanic. Much of his time was spent training (TR 168 to 169). Among other duties, he repaired frozen pipes, a duty he believes only a water service foreman can do (TR 53). Mr. Powers continued to enter the title of foreman into his timesheet (*Id.*). For several months, his time roll auto-populated as a foreman, but in March of 2014 it began to populate as a mechanic (TR 55 to 56). After this change, he began to change it manually to foreman, but no one spoke to him about the change (TR 56). Mr. Wagner approved the time sheets each time, but he could only see the amount of hours Mr. Powers worked, not the rate of pay or title (TR 131, 132, 160).

The CBA between Union Pacific and Claimant's union allows employees to be paid at a higher rate of pay when they temporarily fill in for the duties of a foreman. Rule 27 of the CBA states "[w]hen an assigned employee is required to fill the place of another employee receiving a higher rate of pay, he will receive the higher rate; but if required to fill temporarily the place of an employee receiving a lower rate, his rate will not be changed." (JX 21, p. 54). The collective bargaining agreement between Mr. Powers' union and Union Pacific states that time discrepancies should be brought to the attention of the employee and disallowed (JX 21, p. 71). Mr. Powers never received any written notice about discrepancies after he accepted the water service mechanic position and began to enter his hours as a foreman (TR 145).

b. *Willard Smith's Complaint*

On May 9, 2014, Union Pacific Water Service Foreman Willard "Bill" Smith made a verbal complaint to Union Pacific Risk Management Representative Phillip Houk about Mr. Powers (TR 88 to 89). Mr. Smith believed Mr. Powers was violating company rules by doing personal business during shifts, and leaving work early while collecting a full day's pay. Mr. Smith also believed Mr. Powers was using the company vehicle to do personal tasks (*Id.*). No one told Mr. Smith to complain to Mr. Houk – he believed Mr. Powers' behavior was inappropriate (TR 88). He did not know where Mr. Powers went, but he would disappear from his assigned work site (TR 105). Union Pacific's law department hired a third-party to investigate the matter. Mr. Powers admits he might have spent time in his truck and perhaps leaving to check out of his motel, but denies failing to do his job or being unreachable (TR 63 to 65).

Mr. Houk believed he had an obligation to report potential abuses or violations of ethics policies to Director of Risk Management Chuck Salber (TR 115 to 116, 119). As of May 9, 2014, the day of the complaint, Mr. Houk did not know Mr. Powers and did not know of his 2007 injury, FELA claim, or pending whistleblower claim (TR 116 to 117).

c. *The Investigation*

Once again, private investigator Jon Iguchi conducted surveillance on Mr. Powers. He observed Claimant on May 22, 28, and 29, 2014 (JX 3). On May 22, Mr. Powers left the yard at 11:30 AM, five and a half hours earlier than his normal 5:00 PM clock out time. He also used the company truck to pick up his children's bicycles at his ex-wife's home that day (TR 35 to 36).

On May 28, Mr. Powers took his co-worker Kyle Ritter, an employee assigned to assist him that day, on a number of errands. In the morning, Mr. Powers took Mr. Ritter to his house where they spent over a half hour picking up a tool (TR 42 to 43; JX 3). Mr. Powers did not explain why he took Mr. Ritter with him, and Mr. Ritter did not testify. The entire errand took 45 minutes (JX 3).

Mr. Powers returned to the yard a few minutes later and left again to visit a motorcycle store and the DMV (JX 3; TR 44). Mr. Powers asserts he wanted to get a class A license for work; however, no one gave him express permission to leave work to do so (TR 43). The motorcycle store was across the street (TR 44). Kyle Ritter also accompanied Mr. Powers on these errands (TR 45 to 46). Mr. Powers then stopped at a different DMV on the way back to work (TR 44 to 46). He later left work at 5:01 PM (JX 3).

On May 29, Mr. Powers was at work at 5:40 AM, 50 minutes earlier than his start time (TR 49). That morning, he was at a restaurant with Tony Cardwell, their local union representative who is not a Union Pacific Employee (TR 49). They spoke for 45 minutes and Mr. Powers returned to work (JX 3). Mr. Powers called this a safety “stand-down” meeting, in which Mr. Cardwell could explain safety issues over breakfast (TR 49 to 50). Mr. Powers left work at 4:05 PM (JX 3). Mr. Powers believes he was entitled to leave at that time because he arrived at work fifty minutes early (TR 50). Over those three random days of surveillance, Mr. Iguchi observed Mr. Powers spend time at his residence, visit the DMV during work hours, transport personal bicycles in his company truck, and visit a motorcycle-parts store during working hours (*Id.*). He also saw Mr. Powers eat breakfast on company time with individuals who did not work for Union Pacific and leave work earlier than his scheduled stop time (JX 3).

Union Pacific, according to Mr. Wagner, is entitled to ten hours of work, four days a week out of an employee with Mr. Powers’ schedule (TR 161 to 162). Mr. Wagner did not approve of Mr. Powers personal errands including his visit to the DMV. He only discovered their existence during the investigation (TR 157 to 158).

James Hill, Director of Bridge Maintenance, was the charging officer in Mr. Powers’ disciplinary proceedings (TR 124). He might have known Mr. Powers’ had a lawsuit “for something” but he did not know any details and he could not remember anything about an injury in 2007 (*Id.*).

After reviewing the surveillance package, Mr. Hill also looked at Mr. Powers’ time entries, and discovered he was receiving pay as a foreman rather than a mechanic (TR 125 to 126). Mr. Hill made a call to the Values Line, an ethics hotline for Union Pacific (TR 126, 177 to 178). Union Pacific’s Corporate Audit Department conducted the formal investigation, and the assigned auditor found Mr. Powers violated Union Pacific’s General Code of Operating Rules 1.6 (Conduct: Dishonesty), 1.19 (Care of Property), and 1.13 (Reporting and Complying with Instructions). Shane Keller, the Regional Vice President of the Western Region, removed Mr. Powers from service and recommended termination pending a union hearing (JX 8; JX 15). Mr. Hill issued charge letters to Mr. Powers and Mr. Ritter (TR 127; JX 8; JX 9). Mr. Hill accused Mr. Powers of changing his pay code, performing non-Union Pacific work related activities on company time, and using a company vehicle for personal reasons (TR 127 to 128; JX 8).

Union Pacific conducted a formal investigation hearing on July 9, 2014 for both Mr. Powers and Mr. Ritter (JX 6). The company found Mr. Powers used a company truck to perform personal errands on company time, claimed 10-11 hours of work on days he actually worked as little as five hours, and manipulated his pay records to receive a higher level of pay than he was otherwise entitled to as a water service mechanic (JX 8).

David Wickersham, the Chief Engineer for Union Pacific's Western Region, made the ultimate decision to terminate Mr. Powers (TR 132 to 133). He believed Union Pacific would not allow the Vice Chairman of the Union to have a safety sit down meeting on company time (TR 197 to 198). He felt like there was enough evidence in the transcript of the disciplinary hearing and accompanying exhibits to warrant dismissing Mr. Powers (TR 198 to 200). Mr. Wickersham was aware of Mr. Powers' personal injury and legal claims, but he does not believe that played a role in his decision (TR 200)

Mr. Wickersham also made the decision to terminate Mr. Ritter. However, the union contacted Mr. Wickersham, and asked him to be lenient on Mr. Ritter (TR 199 to 201). Mr. Wickersham reinstated Mr. Ritter without back pay because he accepted responsibility for his actions and because the union asked for leniency (TR 200 to 201). The union did not make a similar request on behalf of Mr. Powers (TR 203).

### C. Wages

Mr. Powers made about \$50,000 a year in 2014 (TR 58 to 59; JX 26). In October of 2016, he began working for UPS in a seasonal position until December 31, where he made \$18 an hour (TR 59 to 60). From there, he worked temporary jobs welding, pipe-fitting, and in construction where he made \$20 to \$25 an hour (TR 60).

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The FRSA prohibits rail carriers from retaliating against employees engaging in safety-related protected activities. 49 U.S.C. § 20109. A rail carrier may not discharge or in any other way discriminate against an employee who lawfully and in good faith notifies or attempts to notify the railroad carrier of a work related personal injury or illness. 49 U.S.C. § 20109(4).

According to statute, FRSA actions are governed under standards of proof enumerated in 49 U.S.C. § 42121(b), better known as AIR21. 49 U.S.C. § 20109(d)(2)(A). To prevail, a complainant must make a prima facie case showing (1) she engaged in protected activity, (2) the employer knew or suspected, actually or constructively she engaged in protected activity, (3) she suffered an adverse action, and 4) the circumstances raise an inference the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(B)(i). However, the complainant may not recover if the employer demonstrates by clear and convincing evidence it would have taken the same unfavorable personnel action in the absence of that behavior. 49 U.S.C. § 42121(iv).

### a. *Protected activity*

Under 49 U.S.C. § 20109, it is protected activity to file a complaint applicable to railroad safety or security. 49 U.S.C. § 20109(a)(3). Notifying the railroad carrier of a work-related inju-

ry is also protected activity. 49 U.S.C. § 20109(a)(4). Mr. Powers claims he engaged in protected activity when he reported his injury in 2007 and filed his FRSA claim in 2008 and Union Pacific does not dispute this claim (Claimant's Closing Brief, p. 10). I find Mr. Powers engaged in protected activity when he reported his injury in 2007 and filed his FRSA claim in 2008.

*b. Knowledge*

The employer must know or suspect, actually or constructively the employee engaged in protected activity. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); *see also* 49 U.S.C.A. § 42121(B)(i). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity. 49 U.S.C. § 42121(a). Since Chief Engineer David Wickersham testified he knew of Mr. Powers' 2007 injury when he made the ultimate decision to terminate Mr. Powers, Union Pacific had knowledge of Mr. Powers' protected activity (TR 198 to 199).

*a. Contributing factor*

"A contributing factor is one which, alone or in combination with other factors, has affected the outcome of the employer's decision." *Mercier v. United States Department of Labor*, 850 F.3d 382, 388 (8th Cir. 2017). The contributing factor standard does not require the employee to conclusively demonstrate the employer's retaliatory motive, but it does require the employee prove "intentional retaliation prompted by the employee engaging in protected activity." *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

Mr. Powers' case fails because he does not provide enough evidence to show his protected activity contributed to the adverse employment action. Union Pacific does not dispute Mr. Powers engaged in protected activity when he reported his injury in 2007 or filed his complaint in 2008. Nor does Union Pacific dispute whether Mr. Powers suffered unfavorable personnel action when Union Pacific terminated him on July 24, 2014. However, Union Pacific argues Mr. Powers' protected activity did not contribute to Union Pacific's decision to terminate Mr. Powers.

Mr. Powers asserts he engaged in behavior common to other Union Pacific employees, but Union Pacific used these rule violations as pretext to terminate Mr. Powers in part because of his protected activity (Claimant's Closing Brief, p. 10 to 19). He believes the temporal proximity between his protected activity and the adverse employment action supports this theory (*Id.*). However, Mr. Powers fails to show Union Pacific employees regularly engaged in the same kind of behavior as his without suffering punishment. He fails to account for the six-year gap of any adverse action between his protected activity and his July 24, 2014 termination. Finally, he also fails to account for his behavior acting as an intervening event, cutting off the temporal proximity between the adverse action and his protected activity.

- a. *Mr. Powers fails to prove Union Pacific allowed its employees to run personal errands on company time using company vehicles.*

First, Mr. Powers fails to prove it was common practice for employees to use company vehicles to run personal errands on company time. His sole support for this assertion is his own statements made during testimony and two vague affidavits. Mr. Mike Anzo and Mr. Paul Henshaw provided the affidavits, but they lack details (JX 30; JX 31). Neither person testified at the March 5, 2018 hearing, so neither party had a chance to inquire further. The affidavits do not provide enough detail to determine whether Mr. Powers' situation was similar to either Mr. Henshaw or Mr. Anzo. Neither affidavit specifies whether these licenses to break rules apply to someone of similar rank or location as Mr. Powers. Mr. Anzo does not discuss running personal errands at all.

Mr. Henshaw writes Union Pacific tolerated personal errands during the work day, but what he describes is not what Mr. Powers is accused of doing. Mr. Henshaw says it was common practice for employees to leave work a few minutes early or stop on the way to work to perform personal errands even though they were driving company vehicles. He says it was common to go out to lunch or run quick errands (JX 31). The accusations against Mr. Powers are in different league. Mr. Powers is accused of wasting hours of company time on personal errands. In addition, Mr. Henshaw does not explain who he worked with, and Mr. Wagner and Hill have never known him (TR 138; TR 166). Even if he were discussing similar behavior to Mr. Powers, there is insufficient detail to determine whether his opinion is relevant.

Even Mr. Powers' testimony lacks sufficient detail. At the hearing, he asserted he and his fellow employees would routinely run errands during the course of the day (TR 36; TR 62 to 63; TR 69). Mr. Powers believed it was common practice for employees to run personal errands during the day when there is no pressing business. He thought of himself as being on call during these times (TR 36). Mr. Powers does not elaborate how often Union Pacific employees would do personal business and he does not elaborate on the context of any of these trips. Nor does Mr. Powers elaborate on whether these trips occurred during private time or company time. It is not enough to contend it was common to leave a work site. The burden is on Mr. Powers to prove employees regularly left work sites in his area using company vehicles without permission to run personal errands in the same manner as himself. He has failed to meet this burden.

On the rare occasion Mr. Powers provides specific details, he does not help his cause. Mr. Powers testified Union Pacific encourages its employees to upgrade their licenses and that there is an agreement between Union Pacific and its employees that they may do so on company time (TR 45). The evidence indicates, however, this policy does not exist. No one told Mr. Powers to go to the DMV (TR 67). A Class A upgraded license is not required of a water service mechanic (TR 161). The record does not indicate Union Pacific gave its employees permission to leave work at any time to upgrade licenses they would not need for their jobs.

Union Pacific's evidence is more persuasive. Mr. Powers' superiors testified he was not allowed to engage in such behavior. Mr. Wickersham terminated a manager for using company resources to move playground equipment (TR 207). James Hill, the charging officer, accused Mr. Powers of breaking the rules by using a company vehicle for personal reasons (TR 127 to 129). Mr. Wagner, believed Union Pacific was entitled to ten hours of work from Mr. Powers (TR 161 to 162). At least one of his peers also testified employees were not to use company trucks for personal use. Mr. Smith moved a personal motorcycle and his manager formally told him not to do it again (TR 138, 166). The superior number of witnesses who testified employees may not run personal errands on company time using company vehicles makes Union Pacific's position more persuasive.

*b. Mr. Powers fails to prove there was a "gentlemen's agreement" between Union Pacific and its employees which encouraged them to leave work early instead of earn overtime.*

Mr. Powers fails to meet the burden of proving employees could leave earlier than their shift allowed if they worked extra hours at an earlier time, even without notifying his supervisors. To justify his position, Mr. Powers relies on his testimony and Mr. Anzo's affidavit.

Mr. Powers' argument does not succeed for two reasons. First, Mr. Powers fails to prove the existence of the policy itself. He believes there is a "gentlemen's agreement" between management and employees in which employees would trade accrued overtime for the privilege of leaving work early. (TR 38 to 39). No other witness testified such a policy existed. Mr. Wagner, Mr. Powers' supervisor testified it did not (TR 161 to 162). The sole piece of evidence besides Mr Powers' testimony is Mr. Anzo's vague affidavits. Mr. Anzo wrote it was common practice for Union Pacific workers to make agreements with their supervisors to leave early instead of claim overtime worked. This statement is not detailed enough for me to determine whether the policy existed or whether it was relevant to Mr. Powers' situation. Mr. Powers was leaving work hours earlier than his ordinary schedule dictated. The affidavit does not specify quantity of time. Nor does it make clear what positions were allowed to leave early at what locations. Mr. Powers fails to meet his burden of proving the policy existed.

Even if the policy existed, Mr. Powers fails to prove he followed it. He left work early on May 22, according to himself, because he worked extra hours in the previous week, but did not provide any evidence to show he did so (TR 38). He has not introduced any evidence of any agreement with his supervisor.

Mr. Powers' superiors and coworkers did not appreciate his efforts to leave work early, indicating there was no such policy. His tendency to disappear annoyed Mr. Smith enough to elicit Mr. Smith's complaint. Mr. Powers' direct supervisor, Mr. Wagner, expected him to work from 6:30 in the morning to 5:00 in the evening while performing exactly ten hours of work (TR 161 to 162). If Mr. Powers were to take extra time for lunch or errands, Mr. Powers would need

to make up the work and stay late (TR 163). Mr. Powers fails to prove the policy existed anywhere other than in his own head. And even if it existed outside the confines of his own imagination, he does not show he followed it.

*c. Mr. Powers fails to prove Union Pacific allowed its employees to increase their pay after being told they were not qualified for the position*

Mr. Powers also argues the CBA allowed him to increase his own pay to foreman status. Rule 27 of the CBA reads “[w]hen an assigned employee is required to fill the place of another employee receiving a higher rate of pay, he will receive the higher rate; but if required to fill temporarily the place of an employee receiving a lower rate, his rate will not be changed.” (JX 21, p. 54). Mr. Powers, however, fails to prove he could take advantage of this regular policy. He also fails to prove it was common practice for an employee unilaterally to increase his or her pay in the manner he did.

Mr. Powers’ supervisor told him he was not qualified to be a foreman, and then changed the title of his position. Despite this direct confrontation, Mr. Powers continued to make sure he was paid as a foreman. First, he took advantage of a glitch in the pay system, and then he affirmatively changed his time card to reflect a status he knew he was not entitled to. This is a far cry from what Rule 27 states. The plain language of this rule suggests that when an employee is assigned to substitute for an employee at a higher rate, they receive the rate of that employee. Mr. Powers was not filling in for any employee. His supervisor abolished the foreman position because Mr. Powers was not qualified for it. Nothing in the rule encourages an employee to increase their pay to a position they have been told they are not qualified for. Therefore, this rule did not apply and Mr. Powers spent months awarding himself wages he was not entitled to. Mr. Powers has not proven he was following Rule 27, he has only met the burden of proving he ensured he was paid as a foreman after accepting a bid as a service mechanic by entering his time as a foreman.

Mr. Powers offers insufficient proof his fellow employees engaged in this practice. Once again, Mr. Powers relies on the vague affidavit of Mr. Anzo. Mr. Anzo wrote it was common practice for an employee performing the tasks of a foreman to enter time as a foreman and for Union Pacific to pay them at a foreign rate. This bare statement is insufficient. Mr. Powers either accepted the status of foreman after his supervisor told he was not entitled to it or proactively changed it. He did this, despite undergoing training and having no experience (JX 31). Mr. Anzo’s statement does not elaborate on positions, location of the job, or length of time. The affidavit is, therefore, insufficient to prove Mr. Powers engaged in a common practice.

*d. Mr. Powers fails to prove Union Pacific allowed its employees to hold safety meetings with union officials on company time*

There is nothing in the record to indicate Union Pacific regularly tolerated breakfast meetings between its employees and union officials on company time. Mr. Powers believes this is common practice even with non-Union Pacific employees, (TR 50, 66), but Mr. Wickersham testified such meetings were not allowed (TR 199). Mr. Powers has not offered any evidence other than his testimony to indicate it was common practice to discuss union business over breakfast on company time. Given Mr. Wickersham's high-ranking position at Union Pacific, I find him a more credible source of information on Union Pacific policy.

*e. Mr. Powers fails to prove he was inconsistently punished compared to other employees in his situation*

The record does not indicate Union Pacific punished Mr. Powers inconsistently compared to other employees in his position because his rule violations were more extensive than any other employee mentioned at any point in the record. Mr. Powers violated Union Pacific's General Code of Operating Rules 1.6 (Conduct: Dishonesty), 1.19 (Care of Property), and 1.13 (Reporting and Complying with Instructions). He broke these rules on many occasions over the course of several days, and for months overpaid himself using a pay grade he was not entitled to claim. Mr. Powers fails to provide any evidence of an employee whose violations are of comparable magnitude or that he engaged in any kind of common practice which Union Pacific ordinarily tolerated.

The only employee mentioned in the record within the remote realm of comparison to Mr. Powers was Mr. Ritter, but his case is distinguishable. First, Mr. Ritter did not unilaterally increase his own pay. Second, a number of other factors distinguish Mr. Ritter's punishment process. The union intervened and asked Mr. Wickersham to be lenient towards Mr. Ritter, but did not make the same request for Mr. Powers (TR 200 to 201). Contrary to Mr. Powers, Mr. Ritter acknowledged responsibility for his actions (TR 201). In addition, Mr. Wickersham believed Mr. Powers was in charge that day and therefore bore more responsibility (TR 202 to 203). All of the personal errands run that day revolved around Mr. Powers. Mr. Ritter and Mr. Powers went to Mr. Powers' house and ran his errands, indicating greater responsibility (TR 203).

Because Mr. Powers failed to provide any examples of employees who engaged in misconduct of a similar magnitude as himself, he fails to show he was treated differently on the basis of his protected activity.

*f. The temporal proximity between the protected activity and the adverse employment action is insufficient for Mr. Powers to meet his burden*

In *Davis v. Union Pacific Railroad Co.*, No. 12-cv-2738 (W.D.La. July 14, 2014) (2014 WL 3499228) (case below 2011-FRS-33), the Defendant filed a motion for summary judgment arguing that the Plaintiff's report of a work-related injury was not a contributing factor in its de-

cision to terminate the Plaintiff's employment, arguing Plaintiff was terminated for dishonesty and that the injury report played no part. The court found that temporal proximity between the Plaintiff's injury report, the Defendant's investigation charging dishonesty, and the Plaintiff's eventual termination, in itself created a genuine issue of material fact on the contributing cause element of the Plaintiff's FRSA claim sufficient to survive summary judgment.

But temporal proximity has its limits. In *Araujo v. New Jersey Transit Rail Operations, Inc.*, CA No. 10-3985, 2012 WL 1044619 (D.N.J. Mar. 28, 2012) (unpublished) (case below ALJ No. 2010-FRS-23), the court concluded temporal proximity alone is not conclusive. While deciding a motion for summary decision, the court dismissed the plaintiff's argument that the temporal proximity between his protected activity and the defendant filing disciplinary charges against him evidenced a causal relationship because the company was required under its collective bargaining agreement with the plaintiff's labor union to initiate rule violation charges within ten days of the incident. In light of the collective bargaining agreement's constraints, the court found "the temporal proximity in this case is not indicative, much less unusually suggestive' of a causal relationship between the injury reports and the date the charges were filed." *Araujo* at 7. An intervening event may also prevent temporal proximity from helping a claimant reach their burden. In *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8<sup>th</sup> Cir. 2014), the court affirmed summary decision where an intervening event independently justified adverse disciplinary action and the action had no relation to the protected activity.

The temporal proximity between Mr. Powers' protected activity and the adverse employment action alone is not enough circumstantial evidence to show the protected activity contributed to Union Pacific's decision to terminate Mr. Powers' employment. There is a six-year gap between Mr. Powers' protected activity and his termination. There is no evidence in the record indicating Mr. Powers' protected activity influenced any decision Union Pacific made in regards to Mr. Powers' employment. There is no evidence his activity was mentioned to anyone during the disciplinary process. Nor is there evidence of a single adverse action on Mr. Powers' record until his termination in 2014. Mr. Powers would like this court to find Union Pacific waited, in complete silence, for six years to punish Mr. Powers for his protected activity – a suggestion the court considers unlikely.<sup>2</sup> The six-year gap indicates the temporal proximity is too remote to help Mr. Powers reach his burden.

Mr. Powers' case is currently pending before the 9th Circuit. However, Mr. Powers has not introduced any evidence that indicates his pending 9th Circuit case came to the attention of any Union Pacific employee involved in this case. Therefore, he has failed to meet his burden of proof.

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<sup>2</sup> Mr. Powers argues there has been "continuous" harassment and retaliation from Union Pacific, but does not provide any evidence in the record to support this assertion (Claimant's Closing Brief, p. 12). Based on the record, Mr. Powers never suffered any adverse employment action until he was terminated on July 24, 2018. There is not even evidence anyone was uncivil to Mr. Powers between his reinstatement and his termination.

Even if the temporal proximity were closer, Mr. Powers' rule violations are an intervening event. As noted above, the record does not indicate there were any employees who violated as many rules as Mr. Powers. He stole both time and money from his employer while his co-workers were forced to make up for his absence. On three random days, Mr. Powers committed multiple rule violations. His malfeasance was serious. Mr. Powers' violation of Rules 1.6, 1.19, and 1.13 would independently justify adverse disciplinary action and they were not related in any way to Mr. Powers 2007 injury or 2008 claim. Nor can Mr. Powers link them to his pending 9th Circuit appeal.

The chain from initial complaint to termination is free of any evidence Mr. Powers' protected activity contributed the decision to terminate his employment. The investigation into Mr. Powers began with Mr. Willard Smith's complaint. There is nothing to indicate he brought his complaint for any reason related to Mr. Powers' 2007 injury or his 2008 FRSA complaint. After Mr. Smith complained to Mr. Houk, Mr. Houk initiated an investigation into Mr. Powers which revealed Mr. Powers was manipulating his timesheets so he could receive a higher pay than he was entitled. He was also using the company truck to run personal errands, and getting paid for many more hours than he was working. Once the investigation was complete, there was a disciplinary hearing. The results of that hearing went to Mr. Wickersham who made the decision to terminate Mr. Powers. While Mr. Wickersham knew of Mr. Powers' protected activity, knowledge and contribution are not the same element. Mr. Powers fails to prove anything in this chain of events was related to his protected activity.

In conclusion, Mr. Powers fails to meet the burden of proving his protected activity contributed to Union Pacific's decision to terminate him on July 24, 2014. Because Mr. Powers fails in meeting this burden, I see no reason to address the issue of whether Union Pacific has proven by clear and convincing evidence it would have terminated Mr. Powers' employment even if he had not engaged in the protected activity. Nor do I see a reason to address the issue of damages.

## **V. CONCLUSION**

Having reviewed the hearing testimony and exhibits, I find:

1. Mr. Powers engaged in protected activity when he reported his 2007 injury and filed in 2008 FRSA complaint.
2. Union Pacific knew Mr. Powers engaged in protected activity when they terminated him on July 24, 2014.
3. Mr. Powers failed to prove any of his alleged protected activities contributed to Respondent's decision to terminate his employment on October 16, 2013.

## **VI. ORDER**

Mr. Powers' complaint is DENIED.

SO ORDERED:

CHRISTOPHER LARSEN  
Administrative Law Judge

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifi-

cally 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).