



Issue Date: 22 September 2016

Case No.: **2016-FRS-00024**

In the Matter of:

TIMOTHY L. STEARNS,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances:

For the Complainant:
Timothy L. Stearns, *pro se*
North Platte, Nebraska

For the Respondent
Torry N. Garland, *Esq.*, Union Pacific Railroad Company
Denver, Colorado

Before: Morris D. Davis, Administrative Law Judge

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This proceeding arose under the employee protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (October 16, 2008), and the FRSA regulations issued at 29 C.F.R. Part 1982. Section 20109 protects employees of railroad carriers from discrimination based on their prior protected activity pertaining to railroad safety or security. Here, Timothy L. Stearns (“Complainant”) alleges that the Union Pacific Railroad Company (“Respondent”) fired him in retaliation for making a safety complaint.

I. Procedural Background

On January 12, 2016, the Secretary issued findings dismissing Complainant’s complaint. On January 18, 2016, Complainant requested a hearing before an administrative law judge (“ALJ”). On May 11, 2016, I issued a Notice of Hearing and Prehearing Order scheduling this case for hearing on August 24, 2016, in North Platte, Nebraska. On August 1, 2016, I received

two motions from Respondent: a Motion in Limine to Exclude Testimony and a Motion for Summary Judgment (“Mot.”). On August 4, 2016, I issued an Order for Claimant to Show Cause and Continuance of Hearing. In that order I gave Complainant “fair notice of [his] need to respond in kind with affidavits or ‘other responsive materials.’” *Galinsky v. Bank of America, Corp.*, ARB No. 08-014, ALJ No. 207-SOX-00076 (Jan. 13, 2010).¹ On August 23, 2016, I received Complainant’s Memorandum in Opposition to the Respondent’s Motion for Summary Decision (“Opp’n”). On August 22, 2016, counsel for Respondent contacted my law clerk to inquire if Respondent could reply to Complainant’s opposition. My law clerk notified both parties that I approved Respondent filing a response not later than Friday, September 2, 2016. On September 2, 2016, I received Respondent’s reply (“Reply”). On September 13, 2016, Complainant submitted a response to Respondent’s reply and included two attachments.² As Complainant’s response to the reply was not authorized, it was not considered in this decision.³

II. Factual Background⁴

Respondent hired Complainant as an Intermodal General Supervisor in Seattle, Washington, on May 1, 1995. (RX A at 10).⁵ Twenty months later, Complainant took a position as a Yardmaster in North Platte, Nebraska. (*Id.*). On March 3, 2014, Complainant left his position as Yardmaster at the East Hump at Baily Yard and turned the duties over to Jess Harwager. (CX 4⁶ and Opp’n at 14). Respondent disciplined Complainant for this as Respondent believed Jess Harwager was not fully trained to perform Yardmaster duties.⁷ On March 11, 2014, Complainant voluntarily signed a letter, drafted by Respondent, stating that “he

¹ Several federal circuits require that *pro se* litigants be given notice of the consequences of a summary judgment motion. See *U.S. v. Ninety Three Firearms*, 330 F.3d 414 (6th Cir. 2003) (collecting cases). While this is most often applied to *pro se* litigants who are incarcerated, at least two circuits extend this to non-prisoner litigants as well. *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985); *Williams v. Corporate Express Delivery Sys.*, 3 Fed. Appx. 36 (4th Cir. 2001) ((citing *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975)). The Administrative Review Board has applied *Roseboro* to whistleblower cases. *Hooker v. Westinghouse Savannah River, Co.*, ARB No. 03-036, Slip Op. at 8-9 (Aug. 26, 2004); *Charles v. Profit Investment Management*, ARB No. 10-071, ALJ No. 2009-SOX-040 (Dec. 16, 2011). The Eighth Circuit, which is where this case arose, has expressly rejected this rule. *Mathis v. Mathes*, 170 Fed. App’x. 985, 985 (8th Cir. 2006) (citing *Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001)). However, in light of the remedial purpose of the FRSA and the Board’s adoption of *Roseboro*, I provided Complainant with a “*Roseboro* notice.”

² When a motion is filed, the opposition has 14 days to file a response and no further replies are permitted unless the judge directs otherwise. 20 C.F.R. § 18.33(d). Here, Respondent requested and was granted permission to file a reply to Complainant’s response. Complainant did not obtain permission to file his September 13, 2016 response.

³ Consideration of the response would not alter the outcome of this case. The response contained arguments, but included no additional evidence that would create a genuine issue of material fact that Complainant made a good faith safety complaint or that the alleged complaint contributed to his termination. The two attachments were a seniority roster listing dated August 13, 2016 and a circular for the North Platte Service Unit dated September 13, 2007 addressing “Yardmaster turnover time/overtime.” Neither exhibit is material to the issues addressed herein.

⁴ This is based upon the evidence the parties submitted in support of or opposition to the motion and is applicable only to this decision on the motion.

⁵ Respondent’s exhibits are designated “RX” and Complainant’s exhibits are designated “CX”.

⁶ Complainant did not submit exhibits with his opposition. However, he continually referenced several exhibits that he submitted to the court with his prehearing statement. For this reason, I have considered Complainant’s previously submitted exhibits 1-12. Complainant also cited to what appear to be Respondent’s exhibits intended for the hearing; however, those exhibits have not been submitted to the court.

⁷ The parties dispute if Jess Harwager was qualified to relieve Complainant. However, whether or not Mr. Harwager was qualified is not relevant to the issues before me.

left his Yardmaster assignment . . . prior to being properly relieved by another qualified Yardmaster while switchmen were actively working.” (CX 4). The letter noted that Complainant was returned to service on a probationary basis for a period of 18 months and warned that he could be dismissed without a hearing if he violated Rule 1.6 of the General Code of Operating Rules (“GCOR”).⁸ (*Id.*)

The incident that led to Complainant’s termination and the current action took place less than five months later. On July 27, 2014, Complainant requested assignments for two inbound locomotives and Stephen Driggs, the Inside Locomotive Foreman, did not immediately respond to the request. (Mot. at 2 and Opp’n at 3). Complainant alleges that this severed the flow of information and put conductors and engineers in harm’s way because they were moving a train and did not know what they were to do next. (RX A at 16-17). When asked what he did when Mr. Driggs did not reply, Complainant said, “because he was of the retirement age, I asked him, specifically, ‘Just because you can retire and you’re cutting back on your workload, does not mean that you don’t have to do your job. I need the information.’” (RX A at 17⁹).

Mr. Driggs requested the assistance of supervisor Greg Mellon. (RX A at 23). Mr. Mellon was nearby and had heard the raised voices. He heard Complainant “ranting and belittling” Mr. Driggs and accusing him of not doing his job. (RX C at 6). Mr. Mellon described what followed:

And then [Complainant] stopped directing it towards [Mr. Driggs] at that time. And then he’s, you know, right up in my face talking about or you know, he basically yelling I guess. You know, about how everybody does his job. How [Complainant is] expected to do his job. And how [Mr. Driggs is] not doing his job, he’s not doing his job. It’s the very next train and how can you tell me you can’t provide me with the power plan for the very next train. And those things. And I kept telling – I kept telling [Complainant] to calm down, to calm down, we need to act professional, we need to, you know, do this.

(*Id.* at 7).

After the initial exchange, Mr. Driggs left and Complainant resumed his duties. (RX A at 27). Approximately twenty minutes after the exchange, Complainant was called down to Mr. Mellon’s office. (RX A at 29). According to Complainant, Mr. Mellon “threatened me with my job” because of the incident with Mr. Driggs. (*Id.* at 31). According to Mr. Mellon, he agreed with Complainant that Mr. Driggs should have known the power plans for the trains coming into the yard, but he told Complainant he needed to act in a professional manner. (RX C at 10). Mr. Mellon said he had no intention of bringing charges against Complainant at the time their meeting ended. (*Id.* at 12).

⁸ Employer did not provide the content of Rule 1.6. Complainant provided an unofficial copy of the Seventh Edition of the GCOR; however, the seventh edition became effective on April 1, 2015, after the incident on July 27, 2014. (CX 1). Pursuant to 20 C.F.R. § 18.84, I take official notice of the Sixth Edition of the GCOR, which became effective on April 7, 2010. *available at* [http://1405.utu.org/Files/\[4886\]BNSF-GCOR%202011-08-01_gcor_updated.pdf](http://1405.utu.org/Files/[4886]BNSF-GCOR%202011-08-01_gcor_updated.pdf). Rule 1.6(6) prohibits employees from being “quarrelsome.”

⁹ The page number corresponds to the deposition page number.

After the meeting, Complainant went back to work, but he was frustrated that he had been threatened with termination. (Opp'n at 3). Complainant went to eat lunch in an attempt to calm down. (*Id.*). While in the lunchroom, Complainant threw a steak knife against a wall six to eight feet away. (Opp'n at 9). Other employees were present when it happened. (RX A at 35). When he was deposed on July 2, 2016, Complainant said: "Oh, it was inappropriate behavior. I – I was upset... And I was frustrated. And it's unfortunate. I feel bad about it. I wish I could take it back." (*Id.* at 69-70).

Another Yardmaster, Lester Sheets, was present in the lunchroom. According to Mr. Sheets, Complainant was upset and expressed his displeasure with Mr. Driggs. Mr. Sheets said that as Complainant was cleaning off a steak knife he said "I'll tell you what I would have liked to have done. I would of liked to do this towards him." He said Complainant stood up, threw the steak knife against the wall and said, "That's what I would of liked to do." (RX D at 3). Mr. Sheets prepared a written statement describing what he heard and observed and he gave it to Mr. Mellon the next day.¹⁰ (RX C at 14-15).

When Complainant showed up for work on July 28, 2014, he was removed from service pending an investigation. (Opp'n at 4). On July 29, 2014, Complainant received official notice of the investigation regarding the incident. (Mot. at 2 and Opp'n at 4).

While on leave, Complainant went to the doctor, and was diagnosed with posttraumatic stress disorder ("PTSD").¹¹ Complainant was placed on medical leave until his termination. (Opp'n at 4). Complainant was terminated on June 5, 2015, for violating Rule 1.6 and Union Pacific's Abuse in Workplace Violence Policy. (RX A at 44 and Mot. at 6).

III. Issues

The following issues are in dispute:

- (1) Whether Complainant engaged in protected activities.
- (2) If Complainant engaged in protected activities, whether that contributed to his termination.

IV. Legal Standard

Summary Decision Standard

In cases before this tribunal, the standard for summary decision is analogous to the standard developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by

¹⁰ Mr. Mellon said that he conducted separate interviews of the other employees present during the incident and their versions of what transpired corroborated Mr. Sheets's written statement. (RX C at 17-18).

¹¹ While the record is not clear, it appears that the PTSD is related to Complainant's service in the military. (Opp'n at 19-20 and RX A at 9).

discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011). “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.” *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth “specific facts” showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, an ALJ must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. The ALJ is not to weigh conflicting evidence or make credibility determinations. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

Standards Applicable to FRSA Claims

The FRSA, under which Complainant brings this claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant’s case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant’s protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant

suffered an unfavorable personnel action,¹² and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet his burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Respondent knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.¹³ *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).¹⁴

V. Discussion¹⁵

Here, it is undisputed that Complainant complained about Mr. Driggs’s behavior to Mr. Mellon, and that Complainant later suffered an adverse action – termination of his employment. Therefore, I need only address whether Complainant’s complaint regarding Mr. Driggs’s behavior is a protected activity and if it was, whether it was a contributing factor in Complainant’s termination.

a. *Whether Complainant Engaged in a Protected Activity*

As discussed above, a complainant must prove by a preponderance of the evidence that he engaged in protected activity under the FRSA in order to prevail on a retaliation claim. A

¹² An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). See also *Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

¹³ Although I list the knowledge requirement as a separate element, I note that the ARB has said repeatedly that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013). See also *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis).

¹⁴ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). See also *Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011), at 31-32 ; see also *Kudak v. BNSF Ry. Co.* 2014 U.S. App. LEXIS 19099 (8th Cir. Oct. 7, 2014) (“[A] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

¹⁵ I will discuss only Complainant’s claim under the FRSA. I will not address protections, if any, he may have as a disabled veteran as that is outside the scope of my authority.

railroad carrier may not discipline, or threaten to discipline an employee for reporting in good faith a hazardous safety concern or security condition. 49 U.S.C. § 20109(b)(1)(A); 29 C.F.R. § 1982.102(b)(2)(i)(A). Thus, any good faith report of a hazardous safety condition made by Complainant qualifies as protected activity. A good faith report requires both an objective and subjective belief that the complaint relates to safety concerns. *See Hernandez v. Metro-North Commuter Railroad*, No. 1:13-cv-02077 (2015 WL 110736) (S.D.N.Y. Jan. 9, 2015) (finding that the FRSA requires a reasonable belief by the complainant both that the reported conduct was related to railroad safety or security and that an objectively reasonable person in the same factual circumstances as the complainant could believe the same); *Jackson v. Union Pacific R.R. Co.*, ARB Case No. 13-042; ALJ Case No. 2012-FRS-00017 (Mar. 20, 2015) (finding substantial evidence supported the ALJ's finding of protected activity when the record contained support for both the complainant's subjective good faith and other employees' reasonable belief that a complaint, like that made by complainant, constituted a safety concern).

In the present case, Complainant complained to his supervisor, Mr. Mellon, that Mr. Driggs was not responsive when Complainant asked for power plans for incoming locomotives. Complainant contends that the failure of Mr. Driggs to provide the information severed the flow of information and created an unsafe condition. (RX A at 17). Respondent contends that the complaint was not about safety at all, but instead concerned an employee relations dispute and a production/efficiency issue. (Mot. at 10). However, in their briefs neither party specifically addressed the practical consequences of Mr. Driggs's conduct other than their general statements about safety or efficiency.

Mr. Mellon's interview with the OSHA investigator is the only evidence that provides context for the incident between Complainant and Mr. Driggs and the consequences of Complainant not getting the information he requested. Mr. Mellon said that what Complainant requested was the power plan for an inbound train and that not having the plan did not raise a safety issue, but instead raised a work efficiency issue. The following exchange took place between Mr. Mellon ("GM") and Investigator Shannon Huffman ("SH"):

SH: Okay. In your mind would that be a – would that be a situation that could create an unsafe work area in the – in the terminal?

GM: No because I mean what would happen, you know if, in this case it was Track 282 if memory serves me correct, you know so this – this train into Track 282 and generally our coal trains, like 45 percent of them, the power cuts on them and we have to perform some kind of work. So it has to go someplace, it has to do something. You know it might go to one of our service in tracks or another service in track, or maybe it goes to a different train or you know, it – 45 percent of them have a – have a plan besides staying on the train. Okay?

SH: Okay.

GM: So in this case the train comes in 282 and we don't have a power plan for it that's programmed into the computer.

SH: Uh huh.

GM: In that case we would wait until the power plan came up. So the train would come into 282, it would stop, we start tying down the train, and that power would not come off the train until we had a power plan. And so maybe the power plan was the power stays on. So the only thing that would – you know like the result of not having the power plan would be production delays.

SH: Okay.

GM: You know that – that – those locomotives would sit there or that crew would sit there while we waited for somebody else to come up with what needs to happen to those locomotives. So once a plan was given, say those locomotives needed to come off of 282 and needed to go to west end of 602 which would have been a service in track. Then at that time [Complainant] would say okay it needs to go to 602, we'd have to consider his movements in the yard and then instruct the crew, you know, hey I got a train out long to – you know long to long or I got a train going out long to new or old to new. After he leaves then you can get – you can, you know, take your power off south of the C crossover or south to the A crossover and put your power in the west end of 602.

SH: Okay. So when I asked if [Complainant] reported any safety concerns you said no. I would think that when you had the conver – when you observed the conversation in part and then you had the conversation with – with him on July 27th where he's telling you his opinion of Mr. Driggs wasn't doing his job because he didn't have the power plan, correct?

GM: Uh huh.

SH: So that's when you had knowledge of what he's claiming protected activity and that what I'm asking you and you just informed me that you don't think that the lack of a power plan, the result of that would have been a safety issue, is that correct?

GM: No because nothing – that crew would not have done anything until a power plan was – it wasn't like a crew would just, you know cut the power off and just start moving it everywhere without anyone's knowledge of what was happening with the power. You know it wouldn't hurt until we had a plan.

SH: Sure. What would that create for Mr. Stearns as far as his – his job duties? Would it create an issue for him and if so what would that issue be?

GM: The thing it would create for him is once he got the plan that he'd have to assess where current movements were at and then give the instruction to that crew of what they need to do with their power and watching out for these other moves that were taking place.

SH: So it wouldn't – would it create additional work or just a delay in the – in the work?

GM: Delay in the work.

SH: Okay. At any time as his immediate supervisor, not just this incident, but any other time did [Complainant] ever report any safety related concerns to you?

GM: Not that I can remember.

(RX C at 21-23).

Mr. Mellon's statement supports Respondent's position that there is no genuine issue of material fact because there is no evidence that the alleged insubordination of Mr. Driggs created a safety issue, thus shifting the burden to Complainant to set forth "specific facts" showing that there is a genuine issue of material fact to be resolved at a hearing. 29 C.F.R. § 18.4(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Despite my order on August 4, 2016, giving Complainant "fair notice of [his] need to respond in kind with affidavits or 'other responsive materials,'" Complainant has not provided "specific facts." Instead, Complainant makes repeated reference to Mr. Driggs "severing the flow of information." (Opp'n at 1, 3, 5-7, 9, 18-20, 23). What Complainant has not done is present any evidence showing that this created an unsafe condition or that rebuts Respondent's evidence showing that it was just an inconvenience and only had an impact on efficiency. When viewing all evidence in the light most favorable to Complainant, he has failed to establish a genuine issue of material fact concerning whether he made a good faith safety report.

As referenced above, a good faith report of a hazardous safety condition requires both an objective and subjective belief that the complaint related to a safety concern. Complainant made several statements in his brief that Mr. Driggs's behavior constituted a safety issue. He stated he was "put into a very difficult safety sensitive position while no less than six trains and multiple locomotives were moving within the yard with other crafts and contractors as well were in harms' way." (Opp'n at 2). "Mr. Driggs was the Inside Locomotive Foreman . . . [and] Complainant told him that he needed assignments for locomotives on two different inbound trains. He told the Yardmaster he was busy. Mr. Driggs was not doing his job which dampens the whole safety and efficiency which is the job as Yardmaster." (*Id.* at 3). The lack of information "hindered [Complainant's] safety-sensitive job." (*Id.* at 7). These statements create a genuine issue of material fact whether Complainant subjectively believed that failing to obtain the information from Mr. Driggs created a safety issue.

These generalized statements do not, however, establish that an objectively reasonable person in the same circumstances would be likely to arrive at the same or similar conclusion. Complainant provided no affidavits or other responsive evidence to show what an objectively reasonable person in the same scenario would conclude. Respondent's evidence establishes that a reasonable person would conclude the circumstances created an inconvenience, not a hazard.

Complainant provided a Superintendent Bulletin dated September 2, 2015, that he contends supports his position. (Opp'n at 3). The bulletin – which was issued more than a year after the incident – addresses efficiency, not safety. It states:

The purpose of this Bulletin is to give Run Through Program time to have resources and a plan in place for these trains and do what needs to be done to expedite them through the terminal. Run thru team: We need to have a plan in place before the train arrives. If it is a locomotive issue that needs to be cut have the inbound crew do the power work and the hostler pilot assist when available.

(CX 6).

If the Superintendent Bulletin was issued in response to Complainant's complaint – and there is no evidence showing that it was – it only establishes that Respondent wanted to improve the efficiency of moving trains through the terminal, not correct a safety problem. Therefore, this is insufficient to show a genuine issue of material fact – the objective component of a good faith safety report.

For the forgoing reasons, I find that the evidence, viewed in the light most favorable to the Complainant, does not establish that there is genuine issue of material fact concerning whether Complainant filed a good faith safety complaint.

However, even if Complainant did file a safety complaint, the complaint was not a contributing factor in the decision to take adverse action against him.

b. Whether the Alleged Safety Complaint Contributed to Complainant's Termination

A complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the retaliatory discrimination, not the sole or even predominant cause. *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrack)*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 29, 2013); *see also Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3d Cir. 2013). The Administrative Review Board has explained that a contributing factor includes “*any factor* which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 6 (ARB Feb. 29, 2012); *see e.g., Id.*, slip op. at 7 (credible evidence that the employee's report of a slip and fall injury led Respondent to investigate for safety violations and was a contributing factor); *Henderson*, ARB No. 11-013, slip op. at 14 (credible evidence that the employee's report of back pain led Respondent to investigate for its timely filing and was a contributing factor); *Clark v. Airborne, Inc.*, ARB No. 08-133, 2005-AIR-027 (employee memos discussing safety concerns during company downsizing was not a contributing factor). Further, “the causation question is not whether a respondent had good reason for its adverse action, but whether the prohibited discrimination was a contributing factor.” *Henderson*, ARB No. 11-013, slip op. at 11.

The contributing factor element “may be established by direct evidence or indirectly by circumstantial evidence.” *Id.*, slip op. at 6-7. Circumstantial evidence may include:

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

Id. slip op. at 7. "Standing alone, temporal proximity, pretext, or shifting defenses may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his Respondent's adverse action." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-00011 (ARB May 26, 2010). However, the totality of the evidence may nonetheless support a finding of causation. *Id.* Furthermore, failure to consider the totality of the circumstantial evidence of the causal relationship between protected activities and adverse actions is reversible error. *Randolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 29, 2013).

When a complainant makes an inferential case of discrimination by means of circumstantial evidence, "[t]he ALJ (and ARB) may then examine the legitimacy of the Respondent's articulated reasons for the adverse personnel action in the course of concluding whether a complaint has proved by a preponderance of the evidence that the protected activity contributed to his Respondent's adverse actions." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055 (ARB Apr. 30, 2010). Thus, the nondiscriminatory reasons are evaluated contemporaneously with a determination of whether the protected activity contributed to the adverse action. "Thereafter, and only if, the complainant has proven discrimination by a preponderance of the evidence, does the Respondent face a burden of proof." *Id.*; see also *Brune v. Horizon Air Indus., Inc.*, ARB 04-037, slip op. at 14, ALJ No. 2002-AIR-00008 (ARB Jan. 31, 2006) (explaining that Respondent's burden of proof arises after, and only if, complainant establishes discrimination by preponderance of the evidence).

Here, the undisputed facts are that On March 11, 2014, less than five months before the July 27, 2014 incident, Complainant signed a disciplinary letter for violating the General Code of Operating Rules ("GCOR") Rule 1.6. (CX 4). In that letter it states that Complainant:

[i]s being returned to service on a probationary basis for an eighteen (18) month period commencing with the first day he returns to service and draws compensation. In the event that [Complainant] violates General Code of Operating Rule 1.6 Conduct during the eighteen (18) month probationary period, he will be removed from service without a formal investigation as provided by the applicable Agreement Rule and he will revert back to the status of a dismissed employee.

(CX 4).¹⁶

¹⁶ Complainant contends this letter was "erroneous" and that he signed it against his better judgement. (Opp'n at 14). The merits of the events leading up to the March 11, 2014 letter are not before me for adjudication.

After an investigation into the events that unfolded on July 27, 2014, Respondent notified Complainant by letter dated June 5, 2015, that he was permanently dismissed. The letter stated the reason for Complainant's dismissal was that:

at approximately 1500 hours, on July 27, 2014, you verbally attacked another employee. Additionally, later the same afternoon on July 27, 2014, you made threatening comments and threw a steak knife toward the west wall of Area 51. This is found to be in violation of Rule 1.6 Conduct (1) Careless of Safety of Themselves or Others, (6) Quarrelsome, and the part reading "Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated," as contained in the General Code of Operating Rules, effective April 7, 2010, and the Violence and Abusive Behavior in the Workplace Policy, effective March 15, 2014.

(CX 10). Rule 1.6 of the GCOR reads:

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
 2. Negligent.
 3. Insubordinate.
 4. Dishonest.
 5. Immoral.
 6. Quarrelsome.
- or
7. Discourteous.

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.¹⁷

Here, Respondent's termination letter stated that Complainant was permanently dismissed from service for the verbal assault on Mr. Drigg's and the hostile statements and steak knife throwing incident that followed. (CX 10). Respondent's assertions are further supported by a statement made by Anthony Orr, General Superintendent of the North Platte Service Unit. Mr. Orr stated that Respondent takes workplace violence very seriously and viewed Complainant's actions as a serious violation. (EX B at 2, 5-6).

¹⁷ *Supra*, note 8.

This evidence demonstrates that there is no material fact in dispute here. Mr. Mellon said that after he intervened in the dispute between Complainant and Mr. Driggs and later called Complainant into his office and counseled him on acting in a professional manner, he had no intention of taking any formal disciplinary action. (EX C at 12). It was only after Complainant chose to make threatening comments and throw a steak knife in the presence of other employees that Mr. Mellon initiated disciplinary action that Mr. Orr subsequently approved. Complainant did not deny what transpired in the lunchroom and even he acknowledged that his behavior was inappropriate, he felt bad about it, and he wished he could take it back. (RX A at 70).

The burden shifts to Complainant to show that there is a genuine issue of material fact. To prevail on summary decision a complainant “can prevail by showing that the respondent’s reason, while true, is only one of the reasons for its adverse conduct and that another reason was the complainant’s protected activity.” *Henderson*, ARB No. 11-013, n. 37.

Complainant mentions *DeFrancesco*, *Smith* and *Henderson* to show that his alleged protected activity was a contributing factor in his dismissal. (Opp’n at 6). In *DeFrancesco*, the complainant reported that he slipped on a sheet of ice hidden beneath the snow, and that the superintendent, because of this incident, decided to review the complainant’s discipline and injury history to determine whether he exhibited a pattern of unsafe behavior that required corrective action. *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009 (ARB Sep. 30, 2015). In the present case, in viewing all evidence in the light most favorable to Complainant, Respondent started its investigation only after Complainant threw a steak knife six to eight feet across a company lunchroom and made threatening comments, which was wholly unrelated to any alleged protected activity. In *Henderson*, the Board found that the employer failed to meet its burden in its summary decision motion because its submissions referenced that the reported activity led to its formal investigation. *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-00012, at 11 (ARB Oct. 26, 2012). Here, it was not the fact that Complainant told Mr. Mellon about his issues with Mr. Driggs that led to an investigation, it was the quarrelsome way that Complainant chose to deal with Mr. Driggs’s alleged insubordination and his threatening comments and steak knife throwing incident that caused Respondent to act. The context of the *Smith* case is unknown as it is a common last name (there are 20 ARB decisions titled *Smith*) and Complainant did not provide a case citation.

Temporal Proximity

Complainant also contends that he was removed from service the day after the alleged complaint. (Opp’n at 4). Determining what is temporally proximate “is not a simple and exact science but requires ‘fact-intensive’ analysis.” See *Franchini v. Argonne Nat’l. Lab.*, ARB No. 11-006, 2009-ERA-014, slip op. at 10 (Sept. 26, 2012) (citing *Hicks v. Forest Preserve Dist. Of Cook Cnty.*, 677 F.3d 781, 789 (7th Cir. 2012) for the proposition that there are no “bright line rules to apply when considering temporal proximity of adverse actions to protected activities”). On the other hand, an ALJ may consider case law to develop some general parameters of strong and weak temporal relationships, but the context surrounding the present claim plays a significant role. *Id.*, slip op. at 10. A range of five months has been suggested as sufficient to support an inference of unlawful discrimination. *Barker v. UBS AG*, 888 F. Supp. 2d 291, 301 (D. Conn. 2012) (SOX case).

Here, when viewing the facts in light most favorable to Complainant, the temporal proximity does not show that Complainant was removed for making an alleged safety complainant. Complainant was removed because he threw a steak knife while making threatening comments about a co-worker. Complainant admits that he threw the steak knife (Opp'n at 9) and he said it was inappropriate behavior that he wished he could take back. (RX A at 70). However, Complainant contends that this did not constitute workplace violence because no one was in harm's way and no one felt threatened. (Opp'n at 9). That argument fails. Throwing a steak knife in the workplace violates GCOR rule 1.6(1) that warns an employee must not be "careless of the safety of themselves or others."

Complainant has provided nothing additional to show that his alleged complaint was a factor at all in his termination. While Respondent cited the incident with Mr. Driggs in the termination letter, it only cited the quarrelsome way Complainant went after Mr. Diggs, not the substance of their dispute.

VI. Conclusion

For the reasons stated above, I find that Respondent Union Pacific Railroad is entitled to a decision in its favor as a matter of law on the allegations that Complainant made a protected complaint and that the complaint contributed to Complainant's termination. Respondent's motion for summary decision is **GRANTED** and the complaint is **DISMISSED**.

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 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).