



Issue Date: 05 October 2017

Case No.: 2016-FRS-00039

In the Matter of:

FRANK THURSTON

Complainant

v.

BNSF RAILWAY

RESPONDENT

DECISION AND ORDER DENYING RELIEF

This matter involves a dispute concerning alleged violations by BNSF Railway Company (“Respondent”) of the Federal Rail Safety Act (“FRSA”) or the “Act,” 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), as implemented by regulations at 29 C.F.R Part 1982. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL HISTORY

On November 11, 2014, Complainant filed his first complaint with the Occupational Safety and Health Administration (“OSHA”).¹ In his complaint, Complainant alleged that in October 2014, Respondent removed him from his permanent assignment involuntarily and without notification after reporting a work-related illness in violation of the collective bargaining agreement (“CBA”) and conditioned his return on a fitness-for-duty medical release, causing him to lose wages. On December 7, 2015, Respondent terminated Complainant for incurring unauthorized lodging expenses while traveling. Complainant also asserted that he engaged in protected activity at various times from 2009 to 2013.

¹ The following abbreviations are used in this Decision: “JX” refers to Joint Exhibits; “CXD” refers to Complainant’s Document Exhibits; “CXR” refers to Complainant’s Recording Exhibits; “RX” refers to Respondent’s Exhibits; and “Tr.” refers to the transcript of the September 7-8, 2016 hearing.

On March 2, 2016, OSHA found no reasonable cause to believe that Respondent violated the Act. The Secretary determined that the illness that Complainant complained of did not constitute protected activity under 49 U.S.C. § 20101. Moreover, the Secretary determined that the timing between Complainant's 2009 to 2013 protected activity and his 2015 termination did not lend itself to temporal proximity such that Complainant could prove a nexus between the two. As such, Complainant failed to make out a *prima facie* case. Complainant timely appealed to the Office of Administrative Law Judges ("OALJ") on March 23, 2016 and the matter was assigned to this Tribunal on April 13, 2016.

The Tribunal issued a Notice of Assignment and Order Setting Conference Call on April 21, 2016. Respondent and Complainant submitted their respective responses to the Notice of Assignment on April 29, 2016 and May 13, 2016. On May 18, 2016, the Tribunal issued a Notice of Hearing and set the hearing in this matter for September 7, 2016 to September 9, 2016 at a location to be determined. In an Order dated August 9, 2016, the Tribunal selected Denver, Colorado as the location for the hearing.

On July 11, 2016, Complainant filed his Request for Documents & Tangible Things.

On July 29, 2016, Respondent filed its Motion for Summary Decision, to which Complainant filed his response on August 5, 2016. The Tribunal denied Respondent's Motion for Summary Decision by Order dated August 22, 2016.

On August 8, 2016, Respondent submitted its Motion to Exclude Evidence Regarding Complainant's Union Grievances. Complainant filed his Response for Denial of [Respondent's] Motion to Exclude Evidence Regarding Complainant's Union Grievances on August 18, 2016. The Tribunal issued an Order dated August 22, 2016 granting Respondent's Motion in part and denying in part. In particular, the Tribunal determined that it would not receive evidence or take testimony concerning matters that occurred prior to May 2012. However, any relevant and material evidence regarding events that transpired March 2014 and onward would be permissible.

Complainant filed his Motion for Objection to Respondent's Use of Deposition on August 11, 2016. By Order dated August 22, 2016, the Tribunal denied Complainant's Motion.

Pursuant to the Notice of Hearing, the Tribunal held a teleconference with the parties on August 23, 2016.

The hearing was held as scheduled on September 7, 2016 through September 8, 2016 in Denver, Colorado.

Respondent and Complainant thereafter submitted their post-hearing briefs on December 22, 2016 and January 13, 2017 respectively.

II. SUMMARY OF THE PARTIES' POSITIONS

A. Complainant's Position

Respondent implemented a plan of action to dismiss Complainant in retaliation of protected activity by working to collectively isolate Complainant and failing to return his phone calls addressing the adverse actions he suffered. Complainant's union secretary informed him of the ongoing retaliation and advised that he "lay low" to avoid drawing further attention to himself. *See* Complainant Post-Hearing Brief – Factual Legal Argument to Summarize Position ("Compl. Br.") at 25.

Respondent did not follow the Policy for Employee Performance and Accountability ("PEPA") as Complainant was not within any of the disciplinary levels in the progressive policy contained therein. Respondent also denied Complainant his rights to the Alternative Handling Discipline Agreement/Policy. Employees with a similar history within greater levels of progressive discipline were not disciplined in a similar manner as Complainant. Specifically, Respondent allowed other employees to use reverse lodging under the same circumstances that Complainant used it, as supported by CXR 41. The exhibit shows that South Loop La Junta Conductor Tom Roman used reverse lodging in Amarillo, Texas, just as Complainant did, while working at the Santa Fe turn. However, Santa Fe employees do not have reversing lodging agreements. Respondent's testimony confirms that Colorado and Southern (C & S) employees, including Complainant, have had a reverse lodging agreement since 1985 and Respondent has not otherwise produced documents serving notice on Complainant or the union as to an intent to change this arrangement. Furthermore, Forth-Worth Denver ("FWD") conductor Chris Linqish, who worked at the La Junta BN² turn, was permitted to use reverse lodging in La Junta, yet Respondent's testimony indicates that FWD employees do not have a reverse lodging agreement. Complainant is the only employee in Respondent's history to have been dismissed based on a property investigation hearing. Compl. Br. at 25-26.

Respondent knew of Complainant's protected activities during his employment and subjected him to adverse actions from October 2014 through December 2015 in retaliation of those protected activities, even though the CBA provides for reverse lodging. It also denied his collective bargaining rights as provided for under the Railway Labor Act ("RLA"). Compl. Br. at 26.

First, Respondent's characterization that Complainant's use of the lodging facility in Amarillo, Texas without prior permission as dishonest and with an intent to defraud lacks merit. *See* CXD 126. Respondent violated the CBA when, instead of issuing proper notice of a disallowance to Complainant's use of lodging facility, it called for "investigation for filing claims/arbitraries (lodging) and grievances." Compl. Br. at 27.

As for protected activity, Complainant reported injuries and occupational illness, including his seeking of medical attention, unsafe locomotive conditions, and Respondent's unsafe operations by locomotive engineers during 2014 and 2015. Respondent's dismissal of Complainant was an adverse action in retaliation for Complainant's filing of these grievances. Compl. Br. at 27.

² BN refers to Burlington Northern.

Moreover, Respondent created an ongoing hostile work environment for Complainant when it forced his transfer within the North and South Coal Loop operations between Amarillo and Denver, denying benefits to Complainant given to other employees performing the same tasks as Complainant such as equity, overtime, crew payments, mileage reimbursement, held away from home terminal payments, and reverse lodging. Respondent also altered computer programs to assist in the creation of adverse working conditions. The difficult, strenuous, and unpleasant conditions created by Respondent would have caused a reasonable person to resign or relocate to another territory. Its punishment for Complainant's use of reverse lodging formed the basis of his dismissal after he was forced to relocate to claim his protected equity as opposed to not resigning, retiring, or relocating to a different territory. *See* CXD 150.³ Compl. Br. at 27.

The totality of the record demonstrates Complainant's protected activity from September 2014 through December 2015. Moreover, a reasonable person would find his protected activity a perceived threat from Superintendent Mr. Jason Blakeman and Director of Labor Relations Mr. Jason Ringstad. An abundance of evidence contradicts Respondent's contention that management perceived Complainant as dishonest with intent to defraud. More likely, Respondent's management had enough of Complainant's frequent safety reports/protected activity. Based on CXD 140, Respondent singled out Complainant as having problems with its safety program and requested a meeting with general manager Mr. Mike Sickler. Compl. Br. at 27-28.

In conclusion, the evidence supports the theory that Complainant engaged in protected activity when he notified Respondent of a number of work-related personal injuries and illnesses throughout 2014 and 2015. Complainant further reported unsafe railroad hazards found in Respondent's rail plant, equipment, operations, training and safety program accurately and did so in good faith. A reasonable person in the same circumstances would have concluded that that these hazardous, unsafe conditions presented an imminent danger resulting in injury and work related illness. Complainant sought medical treatment, followed orders and treatment plans of physicians and Respondent's medical department. However, Complainant encountered interference over the course of treatment from Respondent's managers, supervisors, and employees acting out of compliance with guidelines provided in Respondent's policies.

B. Respondent's Position

Respondent counters Complainant's arguments by first contending that any claims that occurred on or after May 18, 2014 are untimely under the FRSA. These complaints include any acts of discrimination based on age or disability; reporting of workplace injuries and reporting of violations of Federal law relating to railroad safety; use and disclosure of medical records and other personal health information; denial of Complainant's overtime and mileage reimbursement; and denial of reverse lodging benefits. Respondent does not challenge the timeliness of Complainant's claims of removal from his permanent job assignment, denial of benefits, or his

³ Complainant emailed Mr. William Badenhop and Mr. Dane Freshour requesting cancellation of the entire investigation due to Respondent's failure to comply with his CBA rights.

December 7, 2015 termination on the basis of timeliness. *See* Respondent's Post-Hearing Brief ("Resp. Br."), at 29-31.

As to Complainant's *prima facie* case, Complainant asserts a long list of protected activities, several of which are not protected under the FRSA, which is designed to protect employees who assist in investigations related to violations of any Federal law, rule, or regulation relating to railroad safety or security. For example, Complainant's August 2011 EEOC charges are not related to the enforcement of the FRSA and therefore do not constitute protected activity under the Act. Likewise, reporting shortages in productivity funds to union leadership is a matter reserved for the union's collective bargaining agreement, and do not amount to violations of the Act related to railroad safety. What remains are allegations that Complainant reported personal injuries, an illness, and safety violations/unsafe practices; filed a FRSA complaint with OSHA in 2012; made internal complaints with Human Resources regarding alleged FRSA retaliation; and reported hours of service violations. Resp. Br. at 33-34.

Complainant must also show that Respondent took an adverse action against him. Here, Complainant's allegation that his placement on medical leave in October 2014 is an adverse action makes no sense. Complainant had been hospitalized with pancreatitis and maintained that his placement on medical leave would dissuade a reasonable person from reporting his condition. But such injured employees would want to qualify for leave so that they do not run afoul of attendance rules. Complainant's real concern is not his placement on leave, but that it lasted one week. This does not amount to a significant change in employment status such as hiring, firing, failing to promote, or reassignment and any impact on Complainant's compensation was minimal and ceased upon his return. Complainant's argument that Respondent used his medical records during this period as an adverse action similarly fails. Complainant did not prove that Respondent used his medical records without his permission. Instead the record shows that he voluntarily provided this information to Respondent. Moreover, Complainant did not offer any evidence that the Respondent used the medical records for any purpose other than to verify his fitness to return to work. If Complainant takes issue with transmittal of his medical information to Respondent's help desk, he should bring an action against his providers. In any event, the use of medical information to gauge an employee's fitness to return to work does not qualify as an adverse action or significant change in employment status. To categorize it as such would dissuade a reasonable employee from disclosing medical information to an employer to evaluate his or her fitness for duty, which would eviscerate employers' ability to perform fitness for duty assessments. Without these assessments, employees could present and be exposed to unsafe working conditions. Resp. Br. at 34-35.

Complainant also alleges that his transfer to Amarillo as a result of the mishandling of job boards led to the loss of unspecified payments and/or positions on the boards and loss of permanent position in March 2015. However, Complainant again does not offer any evidence of changes in his responsibilities or benefits. Although he has argued that movement of positions on the job board did not comply with the CBA, he has not shown how this action, at best a CBA violation, has harmed him. Complainant indicated that working in Amarillo was detrimental but has not explained why, except for testimony that he incurred costs traveling to Amarillo after crew management mistakenly told him that he could bump down to Amarillo having temporarily relocated to Denver. However, Complainant was reimbursed after incurring these costs.

Complainant's final alleged adverse action is that Respondent's claim's department failed to pay his personal injury claims. Although the ARB ("ARB" or "Board") has determined that the classification of a work-related injury as non-work related constitutes an adverse action, no authority exists that states failure to pay a claim is an adverse action.⁴ Such a complaint would more properly be brought through an FELA lawsuit. Complainant even admitted that he was pursuing the claims because the statute of limitations under FELA was set to expire. Complainant is simply trying to resurrect a stale FELA claim under the guise of an FRSA lawsuit by alleging that the failure to pay stemmed from retaliation. This should not be permitted. Resp. Br. at 35.

Finally, Complainant bears the burden of demonstrating that he suffered an adverse action in whole or in part because of protected activity. Respondent distinguishes ARB case law from recent Supreme Court precedent. In 2015, the Court held that federal laws against discrimination reach unintentional discrimination only based on the results of the act, and not the actor's intent.⁵ Where three other anti-discrimination statutes, Title VII, the ADEA, and Fair Housing Act, contain "results" language, section 20109(a) does not include such language. Moreover, Title VII and the ADEA do not include analogues that have been held to allow unintentional discrimination claims. Aside from the "results" language, the operative text of these statutes are so indistinguishable from the substantive text of Section 20109(a), that the Court has twice held that the statute unambiguously referenced discrimination from the mindset of the actor or the actor's intent.⁶ While Section 20109(a) adopted a lower causation standard than the "because of" language, *Inclusive Communities* rejected the argument that the causation standard defines the grounds for statutory *liability* when it held that even though Title VII and the ADEA contain "because of" language, the Court nonetheless held that those statutes impose disparate impact liability. It follows that the Board is required to adhere to the *Kuduk* standard that to establish a violation of Section 20109(a), discriminatory animus, and not merely protected conduct itself, must be proven as a contributing factor to the adverse action.⁷ Resp. Br. at 35-36.

Respondent is entitled to set its own rules and the courts do not have authority to review those business decisions. Even if the business decision was ill-considered or unreasonable, as long as the decision maker honestly believed the non-discriminatory reason he gave for the action, pretext does not exist.⁸ A showing of animus is required and can be demonstrated by circumstantial evidence of temporal proximity, pretext, shifting explanations, antagonism, or hostility toward protected activity, or a change in attitude toward the employee after engaging in protected activity.⁹ Absent such evidence, Complainant is not entitled to relief under the FRSA even if Respondent made its decision based on erroneous information. Resp. Br. at 36.

⁴ See *Fricka v. Nat'l Passenger Corp.*, ARB No. 14-047 (Nov. 24, 2015).

⁵ See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 136 S. Ct. 2507 (2015).

⁶ *Id.* at 2518-19.

⁷ See *Kuduk v. BNSF Ry Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

⁸ See *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012).

⁹ See *Kuduk*, 768 F.3d, at 790.

As applied here, Complainant's contributing factor argument cannot stand because the relevant decision makers, Mr. Cargill and Mr. Sickler, did not know of Complainant's protected activity. Mr. Sickler chose to terminate Complainant after he reviewed the formal investigation transcript and exhibits, not Complainant's injury record or safety reports. Nor did Mr. Sickler consider Complainant's prior injury record, reports of safety issues, or prior hours of service complaints. No evidence suggests that either of individual knew of Complainant's prior 2012 FRSA complaint or internal HR complaints. Complainant has also failed to proffer evidence of temporal proximity as several of the alleged protected activities that he wants the Tribunal to consider occurred decades before his December 2015 termination. The more recent events amounted to mere continuances of what he had reported at least a year prior and they do not independently establish temporal proximity. If Respondent had not fired Complainant for injury reports and safety complaints prior to 2015, why would it have done so in 2015? Complainant does not offer evidence to answer this question. Resp. Br. at 37-38.

Complainant also failed to show evidence of pretext, shifting explanations, antagonism, or hostility toward the protected activity, or a change in attitude toward the employee after engaging in protected activity. Respondent's explanation for the dismissal has stayed consistent: that Complainant violated rules relating to honesty, and use of company credit and reverse lodging without permission or approval. While some may label the decision as severe, there is no evidence that the reasons were pretext or that the decisionmakers did not truly believe that Complainant knew he could not take such actions absent approval. Considering Complainant's rising frustration with issues related to the South Coal Loop since 2003, which culminated in what he perceived as a forced stay in Amarillo, it is no wonder he felt justified to remain in Amarillo without permission in an attempt to work it out after the fact. Complainant tries to manufacture a change in attitude toward him by alleging differential treatment by claims representatives, but his efforts fall short. Complainant fails to provide evidence of this and it seems his real dispute concerns that his claims were not paid. This does not show a change in attitude, but does provide evidence that Respondent continued to accept his injury and safety reports and continued to address them as appropriate. Resp. Br. at 38.

Finally, under the FRSA, an employer avoids liability by furnishing clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. The best evidence that Respondent would have done so is that Mr. Jason McBride, the first person to notice Complainant's reverse lodging, hardly knew Complainant or about his history. Messrs. Blakeman, Sickler, and Ringstad engaged in fact-checking thereafter and none of them cited Respondent's history in their investigation. The issue clearly concerned whether an agreement existed and whether Complainant obtained permission, issues that were proven by the formal investigation. His stay in Amarillo and Mr. McBride's finance report triggered the investigation, not Complainant's protected activity. Thus the investigation would have occurred even in the absence of protected activity since the latter was not even noticed. Moreover, the discipline handed down by Respondent was demonstrated to have applied consistently, in a non-disparate manner, and within clearly established company policy against employees who committed the same violations, but who did not engage in protected activity.

C. Complainant's Response

Complainant alleges that he engaged in protected activity when, in a safety meeting on September 24, 2014, he requested a conference with the newly-promoted superintendent Mr. Blakeman to discuss safety issues. The request fell on deaf ears. On October 23, 2014, Complainant was hospitalized while on duty in Boise City due to a work-related injury and filed a personal injury report two days later. The incident stemmed from a service interruption due to defective switches which Complainant had reported at the September 24, 2014 meeting. These events occurred while Respondent employed Complainant and therefore is protected activity. *See Reply Brief of Complainant ("Compl. Reply")*, at 2.

A negative change in attitude toward Complainant occurred after October 25, 2014, when divisional manager Mr. Loya refused to accept the report and thus failed to comply with Respondent's Operations Management Injury Reporting Policy. Mr. Blakeman supervised a number of other division managers, who were deployed to retaliate against Complainant by removing him from permanent assignment, thus reducing his earnings. Mr. Blakeman interpreted Complainant's protected activities as a personal attack on him and deployed his division managers in such a way as to broadcast what happens when employees have the audacity to question his competence. The division managers worked collectively to isolate Complainant and ignored, delayed or did not return his phone calls and emails requesting that the retaliatory action cease. For example, on May 12, 2015, Complainant received a phone call from a union official that warned him to "lay low" on the emails and not send further correspondence to prevent "target on his back." *Compl. Reply* at 2.

Other instances of protected activity included a November 24, 2014 email from Complainant to Mr. Blakeman and Mr. Dane Freshour requesting the cessation of misconduct (CXD 42); Complainant's request to return to work (CX 11D); participation in an internal investigation with Mr. Blakeman where Respondent refused to correct an adverse action and pass his complaint to the labor relations department (CXR 12); a May 4, 2015 email request that Mr. Blakeman abate discrimination and retaliation; a report of a defective speed recorder (CXR 19); report of an unsafe engine (CXR 20); participation in Mr. Loya's investigation of protected activity claims (CXR 23); report of an inadequate training of locomotive engineers (CXR 24); a personal injury report of whiplash as a result of unsafe handling by an engineer (CXD 110); email to Mr. Freshour requesting a stop to ongoing discrimination and termination; and a report of a defective step on the lead locomotive; and a protected activity personal injury report regarding an instruction to operate a defective switch when the previous crew reported it in bad order dated November 17, 2015. *Compl. Reply* at 5-6.

Prior to his termination, Respondent changed the conditions of Complainant's employment when, without prior notification, it took away his reverse lodging benefits on several days in July and August 2015. Respondent chose not to fire Complainant for previous protected activity prior to 2014 because he remained a good and dedicated employee. Moreover, he worked under different management at that time, who, unlike the current set of managers, did not view Complainant's actions as protected activity that would threaten Respondent. *Compl. Reply* at 2-3.

When Respondent fired Complainant for alleged theft for fraud, it failed to follow its own disciplinary process. The labor agreement provides that management's disagreement with an employee's reasoning for a particular claim itself does not make the claim fraudulent. To the contrary, Complainant's underlying basis for reverse lodging in Amarillo was factual. He complied with the CBA when he gave advanced written notice to utilize the reverse lodging option, but Respondent excluded this evidence during its internal investigation in retaliation for his 2014 and 2015 protected activities. The CBA requires that such disputes be resolved by mandatory and binding arbitration and Respondent's failure to follow this procedure also evidences an intent to retaliate for Complainant's protected activity. If Respondent believed that Complainant had improperly used reverse lodging, it should have declined the claim and taken it to arbitration. Respondent showed no factual evidence that Complainant purposefully took money from the company and this demonstrates an intent by Respondent to retaliate for his 2014 and 2015 protected activities. Compl. Reply at 4.

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) stands for the proposition that any action by an employer that makes an employee think twice about speaking up for fear of reprisal is considered an adverse action. He was singled out in a safety meeting on September 17 and 18, 2015 for his protected activity reporting and this shows that Mr. Sickler was fed up with Complainant exercising his protected activity rights. Complainant's exclusion from a conference to discuss safety hazards also might well deter a reasonable employee from complaining about discrimination. Complainant lists a number of "opposition" and "participation" protected activities, which this Tribunal will address in the analysis that follows. Compl. Reply at 5-8.

According to *Palmer v. Canadian National Railway*,¹⁰ protected activity need only play any role at all as a contributing factor in an adverse action and that it did so in his case. Various members of Respondent's management knew of Complainant's injury and safety reports based on his work history transcript at CXD165 and reviewed Complainant's work history file before terminating his employment in December 2015, providing the necessary link between protected activity and adverse action. These members of management perceived Complainant's reports as a threat to their authority because the number of such reports helped determine their year-end performances. Based on Respondent's PEPA policy, which includes "Dishonesty about any job-related subject including falsification, or misrepresentation of an injury," one can infer that the real reason for Complainant's standalone dismissal was for misrepresentation of an injury as opposed to the alleged fraudulent charge. This shows that Respondent acted with animus when it imposed an adverse action on Complainant. Mr. Sickler did not accept Complainant's September 21, 2015 retaliation complaint and request to correct adverse actions and, in doing so, he silently condoned such hostile actions by failing to respond. Compl. Reply at 9-10.

The denial of reverse lodging privileges that Complainant was entitled to under the CBA without notification or arbitration, is an adverse action. There were no similar cancellations of reverse lodging benefits for other eligible employees in the operating system. Respondent failed to follow its own PEPA policy when the discipline handed down to him was not independently reviewed. Such intimidating conduct would have deterred a reasonable person from

¹⁰ ARB No. 16-035, ALJ No. 2014-FRS-154 (Sept. 30, 2016).

whistleblowing and forced that person to resign in the face of such a severely abusive working environment. Because an employer may be held liable for a supervisor employee's discriminatory animus under the "Cat's Paw" theory as articulated under *Staub v. Proctor*,¹¹ even if that employee did not make the ultimate employment decision, Respondent's reliance on the influence of employees such as Mr. Blakeman and Mr. Sickler render Respondent liable for these individual's actions. The only way to protect the company is for it to conduct an independent investigation into its employee's actions, which Respondent did not do. Respondent made no effort to comply or take affirmative steps with FRSA or RLA violations, as evidenced by Complainant's various protected activities from October 2014 to December 2015. Compl. Reply at 11.

Respondent's evidence shows that Complainant is the only employee in its history to have been dismissed for an on-property investigation. Other similarly situated employees who incurred higher levels of discipline did not face such treatment. Respondent allowed numerous other employees to utilize reverse lodging and never served notice to Complainant of its intent to nullify the reverse lodging policy, established by a CBA in 1985. Compl. Reply at 12.

OSHA's position that a railroad's bad faith refusal to allow an employee to return to work is an adverse action under the FRSA was affirmed in *Rader v. Norfolk Southern*.¹² Such a retaliatory refusal cannot be properly regarded as made pursuant the FRA's or the carrier's fitness for duty assessment, which would qualify the carrier for the safe harbor provision allowing it to hold out the injured employee. Carrier standards dictate whether a company can refuse to allow an employee to return to work. Respondent did not record such standards in its official policies, did not uniformly applied, or demonstrate that they were medically reasonable. This shows that Respondent's refusal is due not to a legitimate safety concern of a railroad carrier, but rather is motivated by retaliatory intent. Compl. Reply at 12.

Respondent has not shown that it would have taken the same action it did absent Complainant's protected activity. For example, it has provided no alternative explanations for its adverse actions; Respondent had no other reason to take the adverse actions it did in order to comply with the FRSA. Complainant provided information to Respondent's employees with supervisory authority and assisted in numerous internal and OSHA investigations, which he reasonably believed to constitute a violation of Federal law, rule or regulation of railroad safety and security. Respondent failed to take action. A duty of trust exists when a person agrees to maintain information in confidence. When Respondent requested and received Complainant's confidential information regarding his protected activities, it demonstrated a link to any and all retaliatory acts of discrimination from 2014 to 2015. Compl. Reply at 12-13.

Complainant has proven that Respondent acted with an intent to retaliate by not correctly enforcing its own rules and as demonstrated by its awareness of his protected activity. Evidence also validates temporal proximity of protected activity and adverse actions. Respondent's employee's testimony shows that they made mistakes in their determination that Complainant misused and violated rules and only proved that Respondent's actions were motivated by

¹¹ 560 F.3d 647 (7th Cir. 2008).

¹² 2016 U.S. Dist. LEXIS 17913.

Complainant's protected activities and disability. Pretext exists; circumstantial evidence exists in the form of a change in attitude toward Complainant after he engaged in various forms of protected activity between September 2014 and December 2015. Compl. Reply at 13.

Respondent has not demonstrated by clear and convincing evidence that it would have terminated Complainant absent his protected activity as evidenced by a lack of employees disciplined for misuse of reverse lodging and who also did not engage in protected activity. More likely, Respondent had enough of Complainant's insistence of protected activity reporting of safety hazards, personal injury reports, and hours of service violations. Complainant was permitted to operate under the South Coal Loop Agreement from September 2003 to July 2015 and informed Respondent of his intent to use reverse lodging. Moreover, employees did not receive notice of a change in policy until after the adverse actions taken against Complainant as demonstrated at CXR-52. Compl. Reply at 13-14.

III. ISSUES

- A. Did Complainant Timely File his Claims?
- B. Did Complainant Engage in Protected Activity?
- C. Did Complainant Suffer an Adverse Action?
- D. Did Complainant's Protected Activity Contribute to the Adverse Action?
- E. Would Respondent have Taken the Same Action in the Absence of Complainant's Protected Activity?

IV. APPLICABLE LAW

The purpose of the FRSA is to "promote safety in every area of railroad operations and reduce rail-road-related accidents and incidents." 49 U.S.C. § 20101. Section 20109(a) of the Act, in pertinent part, prohibits a railroad carrier, a contractor or subcontractor of a railroad carrier, or an officer or employee of a railroad carrier, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because (s)he: (a) provided information regarding any conduct the employee reasonably believes constitutes a violation of any federal law, rule, or regulation relating to railroad safety, or security, if the information is provided to a person with supervisory authority over the employee; or a person with authority to investigate, discover, or terminate the misconduct; (b) refused to violate any federal law, rule, or regulation regarding railroad safety or security; (c) filed a complaint related to the enforcement of provisions of the Act; or (d) notified the railroad carrier or the Secretary of Labor of a work-related personal injury or work-related illness of an employee.

Additionally, Section 20109(b) prohibits a railroad carrier, or an officer or employee of a railroad carrier, from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee because he: (a) reported in good faith a hazardous safety or security condition; (b) refused to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, provided the refusal was made in good faith and no reasonable alternative to refusal was available, and a reasonable person in the circumstances then confronting the employee would conclude that 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 the employee, where possible, notified the railroad carrier of the existence of the hazardous condition and his intention not to perform further work, or not 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; or (c) refused to authorize the use of any safety-related equipment, track, or structures if the employee believes they are in a hazardous safety or security condition, subject to the same qualifying provisions just discussed above.

Finally, Section 20109(c) of the Act prohibits a railroad carrier, or an officer or employee of a railroad carrier, from disciplining or threatening to discipline an employee for requesting medical or first aid treatment, or for following the order or treatment plan of a treating physician. However, a railroad carrier's refusal to permit an employee's return to work following medical treatment shall not be considered a violation of the Act if the refusal is made pursuant to Federal Rail Administration medical standards, or the carrier's medical standards for fitness for duty.

Section 20109(d)(2) of the FRSA incorporates the investigatory proceedings and structure of the burdens of proof of AIR 21, 49 U.S.C. § 42121. Under AIR 21 and the FRSA, a complainant must establish by a preponderance of the evidence that he engaged in protected activity, the employer took an adverse action, and the protected activity was a "contributing factor" that motivated the respondent's adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(i), (iii). See *Palmer v. Canadian National Railway / Illinois Central Railroad Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, DOL Rptr. at 16 (Sept. 30, 2016). Thereafter, a respondent can only rebut a complainant's *prima facie* case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1982.109; see also *Palmer*, ARB No. 16-035, US DOL Rptr. at 56-57.

V. FACTUAL BACKGROUND AND TESTIMONIAL EVIDENCE

A. Summary of Testimonial Evidence

Mike Sickler (pp. 82-144)

Mr. Sickler has worked for Respondent for 38 years. He will retire on October 3, 2016. He started working for Respondent in Mandan, North Dakota and has been transferred to thirteen different locations during his career. On July 22, 2012, Respondent consolidated the Colorado division and the Powder River Division into one division. At that time he transferred to Gillette, Wyoming and served as the general director of transportation, directly reporting to the general manager until 2015, when he became the general manager of the Powder River Division, the position he currently holds. Tr. at 82-84. He has anywhere from 12 to 15 managers reporting to him. There are between 4,000 and 4,300 employees in this division. Mr. Jason Blakeman directly reported to him in 2015 and was the superintendent between Denver and Amarillo. Tr. at 93.

Respondent is a transportation company that moves freight across the United States. Respondent's operations consist of twelve divisions,¹³ but that was recently reduced to ten divisions, including the Powder River Division. As a general manager, his duties include overseeing the entire operations of transportation yard and engine employees at the Powder River Division. These individuals move rail cars and operate trains. Tr. at 84-85.

Respondent absolutely encourages employees to report injuries through training of its officers and employees, safety meetings and its behavioral analysis program ("BAPP"), as well as the Safety Issue Resolution Process ("SIRP"). Respondent wants a safe railroad. Respondent also has the "enhanced safety program" led by union employees where the employees are paid to learn about how to approach their peers about safety issues. Tr. at 86-88.

Respondent has policies in place that prohibit retaliation. Respondent will not tolerate retaliation and an employee can be dismissed for retaliating against another employee. Tr. at 90.

The "South Coal Loop" consists of operating a train from Amarillo to Trinidad. One would van from Trinidad to La Junta and wait for another train to come back from La Junta to Amarillo. In essence there are three points in the South Coal Loop: Amarillo, Trinidad and La Junta. The "North Coal Loop" would operate a train from Denver to La Junta and van to Trinidad and wait for a train to come out of Amarillo to take it back to Denver. Both of these loops are part of the Powder River Division. Tr. at 91-92.

Mr. Sickler knew Complainant as one of his employees in the Powder River Division on the South Coal Loop. He first met Complainant in 2013 at a division town hall safety meeting for scheduled employees.¹⁴ Mr. Sickler is aware of the term "reverse lodging." He explained it as follows:

If I'm an employee, say for instance in Denver, and I operate a train between Denver and Sterling, and I can no longer hold that position, I'm going to bump into Sterling and bump another employee. And so now my home terminal is Sterling. I live in Sterling, so obviously I don't need a hotel in Sterling. So, I ask a superintendent ... is it okay, under the Collective Bargaining Agreement, if I can reverse lodge in Denver. You can, but it cannot exceed the length of your stay, as if it were on your home terminal.

Tr. at 94-96.

Mr. Sickler became aware of a reverse lodging issue involving Complainant in June or July 2015. The general director of transportation, Steve Thompson,¹⁵ had called him to ask if

¹³ At the time germane to this complaint, there were 12 divisions, but even after the reduction to 10 divisions the Power River division stayed basically the same. Tr. at 92.

¹⁴ Mr. Sickler explained that officers are "exempt" employees, while union member are "scheduled" employees. Tr. at 95.

¹⁵ Mr. Thompson works at the Kansas Division and "part of his duties are to watch the division budget, and he was the general director for the Kansas Division." Tr. at 97.

Mr. Sickler had approved Complainant's request to reverse lodge in Amarillo; he had not. Tr. at 96. Mr. Sickler denied approving reverse lodging and told Mr. Thompson that he would see if anyone on his staff had given Complainant permission to reverse lodge. Mr. Thompson indicated that he would do the same. Mr. Sickler reached out to the managers that would have direct knowledge of anyone that had given Complainant permission to reverse lodge; none had given Complainant permission. He also learned from Mr. Thompson that his division did not give Complainant permission to reverse lodge either. At that point, Mr. Sickler reached out to the labor relations department to check for an agreement or former agreement¹⁶ that would allow Complainant to reverse lodge without permission. Complainant worked under the Fort Worth and Denver ("FWD") CBA as his seniority bid was to work a FWD position. When Mr. Sickler learned that none of the agreements covered reverse lodging, he decided to call for an investigation to determine the facts as required under the CBA. Tr. at 96-101.

JX F is the Notice of Investigation that he had sent to Complainant. Mr. Sickler acknowledged that he issued the Notice of Investigation on the Kansas Division letterhead as that division bore responsibility to pay for the hotel where Complainant reverse lodged, a hotel in Amarillo. Following the investigation, he reviewed the investigation transcript (JX E) and the attached exhibits to the investigation (JX F). After counseling with a few individuals at Fort Worth and as the person who determined what discipline Complainant should receive, he concluded: "[t]o dismiss on a stand-alone basis, for theft and dishonesty." Tr. at 102-04.

Respondent has a discipline policy called PEPA. See JX J. Appendix B of this policy explains "Stand-alone Dismissal Violations." Item 1 reads: "Theft or any fraudulent act which may be evidenced by the attempt to defraud [Respondent] or by taking of [Respondent] monies or property not due." Tr. at 105.

Prior to dismissing Complainant, Mr. Sickler considered the investigation report¹⁷ and exhibits as well as Complainant's long term employment with Respondent. He "wanted to check all the facts because [Complainant] was a good conductor, thorough conductor, and he was a past local chairman [for the union], and I wanted to make sure that I had did (sic) my due diligence and the respect of being a local chairman that I did my due diligence." He "considered a three year Level S, but after talking to the PEPA team, [concluded] that there are no exceptions for bullet point number one, which is theft or taking of BNSF monies." He could not issue a more lenient form of discipline than dismissal. Tr. at 107-08.

Mr. Sickler recalled that during the investigation Complainant indicated that he had permission from the prior superintendent to reverse lodge. Mr. Sickler reached out to that prior superintendent, although he had retired, and that person denied giving Complainant permission to reverse lodge. Tr. at 107-08.

¹⁶ Mr. Sickler stated that Santa Fe Railroad, the Colorado and Southern Railroad (C&S), and the Fort Worth and Denver Railroad (FWD), were former railroads that now make up an entity of Respondent. Tr. at 100.

¹⁷ Mr. Sickler testified that the investigation consisted of over 400 pages and lasted 12 hours. Tr. at 109.

JX G is Complainant's dismissal letter. Complainant's past reported safety issues to Respondent related to any kind of illness or injury played no factor in Mr. Sickler's decision to dismiss Complainant from further employment. JX L is the union's initial letter appealing Complainant's dismissal. JX M is Mr. Sickler's letter to the union declining its appeal on Complainant's behalf. Tr. at 111-12.

Since becoming general manager, Mr. Sickler has terminated the employment of employees in the past for using company resources without permission: one exempt employee and one scheduled employee. Regarding the scheduled employee, a conductor, he stayed at a hotel the company had paid for when he had already been furloughed. The exempt employee was terminated from employment because he used his company vehicle to take personal photos of trains.¹⁸ Over his career, Mr. Sickler has terminated the employment of "quite a few" employees for misusing company resources. Tr. at 116-18.

On cross-examination, Mr. Sickler was shown CXD 23 and acknowledged the reverse lodging agreement for C&S. Tr. at 120-21. He agreed that the loop was a combined seniority district, but at the time at issue, Complainant was on an FWD turn. Mr. Sickler had seen CXD 153, dated September 21, 2015, previously. He did not take action on this letter from Complainant but Respondent did; it provided EEO training for La Junta and Trinidad. An RL code is a claim made by an employee for mileage of a trip. Mr. Sickler agreed that the RL code was for an arbitrary claim for reverse lodging. However, if one does not provide the required information, the claim is not paid. In this situation, Complainant worked an FWD position and he was not entitled to an RL code. Monies had already been paid out. Mr. Sickler responded "that's not how it works" when asked if Respondent could have just held the money from Complainant's paycheck for the hotel room. Mr. Sickler agreed that Complainant's work history showed zero levels.¹⁹ When presented with CXD 131 concerning "Alternative Handling," Mr. Sickler said Complainant did not qualify for alternative handling because the offense was misuse of company funds. Using reserve lodging at a location not authorized hurts the company because it maintains so many guaranteed spots for the hotel. Second, "when employees reverse lodge, they exceed their stay of the home terminal that they are supposed to be at." Tr. at 120-38.

The Tribunal asked Mr. Sickler, when referring to CXD-23, "Are you aware of whether or not the Complainant in this case ever gave advanced written notice of his intention to use reverse lodging", he responded "No, he did not." Further, when asked about him considering the imposition of a three-year Level S, Mr. Sickler stated that is was neither his practice nor Respondent's past practice to do that for theft or dishonesty. When asked about the two employees he had terminated, one exempt and one scheduled, he stated that JX J would not have applied to the exempt employee. Mr. Sickler indicated that the scheduled employee he terminated had worked for Respondent for three years whereas Complainant had close to 43 years of service. Tr. at 139-44.

¹⁸ Mr. Sickler clarified that this person was terminated from exempt status and that this employee went back to work as a scheduled employee under the Collective Bargaining Agreement. Tr. at 118.

¹⁹ The Tribunal infers that this means that Complainant had a clean disciplinary history.

Craig Adams (pp. 146-153)

Mr. Adams has worked for the railroad since May 1972 and joined C&S in November 1978. He currently works in Denver on a yard job. He worked on the Coal Loop from April 2004 off and on until January 2016. He worked Trinidad to Denver so he worked the C&S Seniority District. He used reverse lodging at Trinidad, Colorado. He understands that reverse lodging is an arbitrary part of the CBA. There was no claim involved in the reverse lodging process; one just went to the hotel and signed in. He received his permission to do reverse lodging in Trinidad from the superintendent's office in Denver.²⁰ He knows probably 25 to 50 people that use reverse lodging. Since Complainant's termination, reverse lodging was terminated in Trinidad and he does not know why. Mr. Adams served as a local union chairman for 16 years in Cheyenne, Wyoming and it is not a normal practice to immediately pull someone out of service for claiming an arbitrary. Instead the claim is just denied or sent up the chain of command. Mr. Adams has seen instances where claims were paid and Respondent later took it out of an employee's paycheck. He recalled Respondent doing that several years ago where employees were overpaid on vacations. Tr. at 146-50.

On cross-examination, Mr. Adams acknowledged that he has never worked out of Amarillo or on the FWD turn, and is not familiar with the FWD CBA's reverse lodging provision. Mr. Adams clarified that his examples about Respondent recouping from an employee's pay concerned instances where an employee actually filed a claim as opposed to the employee just using the company card to sign into a hotel. All of the persons he mentioned that used reverse lodging were all former C&S employees. Tr. at 151-53.

Jeffrey T. Cox (pp. 155-163)

Mr. Cox is a union representative and has served as a local chairman for two years. He works north out of Trinidad to Denver and is familiar with the reserve lodging agreement with C&S. He has not used reserved lodging himself, but knows people who have. In the last year, he knows of three employees who used reverse lodging. Tr. at 155-56.

Complainant worked the AMT 51-11 turn. The back of the North Loop agreement shows which turns are allocated to which numbers, but it should be a BN turn. Whatever turn the employee is holding determines which agreement applies. While Complainant was going through his investigation, he called the union general chairman and the general chairman understood that Complainant should be able to call reverse lodging. Tr. at 157-58.

As far as arbitrary claims, they depend on where one is working and what one is doing. There are many different arbitrary pay agreements, probably hundreds of them and they are easily confused. Not all of the agreements are posted, so a person cannot easily look them up and most people just learn as they go. Complainant is the only employee he knows of where Respondent conducted an investigation for claiming an arbitrary. Mr. Adams does not believe

²⁰ He later explained that he only needed permission from his superintendent once and could use it thereafter, as opposed to having to request permission each time he wanted to use reverse lodging. Tr. at 153-54.

that it is right to dismiss Complainant. “They had the opportunity to decline the claims and take their money back and let it go to arbitration, like all the other claims do.” He is aware of other cases, including those involving himself, where Respondent recouped its money because the company overpaid an employee. Tr. at 159-62.

On cross-examination, Mr. Adams agreed that issues related to reverse lodging are subject to CBA interpretation, and if there’s a dispute between the union and the company about an interpretation, it is subject to arbitration under the Railway Labor Act. Tr. at 163-64.

Michael A. Solano (pp. 164-182)

Mr. Solano has worked for the railroad almost 22 years. Complainant and Mr. Cox asked him to represent Complainant in the investigation concerning this matter. He is a Santa Fe employee while Complainant worked in C&S. The investigators said that Complainant was under an FWD agreement, which he was not; they believed him to be on a C&S turn, but the turn was 51-11. The general chairman identified this as a C&S assigned turn in the original North Loop agreement. Part of the investigation process involved a form of exchange of information 48 hours in advance. Mr. Solano had never represented someone before in one of these investigations so he did not even know what kind of computer system was being used. Mr. Blakeman gave him a data dump, because he told Mr. Solano that they needed to meet. Mr. Solano met with Mr. Blakeman at a Waffle House 48 hours prior to the investigation to exchange information.²¹ During this meeting, he told Mr. Blakeman that he opposed conducting the investigation under the FWD agreement, but Mr. Blakeman indicated that is how it would proceed. Tr. at 164-67.

At the beginning of the investigation, Mr. Solano attempted to get the FWD agreements “thrown out” and proceed as a C&S investigation. The investigation lasted about 15 hours – it went on and on – but they still did not resolve the FWD or C&S issue. *See* JX E. Local Chairman Cox gave him what Mr. Cox had provided to the officials for the meeting which included a statement by General Chairman Schollmeyer, stating his belief that Complainant was still under the agreement where he could reverse lodge, because he operated at a C&S turn. Reverse lodging is an arbitrary. An arbitrary is a matter intended to go to a higher official “and if that official declines it then it gets brought back and then we have the ability to push it to our (sic) Vice General Chairman and General Chairman, and they take it up with the Vice President of the company, until... arbitration.” To his knowledge, he has never known of an employee pulled out of service for claiming an arbitrary. In his experience, pulling out of service ahead of time requires a severe issue. “[U]sually you only get pulled out of service ahead of time, if there’s alcohol or drugs on there, because they’ll argue that you’re a safety hazard to them and yourself.” Mr. Solano did not feel comfortable with the outcome of the investigation and stated so in his closing statements. Tr. at 167-71.

On cross-examination, Mr. Solano agreed that he was not familiar with the FWD agreement used during the investigation, although he had represented union members in close to

²¹ Complainant was not notified of or attended the meeting with Mr. Blakeman. According to Mr. Solano, Mr. Blakeman forced the meeting upon him. Tr. at 167.

40 or 50 investigations. He agreed that Complainant knew that an exchange of information about the investigation had occurred prior to the meeting. Mr. Solano and Complainant were copied in on JX F, an email dated Friday, November 20, 2015 about exchanging exhibits on Sunday. The investigation hearing was held on November 24, 2015. Tr. at 172-77; *see also* JX E.

In response to the Tribunal's questions, Mr. Solano said on JX F, page 8, Complainant should have been identified, with C&S Seniority, as CO-10 as a prior rights C&S conductor rather than NH-99 as the spreadsheet indicates. "NH-99" means new hire which is almost five seniority levels beneath Complainant. In joint service with the BN, he should be a CO-08. Complainant, with 40 plus years of time, was a CO-10 and not a new hire. The code CO-10 means that person is a prior rights Colorado and Southern conductor. Tr. at 177-80.

On re-cross-examination, Mr. Solano described a separation between what regular employees can see and what another employee with enhanced abilities can see on Respondent's computer system. Tr. at 180-81.

Daniel B. Best (pp. 183-217)

Mr. Best has worked for Respondent for nine years. He currently works as the field manager for the Medical and Environmental Health Department for the Powder River Division. He holds a master's degree in vocational rehabilitation counseling and vocational evaluation, and is a certified rehabilitation counselor and qualified rehabilitation consultant. Tr. at 184. His job duties include providing services to Respondent's employees at work or returning them to work after they have had some type of health event. He views his primary job is "[t]o keep employees putting food on the table." Tr. at 203.

Mr. Best first came in contact with Complainant shortly after he started with Respondent in 2008. His office had received a hotline report about Complainant expressing concern for his condition, indicating Complainant had gone somewhere in an ambulance and looked very ill. Eventually, the matter was set aside as there was no indication that Complainant had actually gone anywhere in an ambulance. Mr. Best did not directly contact the hospital about Complainant on October 24, 2014, but someone from Respondent did.²² CXD 11 is Complainant's medical release of information form dated October 27, 2014. Respondent has a general procedure that any time an employee has an incident requiring hospitalization, it wants to make sure that its employee receive medical treatment. Respondent provides billing information, insurance information and the medical status form to the facility.²³ Respondent also has an obligation to report on-duty injuries to the Federal Railway Administration.²⁴ HIPAA²⁵ applies to the hospital's release of information to Respondent, but it is not a violation of HIPAA for Respondent to ask for information from them. Tr. at 184-94.

²² A help desk nurse for Respondent contacted the hospital. Tr. at 190.

²³ *See also* Tr. at 193.

²⁴ *See* 49 C.F.R. Part 225.

²⁵ Health Insurance Portability and Accountability Act.

Subsequent to his hospitalization, Complainant provided Respondent three medical status forms. Mr. Best had a number of telephone conversations with Complainant about returning to work; Complainant was begging to him go back to work. But Mr. Best did not release him to return to work because Complainant had a new diagnosis of diabetes and Respondent did not know whether Complainant had had a low blood sugar event. Tr. at 195. Mr. Best explained the process for determining when an employee can return to work:

When anyone is hospitalized, we have an obligation to perform what's called a "Fitness for Duty" evaluation. We have to make sure that the person who has had a significant medical event is not placing themselves, the public or other workers at risk. So, we have to have an understanding. If something is serious enough that the person is admitted to the hospital as a patient, we need to have a good assurance that we understand what's happening.... With a situation like this, when someone has a new diagnosis of diabetes, it's our standard policy, with any employee, whether it's, you know, something that happened on property or whether it's something that happened at home or on vacation, we have to be able to determine that their blood sugar, their A-1-C levels, are stable enough or not dropping too low. In a situation like this -- and this was explained to [Complainant] on several occasions -- the necessity is that we have to be able to see a certain period of time of blood sugar logs, so that we're sure that he's not going to have a hypoglycemic event.

Tr. at 195-96.

The medical department can convey to an employee's supervisor that it cannot verify that the person is fit for duty and can recommend that the employee be held from service until cleared by the medical department. Mr. Best's office tries to make a determination as quickly as possible. He denied any insinuation that his department would hold someone out indefinitely for a variety of tests, "that just doesn't happen." Tr. at 200.

On cross-examination, Mr. Best acknowledged that he had encountered Complainant on several occasions and was always able to establish fitness for duty and return him to work. No one ever instructed him to keep Complainant off of work for the October 2014 incident. He does not play a role in the discipline of scheduled employees. On occasion he does interact with Respondent's claims department. Mr. Best makes sure that the bills are paid for the work related injuries and sometimes the claim's department staff will have questions about the timeline and when someone is coming back to work. In the medical department he works with the entire department. Mr. Best would not be aware of safety related reports other than those that concern medical matters. Tr. at 204-07.

In October 2014, during his initial telephone call with Complainant, Complainant told Mr. Best that he had pancreatitis. Complainant mentioned that the doctor told him that he was borderline diabetic and his blood sugar had spiked. Mr. Best understood that at the time of his incident Complainant had been on a train and had to be taken off the train. Mr. Best involved

Ms. Carol Wilkes because of Complainant's diabetes diagnosis.²⁶ Ms. Wilkes wanted to look at one week's worth of blood sugar logs to determine whether Complainant had dramatic highs and lows that Respondent needed to know about. CXD 34 is an email dated November 4, 2014 that Mr. Best sent to Complainant after Complainant had returned to work. CXD 34 accurately reflects Respondent's policy regarding actions it follows after an employee has been admitted to a hospital. It matters not whether the incident occurred on or off duty; "[o]nce we have knowledge that there's been a severe or significant medical event to that extent, our responsibility kicks in." Mr. Best has seen numerous letters like those contained in RX 16, letters that have gone to employees who had a new diabetes diagnosis and required them to submit blood sugar logs. Complainant submitted the requested blood sugar logs and was allowed back to work the very same day. Mr. Best was not aware that Complainant alleges that he did not have diabetes. Nothing in Complainant's records supports that. Mr. Best was not involved in any decision to issue the Notice of Investigation Complainant concerning use of company funds and lodging, or the decision to terminate Complainant's employment. Tr. at 207-17.

Larry Ray Miller, Jr. (pp. 219-230) (testified telephonically)

Mr. Miller, hired on the railroad in 1997, has been the General Chairman since October 26, 2016. He knows Complainant and is familiar with the Cool Loop Agreement. Complainant first worked on turn 51-11, which is a BN turn – the South Loop. Mr. Miller has not read the investigation transcript but has read the agreements and is familiar with the reverse lodging agreement. Section 1.38 states "under the South Loop job application table that is the specific turn, whether or not they are BN or Santa Fe turns. And turn 11 is a Trinidad based BN turn, straight out of the job application table, right out of the South Loop agreement." See CXD 50.²⁷ Complainant was working under turn 11, 51-11. The number 51 indicates the south loop and that Complainant worked on a Trinidad turn. Under section 1.3, one works under that agreement that his or her turn delegates. Therefore, Mr. Miller believes that Complainant was working under BN "or for that matter the C&S agreement," which entitles him to reverse lodging. Reverse lodging is not considered an arbitrary. He is aware of no case where a Respondent employee was pulled out of served for claiming reverse lodging without permission. Tr. at 219-226.

On cross-examination, Mr. Miller disagreed that the FWD collective bargaining agreement would apply in this case. He maintained that the South Loop agreement would apply, referencing section 1.4 and that 51-11 was not an FWD turn. In his opinion Respondent wrongly applied the agreement in this case. Tr. at 227-30.

Frank Edward Thurston (pp. 237-332)

Complainant started working on the railroad in 1971. He served as a brakeman from 1972 until 1977 when he was promoted to assistant trainmaster. He held various management

²⁶ Mr. Best testified that Ms. Wilkes is a registered nurse and "kind of our go-to person for questions and guidance for people who have cardiac conditions, strokes, diabetes, sleep apnea...." Tr. at 206.

²⁷ The table reference is located at CXD 50, page 12. Tr. at 225.

positions for 19 years. Upon Respondent's merger in 1995, he returned to the ranks as a trainman. When he left as an official, his pay scale was equivalent to assistant superintendent. Tr. at 237.

One of Complainant's complaints centers on two injuries he sustained for which he did not receive compensation. The first injury, a hearing loss claim, occurred in 2012. The second claim was a whiplash claim that also happened in June 2012. He submitted personal injury reports, CDX 60 and CDX 90. *See also* JX A. However, the hearing loss claim is not on his "hard card." The statute of limitations on the claim expired around June 10, 2015 so he contacted an attorney who in turn contacted Respondent's claims department. Complainant was told to contact Mr. Loya in the claims department to discuss his two outstanding cases. He then sent an email to Mr. Loya requesting a conference to discuss the claim and Mr. Loya forwarded the email to a claims office in Montana. CXR 23 reflects a meeting between Complainant and Mr. Loya to discuss the claims. Tr. at 237-44.

Complainant had a pancreatitis attack while working. While he was in the emergency room at the hospital in Boise City, the trainmaster from Amarillo (Mr. Curtis Williams) came into the examination room, sat on the doctor's seat and started questioning him. Complainant was transported to an emergency room in Amarillo and a nurse came up to him and gave him a note to call Mr. Best. He called Mr. Best back who asked about Complainant's pancreatitis attack and Complainant told him that doctors were still examining him. Complainant "indicated to him that they thought [he] might have an onset of diabetes." Mr. Best then explained to Complainant that Respondent had a diabetic program headed by Ms. Wilkes. Following that telephone conversation, Complainant was removed from his permanent assignment and placed on the "Trainmaster's Cut-Off Board" and put on medical leave. This occurred prior to the completion of the doctors' examination. Complainant alleged that "our agreement provides that we're not supposed to be put on medical leave for at least five days. So, I thought that this was all retaliatory to me having the injury that resulted in a service interruption, because we couldn't line the switches [at] Boise City to put the train off the main line." Complainant indicated to Mr. Best that he wanted to return to work immediately because he was looking to retire and wanted to attain the highest five years of income.²⁸ Mr. Best did not return Complainant's phone calls and he had to reach out to the local chairman before Mr. Best returned Complainant's calls four days later. Tr. at 244-48.

After Complainant went through that medical process, he could not return to his regular assignment, and that was part of the problem. "Under our agreement, you cannot be removed from your permanent assignment for 30 days." When Complainant tried to go back to his assignment, Respondent said that he had to displace the most junior man instead of going back to his earlier assignment; so he tried to do that. However, he was precluded from doing so and the managers would not return his calls about it, which is why he thought it was all retaliatory.²⁹ In

²⁸ Complainant later explained that an employee does not receive pay while on medical leave. Tr. at 247.

²⁹ Complainant's lay representative then stated the following: On the back of CXD 47, the last page references "'Assignment 4300 Station: La Junta.' 'Home conductor South Coal...' 'F.E. Thurston CO-10,' well, that shows me with my prior rights on the C&S, and the computer assigns things to the most senior people. And then you see 'NH-99,' that's that 'New Hire-99,' code." Tr. at 252. Seniority always

the South Loop there are three districts: Trinidad, La Junta, and Amarillo. Trinidad operates under the C&S agreement. La Junta operates under the Santa Fe agreement. In Amarillo, there are two seniority districts, FWD and Santa Fe. They split up the turns according to those different seniority districts. Complainant's seniority is at the top of everybody for C&S turns. When Complainant works a Santa Fe turn his seniority falls under Santa Fe's agreement, but he would still be a CO-10 and he falls above the new hires. There is no a situation where Complainant should be coded NH-99. Tr. at 248-55.

Upon establishment of the loops, the C&S committee did not sign the agreement but the Santa Fe committee did. Until an agreement is reached or goes to arbitration, employees covered by the C&S agreement do not have to relocate from their home terminal, which in Complainant's case was Trinidad. Any fringe benefit that C&S employees receives continues in effect until an agreement is reached. C&S covered employees had a reverse lodging agreement and Superintendent Boyd³⁰ approved it for people working the Loop. Because of that, Complainant checked into the hotel using the reverse lodging at Amarillo. He did not collect lodging at both ends. Complainant did not submit a written request for reverse lodging because the agreement directs employees to notify the carrier. Before the Loop, he sent a letter that he wanted the provisions of that agreement for lodging to apply at the terminals that he would be working in August 2003. *See JX F*. The first time he learned Respondent took exception to his use of the reverse lodge at Amarillo occurred during the August 19 meeting in Denver, when he learned that the Kansas Division objected to its use. At that meeting, Complainant said that if he did something wrong, he would be willing to reimburse the monies. After the meeting he called the union and spoke with general chairman Joy Schollmeyer, who agreed with Complainant that Respondent was wrong. Tr. at 255-59.

Upon notification of the investigation meeting, Complainant relayed to Mr. Blakeman that no one told him that they were going to discuss the agreements and all of his paperwork was at home. Mr. Blakeman indicated that he did not know the agreements either and that the labor relations department told him that there was no FWD reverse lodging agreement. It surprised Complainant that instead of letting the C&S committee handle his matter, they were forcing him under the FWD rules and felt that this was not right. It placed Complainant at a disadvantage because he did not know how to proceed under the FWD process to defend himself. In his 43 years with Respondent he had never been subjected to the FWD rules. Due to application of the FWD process Complainant did not have the opportunity to include the representatives he wanted in his committee. Complainant was not made aware of the meeting or the exchange of any exhibits that occurred between Mr. Blakeman and Mr. Solano until the investigation began. So when Complainant wanted to enter exhibits at the hearing, the interrogating officer would not permit it. "[T]here was no way for me to determine which exhibits were actually looked at by the carrier when they issued the discipline notice," said Complainant. Mr. Solano, Complainant's designated representative, was not familiar with the FWD rules either. In fact,

follows where the employee works. Respondent's counsel specifically stated that he did not object to Complainant's representation, but did object to the representative testifying on behalf of Complainant. Tr. at 253.

³⁰ Mr. Boyd's first name was not provided at the hearing.

none of the union representatives on his side knew the FWD rules. CXD 163 is a copy of the appeal of the dismissal by the union, an appeal declined by Respondent. Tr. at 260-70.

Complainant believes these discriminatory practices took place to force him to retire. Respondent is upset because of the injuries and the safety items he reported, especially the young engineers' improper operation of the trains. As far as damages, Complainant desires reinstatement with back pay for the earnings he has lost. His home is in receivership and under foreclosure. He also seeks reimbursement for expenses related to these incidents. However, when asked about evidence of expenses, he did not present exhibits to the Tribunal. He also asked for removal of censor from his personnel record, reinstatement of seniority rights, payment of vacation allowance, and punitive damages. Tr. 270-73; *see also* CXD 163.

On cross-examination, Complainant acknowledged that prior to 2014 he reported 18 personal injuries over those 42 years with Respondent. The only discipline on his record was a reprimand in 2000. Tr. at 273-74.

Regarding his October 2014 hospitalization, Complainant agreed that when he asked the Respondent's representative to leave, he did so. The representative did not prevent any of Complainant's medical care. Complainant was shocked to receive a note from the nurse telling him to call Mr. Best while on the emergency room table; it upset him. Complainant agreed that Respondent has a rule that required him to notify the company about medical issues so that its employees do not pose a safety risk. Complainant denied that he told Mr. Best that he had diabetes. Complainant told Mr. Best that the doctors had not finished their tests but believed he may have an onset of diabetes. But he told Mr. Best that his condition was still under evaluation and he would provide Mr. Best with a full report. However, Mr. Best told someone about Complainant's health status and Respondent removed him off his permanent assignment and put him on medical leave. Complainant took exception to this action. When he testified earlier that he could not be removed, he had referred to agreements that provide that prevent his removal from his permanent assignment for 30 days. Complainant referenced the C&S Productivity Agreement, Rule 36 located in CXD 181. However, the Human Resources department stated that under the agreement that removal could not occur for five days, not 30 under the C&S agreement. Tr. at 276-86.

Respondent took issue with Complainant's pancreatitis attack because it caused a service interruption. Complainant was instructed to take the train off the main track and put it in a siding. Complainant could not do this, which meant that the train remained on the main line for an extended period of time—because Respondent had to direct a new train crew behind his crew to come and remove the train from the main line. Tr. at 286-88.

Complainant believes that when a doctor clears him to return to service, Respondent should clear him for service. Tr. at 290. Complainant had three telephone conversations with Mr. Best, one on October 24, one the next day and one again on October 27. Tr. at 290-91. Complainant has worked on trains with numerous employees who have diabetes. Tr. at 292.

Complainant admitted the importance of returning to work because he was trying to maximize his earnings in the five years before his retirement. The retirement money does not

come from Respondent. In 2015, he was denied work more than in his entire career. Complainant maintained that he was either removed from a job board, the board was shuffled when it should not have been, or the computer would not let him mark up to a certain position. During this time, Complainant took issue with more than one local chairman when Complainant felt the local chairman manipulated the crew management system improperly. Those local chairmen are not in Respondent's management, but are local chairmen of whatever union covers the territory in which the Complainant worked. Complainant maintains that the authority given the local chairman to shuffle the boards violated the RLA. Complainant faults Respondent's managers, including Mr. Blakeman, for not taking action to correct the issue he brought to their attention. Because they did not take action, Complainant assumes that their inaction relates to his reporting injuries and making safety complaints. Tr. at 292-98.

Concerning the reverse lodging issue, Complainant has seniority in each of the three seniority districts at Amarillo: FWD, Santa Fe and Burlington Northern and has to use them as explained by his lay representative.³¹ The C&S agreement has four or five levels. Complainant's C&S seniority applies when he works C&S jobs in La Junta, where he is working a C&S turn; and they apply to him when he is in Amarillo working a Burlington Northern C&S turn. Tr. at 301-03.

JX F is a letter dated August 28, 2003, in which Complainant requested reverse lodging. At the time he wrote this letter, the C&S union had challenged the creation of the Loop. Complainant understood that the agreement provided that until there was a final agreement or an arbitration award, no one should have to be moved. Complainant maintained that C&S never reached a final agreement with Respondent. An arbitration award was entered September 1, 2004, Public Law Board 67-57 located at CXD-78. Complainant acknowledged that he did not ask any current management for permission to reverse lodge in Amarillo. Tr. at 303-12.

CXD 163 is the union's appeal of Complainant's dismissal. Complainant maintains that the wrong union committee submitted the appeal because the wrong agreement was used to conduct the investigation. Complainant falls under the C&S agreement, not the FWD agreement. However, given the circumstances of the investigation, he had no choice. Tr. at 317-19.

Complainant acknowledged a "General Notice" as a notice that applies to all territories in which one works. During the investigation, a general notice was entered that requires an employee to first ask for permission to use reverse lodging. However, when he read the notice, it did not indicate that he needed to obtain permission. Complainant knew of the rules quoted during the investigation, but he took exception to their application regarding the agreement and his dismissal. Tr. at 327-29.

Since his termination from employment, Complainant has not looked for other employment. Complainant stated that he cannot look for employment because if he takes employment elsewhere, he loses his connection with the railroad for retirement benefits. Complainant has not applied for railroad retirement. Tr. at 329.

³¹ See footnote 30, *supra*.

Russell Gonzales (pp. 333-64)

Mr. Gonzales is a Division Crew Manager. In that position, he manages a group of Managers of Corridor Operations and ensures that there are enough crews to manage the traffic flow across the division. Back in 2014 to 2015, he served as a division crew manager for the Powder River Division. Tr. at 333-35.

He used a computer planning program called "TSS Express" to perform his duties. Mr. Gonzales defined a turn as an individual's position on the board. Individual employees are assigned to the board and the board holds a number of turns that run between point A and point B based on mileage. Whenever Respondent combines roads, other prior employee rights from other boards come into play. Various agreements determine how many slots on a board are allotted to a particular group of railroad employees based on percentage. Part of his job involves reviewing and interpreting collective bargaining agreements. He confers with the local chairman "quite a bit, actually" when he has to decipher an agreement to ensure that he is interpreting it correctly. "Sometimes the agreements can be very complicated to read and I've got to make sure that I understand fully what's being said." Tr. at 335-37.

Mr. Gonzales knew of Complainant's October 2014 hospitalization, which prevented him from completing his turn. Once it is determined that an individual cannot cover the turn coming back, they are placed on a layoff away from home code. So Complainant went back to the original board so he could return to his home terminal. The decision to place Complainant on a medical layoff was handled through the medical department. If an employee's medical layoff lasts for an extended time period, that employee will be moved to the Cut-off Board. Mr. Gonzales has no role in determining the length of a medical leave absence. Once placed on the Cut-off Board, the employee is taken off of his turn. In Complainant's case, he was removed from his La Junta turn. Once an employee comes off of the Cut-off Board, he is placed on the "Bump Board," which allows an individual to make a move based on his seniority – to go and bump somebody else. Once on the "Bump Board," the employee, here Complainant is not limited to the board he was on previously, but he could bump onto other boards. Mr. Gonzales has no decision making authority on what board Complainant can bump back onto; it is Complainant's decision. CXD 43, an email dated December 18, 2014, is a description of what happens on a particular board, the "La Junta Board 300, the South Coal Loop." It accurately reflects how the process worked for Complainant. As far as making decisions related to the movement of a board at issue, the local chairman made those decisions, not him. Mr. Gonzales has not seen the local chairmen take any action concerning Complainant that he has not seen taken with other employees. Tr. at 339-45.

The local chairman decided to move Complainant to Amarillo, from the Santa Fe board to the FWD board. Mr. Gonzales viewed this move as illegal, but he did not know if the local chairman was aware of that. If someone told Complainant that he could go to Amarillo, that person would be incorrect. It is true that Complainant was initially told he could move but it was later deemed incorrect. Mr. Gonzales acknowledged that discovering this after the fact happens. "I don't know how often, but it does happen." Tr. at 345-47.

On August 19, 2015, Mr. Gonzales attended a meeting in Denver that Complainant also attended. During this meeting, Complainant raised issues about the balance of work assignments in the Coal Loops. As a result of that meeting, it was discovered that the system calculations used to cut a turn had been handled incorrectly. Complainant correctly maintained that something was wrong there, but Mr. Gonzales does not know of any repercussions to Complainant for bringing the issue to light; he described it as a positive thing. Tr. at 348.

Mr. Gonzales is aware that Complainant was noticed for an investigation regarding his use of reverse lodging in Amarillo without permission. He was not involved in the investigation process and does not deal with reverse lodging issues as part of his job. JX F, page 8 is a screen shot of specific job number out of a pool, Amarillo 51-11. It lists NH-99, the Midwest seniority roster, which is not Complainant's roster. Mr. Gonzales had no idea why the screen shot showed the wrong roster. JX F, page 70 is a bulletin posted for the South Loop effective September 20, 2015. The bulletin refers to AMT-5111, a 5100 series turn, a FWD turn that falls into the BN classification. Tr. at 349-54.

In response to the Tribunal's questions, Mr. Gonzales stated he supervises 26 different stations and any station can range from two to 10 boards. There are about 2,700 people on these boards, and not many have more than 40 years of service like Complainant. A person with 40 plus years of service is not very likely to be bumped out of a job. Although Mr. Gonzales could not tell from the printout at JX F, page 70, the BN designation includes both FWD and C&S. Based on the turn itself, he cannot tell if the equity is C&S or FWD. This document does not tell someone whether or not the C&S rules apply. The FWD does not mean anything for purposes of understanding which rules apply for Complainant's seniority. Tr. at 361-64.

Jason McBride (pp. 365-79)

Mr. McBride is currently a Manager 2 of Technologies Services. He has worked in the railroad industry since 1997 for an entity that merged with Respondent. He has worked as a yardmaster, dispatcher, chief dispatcher, chief 2 dispatcher, terminal manager, and served as the terminal superintendent in Amarillo from 2011 until November 2015. As the terminal superintendent, he was responsible for everything coming in and out of the terminal, including the finances of the Amarillo terminal. He would see Respondent's employees coming through that terminal from both directions and those employees may or may not use Amarillo as their home terminal. Tr. at 365-69.

Sometime in 2015, Complainant marked up on one of the boards in Amarillo. To Mr. McBride's knowledge, it was the first time Complainant had been to Amarillo. He knows that the hearing involves Complainant use of reverse lodging in Amarillo. He first learned of the issue when he reviewed reports related to hotel allocations. At that time, he noticed that the number of consecutive nights on that report was very high. At that point in time, Complainant had not checked out in 20 or 30 nights. This indicates that someone has kept their belongings in a room and prevents someone else from using the room. Mr. McBride contacted the crew manager for the Kansas Division to see if Complainant had contacted her about reverse lodging and he forwarded the information to his expense person to see if he had notes on it. After it came back that none of this was approved, he sent the information to Mr. Blakeman, to see if the

Powder River Division had approved Complainant's reverse lodging. Mr. McBride learned that Complainant had not made a request nor had there been approval for Complainant to use reverse lodging. None of the communications on this issue included discussions of Complainant filing safety complaints or his injury history. JX F, page 6 is the excel file that he reviewed about the lodging. Mr. McBride noticed that Complainant was going towards La Junta, a FWD turn. There are no turns that Respondent runs north out of Amarillo that are not FWD turns. An employee out of Amarillo would learn that turns headed north are FWD turn by doing some research or consulting the local chairman. Tr. at 370-74.

On cross-examination, Mr. McBride was shown CXD 131, another hotel spreadsheet. He agreed this spreadsheet does not show Complainant staying 20 nights, but only one. However, he asserted that there was another report that shows how many days in a row he stayed. Tr. at 376-79.

Jason Blakeman (pp. 381-418)

Mr. Blakeman started working for Respondent in July 2004. His prior work history includes working as a conductor, trainmaster, a manager in systems safety, terminal manager, superintendent of operations and most recently the Director of Technology Services. In 2014-2015 he was Superintendent of Operations in Pueblo, Colorado. In that job he was responsible for operation of train movements, manpower, and car and locomotives. He reported to Mike Sickler, the general manager at the time. Under Mr. Blakeman, he had five trainmasters, five division trainmasters and one senior trainmaster. Complainant reported to one of his division trainmasters. Tr. at 381-84.

Mr. Blakeman first learned about Complainant's misuse of company resources in August 2015 when Mr. Sickler forwarded an email to him. In this email, the Kansas Division had discovered that there was an Amarillo-based, Powder River Division employee staying at the Amarillo crew lodging facility. They wanted to know if the Powder River Division had any knowledge or explanation for that occurring. Mr. Blakeman reached out to the crew officer, Mr. Gonzales, and asked him if there was any valid reason why Complainant would stay at the Amarillo crew lodging facility. Mr. Blakeman also consulted TSS, Respondent's operating system, and looked at the turn Complainant worked, as well as his movement history.³² He also looked at the applicable rules and agreements to verify if an agreement allowed for it. Mr. Blakeman found a general notice requiring a superintendent's approval for the use of lodging in that manner. Mr. Blakeman learned that Complainant had bid on the Amarillo 51-11 turn, which is a FWD former road turn and thus a FWD agreement would apply. After talking with the labor relations department, he understood that no applicable agreement allowed reverse lodging. However, to give Complainant the benefit of the doubt, he went over and above what was required, as he contacted Complainant instead of just issuing an investigation notice.

³² Mr. Blakeman later explained that when he reviewed Complainant's movement history, he was looking at where Complainant worked, when he went there, and what agreements applied to him and his movements. Tr. at 387-88.

Mr. Blakeman met with Complainant on August 28, 2015 at the Amarillo conference room. Among other things, Mr. Blakeman asked Complainant to show him an agreement or inform him of an agreement allowing to him to use reverse lodging without permission. If Complainant had done so, Mr. Blakeman would cancel the investigation. Complainant had numerous agreements with him, but could not find anything of relevance initially. Mr. Blakeman asked Complainant about the dates Complainant stayed in the Amarillo's crew lodging facility and asked him what policy that would allow him to do so. Complainant was surprised to learn that the money came from the Kansas Division's budget. Complainant believed that Mr. Blakeman came from the Powder River Division budget and that he would be able to "correct any issue with [Mr. Blakeman], if anything came out". This response surprised Mr. Blakeman and made him feel as though Complainant "knew that there was a problem with what he was doing and that he thought if he was caught, he would be able to just work it out with me, specifically, versus any kind of formal process." Mr. Blakeman made the decision to go forward with the investigation notice. Tr. at 384-93.

After Mr. Blakeman's meeting with Complainant, Complainant sent him an email dated August 31, 2015, at RX 1. Mr. Blakeman inquired as to the documents sent by Complainant and learned they were not applicable and that no applicable agreement for reverse lodging for former FWD employees existed. Tr. at 394-95.

Mr. Blakeman's next involvement in this matter occurred during the investigatory hearing, in which he introduced several applicable rules. JX F includes General Notice No. 17 that discusses lodging and associated information for the Powder River Division, and states "Reserve lodging utilized by TY&E employees must be approved by the superintendent." After the hearing, Mr. Blakeman did not participate in the discipline issued to Complainant. Tr. at 395-99.

On cross-examination, Mr. Blakeman denied holding Complainant out of service pending the investigation. He agreed that Respondent had to ensure that all injuries are reported per the FRA regulations. If an employee is injured and an issue needs correction, he would sometimes become involved in such a matter. Mr. Blakeman acknowledged that he did not attempt to find out if a disputed agreement was in effect on the C&S and BN for reverse lodging. He knows of an agreement for reverse lodging under the C&S agreement. Mr. Blakeman did not try to clarify with any union representative whether they thought the C&S agreement applied to Complainant's situation. Mr. Blakeman used the TSS system and his conversation with Mr. Gonzales to determine the Complainant was on a FWD turn. Mr. Blakeman did not select Mr. Solano as Complainant's union representative for the investigation and is not responsible for what the union representative does or does not know about the FWD investigatory process. He acknowledged that Complainant expressed concerns about FWD conducting the investigation, but Mr. Blakeman was a witness during the investigation not the conducting officer. Tr. at 400-15.

Derek A. Cargill (pp. 418-452)

Mr. Cargill began working for Respondent around April 2011. He started out as assistant manager in the labor relations department, and was promoted six months later to manager. He

has held the title of director Labor Relations since May 2012. His current primary duty is to oversee the Policy for Employee Performance Accountability (“PEPA”), a discipline policy that applies to all of Respondent’s scheduled employees. Any time a supervisor in the field has a question about the applicability of the PEPA policy, or the appropriate level of discipline, they will call either Mr. Cargill or someone on his team. In addition, any time a formal investigation that could lead to dismissal, the supervisors in the field are required to send the transcript of that investigation to his office for review, and his office informs the field supervisor whether or not dismissal is supported under the policy and consistent with how discipline is assessed throughout Respondent’s system. His office’s review of the investigation transcript is an independent review. Tr. at 419-21.

Mr. Cargill had the opportunity to review Complainant’s investigation transcript and exhibits concerning the misuse of company resources. Mr. Bill Badenhop was the conducting officer of Complainant’s investigation hearing. After Mr. Cargill’s review of the investigation transcript, he sent his findings back to Mr. Badenhop, telling him that the findings supported dismissal under the PEPA policy. He based his reasoning for the dismissal on a couple of grounds. First, Complainant’s conversation with Mr. Blakeman on August 28, 2015 indicated to him that Complainant recognized that use of reverse lodging could be an issue. There was nothing to show that he worked under an agreement that allowed him to conduct reverse lodging nor did he receive permission from a supervisor to do so. The general notice in effect required Complainant to obtain prior permission. Finally, based on the investigation, the conducting officer did not find Complainant credible. He considered the possibility that Complainant could have made a mistake, but importantly, Complainant had 41 years of service, including time as a manager in the company and as a local union representative. Complainant also had extensive knowledge of the agreements. When weighing those factors, Mr. Cargill believed Complainant’s actions did not constitute a simple mistake, but rather he found intent. Under the PEPA policy (JX J, App. B), misuse of company resources is considered a stand-alone violation which is grounds for dismissal on a one-time basis. Mr. Cargill specifically referenced Sections 1 and 2 to Appendix B of the PEPA policy. In making his recommendation for dismissal, neither Complainant’s previous injury reports or nor safety violation reports played a factor in his recommendation. Tr. at 421-28.

On cross-examination, Mr. Cargill acknowledged that he deferred to the expertise of Mr. Ringstad on the issue of whether or not the C&S agreement applied to the reverse lodging issue. He did consider Complainant’s assertion that Complainant thought he was authorized to use reverse lodging under an agreement, but did not find Complainant credible. Mr. Cargill agrees with Respondent’s alternative handling policies and Complainant would not have been eligible for alternative handling. “I think anytime you have an employee that’s charging for something that is not authorized, that is fraudulent conduct, and it’s taking money from the company when that hasn’t been approved.” When asked, Mr. Cargill could not remember ever recommending dismissal of an employee based on the employee claiming an “arbitrary” to which the employee believed he was entitled. Tr. at 428-43.

Upon the Tribunal’s questioning, Mr. Cargill stated that Respondent did not conduct an investigation of the extent of the loss related to Complainant’s actions or perform research into whether Complainant received permission to use reverse lodging. In dismissing Complainant,

Mr. Cargill considered the number of instances of alleged fraud against him. Mr. Cargill could not explain why no investigation occurred when the alleged improper reverse lodging occurred from July 10, 2014 to November 23, 2015. When shown RX 7 and its indication that Respondent was not charged for two of the days alleged in the dismissal letter, Mr. Cargill did not think that reduced the seriousness of Complainant's violation. He maintained that none of Complainant's supervisors knew that Complainant used reverse lodging for over a year. Mr. Cargill acknowledged that under the PEPA policy that one "may" be terminated from employment for committing one of its standalone violations. However, he stated "for a charge like [Complainant's], for fraud or dishonesty or theft, it would be either dismissal or no discipline." The policy did not provide for an intermediate form of discipline. When questioned about this, Mr. Cargill stated that there was "potentially" a hierarchy of punishment within the stand alone violations that could result in dismissal. He also acknowledged that Complainant attempted to proffer additional documents at the hearing but did not allow them nor did he consider them because Complainant did not provide them 48 hours prior to the hearing as required by the FWD agreement. Tr. at 443-51.

Jason Ringstad (pp. 452-485)

Mr. Ringstad is the General Director of Labor Relations currently assigned to the Train, Yard and Engineman (TY&E) craft on the South Region for Respondent. His duties include negotiating contracts, handling cases in arbitration, interpreting labor agreements and resolving disputes. He held this position in 2014. He reports to the assistant vice president of the labor relations department. He knows Complainant, having had five or less face-to-face interactions with him. JX, page 27 is the South Coal Loop Agreement. This agreement created the routes between La Junta, Amarillo and Trinidad—the routes discussed during the hearing. Section 1.3 of this agreement means if an employee was on a C&S allocated turn, then the C&S agreement would apply, just as it would for Santa Fe and FWD. Mr. Ringstad determined that Complainant was assigned to an FWD allocated turn while in Amarillo. Thus, the FWD agreement applied to him in this situation. Mr. Ringstad is not aware of any non-FWD allocated turn coming out of Amarillo. Further, he understands Section 24 of JX F to mean that reverse lodging does not extend to employees. Tr. at 452-59.

Mr. Ringstad disagrees with prior testimony interpreting JX F, page 39 the 51-11 turn as a Trinidad/BN turn, which would make it a C&S allocated turn. This page means that if there are 11 turns in the pool, four would be allocated to Trinidad/BN, four to Amarillo/BN, one to Amarillo/Santa Fe, one to La Junta, and one to Pueblo. Tr. at 459-63.

During the August 19, 2015 meeting in Denver, he recalled discussions about the mileage regulation. Mr. Ringstad did not recall Complainant raising any safety reports or any discussion of Complainant's prior injury reports during that meeting. Tr. at 463-64.

Mr. Blakeman did reach out to Complainant to ensure Mr. Blakeman correctly understood the applicable agreements. Mr. Ringstad took the position that the FWD agreement applied to a FWD turn. He knows that Complainant asserts that the C&S agreement applied to that turn. However, even if the C&S agreement did apply, Complainant would still have to comply with its terms and conditions, which included obtaining permission from a supervisor

first. Complainant did not comply with that prerequisite. Although Mr. Ringstad heard Complainant assert that he was grandfathered into a C&S agreement with reverse lodging, Mr. Ringstad does not know to which agreement Complainant cites. As far as “forcing” Complainant to use different investigation procedures, the procedure stems from collective bargaining. Mr. Ringstad had no involvement in Complainant’s reverse lodging investigation other than providing guidance on which agreement applied and which investigation rules would apply. He did not provide a recommendation on what he thought should happen to Complainant. Complainant’s dismissal is currently in a dispute resolution process outlined in the FWD agreement. Tr. at 464-75.

On cross-examination, Mr. Ringstad agreed that he had been in the hearing room throughout all of the testimony. All of the agreements referenced during the hearing are available on the labor relations webpage and accessible to all of Respondent’s employees. Mr. Ringstad acknowledged that Mr. Miller’s opinion about applicability of a given agreement has some weight. He did not know of Mr. Miller’s opinion until he heard it at the hearing. Mr. Ringstad agreed with Mr. Miller that reverse lodging is not an arbitrary. Mr. Ringstad said that, to his knowledge, in Complainant’s 42 years with the company, the Complainant had never worked on the FWD prior to this incident. Tr. at 477-85.

VI. TIMELINESS

The FRSA allows a complainant to file a complaint with OSHA within 180 days of the alleged violation. *See* 49 U.S.C. § 20109(d). Complainant filed his original complaint with OSHA on November 14, 2014. *See* Compl. Reply, at 6; *see also* CX 13. Therefore, any alleged violations that he became aware of **prior to May 14, 2014** are untimely pursuant to 49 U.S.C. § 20109(d), unless Complainant can successfully argue that the statute of limitations should be equitably tolled.³³ However, Complainant makes no such argument. These untimely incidents include Complainant’s April 7, 2014 Employee Personal Injury/Occupational Illness Report (CXD 4) and his August 28, 2003 letter of intention to utilize the reverse lodging option (CXD 24). Complainant also characterized Mr. Loya’s December 2, 2014 email advising Complainant that Respondent’s claims department does not accept personal injury reports as a negative change in behavior. *See* Compl. Br. at 2; *see also* CXD 8. As this alleged violation occurred *after* Complainant filed his November 14, 2014 OSHA complaint, it also falls outside of the 180-day period.

Complainant later supplemented his OSHA complaint by email dated February 8, 2016. *See* CXD 172. Here, Complainant is time barred from bringing any allegations that accrued **prior to August 8, 2015**. Complainant has not averred that he learned of these incidents or of their protected activity nature after the date on which they occurred, which would toll the statute of limitations. Several incidents alleged by Complainant predated August 8, 2015 including:

³³ “Equitable tolling should be applied sparingly and only when exceptional circumstances prevented timely filing through no fault of the plaintiff.... Only exceptional circumstances, not garden variety claim[s] of excusable neglect, allow us to toll the statute of limitations.” *Bohanon v. Grand Trunk Western Railroad*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (Apr. 27, 2016).

- March 19, 2015: Complainant's email to Mr. Blakeman filing internal EEOC charges against Mr. Chad Fluke for alleged violation Respondent's TY & E Safety Rule S-26.9. *See* Resp. Br. at 4.
- March 23, 2015: Complainant's removal from assignment to relocate to Amarillo. *See* Resp. Br. at 12.
- April 2, 2015: Denial of Complainant's personal injury claim (CXD 65).
- April 2, 2015: Recorded conversation between Complainant, Mr. Freshour, Mr. Blakeman and Mr. Best (CXR 12). Complainant states "At this point, one can infer Respondent Blakeman made the decision to dismiss Complainant." Compl. Reply at 5.
- April 27, 2015: Recording of Complainant's report of excessive wheel slippage (CXR 15).
- April 29, 2015: Recorded conversation between Complainant and Mr. Loya regarding Complainant's personal injury claim. (CXR 16).
- April 29, 2015: Recorded conversation between Complainant and Mr. John Redure, manager for Respondent, regarding safety issues related to switches (CXR 1A).³⁴
- May 4, 2015: Complainant's email to Mr. Blakeman requesting termination of discrimination and retaliation. *See* Compl. Reply at 5.
- May 8, 2015: Complainant's email to Mr. Blakeman reiterating his previous report that Mr. Fluke had removed his turn from La Junta.
- May 9, 2015: Complainant's email to Mr. Gonzales reporting acts of misconduct and negligence (CXD 88).
- May 18, 2015: Complainant's recorded complaint of defective seat locks (CXR 19). *See* Compl. Reply at 5.
- May 12, 2015: Recording of Complainant's conversation with Union Secretary Stacy Gulik warning Complainant to stop sending emails (CXR 17).
- May 19 and 21, 2015: Complainant's recorded complaint of defective speed recorder (CXR 20, 21). *See* Compl. Reply at 5.
- May 28, 2015: Recorded conversation between Complainant and Mr. Loya to settle injury claims (CXR 23). *See* Compl. Reply at 5.
- June 9, 2015: Recorded conversation between Mr. Marty Jackson, Mr. Loya, and Complainant regarding personal injury claims dated June 9, 2015 (CXR 24). *See* Compl. Reply at 5.
- June 10, 2015: Email from Mr. Loya to Complainant regarding tolling statute of limitations regarding a June 2012 incident (CXDs 89, 94). *See* Compl. Reply at 5.
- July 1, 2015: Email from Complainant to Mr. Gonzales requesting a conference to discuss grievances (CXD 109). *See* Compl. Reply at 7.
- July 12 to 14, 2015: Voicemails left by Mr. Best concerning treatment of personal injury (CXR 28, 29).

³⁴ Complainant indicates that this conversation took place at a safety meeting on September 24, 2014. *See* Compl. Br. at 2. However, Complainant cites to a transcript of the safety meeting (CXR 1A), which shows that the meeting took place on April 29, 2015, more than 180 prior to his February 8, 2016 OSHA complaint. As the only evidence supporting this protected activity is a transcript dated April 29, 2015, the Tribunal presumes that the meeting took place on that date, rendering the complaint as to this particular protected activity untimely.

- July 13, 2015: Personal injury report in which Complainant allegedly suffered whiplash from an engineer's incorrect/unsafe train handling (CXD 111).
- July 20, 2015: Complainant's email to Ms. Andrea Smith seeking information on mileage reimbursement (CXD 116).
- July 27, 2015: Complainant's email to Mr. Freshour reporting adverse actions (CXD 115).

VII. COMPLAINANT'S *PRIMA FACIE* CASE

A. Protected Activities

Complainant's protected activities can be separated into three categories. First, Complainant made intermittent safety reports throughout 2015, which the Tribunal will analyze below. The latter two protected activities boil down to incidents surrounding two events: an injury suffered while on the job on October 23, 2014 and Respondent's investigation into Complainant's allegedly impermissible use of corporate lodging.

1. Safety Reports

On August 20, 2015, Complainant reported a defective locomotive. In support of this alleged protected activity, he proffered a radio recording of his communication to the mechanical desk in which he stated that he "...talked to mechanical about [a] defect on [the] engineer step" and advised the mechanical desk to "also have them check [the] conductor seat latch [which is] broken [and] rocking back and forth." The mechanical desk responded, "Will put defect in on seat too." CXR 33.

Under 49 U.S.C. § 20109(b)(1)(A): "A railroad carrier...shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting, in good faith, a hazardous safety or security condition." 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).

Complainant has submitted a brief recording of his radio communication reporting a defective step and broken latch on the locomotive. Aside from a fleeting reference in Complainant's reply brief, the record does not provide any detail of the incident. *See* Compl. Reply at 5. It was not discussed during the hearing testimony. Given the unintelligible nature of the recording, the lack of additional evidence, and without the context surrounding this particular incident, this Tribunal cannot ascertain whether Complainant held an objective belief that the defective step and broken latch on the locomotive amounted to a hazardous condition. In other words, the evidence does not prove by a preponderance of the evidence that a similarly situated conductor with Complainant's knowledge and experience would have believed these conditions to be hazardous. Because Complainant has not met his burden proving that he held such an

objective belief, the Tribunal holds that this August 20, 2015 communication does not constitute protected activity.

Next, on September 21, 2015, Complainant sent an email to Mr. Sickler, seeking his assistance to address a grievance. Complainant leveled a number of accusations against members of management in this email. Most germane to railway safety, Complainant asserted that some of these individuals violated TY&E Safety Rules S-1.2.13 Conflict of Interest. *See* CXD 145. However, Complainant did not specify in what way these individuals violated this safety rule and instead reiterated this conclusory statement in the email. Because the content of Complainant's email did not articulate how Respondent's alleged violation of TY & E Safety Rules S-1.2.13 Conflict of Interest impacted railroad safety, the Tribunal finds that the email does not constitute protected activity.

Finally, Complainant's last safety report concerned an incident that occurred on November 17, 2015, in which Complainant communicated to the chief dispatcher regarding a line switch:

Chief: [D]ispatcher said you were refusing to line switch.

Complainant: [N]o I told him the vans were stuck we just stopped we only have 15 minutes left to work if we pull down now we're going to have the crossing blocked. It's to (sic) far to walk from the engine with the snow blowing.

Chief: [I]t's going to be an hour of service issue...I'm authorizing you guys to work pass (sic) the hours of service and operate the switch, your (sic) going over the hours...everybody in the picture knows it there won't be any repercussions for your just following instructions.

CXR 48.

That same day, Complainant completed a personal injury report detailing the incident. At the hearing, Complainant testified that the dispatcher instructed him to operate a switch after his hours of service expired during a snowstorm with high winds, causing him to seek medical attention. He attributed this, and a prior injury, to young engineers not operating the trains properly. Tr. at 270-71. According to the personal injury report itself, the winds twisted his body in such a way that he suffered a pulled tensor and quadriceps, among other injuries. *See* CXD 155.

Subsection (b)(1)(B) of the Act prohibits a carrier from retaliating against an employee for refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties. The Act continues:

(2) 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; and
 - (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.

29 CFR § 20109(b)(1)(B)

There is little doubt, based on the uncontroverted recorded conversation above, that Complainant notified the chief dispatcher about his hesitation to proceed given the weather conditions. As to whether an individual with the same knowledge and abilities and in like-circumstances would have refused to operate the locomotive, Complainant's personal injury report gives some indication of the conditions a similarly-situated conductor would have confronted in his position. In particular, the incident occurred at dawn, in the snow, and at a temperature of 20 degrees. *See CXD 155*. Provision of information is protected activity only when the complainant actually believes in the existence of the violation. *See Ray v. Union Pac. R.R. Co.*, 971 F.Supp. 2d 869, 993 (S.D. Iowa 2013). The conditions in which Complainant found himself suggest that visibility was low, which would give a reasonable conductor in Complainant's position pause to evaluate whether low visibility would impede him from safely making the switch. Given the likelihood that operating under these conditions would result in serious injury, and unsure of when the snow would abate at the time, Complainant's initial refusal was indeed reasonable.

Finally, Complainant must demonstrate that he made his refusal in good faith and no reasonable alternative existed at the time of the incident. Given the weather and time of day, it appears that Complainant refused to make the switch in good faith. Both the audio recordings and the personal injury report corroborate the inclement weather that occurred at the time and this Tribunal sees no reason to doubt that Complainant refused to make the switch for any other reason other than the threat posed by the weather conditions to his personal safety. As to whether he had a reasonable alternative, Complainant had two choices at that moment: refuse to operate the locomotive or comply with the dispatcher's directive. Upon the dispatcher's insistence, he opted for the latter and suffered an injury as a result.

Based on the foregoing, then, the Tribunal finds that Complainant engaged in protected activity when he injured himself conducting a line switch and filed an injury report related to the incident on November 17, 2015.

2. Occupational Injury

By its terms, the FRSA whistleblower statute prohibits railroad carriers from taking an adverse action or in any other way discriminating against an employee if such discrimination derives, in whole or in part, from the employee's good faith act of providing information,

causing information to be provided, or otherwise assist in an investigation regarding railroad safety or security. *See* 49 U.S.C. § 20109(a). More pertinent to this case, the FRSA also provides protection for employees who seek prompt medical protection. Section 20109(c) states:

(c) Prompt medical attention.

(1) Prohibition. A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline. A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, *except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty.* For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C. § 20109(c) (emphasis added)

Complainant essentially characterizes one of his protected activities as his report of a pancreatic injury and his subsequent attempt to return to service. A similar circumstance arose in *LeDure v. BNSF Railway Co.*, in which a conductor suffered a work-related injury and presented an unrestricted release to return to work from his treating physician. The conductor's field manager, who was not a member of the employer's medical staff, found the medical release ambiguous and insufficient because it warned of the attendant hazards of the conductor's return to heavy industrial activity. As such, he chose not to relay the conductor's medical release to the employer's medical director and did not return the conductor to work. ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 1-2 (June 2, 2015).

In that case, the ARB narrowed its focus on the Act's safe harbor provision, which allows employers to commit what would otherwise constitute an adverse employment action by preventing an employee from returning to work, as reflected in the italicized language above. The Act permits a carrier to refuse to return an employee to work following an injury if the carrier justifies the refusal in accordance with the Federal Railroad Administration ("FRA") or the carrier's medical standards as to fitness for duty. *Id.* at 6.

Citing to the Act's legislative history, the Board emphasized the importance of the "return to work" provision of subsection (c)(2) by observing that this provision was not part of the original draft of the Federal Railroad Safety Improvement Act of 2007 (House Rep. No. 2095) introduced by Congressman Jim Oberstar of Minnesota. The Senate rejected Representative Oberstar's version and subsequently added qualifying language to subsection (a)(5), which limited the scope of actionable protected activity:

[T]o request that a railroad carrier provide first aid, prompt medical treatment, or transportation to an appropriate medical facility or hospital after being injured during the course of employment, or to comply with treatment prescribed by a physician or licensed health care professional, *except that a railroad carrier's refusal to permit an employee to return to work upon that employee's release by his or her physician or licensed health care professional shall not be considered discrimination if the refusal is in compliance with the carrier's medical standards for fitness for duty.*

Id. at 7 (quoting H.R. 2095, 110th Cong. § 20109(a)(5))(emphasis added). The House responded in kind by adding the fitness for duty language as written in the final version of subsection (c)(2). The end result became law.

Although the Board in *LeDure* deemed this language to represent a safe harbor for the employer to keep an employee from working, it held that the employer bears the burden to prove that the safe harbor provision applies by establishing two elements: (1) that the employer has a fitness for duty standard and (2) that the employee failed to meet that standard. Should an employer fail to satisfy this two pronged test, the Board held, the fact-finder should proceed with the Act's burden-shifting analysis. Finding that the record did not include evidence of the carrier's or FRA's medical standards for fitness for duty, the Board determined that the carrier was not entitled to benefit from the safe harbor provision. *Id.* at 7-8.

Turning to whether the conductor successfully made out his *prima facie* case, the Board affirmed the ALJ's finding that the protected activity, a FELA lawsuit filed by the conductor, did not contribute to the adverse action, the employer's refusal to allow the conductor to return to work. Though the conductor presented some circumstantial evidence that the FELA lawsuit was a contributing factor to the employer's adverse action, which some triers of fact might consider sufficient to show the necessary nexus, the Board affirmed the ALJ's rationale. Particularly, the treating physician's warning in the medical release of the conductor's return to duty would make any prudent medical manager seek out further information before approving the conductor's return, the ARB held. Thus, the Board upheld the ALJ's determination that the employer based its refusal to return the conductor to work on non-retaliatory reasons. *Id.* at 8-9.

In contrast to *LeDure*, the record in this matter is replete with references to Respondent's standard for authorizing an employee with a diabetic condition to return to work. At the hearing, for example, Mr. Best articulated the policy in general terms:

When anyone is hospitalized, we have an obligation to perform what's called a "Fitness for Duty" evaluation. We have to make sure that the person who has had

a significant medical event is not placing themselves, the public or other workers at risk. So, we have to have an understanding. If something is serious enough that the person is admitted to the hospital as a patient, we need to have a good assurance that we understand what's happening.... With a situation like this, when someone has a new diagnosis of diabetes, it's our standard policy, with any employee, whether it's, you know, something that happened on property or whether it's something that happened at home or on vacation, we have to be able to determine that their blood sugar, their A-1-C levels, are stable enough or not dropping too low. In a situation like this—and *this was explained to [Complainant] on several occasions*—the necessity is that we have to be able to see a certain period of time of blood sugar logs, so that we're sure that he's not going to have a hypoglycemic event.

Tr. at 195-96. (emphasis added).

When shown his prior deposition testimony at the hearing, Complainant agreed that he had previously testified that Respondent indeed explained the situation to him when he stated, “My understanding was that they were going to remove me from service, because of my medical condition for fitness for duty.” Tr. at 281.

Respondent proffered an example of a letter it sends to an employee who has been diagnosed with diabetes. It sets out the medical documents required to complete a fitness for duty review including a completed medical status form, copy of a 30-day blood sugar log, an A-1c blood test result, and hospital discharge form. *See* RX 16. In this particular instance, Complainant only needed to provide a seven-day blood sugar log. The duration of the required blood sugar logs depend on a number of factors, Mr. Best explained, such as extremely high or low A-1c levels or the severity of the condition. Employees with diabetes are monitored intermittently to detect alarming levels. Tr. at 212-13.

Complainant characterized Ms. Wilks’s handling of the situation as interference with his treatment plan. *See* Compl. Reply at 6. In a conversation between Ms. Wilks and Complainant on October 28, 2014, however, Ms. Wilks conveyed the reasoning behind the policy described by Mr. Best:

[W]e take it very serious (inaudible) I can tell you I know you have been upset about having to stay to do these blood sugar logs but I can tell you if you lose (sic) consciousness at work due to low blood sugar they may keep you out even longer so the issue is that it’s a safety concern and just because your doctors return you to work doesn’t means (sic) [Respondent] feels safe...we have a different level of risk we’re willing to assume here at the railroad then (sic) your doctor’s.”

CXR 11.

Based on this evidence, the Tribunal finds that Respondent had a fitness for duty standard in place to guard against the dangers of employing an active employee with diabetes. While the

length of time varies depending on the circumstances, *all* employees with the condition must submit blood sugar logs to confirm their blood sugar levels are within a normal range. In fact, when asked whether any employees with diabetes had a history of making safety complaints or prior injuries at the railroad, Mr. Best answered that he did not know and it would not matter; each employee receives the same letter at RX 16. Tr. at 212. Respondent explained this to Complainant in a clear manner and Ms. Wilks even expounded on the policy reasons for this requirement in her explanation to Complainant.

Having met the first prong of the *LeDure* test proving that it has a fitness for duty standard, Respondent must also show that Complainant did not meet the standard. In contrast to Complainant's perception, it does not appear that Respondent intentionally tried to hold him out of work. At the end of the conversation between Complainant and Ms. Wilks, she told him "I'm going to call [Mr. Best] and let him know that I feel at this point that you're ready to return to work." CXR 11. This conversation took place on October 28, 2014—just four days after Complainant reported his pancreatic attack. The abbreviated nature of his absence from work does not indicate an intent to keep Complainant from working, but instead shows that Respondent applied a uniform policy of ensuring an employee with a newly-diagnosed medical condition could safely resume his work duties. In this brief interim period, Complainant's ability to perform his job functions pursuant to Respondent's fitness for duty standards was called into question based on the diabetes diagnosis and Respondent erred on the side of caution by requiring him to submit a week's worth of blood sugar tests according to company policy.

On October 30, 2014, Complainant sent an email to Mr. Best and Ms. Wilks among others containing his blood sugar records from October 24 through October 30. *See* JX B. In response, Complainant was released to work unrestricted that very day on the condition that he provide a completed medical status form by November 30, 2014. *See* JX C. Complainant characterized JX C, dated November 7, 2014, as a threatening letter from Ms. Wilks. *See* Compl. Reply at 6. Given that Respondent had already returned Complainant to work and gave him three weeks to submit the proper documentation, this Tribunal cannot agree with Complainant's depiction of Ms. Wilks's letter as threatening.

Moreover, the medical status form that Ms. Wilks instructed Complainant to submit is the same required form as reflected in the letter sent to any employee diagnosed with diabetes at RX 16, lending credence to the notion that Respondent did not single out Complainant or place barriers preventing him from returning to work. Finally, Respondent's requirement that Complainant need only submit seven days' worth of blood sugar logs, whereas other diabetic employees have had to provide 30-day logs based on RX 16, indicates that Respondent applied its fitness for duty without any particular animus toward Complainant. Once Complainant submitted his blood sugar logs, that is once he satisfied the company's fitness for duty standard, Respondent returned him to work.

Based on the foregoing, Respondent has demonstrated that it has a fitness for duty standard, evaluated Complainant's condition over a four-day period, and once Complainant met that standard, complied with the policy by returning him to duty. As such, the safe harbor provision at 49 U.S.C. § 20109(c)(2) applies, providing a justification for Respondent's decision to keep Complainant from returning to work for the brief period that it did. Because Respondent

opted to hold him out from working pursuant to a fitness for duty standard, the Tribunal finds that Complainant's report of his pancreatic injury and subsequent attempt to return to work do not amount to protected activity.

3. Reverse Lodging

As this Tribunal instructed Complainant's representative during the hearing: "My lane is the Federal Rail Safety Act... as far as bringing the union issues... You're going to have to present some sort of link." Tr. at 76.

In spite of an abundance of Complainant's exhibits, his detailed briefs, and the voluminous nature of the record overall, Complainant has failed to articulate how reverse lodging, a collective bargaining issue, impacts railroad safety such that this activity is protected under the FRSA whistleblower provision.

During his hearing testimony, Mr. Sickler defined reverse lodging as:

[B]asically if I'm an employee and I was... for instance in Denver, and I operate a train between Denver and Sterling, and I can no longer hold that position, I'm going to bump into Sterling and bump another employee. And so now my home terminal is Sterling. I live in Sterling, so obviously I don't need a hotel in Sterling. So, I ask a superintendent, I ask an officer, is it okay, under the Collective Bargaining Agreement, if I can reverse lodge in Denver. You can, but it cannot exceed the length of your stay, as if it were on your home terminal.

Tr. at 96.

On its face, this description of reverse lodging, a concept foreign to this Tribunal prior to the hearing in this matter, does not seem to invoke railroad safety, which is the purpose of § 20109. In his reply brief, Complainant lists numerous alleged protected activities. *See* Compl. Reply at 5-7. Reviewing these asserted protected activities, this Tribunal sees no overt reference to reverse lodging.

Although reverse lodging was discussed at the hearing *ad nauseam*, the Tribunal still fails to see how reverse lodging relates in any way to railroad safety. As an example of Complainant's inability to explain the relevance of reverse lodging to this matter, Complainant's representative wished to admit CXD-80 at the hearing, a document regarding a dispute as to whether a loop on the map was created properly. When asked about this document's relevance to the case, Complainant's representative responded that "this is where the dispute started that started causing this friction at the railroad." Tr. at 44-45. Although a difference of opinion over a collective bargaining agreement term may indeed represent a source of contention between the parties, this Tribunal fails to see how the issue of reverse lodging issue bears on railroad safety.

As part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, Congress enacted several amendments to the FRSA. Notably, the 2007 amendments transferred authority for rail employees' whistleblower claims from the National Railroad Adjustment Board to the Labor Department's Occupational Safety and Health Administration. The Railway Labor

Act granted jurisdiction to the National Railroad Adjustment Board to decide disputes between employees and carriers stemming from the interpretation of applicable agreements. However, the 2007 amendments stripped the National Railroad Adjustment Board of authority to resolve whistleblower complaints under the FRSA. *See Mercier v. Union Pacific Railroad Co.*, 2011 DOL Ad. Rev. Bd. LEXIS 95, at *8 (Sept. 29, 2011). Because the reverse lodging issue does not represent protected activity or touch and concern a railroad safety issue pursuant to the FRSA, the National Railroad Adjustment Board seems to be a more appropriate venue for the parties should they choose to adjudicate that issue elsewhere. In short, the Tribunal finds that any of Complainant's actions related to reverse lodging do not constitute protected activity under § 20109.

B. Adverse Action

An adverse employment action must affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, slip op. at 3-4 (Oct. 16, 2009); *see also Simpson United Parcel Service*, ARB No. 06-065 (Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, slip op. at 4 (Nov. 30, 2005). In *Melton v. Yellow Transp., Inc.*, ARB No. 06-052 (Sept. 30, 2008), the ARB determined that the deterrence standard established by the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Under the *Burlington Northern* standard, the test is whether the employer's action could dissuade a similarly situated, reasonable worker from engaging in protected activity. *See Jenkins v. United States Environmental Protection Agency*, ARB No. 98146, slip op. at 20 (Feb. 28, 2003) (an action must constitute a tangible employment action, *i.e.*, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

In *Vannoy v. Celanese Corp.*, the Board observed, "An adverse action...is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis." ARB No. 11-044, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board clarified, "that *Burlington's* adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

Applying the standard to whistleblower statutes in the context of AIR 21, the Board held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip

op. at 10-11 n.51 (Dec. 29, 2010)).³⁵ The Board elaborated, “Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20.³⁶ Accordingly, the Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Vannoy*, ARB No. 11-044 at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, ALJ Case No. 1995-ERA-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus.”)). However, this does not mean that every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.

Complainant lists the following alleged adverse actions: his removal from service on October 24, 2014 and subsequent reduction in earnings; denial of his request for reimbursement of those lost earnings in a November 3, 2014 email (CXD 34); a warning from the Union Secretary/Treasurer to stop sending emails if Complainant does not want “a target on your back” on May 12, 2015 (CXR 17); several alleged instances of reduced earnings, termination of benefits, and changed job assignments throughout March 2015 to June 2015 referenced in Complainant’s July 1, 2015 email (CXD 109); Complainant’s loss of seniority following an

³⁵ “Evaluating the respective statutory language of SOX, AIR 21, and FRSA, we conclude that the *Williams* definition of adverse personnel action also applies to FRSA claims. FRSA, which prohibits discharg[ing], demote[ing], suspend[ing], reprimand[ing], or *in any other way discriminat[ing]* is virtually identical to the relevant broad statutory language in SOX (*in any other manner discriminat[ing]*) and even broader than that of AIR 21.” *Fricka v. Nat’l Railroad Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (Nov. 24, 2015) (emphasis added)(internal quotes omitted).

³⁶ See also *Williams*, ARB No. 09-018, slip op. at 15, definitively clarifying the adverse action standard in AIR 21 cases:

To settle any lingering confusion in AIR 21 cases, we now clarify that the term “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term “discriminate” is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

apparent computer system glitch (Tr. at 179); Respondent's refusal to reimburse Complainant certain business expenses from 2009 through 2014 (RX 20); and the termination of his employment on December 7, 2015 (CXD 162). *See* Compl. Reply at 7.

In addition, Complainant also presented a document entitled "Summary of [Respondent] Let's Talk Session Debriefing/Safety Coordinators Meeting." In particular, the document notes that Complainant did not feel that the safety committee functioned correctly and rejected his and other individuals' input. The document indicates that the meeting took place from September 17-18, 2015. *See* CXD 140; *see also* Compl. Br. at 27-28.

As an initial matter, the Tribunal observes that some of these alleged adverse actions are untimely given that Complainant filed his OSHA complaint on November 14, 2014 and supplemented the complaint on February 8, 2016. In order for this Tribunal to consider them timely, any alleged adverse actions must have occurred from May 14, 2014 through November 14, 2014 or August 8, 2015 through February 8, 2016.³⁷ Based on these time frames, the Tribunal holds that the May 12, 2015 warning from the Union Secretary/Treasurer; alleged instances of reduced earnings, termination of benefits, and changed job assignments from March 2015 to June 2015; and Respondents' refusal to reimburse Complainant for business expenses from 2009 to 2014 are untimely. Thus, the Tribunal will not consider these incidents as discrete adverse actions for purposes of the Act.

As discussed above, the Tribunal found Respondent's temporary removal of Complainant from service justifiable based on its application of the company fitness for duty standard.³⁸ Under these circumstances, the Tribunal finds that Respondent's removal of Complainant from work for the purpose of determining whether he maintained normal blood sugar levels does not constitute protected activity. However, Complainant's pursuit of lost wages over the time period in which he missed work is a separate matter.

On November 3, 2014, Complainant emailed Mr. Best, asking to be made whole for the trips he missed as a result of his absence from work. *See* CXD 33. Mr. Best responded by indicating his department does not make determinations as to his time tickets. *See* CXD 34. Mr. Best did not appear to refer Complainant to the department who handles such matters.

"Taking an employee out of work and docking his pay is an adverse employment action." *Calhoun v. United Parcel Service*, 2004 DOL Ad. Rev. Bd. LEXIS 337, at *92 (June 2, 2004). A policy of not compensating an employee for time missed due to an on-the-job injury or illness will reasonably dissuade that employee from reporting his injury in the first place under the *Burlington Northern* standard. If an injured employee knows he will lose some of his earnings by being forced to not work upon reporting his injury, that employee will be incentivized not to disclose the injury. An injured employee who withholds his condition from his employer and continues to work poses a risk to his co-workers because, given his ailment, he may not have the strength or stamina to execute his job duties safely. The purpose of 49 U.S.C. § 20109, after all,

³⁷ "An action...shall be commenced not later than 180 days after the date on which the alleged violation...occurs." 49 U.S.C. § 20109(d)(2)(A).

³⁸ *See* pg. 34-37, *supra*.

is to promote safety in the railroad industry and employing workers who are not at full strength compromises that aim. Because this policy will encourage employees to withhold injuries and illnesses, the Tribunal finds that Respondent's refusal to reimburse Complainant his lost earnings is an adverse action.

Complainant also avers that Respondent's computer system labeled him as a "New Hire-99." He presented a job maintenance sheet at JX F (page 8) that reflects this oversight, dated November 20, 2015. According to Mr. Solano's testimony, Complainant is a prior rights C&S conductor with 40 plus years' time, properly labeled a CO-10, a more senior position. Mr. Solano explained: "they propagated a form that said: 'New Hire-99,' which is almost five seniority levels beneath [Complainant]." Tr. at 179. Among the benefits of his CO-10 status, according to Complainant, is that it gives him "prior rights over [certain] jobs." Complainant further testified that he has seniority rights "on top of everybody at C&S turns, even if they're Santa Fe employees." Tr. at 254. Complainant was stripped of his seniority, rendering him unable to bid his preference on certain turns. Under the *Williams* test, such diminishment of preference affects the terms of Complainant's employment such that it would cause a reasonable employee hesitation to report a protected activity, if the latter was a consequence of the former. Therefore, the Tribunal finds that the misidentification of Complainant as a New Hire-99 constitutes an adverse action.

Next, Complainant references a meeting that took place on September 17-18, 2015 referred to as a Let's Talk Session. In a summary of the two-day event, one bullet point reads that Complainant "doesn't feel [the] [s]afety committee on this Division is functioning correctly and [the] Division does not want his input. [Complainant] requests a meeting with GM." CXD 140.

Although a seemingly innocuous comment taking note of an employee's safety concern does not appear on the surface to constitute an adverse action, the ARB has recognized specific circumstances in which certain workplace conduct can render an otherwise trivial comment an adverse action. Once again, the Board narrowed its focus on "whether a reasonable employee in the same circumstances would be dissuaded from filing a...claim if subjected to the same employment action in question."³⁹ In *Williams*, the Board wrote that "an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity."⁴⁰ ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 33 (Dec. 29, 2010).

By identifying Complainant by name, the author of this company document isolated Complainant because he questioned the functionality of the safety committee. Under *Williams*, Respondent should not be permitted to single out Complainant this way. It follows that shining a spotlight on Complainant for raising a safety complaint might cause employees with similar grievances to hesitate to bring similar concerns forward. Therefore, the Tribunal finds that this notation is an adverse action.

³⁹ See *Menendez*, ARB Nos. 09-002, 09-003 at 20.⁴⁰ See also footnote 36, *supra*.

⁴⁰ See also footnote 36, *supra*.

Finally, Employer terminated Complainant on December 7, 2015, an adverse action that it does not dispute. *See* Resp. Br. at 35.

In summary, this Tribunal finds that Respondent committed adverse actions when it failed to compensate Complainant during the period in which it held him out of work, mislabeled him as a NH-99 employee which caused a loss of seniority, singled him out for his safety concerns, and terminated his employment.

C. Contributing Factor

Finally, Complainant bears the burden of demonstrating that Respondent undertook the adverse action, “in whole or in part,” because of the complainant’s protected activity. 42 U.S.C. § 20109(a); *see also* 29 C.F.R. § 1982.109(a). The Board has held that 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.” *Williams v. Domino’s Pizza*, ARB 09- 092, slip op. at 5 (Jan. 31, 2011). The Board has also explained, “that the level of causation that a complainant needs to show is extremely low,” and that an ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Palmer*, ARB No. 16-035, US DOL Rptr. at 15. Therefore, the complainant “need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Hutton v. Union Pac. R.R.*, ARB No. 11-091, slip op. at 8 (May 31, 2013). Put another way, “did the protected activity play a role, *any* role whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, US DOL Rptr. at 21 (emphasis in original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Factors of circumstantial evidence that may be considered include:

[T]emporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.

Cain v. BNSF Ry. Co., ARB No. 13-006, slip op. at 13 (Sept. 18, 2014).

Protected activity and adverse employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment decision or the decision cannot be explained without discussing the protected activity. *See Benjamin v. Citation Shares Mgmt., LLC.*, ARB Case No. 12-029, slip op. at 12 (Nov. 5, 2013). Though “[t]emporal proximity between protected activity and adverse personnel action ‘normally’ will satisfy the burden of making a *prima facie* showing of knowledge and causation,” and “may support an inference of retaliation, the inference is not necessarily dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB

No. 05-058, slip op. at 7 (Dec. 31, 2007); “The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, USDOL Rptr. at 56 (emphasis in original).

However, “where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006).

As discussed above, Complainant has established that he engaged in protected activity when he conducted a line switch and injured himself in inclement weather and filed a personal injury report regarding the incident. This incident occurred on November 17, 2015. The Tribunal also identified four adverse actions committed against Complainant: its refusal to compensate Complainant during the time Respondent evaluated his diabetic condition; an error that mistakenly identified him as having less seniority than he was entitled to; publication of his objection to certain safety procedures during a meeting; and the termination of his employment.

From a temporal standpoint, the November 17, 2015 protected activity cannot have been a contributing factor to Respondent’s decision to not compensate Complainant while it held him out of service. That adverse action occurred in October 2014. Because this particular adverse action *predated* the only protected activity that Complainant has established, the latter could not have logically caused or contributed to the former. Therefore, Complainant cannot show that his refusal and injury report from November 2015 played “any role whatsoever” in any loss of compensation in October 2014. The same logic applies to Respondent’s singling out of Complainant over his safety concerns during the meeting in September 2015 that took place a full two months prior to the protected activity.

As to the loss of seniority, Complainant again must link this adverse action with protected activity. Though temporal proximity can be sufficient to show this nexus, other factors and context may weigh against such a finding. In a USERRA retaliation case, for example, the plaintiff pilot averred that the defendant employer actively and passively retaliated against him by waiting four months to send him a letter which he had promised to send that would have affected his seniority advancement. *See Quick v. Frontier Airlines, Inc.* 544 F. Supp. 2d 1197, 1209 (D. Colo. Mar. 4, 2008).⁴¹ Granting the defendant’s motion for summary judgment, the Court characterized the oversight as an “adverse omission” lacking improper motivation. The Court further stated “Beyond bare temporal proximity, the record is devoid of evidence supporting an inference that the omission was intentional,” adding that the plaintiff did nothing to rebut the defendant supervisor’s testimony that he composed the letter, forwarded it through the proper channels, and then simply forgot about it. *Id.* at 1210.

Here, temporal proximity similarly exists between the November 17, 2015 protected activity and November 20, 2015 adverse action. Respondent has asserted that it terminated Complainant’s employment for a legitimate reason, namely that he violated company rules

⁴¹ USERRA was enacted to protect the rights of veterans and members of the uniformed services. *Id.* at 1206.

related to honesty and use of company credit. *See* Resp. Br. at 38. *Palmer* instructs that when an employer proffers such a justification, temporal proximity alone may be insufficient to meet complainant's burden of proof. Like the *Quick* plaintiff, Complainant has not put forth evidence beyond bare assertions that the error reflected at JX F (page 8) was borne out of animus based on his protected activity. Nor has Complainant credibly explained that the cause of the oversight was something more than simply a glitch in the computer system. At the hearing, Complainant asserted that somebody working for Respondent intentionally withheld him from job placement by changing the computer programs. Tr. at 251. When pressed by this Tribunal for evidence supporting this claim, Complainant only provided an understanding of the mechanics of the seniority system. Tr. at 254-55. He did not clarify why he believed his mistaken seniority status was motivated by animus from Respondent, let alone draw a link to his protected activity that occurred three days earlier. Although the causation standard as articulated in *Palmer* is extremely low, this does not relieve Complainant of his burden to present at least a modicum of evidence showing that his protected activity affected his loss of seniority status beyond mere temporal proximity. The inference of temporal proximity is not dispositive in this case. Because Complainant has not demonstrated any intent on Respondent's part behind the computer error, the Tribunal does not see how such an "adverse omission" would deter a reasonable employee from engaging in protected activity under the *Williams* test. Therefore, the Tribunal finds that Complainant has not met his burden of showing that his protected activity contributed to his mistaken seniority status.

Lastly, Complainant must prove that his November 17, 2015 refusal and injury report contributed to his termination on December 7, 2015. Here again, temporal proximity exists based on the timeline of events. Although the Board warned against comparing the relative importance of the protected activity and the employer's nonretaliatory reasons for the adverse action in *Palmer*, it also instructed: "Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of nonretaliatory reasons in order to determine whether the protected activity was a contributing factor of the adverse action." ARB No. 16-035, USDOL Rptr. at 15. Because Respondent argues as such, the Tribunal must take certain intervening events into account to provide context for the motivation behind Complainant's dismissal.

Respondent performed an investigation into alleged misuse of company funds when Complainant utilized corporate lodging on November 24, 2015. In its dismissal letter, Respondent cited this investigation as the reason for the termination of Complainant's employment and explained that, through testimony and exhibits presented, it was determined that Complainant violated GCOR 1.6 Conduct, GCOR 1.25 Credit or Property, GCOR 1.3.3 Circulars, Instructions, and Notices, and GN 17 Powder Riving Division Lodging Information. The letter also stated that the investigation considered his discipline record in accordance with the company's Policy for Employee Performance and Accountability. *See* JX G.

The record contains the investigation transcript and exhibits that supported Respondent's decision. *See* JXs E, F. While the transcript discusses reverse lodging extensively, it is devoid of any mention of Complainant's refusal to operate a locomotive and injury report from November 2015 or any other safety or injury reports. The exhibits likewise do not touch on that subject matter either. The scope of Respondent's investigation appears to be limited to the

reverse lodging issue which, as discussed above, does not bear on railroad safety. Moreover, Complainant has not offered proof that Respondent used this investigation as pretext to terminate him for refusing to work in hazardous conditions and making such report. Neither did he assert that Respondent deviate or otherwise shift its explanation for terminating Complainant's employment.

When asked if he felt Respondent would benefit from firing him rather than keeping him employed due to ongoing problems, including the November 17, 2015 incident, at the hearing Complainant answered: "Well, they were really upset with the injuries and safety things I was reporting...The young engineers were not operating the trains properly and I was reporting that. And it happened twice where I was getting injured. And they were really upset about the reports of train handling operations." Tr. at 271. Complainant's representative followed this question by asking Complainant how he knew Respondent's management was upset, to which Complainant responded by pointing to the crew administration's removal of him from certain jobs. Tr. at 271. The Tribunal notes that, despite Complainant's representative giving him an opportunity to explain how his protected activity contributed to the termination of his employment, Complainant simply answered that he perceived Respondent to be upset with him based on its reassignment of him to a different job. This answer implies both that he remained employed by Respondent in spite of his safety and injury reports and that he believed that his protected activity contributed to a job reassignment, not the termination of his employment.⁴²

Complainant stopped short of stating, let alone explaining, that his protected activity contributed to his *ultimate dismissal*. In fact, upon reviewing the hearing transcript and his briefs, Complainant never explicitly alleged that his November 17, 2015 protected activity contributed to his December 7, 2015 firing. In light of Respondent's documented nonretaliatory reasons for dismissing Complainant and Complainant's failure to articulate a contributing factor argument as to this particular adverse action, the Tribunal finds Complainant has not demonstrated that his refusal to make the switch and accompanying injury report played a role in the termination of his employment.

Based on the foregoing, Complainant has failed to meet his burden of proving, by a preponderance of the evidence, that his November 17, 2015 protected activity contributed to any of the adverse actions he suffered as an employee for Respondent.

D. Conclusion- Complainant's *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant engaged in protected activity when he refused to operate a locomotive and reported an injury related to the incident on November 17, 2015. Further, Respondent took adverse actions against Complainant when it did not compensate him during the time it held him out of work due to his diabetic condition, reduced his seniority, singled him out for his criticism of its safety procedure, and terminated his employment. However, Complainant has not proven that his refusal to operate the locomotive

⁴² The Tribunal notes that although Complainant alluded to the crew administration's removal of him from certain jobs, he neither elaborated on this allegation that such a job reassignment occurred following his November 17, 2015 protected activity, nor argued that it constituted an adverse action.

and the related injury report contributed to any of these adverse actions. Thus, Complainant's complaint fails and the Tribunal must dismiss it.

VIII. WHETHER RESPONDENT WOULD HAVE TAKEN THE SAME ACTION
ABSENT COMPLAINANT'S PROTECTED ACTIVITY

Because Complainant has failed to make out his *prima facie* case, the Tribunal need not analyze whether Respondent would have taken the same adverse actions in the absence of any protected activity.

ORDER

The Complaint of Frank Thurston is hereby **DISMISSED**.

SCOTT R. MORRIS
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).