

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 31 May 2018

CASE NO.: 2016-FRS-00086

In the Matter of:

MARLYNN TURNER-BYRDSONG,
Complainant,

v.

NATIONAL RAILROAD PASSENGER CORP.,
Respondent.

Appearances: David T. Vlink, Esq. and Daniel P. Bowman, Esq.
Fillenwarth Dennerline Groth & Towe, LLP
Indianapolis, Indiana
For the Complainant

Susan K. Laing, Esq.
Anderson, Rasor & Partners, LLP
Chicago, Illinois
For the Respondent

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AWARDING CLAIM

This proceeding arises from a claim of whistleblower protection under the Federal Railroad Safety Act (“FRSA” or the “Act”), as amended.¹ The FRSA and implementing regulations² prohibit retaliatory or discriminatory actions by railroad carriers against their employees who engage in activity protected by the Act. The Complainant requested a hearing before the Office of Administrative Law Judges because she objects to a finding by the

¹ 49 U.S.C. § 20109 (2013). Applicable regulations are at 29 C.F.R Part 1982. The regulations provide that the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18, Subpart A, apply to this proceeding.

² 29 C.F.R. Part 1982 (2015).

Occupational Safety and Health Administration (“OSHA”) that Respondent did not commit a violation of the FRSA. The Complainant seeks reinstatement, back pay from January 16, 2015, credit for her pension during the period of her discharge, removal of references to the discipline at issue from her personnel file, compensatory damages in the sum of \$50,000, punitive damages in the sum of \$250,000, and attorney fees and costs.³

STATEMENT OF THE CASE

On January 23, 2015, Marlynn Turner-Byrdsong (“Complainant”) filed a complaint against the National Railroad Passenger Corporation (“Respondent” or “Amtrak”) with OSHA, alleging retaliation against her for two incidents of protected activity occurring in September and October 2013 and in October 2014.⁴ On August 25, 2016, OSHA issued its determination, finding that Complainant did not engage in protected activity under the Act. The Complainant objected to the determination and requested a hearing on or about September 20, 2016 before the Office of Administrative Law Judges. On May 10, 2017, Amtrak filed a Motion for Summary Decision, which was denied by my Order issued May 24, 2017. The hearing in this matter was held on May 30 and May 31, 2017 in Indianapolis, Indiana. The parties filed their initial post-hearing briefs on August 10, 2017 and their reply briefs on September 13, 2017.⁵ In reaching my decision, I have reviewed and considered the entire record, including the exhibits admitted into evidence, the testimony at the hearing,⁶ and the parties’ post-hearing briefs.

ISSUES

The issues in this case are whether Complainant engaged in protected activity within the meaning of the FRSA, whether the Respondent violated the FRSA by issuing her two counseling letters on January 15, 2015, removing her from her position as a Labor Coordinator on January 16, 2015, by removing her from service pending a disciplinary investigation on January 19, 2015, and by terminating her employment on May 29, 2015, and, if so, whether Respondent has established by clear and convincing evidence that it would have taken such actions even absent protected activity. If the Complainant prevails, I must consider the appropriate remedies. The Complainant alleges violations under 49 U.S.C. § 20109(a)(2) and 20109(b)(1)(A).

APPLICABLE STANDARDS

49 U.S.C. § 20109 provides in part:

- (a) In General. – A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s

³ See Complainant’s Post-hearing Brief at 34-36.

⁴ See Complaint and Complainant’s Post-hearing Brief.

⁵ The parties’ briefs will hereinafter be cited as Complainant’s or Respondent’s Initial Brief and Reply Brief.

⁶ The testimony in this case includes the hearing testimony and the depositions of the Complainant and Michael Oathout, which were admitted as exhibits at the hearing. Testimony was also given at the investigative hearing on May 19, 2015.

lawful, good faith act done, or perceived by the employer to have been done or about to be done -

(2) To refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(b) Hazardous Safety or Security Conditions.-

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for -

(A) reporting, in good faith, a hazardous safety or security condition;

The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”)⁷ apply to FRSA whistleblower claims.⁸ Under the FRSA, Complainant must prove by a preponderance of the evidence that she engaged in protected activity, that Respondent took an adverse employment action against her, and that the protected activity was a contributing factor to the adverse personnel action. If Complainant does not prove one of these elements, her claim fails.⁹ If Complainant proves that Respondent discriminated against her because of her protected activity, Respondent may nonetheless avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity.¹⁰

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CONTENTIONS OF THE PARTIES

Complainant’s Contentions:

Complainant contends that she engaged in protected activity under 49 U.S.C. § 20109(a)(2) and 20109(b)(1)(A) when she refused to violate or assist in the violation of a federal law, rule or regulation relating to railroad safety and security by complaining of Michael Oathout’s breach of confidentiality of the Operation RedBlock (“ORB”) protocols during the ENKON Webinar on September 26, 2013 and reporting that breach to the Operation RedBlock

⁷ 49 U.S.C. § 42121(b).

⁸ See 49 U.S.C. § 20109(d)(2)(A).

⁹ *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017); *Dick v. Tango Transport*, ARB No. 14-054, ALJ No. 2013-STA-060 (ARB Aug. 30, 2016); *Pattenaude v. Tri-Am Transport*, ARB No. 15-007, ALJ No. 2013-STA-037 (ARB Jan. 12, 2017); *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009 (ARB Sep. 30, 2015).

¹⁰ 49 U.S.C. § 42121(b)(2)(B); see *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017); *Pattenaude v. Tri-Am Transport*, ARB No. 15-007, ALJ No. 2013-STA-037 (Jan. 12, 2017); *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039 (May 13, 2014), PDF at 7-10; *Dick v. Tango Transport*, ARB No. 14-054, ALJ No. 2013-STA-060 (ARB Aug. 30, 2016).

Executive Steering Committee (“ESC”) on October 2, 2013. She contends that she also engaged in protected activity by complaining of Michael Oathout’s breach of confidentiality on October 29, 2014, when he became aware of the personal information of an employee who had utilized the Operation RedBlock program, and by telling Mr. Oathout that she was going to report the breach at the next ESC meeting to be held on January 21, 2015. Complainant’s Initial Brief at 21-23. Complainant contends that she was subject to unfavorable personnel actions by Respondent by being given two counseling letters on January 15, 2015, by being removed from her Labor Coordinator position on January 16, 2015, by being removed from service without pay on January 19, 2015, and by being terminated on May 29, 2015. Complainant contends that her protected activity contributed to the adverse personnel actions, and that Respondent has not met its burden to show by clear and convincing evidence that it would have taken the same unfavorable personnel actions absent the protected activity. Complainant’s Initial Brief at 21-34.

Respondent’s Contentions:

Respondent contends that Complainant has not met her burden to prove that she engaged in protected activity or that any such protected activity was a contributing factor in the adverse personnel actions Respondent took. Specifically, with respect to 49 U.S.C. § 20109(a)(2), Amtrak contends that Complainant has not sustained her burden to prove that she refused to violate or assist in the violation of a federal law, rule, or regulation because no provision of federal law prohibited Mr. Oathout from seeing the names of employees using the ORB program and no provision of federal law requires the identity of employees using the program to be confidential. With respect to section 20109(b)(1)(A), Respondent also contends that Complainant did not show that she made a good faith report of a hazardous safety condition because her concern was not objectively reasonable. Respondent further argues that Complainant’s actions were not contributing factors in the adverse actions taken by Amtrak. Finally, Respondent states that it would have taken the same adverse personnel actions regardless of her alleged protected activity. Respondent’s Initial Brief at 16-26.

B. SUMMARY OF THE EVIDENCE

STIPULATIONS

Prior to the hearing, the Complainant and the Respondent entered into stipulations as set forth in Exhibit A to Complainant’s and Respondent’s Pre-Hearing Statements filed on May 30, 2017 (Complainant) and May 25, 2017 (Respondent). The parties stipulated to the following:

1. National Railroad Passenger Corporation, also known as Amtrak, is a railroad carrier engaged in interstate commerce within the meaning of 49 U.S.C § 20109.¹¹
2. Marlynn Turner-Byrdsong began her employment with Amtrak in 1990, and between 1990 and 2012 worked in a variety of positions for Amtrak within the Transportation Communications Union bargaining unit. At all times material hereto, Marlynn Turner-Byrdsong was an employee within the meaning of 49 U.S.C. § 20109.¹²

¹¹ This stipulation was amended at the hearing. Tr. at 7.

¹² This stipulation was amended at the hearing. *Id.*

3. Following an interview process, Marlynn Turner-Byrdsong was hired as one of the three Labor Coordinators in Operation Redblock in June 2012.
4. The other Labor Coordinators within Operation RedBlock were Barry Eveland and Martha Henderson.
5. The Operation RedBlock Manager was Michael Oathout.
6. The three Labor Coordinators' direct supervisor was Michael Oathout.
7. The Operation RedBlock Executive Steering Committee was comprised of management and labor leaders within Amtrak and provided oversight to the Operation RedBlock program.
8. At all relevant times, ENKON was the third-party vendor that maintained the mark-off database for employees utilizing Operation RedBlock procedures.
9. ENKON facilitated a webinar on September 26, 2013.
10. The Operation RedBlock Executive Steering Committee met in New Orleans, Louisiana on October 3, 2013.
11. On October 29, 2014, Michael Oathout received an email from a Chicago supervisor regarding an employee that may or may not have utilized Operation Redblock.
12. On January 16, 2015, Marlynn Turner-Byrdsong was removed from her position as a Labor Coordinator.
13. On January 19, 2015, Marlynn Turner-Byrdsong was held from service pending an investigation.
14. On January 20, 2015, Marlynn Turner-Byrdsong was issued a Notice of Investigation for a disciplinary hearing.
15. On January 23, 2015, Marlynn Turner-Byrdsong filed her Complaint with the Department of Labor, Occupational Safety and Health Administration.
16. An investigative hearing was held on May 18, 2015 in Beech Grove, Indiana.
17. The hearing officer for the investigative hearing was Michael O'Connell.
18. On May 26, 2015, the hearing officer rendered his decision, reflected in the letter of that date.
19. On May 29, 2015, discipline in the form of termination was assessed against Marlynn Turner-Byrdsong.

EXHIBITS

At the hearing, the following exhibits were offered and received into evidence. Joint Exhibits (“JX”) 1 through 12;¹³ Complainant’s Exhibits (“CX”) 2,, 3, 4, 7, 8, 10;¹⁴ and Respondent’s Exhibits (“RX”) 1, 4, 5, 9, 15¹⁵, 19, 20, 21, 27, 33, 34, 36, 39.¹⁶ The parties also offered into evidence the depositions of the Complainant and Michael Oathout and the exhibits to those depositions. JX 10 is the deposition of Michael Oathout taken on May 1, 2017 and received into evidence with the deposition exhibits.¹⁷ JX 11 is the deposition of Complainant taken on May 1, 2017 and received in evidence with the deposition exhibits.¹⁸ The parties also offered as JX 12 the transcript of the investigative hearing held on May 19, 2015, and the exhibits thereto.¹⁹

SUMMARY OF TESTIMONY

HEARING TESTIMONY

Complainant’s case:

DONALD BOYD (Questioning by Mr. Vlink at Tr. 10-34; questioning by Ms. Laing at Tr. 36-58; questioning by ALJ Tr. 34-36, 58-59)

Mr. Vlink:

¹³ Tr. at 349-350.

¹⁴ Tr. at 350. The Complainant’s Exhibits are marked as “Plaintiff’s” exhibits but are referred to herein as Complainant’s Exhibits (“CX”).

¹⁵ Exhibit 15 was originally admitted with page 9 missing, and was replaced by a complete copy of the document. See Tr. at 169, 172-73, 316-17.

¹⁶ Tr. at 344-48.

¹⁷ At the hearing, the parties offered in evidence, without objection, all of the exhibits to the depositions of Michael Oathout and the Complainant. The Oathout deposition exhibits used during Complainant’s counsel’s examination of Mr. Oathout are marked as Oathout numbers 1 through 12 and are attached to the deposition. Oathout Exhibits 1-12 contain some duplicates of Complainant’s Exhibits offered and admitted at the hearing, as follows: Oathout 2 is CX 3; Oathout 3 is CX 4; Oathout 4 is CX 8; and Oathout 6 is an excerpt from CX 10. The exhibits used during Respondent’s examination were not attached to the deposition but were retained by Respondent’s counsel. At the hearing, counsel for Respondent stated that the “Defendant’s Exhibits” identified during her examination of Mr. Oathout are the same as the Respondent’s Exhibits bearing the same exhibit numbers listed on Respondent’s exhibit list and as in the binder of Respondent’s Exhibits presented at the hearing. The exhibits used by Respondent during the Oathout deposition were RX 4, 5, 9, 10, 11, 19, 21, 28, 30, 31, 32, 33, and 38.

¹⁸ At the Complainant’s deposition, the Respondent identified “Defendant’s Exhibits” 7, 8, 15, 21, 27, 28, 35, 36, 37, Plaintiff’s Exhibit 10 and Complainant’s Exhibits 1 and 4. The “Defendant’s Exhibits” are the same as the Respondent’s Exhibits bearing the same exhibit numbers. The documents identified as Complainant’s Exhibit 1 (an email invitation to the September 26, 2013 Webinar), Complainant’s Exhibit 4 (list of attendees at the October 2, 2013 Executive Steering Committee meeting) and Plaintiff’s Exhibit 10 (Complainant’s Complaint filed with OSHA, which is part of the administrative record in this case), are not the same documents as the documents with the same exhibit numbers in the binder of Complainant’s Exhibits presented at the hearing.

¹⁹ The exhibits from the investigative hearing are marked as A through N and 1 through 6. Joint Exhibit 12 is the investigative hearing and exhibits. Some of these exhibits are duplicates of other exhibits received in evidence.

Mr. Boyd has been employed by Amtrak since 1980. He is currently on leave for official union business and is the financial secretary/treasurer for UNITEHERE, Local 43. He has been employed with the union since 1986. Local 43 represents Amtrak's onboard service workers, which consists of waiters, dining car staff, cook staff, sleeping car, and coach attendants. He is familiar with the Operation RedBlock program at Amtrak. Operation RedBlock is a labor management drug and alcohol intervention program in which the labor organizations work in conjunction with management to alleviate drug and alcohol use at Amtrak. It started around 1986. He has been involved with ORB since 1986. He was a member of the local steering committee in the Midwest for many years. When he became financial secretary/treasurer within the last eight to ten 10 years he became a member of the Executive Steering Committee. He is paid by the union and not by Amtrak. Tr. 9-14.

He said one of the goals of the program is to keep impaired employees from operating any equipment or trains. The Executive Steering Committee is the entity that's responsible for overseeing Operation RedBlock. He stated that the written document that governs Operation RedBlock is the Amtrak Operation RedBlock Protocols, which he identified as JX 1. All of the unions are signatories to it. The names on the last page of the document are the people on the Executive Steering Committee. Some of the individuals on the ESC are management people and some are union people. Tr. at 13-16.

Mr. Boyd testified that new employees are made aware of Operation RedBlock. The program is divided into divisions, and each division has a steering committee. The steering committee consists of Captains, and the Captains have individual teams and disseminate information about ORB through fundraisers and informational interaction with employees. There are also pamphlets and 1-800 numbers about the program. Mr. Boyd identified CX 2 as one such pamphlet. The pamphlet refers to a website that also gives information about ORB. Mr. Boyd testified that in 2014 there were some revisions to the program. He stated that the ESC wanted employees to know that the CEO was on board with the program, and asked the Amtrak CEO to issue an Amtrak advisory stating that he was behind Operation RedBlock and to encourage people to continue to use the program. Mr. Boyd identified CX 7 as the advisories the Amtrak CEO issued to employees about ORB, dated February 9, 2011 and April 12, 2012. Tr. at 16-22.

Mr. Boyd explained why confidentiality is a critical feature of ORB. The purpose was to make employees feel comfortable that they could use the program without management or co-workers knowing their identity. Mr. Boyd identified CX 3 as the mark-off procedures for those using the program. Mark-off means not reporting to work. Mr. Boyd testified that the loop of confidentiality in the middle of the page identifies who was allowed to have access to confidential information within Operation RedBlock. The document also shows how the mark-off process works. He stated that if the confidentiality of the program were not maintained, he would consider that to be a safety hazard. He stated that if individuals could not be assured that there would be no repercussions if they mark-off, there is a risk of employees operating trains or equipment impaired. Mr. Boyd testified that the Federal Railroad Administration ("FRA") requires railroad carriers to adopt and implement drug and alcohol safety and prevention programs. He said that ORB has been approved by the FRA. Mr. Boyd identified CX 4 as a

document from the FRA. He said this document was shared with the members of the ESC. Tr. at 20-28.

Mr. Boyd testified that the Labor Coordinators are obligated to report breaches of confidentiality to the ESC if they learn of any. He said that the Labor Coordinators are instructed to let the ESC know of any problems with managers, or anyone trying to get confidential information, and would like to know that immediately. Mr. Boyd testified that he has known the Complainant for fifteen to eighteen years and that she has been involved with Operation RedBlock since he was a part of the local steering committee in Chicago. The Complainant was then a Captain in a voluntary capacity. Tr. at 28-30.

Mr. Boyd was present at the October's 3, 2013 ESC meeting in New Orleans when the Complainant reported that a breach of confidentiality had occurred. He stated that the Labor Coordinators are required to give updates at the quarterly meetings. At the end of the meeting, the Complainant became agitated and proceeded to tell the committee that Michael Oathout, ORB's Manager, had seen some confidential information he wasn't supposed to see. Mr. Boyd stated that he was highly upset at this because one of the main driving forces with the program is confidentiality, and that's what they tell the employees. He said everyone present was pretty upset. He said the management team seemed to be little bit more upset than the labor people. He stated that the Complainant appeared to be emotional when she made the report during the last part of her presentation. Mr. Oathout was at this meeting as part of the executive steering committee. Mr. Boyd testified that Mr. Oathout was pretty quiet. Mr. Boyd stated that the normal procedure is that the Labor Coordinators leave the room after their presentations and the committee then discusses various issues. He said that after the Labor Coordinators left the meeting, management and labor came down on Mr. Oathout pretty hard. A couple of the management people were pretty irate and pretty aggressive, and Mr. Boyd didn't think Mr. Oathout was going to be back after that meeting. Mr. Boyd testified that if he would have learned that Mr. Oathout breached confidentiality again in the future, the labor group would probably have asked that he be removed from his position as Manager of ORB. Tr. at 28-34.

ALJ:

Mr. Boyd stated that there are three Labor Coordinators, for the Midwest, East Coast and West Coast, who were hired by a labor-management team. They are supposed to be paid according to whatever crafting contract they normally worked under, with an increase in salary. Mr. Boyd clarified that there are steering committees in each of the different divisions, geographical areas, that the Labor Coordinators are assigned to, and then there is an executive steering committee that governs over the whole country. The steering committees in each division are composed of labor and management people, and the individuals under them are labor people. There are a few supervisors who are union supervisors. The members of the divisional steering committees are different than those who are members of the Executive Steering Committee. Tr. at 34-36.

Ms. Laing:

Mr. Boyd was shown RX 39, the minutes of the October 3, 2013 ESC meeting. He testified that he attends ESC meetings twice a year. He said that minutes are kept of the meeting, which he receives copies of. He stated that he has previously seen the minutes of the October 3, 2013 meeting. He said that the Labor Coordinators normally do not sit in on the entire ESC meetings. They are excused after they give their reports and from other discussions that the ESC members don't want the Coordinators to hear. Mr. Boyd agreed that Mr. Oathout was assigned to follow up on several of the action items listed in the minutes. He stated that all the people who attended the meeting were listed at the top of RX 39. He agreed that at this meeting a little more than half were union representatives and the rest were management representatives. Tr. at 36-44.

Mr. Boyd was asked about JX 1, the ORB protocols that went into effect on February 12, 2014. He agreed that both he and Mr. Oathout were among those who signed it. He agreed that the ESC is at the top of ORB, Mr. Oathout, the Manager, was under the ESC, and the three Labor Coordinators report to Mr. Oathout. There is no intermediate Manager between Mr. Oathout and the Labor Coordinators. Mr. Boyd said he believed that Michael Logue, who also signed the document as Chief Safety Officer, was Mr. Oathout's immediate supervisor. Mr. Boyd stated that CX 3 was part of the original protocol of ORB in 1986. He agreed that it is not in JX 1, but stated that it is still part of the program. He stated that the core operation is the same as far as mark-offs. He said that he would never have signed JX 1 if they had changed CX 3. Tr. at 36-48.

Mr. Boyd was shown CX 6, an "Update" dated June 4, 2012.²⁰ He confirmed that the document comes from unions that are signatories of ORB. He said that the Transportation Communications Union ("TCU") is a participant in ORB. He said that any union can participate in ORB and it does not have to be a signatory to the document. Individuals who call in to mark-off are not asked what union they are in. Anyone who works at Amtrak can use the program. He said that when he began working with Operation RedBlock in 1986, the identity of those marking-off was to be kept confidential and that has always been part of the program. When changes were made in made to the program, they made sure that the names remained confidential. He agreed that when someone marks-off, it is not only the Labor Coordinators who are aware of it. The person taking the call originally knows about it. If the employee who calls is someone who works on the train, *i.e.*, onboard service employees such as cooks and waiters, or engineers and conductors,²¹ then the dispatcher at CNOC²² takes the initial calls from the employee marking off.²³ For other employees, the Labor Coordinators generally take the calls and then call a management-designated supervisor.²⁴ Tr. at 48-54.

²⁰ CX 6 was not offered in evidence by either party.

²¹ These are sometimes referred to in the testimony as "hours-of-service" employees.

²² The parties were unsure what this acronym stands for, but it is apparently a component of Amtrak that functions as a communications arm. See Tr. at 52-53.

²³ In CX 3, this is the dispatcher in the circle at the top right of the page ("Chief Crew Dispatcher takes employee info. Marks UTU/BLE off from work").

²⁴ See the circle furthest to the right on CX 3 ("Chief Crew Dispatcher relates employee info to ORB Coordinator") and the following two circles, indicating that the ORB Coordinator contacts a Captain/Team member and that the ORB Coordinator marks the employee off with a union-selected Supervisor.

It was Mr. Boyd's understanding that Mr. Oathout was also instructed to keep information confidential, but he did not deal with the confidential information. He dealt only with numbers that are disseminated at the executive board meetings; he did not know the names. Mr. Boyd testified that he started at Amtrak as a sleeper car attendant and once he became a union official he took a leave of absence under the collective bargaining agreement. He maintains his seniority but does not physically work for Amtrak. He is still subject to Amtrak's Standards of Excellence, as is every employee. Mr. Boyd confirmed that the Standards of Excellence emphasize teamwork, being polite to others, and professionalism. He agreed that people who violate the Standards of Excellence are subject to discipline. The witness identified the Standards of Excellence as RX 15. Tr. at 54-58.

ALJ:

Mr. Boyd verified that the three Labor Coordinators give reports to the ESC before they leave the meeting. The ESC members wanted the individuals who were dealing with ORB on a daily basis to give them a breakdown of what they were doing, without breaching confidentiality. Tr. at 58-59.

MARLYNN TURNER-BYRDSONG (Questioning by Mr. Vlink at Tr. 60-162, 205-09; questioning by Ms. Laing at Tr. 162-205; questioning by ALJ at 209-212)

Mr. Vlink:

Complainant began working for Amtrak in December 1990 and worked for the company continuously until she was terminated in 2015. She was a member of a bargaining unit, TCU (Transportation Communications Union). Complainant began working for Amtrak at the Beech Grove Maintenance Facility near Indianapolis. This facility does all the maintenance overhauls to the sleeping cars, dining cars, some horizons, locomotives, and is the national distribution center for parts, etc. Her first job was as a janitor, for 1 ½ to 2 years, then material control clerk at the same facility until 2012. She became a Labor Coordinator for the Central division of Operation RedBlock in June 2012. Before becoming a Labor Coordinator she had been a volunteer for the ORB program since 1996, first as a Captain for the Beech Grove Maintenance facility, then, in succession, the treasurer, vice chairperson, chairperson, and trainer for the Central division. She then sat on the divisional steering committee for the Central division in her union capacity. An employee had to be voted into these positions by her peers. When she became an ORB Labor Coordinator, she worked only for Operation Redblock. The Labor Coordinator position was a bargaining unit position represented by TCU and covered by the collective bargaining agreement ("CBA") (CX 10). Tr. at 62- 66.

The Labor Coordinator position was not new but they revamped the program and created three coordinator positions instead of one. The position was advertised and she applied and was selected. She interviewed with a panel of two union members and one management person. Two other Labor Coordinators were hired in 2012, Martha Henderson for the Western division and Barry Eveland for the Northeast quarter. The Complainant covered the Central division and the Southern division. Her office was at the Beech Grove Maintenance Facility. Martha was in Los Angeles and Barry was in Philadelphia's Union Station. All three coordinators had Michael

Oathout as their supervisor. He was in ORB's national office in Philadelphia's Union Station, in the same office as Barry Eveland. One other person who was involved with Operation RedBlock, Arlicia Jones, worked in that office as the business analyst. The Complainant said she would see Mr. Oathout at least twice every quarter, at meetings in the Central and Southern divisions. Tr. at 69-71.

Complainant's office hours were 8 to 4 or 8 to 5 Monday to Friday. Her main duty as a Labor Coordinator was to take mark-off calls. She described the process for mark-off calls. An employee who wants to mark-off calls a CNOC dispatcher who has been trained to take such calls on a telephone dedicated for ORB only. If the call does not involve an engineer, conductor or onboard service employee, the CNOC dispatcher gives the call to the Labor Coordinator responsible for the region the employee is in. The Labor Coordinator then contacts the employee who marked-off, thanks them for using the program, asks them if they are safe and whether they need any immediate assistance and lets them know that a peer (one of the Captains) will do a follow-up call with them. The Labor Coordinator contacts the Captain to let them know they need to do a follow-up call with the employee. The Coordinator would then contact a union-selected designated supervisor to go into the system and make the mark-off change to reflect an approved absence. The designated supervisor is someone chosen by the divisional steering committee. The Complainant referenced the "loop of confidentiality." Referring to CX 3, she stated that the union-selected supervisor is the last oval on the chart (on the left) in the loop of confidentiality, stating "ORB Coordinator marks all other employees off from work with a union selected Supervisor." Other than the union-selected supervisor, all the individuals in the loop of confidentiality are union individuals. With reference to the loop indicating "Chief Crew Dispatcher takes employee info. Marks UTU/BLE off from work," the Complainant testified that UTU is the union for conductors and BLE is the union for the engineers and also handles onboard service personnel. She said that CNOC handles the mark-offs for engineers, conductors and onboard service personnel because if those employees don't show up for work it could result in a train stoppage. CX 3 states that all calls are handled by union employees in a confidential manner over an unrecorded phone line. Tr. at 71-80.

The Complainant testified that she was required to take mark-off calls 24/7, but not on vacation – that would be handled by one of the other Labor Coordinators. If all three Coordinators wanted to be off at the same time, it was determined by seniority. Mr. Oathout was her direct supervisor. His title was ORB Manager. He approved the Coordinators' vacations. Tr. at 80-82.

The Labor Coordinators used a database to input and store employee mark-off information. The database was maintained by ENKON, a third-party vendor. The three Labor Coordinators and ENKON had access to the database. The information in the database for the mark-offs was the employee's name, employee number, date and time they marked off, their union affiliation, job title and work location. The database is maintained because they need to report statistical data to the FRA quarterly. The ORB would give them information about how the mark-offs were going, how many people were using the program, not a list of employees and dates marked off. The ESC was also given only statistical data. Anything that would identify a particular employee as using Operation RedBlock was confidential. No one outside the loop of confidentiality was to have access to the identity of those using the program. The information is

confidential to encourage people to mark-off because they know no one outside the loop of confidentiality would know they were using the program. Referring to JX 1, Ms. Turner-Byrdsong testified that there is a section on confidentiality on page 7. She said this section contains the substance of CX 3 on page 2 in numbered paragraphs. Mr. Oathout was not supposed to have access to any employee information in the database, any confidential information. Tr. at 82-89.

As a Labor Coordinator, she presented information to the Executive Steering Committee regarding what was going on in her division. Specific employees who marked off were never discussed because that was confidential and even the ESC was not privy to this information. The ESC met three times a year. The Labor Coordinators were present at all the meetings until the incident on October 3d,²⁵ and after that when they had a meeting only the Labor Coordinator for whichever region they were in attended.²⁶ Tr. at 89-90.

Complainant testified that ENKON had a webinar on September 26, 2013. The participants were the three Labor Coordinators, the Complainant, Martha Henderson, Barry Eveland, and Michael Oathout. The Complainant was in her office in Beech Grove, Martha Henderson was in Los Angeles and Barry Eveland and Mr. Oathout were in Philadelphia. The webinar was a conference call and a PowerPoint presentation. The Complainant was invited by email. The webinar was in progress before she and Martha were invited to participate and Mr. Oathout and Barry Eveland were on the webinar before they were invited. Referring to Complainant's Exhibit 1 to JX 11 (Complainant's Exhibit 1 to Complainant's deposition, an email inviting Complainant and Martha Henderson to the webinar in progress), the witness stated that the webinar had been in progress for a half-hour before she was invited. She did not know why. The purpose of the webinar was to decide on the kind of presentation to make to the ESC in the form of graphs and pie charts. During the webinar Complainant began seeing employee information that she had entered into the system, names and locations. In demonstrating how to get information from the database, the facilitator was using actual data that was put in, which included names and locations. The facilitator was moving the names and SAP number²⁷ over into a pie chart or into a graph. Complainant asked the facilitator if that was the actual data and he said yes. She told him "we're going to have to stop right here because Mr. Oathout is not supposed to have access to this information." She told Mr. Oathout he had to get off the webinar because the facilitator said that's the way they had to do it. She testified that this was a breach of confidentiality because Mr. Oathout was not supposed to have access to names, SAP numbers or locations, any of that kind of information. When Complainant told Mr. Oathout he was going to have to get off the webinar because of the confidential information, he said no, he's a manager and has to oversee the webinar. Eventually he did get off once Complainant started talking about the certificates of confidentiality they had to sign. She told him she was going to report the breach of confidentiality to the ESC. Tr. at 90-99.

Complainant said that she considered this to be a safety concern. She testified that the certificate of confidentiality she signed says any knowledge of a breach needs to be reported.

²⁵ This appears to be a reference to the ESC meeting on October 3, 2013, when the Complainant reported the breach of confidentiality. The reason for this change was not explained.

²⁶ Mr. Oathout testified that this change happened before the October 3d meeting. Oathout Depo. Tr., at 22.

²⁷ The SAP number is the employee number. See page 96 of the hearing transcript.

She identified CX 8 as the certificate of confidentiality. She said that this was something new; they went over it at an ESC meeting. This was probably in March or April 2013 and she signed it in June 2013. At the meeting the ESC told the Labor Coordinators they wanted them to take this very seriously. They told the Coordinators they wanted them to have the confidentiality certifications notarized. They talked about dismissal if they didn't report something. The Complainant stated she was really concerned about that. She took her responsibilities under the confidentiality certification seriously. She said she would be terminated from employment if she didn't report a breach. Tr. at 99-103.

Complainant testified that she reported the breach of confidentiality at the next ESC meeting on October 3, 2013 in New Orleans. All the members of the ESC and the other Labor Coordinators were present. She did her regular report and then brought up the issue with Mr. Eveland being on the webinar before she and Martha were invited; she wanted to know if there was a lead coordinator, and if not, they should all be participating in the same things. She then said that she needed to report a breach of confidentiality – that Mr. Oathout was in the database and had access to confidential information. Mr. Oathout initially denied it, and was questioned by others. The Complainant said the whole room “went kind of crazy.” She said the union members were mad and there were a few curse words. She had one more issue on her agenda and then they took a break. She said that no ESC member talked to her about the report during the break. Mr. Jagodzinski walked over and told her it took a lot of courage for her to make the report. Tr. at 103-07.

After the Executive Steering Committee meeting, Michael Logue, Amtrak's Chief Safety Officer, who was attending his first ESC meeting, told the Complainant that he didn't like the way she reported the breach, that she didn't follow the chain of command. She replied that she reported it the way she was supposed to, to the entire ESC. Tr. at 108-109.

The witness was shown JX 10, the deposition of Michael Oathout. She was referred to page 102 where Mr. Oathout testified about a rules committee meeting in Baltimore where he said the Complainant became aggressive toward others, and he asked her to tone it down. The Complainant remembered the incident. She said Mr. Oathout did not speak to her about her conduct - he told her that one member of the rules committee was offended by what she said. She thought this was in August 2014. Mr. Oathout did not assess any formal discipline or give her any formal counseling letter. Tr. at 109-10.

Complainant was asked about Mr. Oathout's deposition testimony about a Captains' meeting at Chicago Union Station where he said Complainant was yelling at the ORB volunteers. Complainant said she did not remember what he was talking about. She said there was no Captains' committee meeting at Chicago Union Station after October 2014. Therefore the meeting he was referring to must have been before October 2014. She said Mr. Oathout did not assess any formal discipline or giving any counseling letters with regard to what he said happened in Chicago Union Station. Tr. at 110-11.

The Complainant was also asked about Mr. Oathout's deposition testimony concerning an incident in the Southern region where he said the Complainant was aggressive with Linda Gaston and made a scene. The Complainant said she remembered an incident in the Southern

division with Linda Scotty. She said that Linda Gaston worked in the Central division, not the Southern Division, and Linda Scotty was the ORB chairperson for the Southern division, not Linda Gaston. She remembers an incident where Linda Scotty was doing her presentation and gave an employee an award for doing a mark-off. When she finished, the Complainant told her that awards are usually given at the end of the fiscal year in October to people who have done outstanding things with the program. She gave this award to an employee in the safety meeting for doing a mark-off, and the person he marked-off was also in the safety meeting. She said that both she (the Complainant) and Mr. Oathout considered this a breach of that employee's confidentiality. The Complainant said that she told her in the future when awards are given to give them all at one time and not to single anybody out. The Complainant said she said this in the group setting because she was trying to reiterate the proper way to keep confidentiality, and she thinks Ms. Scotty was offended by that. She told Ms. Scotty she didn't mean to offend her. She said Mr. Oathout did not speak to her about this. The Complainant believed this meeting was in January 2014. Mr. Oathout did not assess any formal discipline or counseling with regard to this incident. Prior to January 2015, Mr. Oathout never gave the Complainant any formal discipline or counseling for anything. Tr. at 111-15.

The witness testified that there was an incident in October 2014 where she believed that Mr. Oathout breached ORB confidentiality again. They were attending a Central division meeting in Indianapolis. On the first day, Complainant conducted training for new hires at the Beech Grove facility. After the training, Mr. Oathout handed her a piece of paper and said that someone contacted him and that she didn't do a mark-off.²⁸ Complainant looked at it and asked what he was doing with it because it had a person's name, SAP number, and the date the employee marked-off. Mr. Oathout said that someone called him. Complainant asked him why he didn't send the person to her to do the follow-up. He said that Complainant didn't do what she was supposed to do. Complainant said that she recognized the name because it was a mark-off she had done. She told Mr. Oathout she was going to report the incident to the ESC because it was someone's personal mark-off information and he wasn't supposed to have it. She told him she was going to report it at the next ESC meeting, which was scheduled for January 21, 2015. She was not able to make the report because she was removed from her position on January 16th and then removed from service on January 19th. Tr. at 116-19.

After Mr. Oathout told her about the employee on October 29th, she went back and confirmed that she did do the mark-off and it was already in the system. She contacted her designated supervisor (the union-selected supervisor) in Chicago to see if he had done his part of the mark-off and he had not. Complainant testified that Mr. Oathout's deposition testimony that she told him she had mistaken the employee's craft and thought he was marked off by the dispatcher was not true. She said that could not be accurate, because the person who marked off worked at Brighton Park, which is a facility similar to Beech Grove, and no onboard service person, UTU person or BLE person would work at Brighton Park. She said she would not have been confused about that. The employees at Brighton Park are therefore not employees who would be marked-off by the CNOc dispatcher because the employee was not an onboard service employee, engineer or conductor. She stated that the designated supervisor²⁹ she called worked

²⁸ In RX 4 and in his deposition (Oathout Depo. Tr. at 52), Mr. Oathout identified the person who called him as Mr. Greene (spelled "Green" in the hearing transcript).

²⁹ *I.e.*, the "union selected Supervisor" in the left bottom circle of the loop of confidentiality (CX 3).

in the Chicago yard. Referring to CX 3, the witness stated that the dispatcher at CNOC does the mark-offs for the UTU and BLE employees and the onboard service employees (referring to the second circle) and she and the other Labor Coordinators do the mark-offs for all other employees. She said that when Mr. Oathout refers to the dispatcher in his deposition, he is referring to the chief crew dispatcher at CNOC. With respect to the October 29th mark-off, she said that she did contact the union-selected supervisor; the union-selected supervisor the Complainant contacted was supposed to change the employee's attendance to reflect the mark-off but he did not. Tr. at 119-124.

Complainant had a meeting with Mr. Oathout on January 15, 2015 at Chicago Union Station. She was in Chicago for a Central division Captain's meeting. After the Captains' meeting, Mr. Oathout said he needed to go over some things with her and asked if she would stay after that meeting. He did not tell her what the purpose of the meeting was in advance. Only the two of them were present. Complainant identified JX 2 and JX 3 as two letters Mr. Oathout gave her at the meeting. He first gave her JX 2. He did not tell her what it was for. She began reading the letter and asked him what it was for. He replied that it was for not attending to her duties in October 2014. The letter had no specifics of what she was being counseled for and it contained no dates. Complainant asked for a union representative, and he said she didn't need one because it was a counseling. She said that the way counseling is usually done, you discuss the issue with the Manager and then you and the union representative sign off on what you agree you discussed. She didn't believe this was in line with the collective bargaining agreement. He then gave her the second letter, JX 3. He said this letter related to a conference call in November 2014. Complainant denied that the Amtrak Standards of Excellence were discussed during the meeting, as stated in JX 3. She said that she told Mr. Oathout that she believed the letters were untimely because they were dated more than 30 days after October and November. She said that Amtrak has a progressive discipline policy. She identified JX 9 as Amtrak's counseling and discipline guidelines. She said that the letters given to her during the meeting were steps 1 and 2 of the progressive discipline policy. She said that the CBA (CX 10) has a provision regarding the imposition of discipline at Rule 24 on page 28. The rule provides that an employee employed over 100 days is entitled to an intent to impose discipline letter before the discipline is actually imposed. She said the intent to impose discipline must be issued not later than 30 days of when the employer became aware of the incident. Complainant denied that she yelled at Mr. Oathout during the January 15 meeting or said he was stupid or that she would make sure he lost his job. She agreed that she was upset he was giving her these letters and was not allowing her to have union representation. Tr. at 124-33.

Complainant stated that she was also given discipline by Mr. Oathout on January 16th. She was in Chicago to attend the divisional steering committee meeting for the Central division. There was a meeting for the Captains one day and then the divisional steering committee meeting. She was late to the meeting because she was taking care of a mark-off. She had trouble getting her designated supervisor in that area and had to make several other calls to divisional management people in the southern division, where the mark-off was. She told Mr. Oathout why she was late when she arrived. After the meeting, Mr. Oathout asked to speak to her in the hallway. When they got to the hallway he asked her if she would go with him to the law department. She asked him if she could get union representation and he said no, that she didn't need it. Going to the law department seemed very serious to her and she thought she was

entitled to representation, so she went back to the conference room to get her telephone to call her local chairman to see what she was supposed to do. Mr. Oathout followed her back there. Before they went back in the conference room, a woman came up and said she was from the law department. The Complainant told her that all she was trying to do was get Mr. Oathout to allow her to have union representation. She shrugged her shoulders and hands like she didn't really know what was going on. The Complainant went into the conference room to get her phone. Linda Gaston, the Treasurer for the Central division, Mike McKenna, the Chairperson for the Central division and Brad Liggin, the Vice-Chairperson for the division were in the room. The Complainant got her phone and called her local chairman, Stephanie Reavis. She was telling Ms. Reavis what was going on and Ms. Reavis asked to speak to Mr. Oathout. The Complainant tried to hand him the phone but he said would not speak to her and that he did not need to speak to her. He then gave the Complainant an envelope while she was still talking to Ms. Reavis. He then told her that she was being removed from her position as a Labor Coordinator. The envelope contained a letter saying that she was being removed from the position. The Complainant identified JX 4 as the letter she was given. The Complainant told Ms. Reavis what the letter said. Mr. Oathout said she was being removed from here position for her conduct on January 15th, when he gave her the counseling letters. Tr. at 133-139.

Complainant identified JX 9 as the letter of January 19, 2015 she received saying she was being removed from service pending investigation.³⁰ The Complainant said that removals from service are typically done in conjunction with a Notice of Investigation. Tr. at 133-40. Complainant was given JX 5, which is a Notice of Investigation dated January 20, 2015. Complainant stated that the notice contained two specifications: specification one refers to her conduct on January 15, for which she was removed as a Labor Coordinator, according to what she was told by Mr. Oathout when he gave her the notice; and specification two refers to conduct that Mr. Oathout said happened on the 16th, the meeting at which he gave her the letter removing her from her position. The hearing referred to did not occur on January 26 as indicated in the letter but on May 19, 2015 because the Complainant was on medical leave. The investigative hearing included a hearing officer, a charging officer, the Complainant's union representative and witnesses and exhibits. The charging officer was an Amtrak employee who presented the case for Amtrak. The Complainant was represented at the hearing by union representatives. The witnesses were the Complainant, Michael Oathout, Michael McKenna, Bradley Liggin, Linda Gaston and Arlette Davenport. Mr. Oathout and the Complainant testified with regard to specification one of the notice of investigation. On specification two, the witnesses were the Complainant, Mr. Oathout, Mr. McKenna, Mr. Liggin, Arlette Davenport, and Linda Gaston. The Complainant identified JX 12 as the transcript of the hearing with exhibits. Tr. at 140 -45.

Referencing testimony at the investigative hearing³¹ by Arlette Davenport³² concerning Complainant's January 16th meeting where Mr. Oathout asked her to turn over her laptop, keys,

³⁰ The Complainant testified that being removed from service is different from being removed from your position. When she was removed from her position she could return to Beech Grove and make a bump with her seniority back into her craft. When they removed her from service, all her bump rights were taken away. She said that bump rights mean seniority rights, giving her the ability to take a position that was open or bump someone with less seniority than her who was holding a position. She said that when an employee is removed from service they are removed from service without pay.

³¹ JX 12.

³² The Complainant stated that Ms. Davenport was with Amtrak's law department or the EEOC department.

telephone and token, she testified that she did not give her phone to him because it had confidential information on it and she could not give him her keys because she did not have them with her. She told him she did not have her keys with her because she was traveling, and asked him to give her time to erase the information in her phone. He said he needed it now. She told him she had confidential information in it and he said she was not allowed to have confidential information in her phone. She said he didn't ask what kind of information it was, he just assumed it was mark-offs, which it was not. It was telephone numbers and names of people she had done mark-offs with or follow-ups with or was still communicating with. She felt it was confidential information that she needed to erase before handing over the phone. This was the Amtrak cell phone they had given her. She turned over the token and the laptop. She did eventually turn over the keys and cell phone. Complainant was also asked about the investigative hearing testimony of Mr. McKenna, Mr. Liggins and Ms. Gaston. The outcome of the investigation was that the witness was terminated. Tr. at 145-54. .

Complainant identified JX 6 as the decision letter issued by the hearing officer. The witness identified JX 7 as her letter of termination dated May 29, 2015. She was removed from service on January 19th. The last day for which she was paid by Amtrak was January 16, 2015. She testified that her compensation as a Labor Coordinator was \$26.10 an hour and she was guaranteed pay for 50 hours a week. She had 20 vacation days, ten sick days and six personal days per year. She had company-provided health insurance with a co-pay at that time of about \$186 a month. Since she left Amtrak she has had health insurance provided through her husband's employment. Amtrak had a retirement plan which both she and Amtrak paid into. She did not receive credit toward her pension for the time since her discharge. She has not worked since she was removed from service and from her position because she didn't think she was going to be off work this long. She also had two granddaughters she was raising. Tr. at 153-56.

Complainant testified that she experienced emotional distress after being removed from her position and from service. She stated that she was very distraught because she couldn't believe this was happening. After she was removed from her position on January 16th, she went to see her primary care physician on January 19th, who told her not to go back to work. The Complainant said she was distraught and nervous and couldn't concentrate. She said her doctor diagnosed her with severe depression, anxiety and sleeplessness. She said she did not have these problems before being removed from service. Tr. at 156-60.

Ms. Laing:

The witness testified that when she was selected as a Labor Coordinator it was an interview process with two labor representatives and one management employee on the panel. The witness agreed that Operation RedBlock is a joint operation between management and labor. All of the Labor Coordinators operated under the same rules and all had to sign the same confidentiality agreement. Before she became a Labor Coordinator she was a material control clerk at Beech Grove. She said she was over the GE overhaul program, which tracked the warranty parts for the locomotives. She did that job for about six years. She worked with the GE liaison on site and the manager dealing with GE. She agreed that she was active in ORB before she became a Labor Coordinator and that confidentiality was a linchpin of Operation RedBlock. She testified that in 2010 the whole ORB staff was comprised of management people

except for one Labor Coordinator. She said that changed in 2012 because they did not want management people to have control over the mark-off information. They therefore changed to three Labor Coordinators and two management people. She said that even before the change the Labor Coordinators possessed the confidential mark-off information on the Coordinator's computer and the management people didn't have it. Complainant said that she did not know Mr. Oathout before he became the Manager of Operation RedBlock. She knew he came from a union craft position as a crew dispatcher. That position was one of the people who would receive mark-off calls. The witness was shown RX 15 and RX 36 (the Amtrak Standards of Excellence and Complainant's acknowledgment of receipt of the standards). The witness agreed that every employee is subject to the Standards of Excellence throughout their employment. She also understood that failure to follow the standards would result in appropriate corrective or disciplinary action, up to and including dismissal. With reference to JX 8 (Amtrak's Counselling and Discipline Guidelines Summary), Complainant understood that progressive discipline means that you move from verbal counseling to written counseling and that as the "crimes" get more serious the discipline gets more serious. She was aware that depending on the nature of the infraction, the employer can jump right to discipline without following the other steps. She was directed to page 8 of the Standards of Excellence under teamwork, regarding being polite, considerate and respectful to coworkers and following instructions from supervisors. She agreed that rudeness and intimidation and using profane or vulgar language is unacceptable. Tr. 162-72.

Complainant was questioned about the ENKON webinar. She agreed that the ENKON facilitator, Niko, was the person pulling up the data and deciding what they were seeing. She agreed that if any names were displayed it was done by Niko. She agreed that Mr. Oathout was accidentally exposed to the information. She does not know if he ever disclosed any names to anyone. To her knowledge Mr. Oathout never told the managers of those employees what he had seen. With reference to JX 1, the ORB Protocols, the Complainant agreed that the top of page 4 indicates that if there is an issue with the mark-off process the matter is to be referred to the ORB Manager. Complainant agreed that she raised the ENKON incident as a concern at the executive steering committee meeting on October 3d. She did not report the names she saw. She agreed the only people who saw the webinar were the three Labor Coordinators, Mr. Oathout and the ENKON representative. Tr. at 173-78.

The witness testified that she reported the incident to the ESC because it was a breach of confidential information and Mr. Oathout was not a part of the loop of confidentiality. Because of the certificate of confidentiality she signed, she believed she had to report it. She thought it was a safety issue because someone may not use the program because they didn't feel it was confidential, and may show up impaired at work. She said that she hoped the information Mr. Oathout saw during the webinar was not disclosed but she was not sure. The Complainant agreed that between when she made the report to the ESC on October 3, 2013 and January 15, 2015 she did not receive any letters of reprimand or file any grievances against Mr. Oathout. She agreed that after the incident in Beech Grove in October 2014 she continued in the same job at the same pay. With respect to the incident at Beech Grove, Complainant agreed that no one except Mr. Oathout and possibly Martha Henderson saw the employee's name, and that the employee was not an hours-of-service employee and so was not a conductor or engineer. She agreed she believed the breach of confidentiality was a safety issue for something that might occur sometime down the road but might not occur. Tr. at 179-82.

She was asked about taking calls on vacation and said she never agreed to cover mark-off calls during her vacation or off days. The telephone conference call about this was with Larry Jones,³³ their union representative, Mr. Oathout and the three Labor Coordinators. The Complainant agreed that she raised her voice during the call. She testified that she was upset, and that she swore once. She denied saying that she was recording the call, stating that she said “I should be recording this call.” She was shown RX 5, Mr. Oathout’s email dated December 2, 2014 to her asking for the recording of the call. She was unsure whether she told Mr. Oathout she made the remark about the recording in jest. She agreed the conference call itself was on November 25, 2014. She said that she was already on vacation the day of the call. She was on vacation all of the month of December except for one week, when she was in Philadelphia for training for all ORB divisional treasurers. She had been a treasurer in the past and trained a couple of treasurers and was doing some of the training at this meeting. Tr. at 182-86.

Complainant was shown RX 21 and stated that she received this email (dated December 11, 2014). She said Mr. Oathout did not ask her to come to his office on December 11th to talk to him. She testified that she did not see this email until the next day because it was sent after she was gone and was on vacation. She did not call Mr. Oathout the next day stating that she was traveling. She said she was on vacation and she ignored the email. She did not call him to ask him what he wanted to talk about. She thought if it was urgent he would call or text her. She was perplexed by the email because she did not tell him that she was coming back to the office and he did not ask her. With regard to the question in the email asking if she brought a copy of the tape he requested, she said that she had spoken to her union official about it. He knew she had “just said that” and told her not to worry about it. She denied that Mr. Oathout had asked her to stop by his office that day. Tr. at 186-189.

She was asked about the meeting with Mr. Oathout on January 15, 2015, after the Captain’s meeting. The witness stated she did not tell him he was stupid while he was trying to talk to her. She may have said “this is stupid,” referring to the process of the pyramiding of the letters in order to progress discipline towards her. She stated that she probably could have chosen a better word than stupid, but she was frustrated because she had sat through one counseling letter. Complainant also testified that she did not tell him he was digging his own grave, and did not imply that. She was referred to page 90 of her deposition when she was asked if she implied something like that and said that she wasn’t sure. She also denied telling Mr. Oathout that she would make sure he lost his job and denied slapping papers together in front of his face during the conversation. Tr. at 189-93.

Complainant was referred to page 8 of JX 12, the transcript of the investigative hearing (regarding the January 15, 2015 meeting). She said that Mr. Oathout’s testimony that he tried to have a discussion with her last month (in December 2014) when she was in Philadelphia and she said he was a liar was not true. With regard to Mr. Oathout’s testimony that she told him that she would “show him” and he was digging his own grave, Complainant said that she may said something about unjust treatment but she doesn’t think she said it in the context of threats. She said she was not sure if he might be partially accurate about that. She again said his testimony that she slapped the paper and said that he is stupid was untrue. With regard to the January 16th meeting, she said she was late because she was handling a mark-off but that she got there before

³³ Testimony at the hearing indicated that Larry Jones is deceased. See Tr. at 276.

the divisional steering committee meeting started. She said the meeting had not started because the vice chairperson and the treasurer were with her. She said she attended all of the meeting. She also said Mr. Oathout's testimony that she said he should give her any other letters he had because she had to go and that she again threatened him before she walked out, stating that she would make sure he loses his job, was not true. She denied that she was stood up and yelled at him across the table and slapped the paper and called him stupid. Tr. at 193-95.

The witness said that after the meeting³⁴ on January 16, 2015, Mr. Oathout was out in the hall and asked her to go with him to the legal department. The witness denied that she refused to go with him; she said she asked him if she could have union representation, and by that time the lady from the legal department came down. She went to get her phone and called her union representative, Stephanie Reavis. The witness said she relayed what Mr. Oathout was telling her to Ms. Reavis. The witness agreed that someone in the room asked her if she wanted them to get a local TCU representative and she said no. The witness agreed that at the end of the meeting she was directed to turn in her computer, keys and phone, and she said she needed to delete confidential information from the phone. She said she asked Mr. Oathout to allow her to erase the information and was going to give the phone to him then, but he was being impatient and would not allow her to erase the information.. The witness agreed that she did not turn in the phone until the disciplinary hearing. She said that the phone had been turned off by Amtrak immediately, however, and she had no contact with Amtrak after the meeting. Tr. at 195-98.

The witness was referred to JX 5, the Notice of Investigation dated January 20, 2015. The witness agreed that calling one's boss stupid is rude, unprofessional and not good teamwork and would be a violation of the Standards of Excellence. She agreed that an Amtrak employee should not issue threats and if they did it would be a violation of the Standards of Excellence. She was asked questions about the investigative hearing. The witness identified JX 6 as the hearing decision. She identified JX 7 as the letter from Michael Logue in which he issued discipline. She said she had been on conference calls where Mr. Logue was a participant and that she had one conversation with him, during the 2013 ESC meeting. When asked if she ever told Mr. Logue that she was planning to report the October 2014 incident about the employee name to the ESC, the witness responded that she would not have told Mr. Logue about that. She said she did not talk with Mr. Logue about the factors he considered when assessing her discipline. She stated that for the period since January 16, 2015 she drove for Uber for one ride and has not looked for work since then. Tr. at 198-205.

Mr. Vlink:

Complainant stated that once Mr. Oathout became a Manager he was no longer in a bargaining unit, but could keep his seniority as long as he retained his union dues. He was not covered by the collective bargaining agreement while he was the ORB Manager. She testified that the CBA has requirements the employer must follow in assessing discipline. She said the employer must have just cause to discipline or discharge a bargaining unit employee. She stated that the confidentiality certification she signed did not make any distinction between accidental breaches of confidentiality or intentional breaches and that she was required to report any breach. She said that during ESC meetings she did not report the names and numbers of employees

³⁴ The divisional steering committee meeting.

because that would have been inappropriate due to confidentiality. With regard to whether she told Mr. Oathout that she had filed an unjust treatment claim against him, she stated that the CBA gives employees the right to file an unjust treatment claim against her supervisor if they believe they have been treated unfairly.³⁵ The witness said this agreement was the one in effect during the entire period she was employed as a Labor Coordinator. Tr. at 205-09.

ALJ:

The witness stated that the source of her understanding that Mr. Oathout could not have access to mark-off information is because the protocol says that only the Labor Coordinators are to have access to that information, and Mr. Oathout was not in the loop of confidentiality. She said the ESC kept reiterating that the Labor Coordinators were the only ones that had access. Prior to the incident with Mr. Oathout, there had not been an allegation that someone who wasn't supposed to have access to confidential information. She said that there is a position description for Labor Coordinators (RX 1). The witness stated that the Labor Coordinators did not receive performance evaluations. Tr. at 209-11.

ARLICIA JONES (Questioning by Mr. Vlink at Tr. 213-218)

Mr. Vlink:

Arlcia Jones testified she is a budget analyst with ORB. She knows Complainant as a coworker within ORB, a Labor Coordinator from 2012 to 2015. Her office is in Philadelphia and she worked in the same office as Barry Eveland and Mr. Oathout from June 2012 to January 2015. She identified Mr. Eveland as a Labor Coordinator and Mr. Oathout as the Manager of ORB until March 2017. Ms. Jones stated that as the budget analyst for ORB she was present at some of the ESC meetings. She attended the ESC meeting in October 2013 where Complainant reported a breach of ORB confidentiality. She testified that when Complainant told them what happened, there was a big commotion and there was chaos in the room. Complainant told them that Mr. Oathout had seen confidential information. Everyone started speaking at the same time. Mr. Oathout denied having seen confidential information. Chris Jagodzinski asked Mr. Oathout about it. After the meeting was over, Michael Logue spoke to Complainant and told her he did not agree with the way she reported the breach, that she should have followed the chain of command. Ms. Jones said that Mr. Logue was very new to the ESC. Tr. at 213-18.

ALJ:

When asked if she had an understanding what he meant by following the chain of command, Ms. Jones said that she was a bit taken aback by it because the ESC is the chain of command for them, for ORB, because it is the governing body. Ms. Jones said that she is management, and her supervisor at that time was Mr. Oathout. Tr. at 218-220.

³⁵ Referencing page 44 of JX 10, the collective bargaining agreement.

Respondent's case:

BARRY EVELAND (Questioning by Ms. Laing at Tr. 237-256, 280-84, 285-86; questioning by Mr. Vlink at Tr. 256-80, 284-85; questioning by ALJ at Tr. 286)

Ms. Laing:

Barry Eveland testified that he has been an Amtrak employee for six and one-half years and currently works at the 30th Street Station in Philadelphia. He first worked for Amtrak in the Operations Center as a crew management representative. In that position he received mark-off calls from employees using ORB. Before joining Amtrak he was a sheriff in New Castle County, Delaware for about eight years. He has an undergraduate degree from the University of Delaware in criminal justice and a master's degree in business administration from the University of Delaware. In 2013 he accepted a promotion into ORB as a Labor Coordinator for the East and was based at the Philadelphia 30th Street Station. As a Labor Coordinator, he handled the mark-offs in ORB and worked with the divisions. He is familiar with Complainant. His duties as a Coordinator were the same as hers but in different geographical regions. He still works as a Labor Coordinator. He worked with Complainant until 2015. At the beginning they would see each other every other month. They also participated in some conference calls and when other matters came up. Later on, they would see each other maybe once a year and their conversations decreased as well. Tr. at 237-40.

Mr. Eveland testified that the Labor Coordinators, Arlicia Jones and Mr. Oathout had conference calls. Mr. Oathout was the ORB Manager. The only staff members of ORB were the three Labor Coordinators, Mr. Oathout and Arlicia Jones. The conference calls took place at Mr. Oathout's discretion, sometimes weekly, sometimes biweekly and sometimes monthly. He testified that several times during conference calls Complainant acted in a manner he considered to be rude or unprofessional. He said that for the first year and a half or two years he spoke to Mr. Oathout about this and later he was requested to put it in writing. He said he delayed that as much as he could but then did. The witness was shown RX 27 (an email chain dated September 13, 2013 concerning the September 10, 2013 conference call). When asked what he recalled about the September 10th conference call, he said that Complainant told Mr. Oathout that "people think you're a racist." He said that Complainant "generally was the biggest voice in the room. Often it was pretty aggressive." Mr. Eveland said that it wasn't unusual for her to "teeter the line of professional and nonprofessional. Sometimes language, and different things. She was opinionated." He said that the problem he had was the way she communicated. Tr. at 240-46.

The witness participated in the ENKON webinar on September 26, 2013 at the Philadelphia office, which is sometimes referred to as the national office. He said the three Labor Coordinators and Mr. Oathout participated. They had been charged to ensure the database was in compliance. He said Mr. Oathout asked him to come into his office. Mr. Oathout was going to have a conversation with Niko, who was the administrator for ENKON. Mr. Eveland came to Mr. Oathout's office and he called Niko. Mr. Oathout said we need to get Molly³⁶ and Martha on the phone. He said it was probably a few minutes that Complainant and Martha Henderson were not on the phone before they were brought into the call. At some point, Complainant had a

³⁶ Complainant is sometimes referred to as Molly in the testimony.

concern that confidentiality had been breached. He said that the home screen on the computer was a list of the last 10 names entered into the system. Mr. Eveland said there was some confusion, even to this day, whether it was actual live data or dummy data. In the past it was dummy data. He said the assumption was it was dummy data. He said that Complainant kind of investigated the process, and Niko wasn't 100% sure what was going on. Mr. Eveland said that because it was a serious allegation, the call was abruptly shut down. The data was up on the screen for "minutes." He does not know if it was live or dummy data. Tr. at 246-49.

The witness was asked about the conference call in November 2014 with the Labor Coordinators, Mr. Oathout and one of the labor leaders, Larry Jones. Mr. Eveland said he had continued to raise questions about being the only employee taking seriously his commitment to working 24/7, including sick time, relief days, and vacation days. Larry Jones was the co-chair for labor. They were all in the TCU in different capacities, so it seemed appropriate for Mr. Oathout to have this call to address Mr. Eveland's concerns. He stated that the Complainant and Martha Henderson were senior employees and had four to five weeks of vacation. Everyone was taking vacations at the same time, which caused an operational concern where you either had to do your work on vacation or someone else had to. He said the job posting indicated employees were responsible to take the calls at all times. He said that he did that and his co-workers did not and he felt that was unfair. Mr. Eveland said that during the call Complainant had an opinion, as they all did, and she voiced her opinion a little louder than everybody else. Again there were the same racist comments. He said she used the term "you guys," meaning himself and Mr. Oathout, versus "us." Complainant told Mr. Jones at one point that he needs to "stay the fuck out of it." Mr. Eveland said that it was basically Molly talking the whole call, particularly after the first ten or fifteen minutes, when she announced that she was taping the call. Mr. Eveland said that he expressed his concern about that and pretty much disengaged from the call as far as anything verbal. She said "just to let you know, I'm taping this call." The witness followed up on the conference call with an email to Mr. Oathout (RX 19). The witness stated that he wrote this email because there was a period of time when he tried to deal informally with some issues but he was not gaining any traction and Mr. Oathout would tell him that he needed to put it in writing. Tr. at 249-55.

The witness testified that he attended the ESC meeting in New Orleans in October 2013. He was present when the Complainant, as part of her Labor Coordinator report, told the committee that Mr. Oathout had breached the confidentiality of the system. He testified that when the allegation was made, the committee members wanted to hear about it, the scenario was described and it really didn't seem to be that big a deal. He said that the Complainant continued to push it to the point one of the committee members, Joseph Derillo, a member on the labor side, told her to shut up several times. Mr. Eveland said that he was not left with the impression from the ESC that Mr. Oathout's job was in jeopardy because of the ENKON incident. Tr. at 255-56.

Mr. Vlink:

The witness stated that he worked in the same office in Philadelphia as Mr. Oathout. He knew Mr. Oathout for about one and one-half years before he became a Labor Coordinator, because they worked in the same department at the same location. He did not know the

Complainant before she became a Labor Coordinator. With regard to the conference call on September 10, 2013, he stated that he did not address any of the issues with the Complainant between the meeting and the date he wrote the email on September 13th. Tr. at 256-59.

With regard to the ENKON webinar on September 26, 2013, he said its purpose was to ensure that what Mr. Oathout was authorizing and Amtrak was paying for was available and completed so that Mr. Oathout could issue final payment. When asked what specifically Amtrak was paying for he said he did not know the details of the contract. He said the purpose of the database was primarily to capture information. He said there were no charts during the call and no graphs that he could recall. He remembers the ENKON database home screen being shown on Mr. Oathout's computer in his office, and Mr. Oathout was able to see the computer. ENKON was the administrator for the database. Mr. Eveland confirmed that when the home screen to the database is opened, the last ten names entered into the database are shown, and that's what he saw on that date. He is not sure whether that was actual data or dummy data. He said it is possible that it was actual data, but that he was not really looking at it to the extent to say it was or not. He said it should have been names. He assumed they were names, but he couldn't confirm or deny that it was. He testified that if Mr. Oathout saw real names that "this would have been a concern." It was his understanding that Mr. Oathout was not privileged to see names. He agreed that if they were real names and Mr. Oathout saw them, then Complainant was under an obligation to report that to the ESC. Tr. at 259-67.

Mr. Eveland testified about the November 25, 2014 conference call. He said he did not know whether the Complainant was on vacation at the time of the call. He said that he was the only Labor Coordinator who was taking calls on vacation and the only one taking calls consistently on normal, obligated time. He said the three Labor Coordinators all took their vacations at the same time every year, from the beginning. He said he took the calls during his vacation. He said that it was Mr. Oathout who approved vacation time, and he would have to approve it for each of the Labor Coordinators. He said that the other two Labor Coordinators had more vacation time than he did. Mr. Eveland said that of the three Labor Coordinators, he had been with Amtrak the least amount of time. He said that he was covered by a different labor agreement than the Complainant and Ms. Henderson. Tr. at 267-75.

Mr. Eveland testified that he did send emails to Mr. Oathout alleging that Martha Henderson acted in a manner that could be interpreted as stealing time (RX 20, p. 3). He also agreed that he sent an email to Mr. Oathout and Mr. Logue about Ms. Henderson being combative (RX 20 p. 3). When asked if he made a habit of sending emails complaining about the Complainant and Martha Henderson to Mr. Oathout, he said that once things were no longer informal and amicable and things weren't changing, he made the choice to put things in writing as requested. Mr. Eveland was asked if, as a Labor Coordinator he considered Operation RedBlock to be related to safety, and he said that he does. Tr. t 276-79.

Ms. Laing:

The witness stated he may have been aware that Ms. Henderson had an informal counseling session with Mr. Oathout and improved her performance. With respect to RX 20 (a series of emails from Mr. Eveland to Mr. Oathout), he said these emails included emails about

both Ms. Henderson and the Complainant. He was directed to an email of November 30, 2014 in which he stated that the Complainant was not taking her calls and indicated that today was one of her REL days (relief days, *i.e.*, a day off). The email says he believed she was paid an additional 25 percent to handle this responsibility. Tr. at 280-83.

Mr. Vlink:

Mr. Eveland stated that he was told by Mr. Oathout that if he wanted to see a change, the preferred method would be to document things in writing. Referring to the email of November 27, 2014 (RX 20, p. 11), he stated that he was not aware of Martha Henderson ever reporting Mr. Oathout for breaching ORB confidentiality. He said Ms. Henderson was not terminated and still works for Operation RedBlock. Tr. at 284-85.

Ms. Laing:

Mr. Eveland was referred to RX 27 and stated that he started documenting some things in writing as of September 13, 2013, before the ENKON webinar on September 26, 2013. Tr. at 285-86.

ALJ:

Mr. Eveland said that Mr. Oathout told him to start documenting things if he wanted change from when they began in their positions, and that he had concerns right away. His understanding was that they were supposed to take mark-off calls on vacation because he said the position description said “responsible to take the 24/7 calls at all times.” When asked if Mr. Oathout told him that he had to take calls on vacation, he said that the people on the interview panel did, and Mr. Oathout was not on that panel. Tr. at 286.

MICHAEL LOGUE (Questioning by Ms. Laing at Tr. 287-312, 332-35, 340-41; questioning by Mr. Vlink at Tr. 312-32, 335, 341-42; questioning by ALJ at 335-40)

Ms. Laing:

Mr. Logue testified that he is employed by Amtrak. His current position is as assistant vice president, safety programs. In 2015 his position was Vice President, Chief Safety Officer.³⁷ He began working at Amtrak on July 29, 2013. He started as a Chief Safety Officer. Before that he worked for the United States Department of Transportation, Federal Railroad Administration from January 1983 through July 2013. He started with the FRA in 1983 as a safety inspector trainee, then became a journeyman inspector, then moved into headquarters in Maryland in a variety of positions until he retired. He said he was a special assistant as a deputy associate administrator for close to 13 years. When he retired he was the associate administrator for administration, responsible for human resources, IT, and procurement, and was also acting associate administrator for safety over all safety operations across the nation. Before he went to

³⁷ Mr. Logue’s title on CX 17 is given as “Vice President & Chief Safety Officer.” He testified that he was chief safety officer until January 30, 2017, when Amtrak went through a reorganization of operations. Tr. at 296.

the FRA he started his railroad career with Conrail in 1977. He began as a yard clerk and then went into train and engine service and became a qualified locomotive engineer. He testified that he was with them until 1982 when he was furloughed due to the recession. He came from the FRA to Amtrak because Amtrak was reorganizing and put up the Chief Safety Officer position for the first time in their history, and he was eligible to retire from the federal government. Tr. at 287-90.

When he started at Amtrak as Chief Safety Officer, Operation RedBlock fell under his purview. He testified that ORB is no longer within the safety department but was transferred to human resources on October 1, 2015. Mr. Logue testified that he attended an Executive Steering Committee meeting of ORB in October 2013. He had not previously been to a meeting. He said that the ESC is a body made up of both non-agreement, or managers, and agreement union leadership. He said that the role of the ESC is to oversee the director³⁸ and the Labor Coordinators. He testified that the ESC did not have the ability to fire ORB staff but that he did as Chief Safety Officer. He testified that he did not recall the Complainant mentioning during the October 2013 meeting that she believed there had been a breach of confidentiality. When asked if the subject came up during the meeting, he said there was something that came up, because he remembered that there was a lot of sniping, that the meeting seemed acrimonious. At some point, it appeared to be almost a food fight. He did not recall any suggestion during that meeting that because of Complainant's report Mr. Oathout's job was in jeopardy. He said he never had any discussions that he could recall with anyone after the meeting about Complainant's report during meeting. He said he did not recall the report. He said he did not give any thought to the report until this claim was filed and did not report the incident to anyone at the FRA, the Department of Transportation, or internally to anyone at Amtrak. He said the incident did not change any of Mr. Oathout's responsibilities or have any effect on his raises or Mr. Logue's raises. Tr. at 287-94.

Mr. Logue testified that he reported to the chief operating officer, D.T. Stadtler. He said he did not recall that Mr. Stadtler ever criticized or counseled him regarding Complainant's report to the ESC. Mr. Logue stated that Mr. Oathout reported directly to him in the chain of command. They would meet face-to-face infrequently and have conference calls on average about once every other week. When asked if he ever became where aware that Complainant might be making a claim that there was a breach of confidentiality in 2014, he testified that he recalled Mr. Oathout conveying something to him but did not recall the particulars. Tr. 294-95.

Mr. Logue stated that during the course of his interactions with Mr. Oathout he became aware of issues Mr. Oathout was having with the Complainant with regard to her participation in conference calls. He believed this was probably sometime in the latter part of 2014 and he suspected that he received emails from Mr. Oathout on this. He said that he would have had follow-up conversations with him as well. Mr. Logue testified he did not recall the specifics of a report from Mr. Oathout following the November 25, 2014 conference call concerning Mr. Oathout, the Labor Coordinators and Larry Jones. He recalls having some conversation with Mr. Oathout over things that were going on, regarding Labor Coordinators taking calls. He said he understood they had a conference call regarding this. He said his recollection was cloudy, but he recalled Mr. Oathout suggesting people were "raising their voices and things of that nature." He

³⁸ The term "director" was not clarified but I assume it refers to the ORB Manager.

does not recall whether it was the Complainant but he recalls Mr. Oathout suggesting it was a female. Tr. at 296-98.

Mr. Logue was shown RX 31. Based on this email, he said that it was the Complainant who became angry during the phone call. He agreed that the email indicated that Martha Henderson and Barry Eveland were covering mark-off calls. When asked whether following this conference call he continued to receive updates in terms of issues Mr. Oathout might be having with Complainant, he replied that he was sure those discussions came up. He stated that the reference to Charlie in RX 31 is to Charlie Woodcock, Amtrak's director of Labor Relations, now Vice President of Labor Relations. Mr. Logue believed he had a discussion with Mr. Woodcock about whether Labor Coordinators should be working on vacation time. He thinks they were able to structure it to give them appropriate time off. Tr. at 296-300.

Mr. Logue recalled that he became aware in December 2014 that Mr. Oathout was exploring moving forward with counseling Complainant on her behavior doing calls. His recollection was that discussions were loud and unruly, behavior inappropriate, particularly for a manager/employee relationship. He vaguely recalled that Mr. Oathout tried to have a counseling session with the Complainant in Philadelphia. He recalled Mr. Oathout suggesting at some point that she was a no-show. He stated that he was sure that as a result of these interactions he told Mr. Oathout to consult with Labor Relations on the proper method to go about counseling someone. He was also sure he was a party to email exchanges as to the result of this process. He testified that he had not been involved in the disciplinary process with any employee at Amtrak prior to this and that he was not "terribly familiar" with the way the agreements worked and what steps were to be done. Tr. at 300-301.

Mr. Logue testified that he did not have a recollection of a discussion with Labor Relations concerning the use of two letters of counseling as the appropriate way to go about counseling the Complainant. The witness was shown RX 33, consisting of two emails dated December 16, 2014. He said that at some point he learned that Mr. Oathout attempted a counseling session with the Complainant on January 15, 2015 and that it did not go well, that the Complainant became angry, loud and very disruptive. He said that the source of his information was Mr. Oathout. The witness was shown RX 9, an email from Mr. Oathout on January 16, 2015 regarding the meeting. He stated that RX 9 reflects the specifics of what Mr. Oathout relayed to him, that she called him a liar and called him stupid and said she would make sure he loses his job. The witness testified that he was concerned that an employee would treat a manager like that. He stated at some point the decision was made to remove her from her position as Labor Coordinator. He had a discussion with Mr. Woodcock about this because he was in charge of labor relations. Tr. at 302-07.

Mr. Logue did not participate in the disciplinary hearing against Complainant. He was shown JX 6, the decision letter. He said he did not know the hearing officer, Michael O'Connell, and did not speak to him about the issue. Mr. Logue said he had no input into the hearing officer's decision. The witness was shown RX 34, a copy of the email he received forwarding a copy of the hearing decision letter. The email forwarded two letters to Mr. Logue to decide which to use, one for a thirty-day day suspension and one for termination. Mr. Logue selected termination. He based that on looking at the information presented to him, looking at what the

charging officer suggested, as well as prior behavior in the October/November/December 2014 time frame. He did not consider any other factors in reaching his decision. With respect to whether Complainant's report to the ESC in October 2013 regarding the breach of confidentiality played a role in his decision, he stated that he "never even gave that a thought." When asked if he was aware that there might be a second reported breach that occurred in October 2014, he stated that he had some slight recollection of Mr. Oathout conveying to him that there was an alleged breach, but that the October 2014 incident did not play any role in his decision to terminate Complainant. Tr. at 307-12.

Mr. Vlink:

Mr. Logue testified that Operation RedBlock was under his purview from July 2013 until October 2015. He stated that he did not agree that ORB is a safety program. He considers ORB to be a wellness program. The witness was shown JX 1, the Operation RedBlock Protocols, and was asked to read the first sentence, which says that ORB is a labor developed, joint labor/management adopted drug and alcohol safety/prevention program. Mr. Logue stated that he disagreed with that. He was shown CX 4 and referred to last sentence of the first paragraph which says that that the FRA supports ORB and believes it meets the confidentiality needs of employers and performs an important safety function. He stated his opinion is that ORB is a wellness program, not particularly a safety program, so he disagreed with that statement. Mr. Logue agreed that drug and alcohol use at Amtrak creates a safety concern. He was shown RX 15, the Amtrak Standards of Excellence, and said he is familiar with that and that all employees are given a copy of this upon hiring. The witness was asked to turn to the language on page nine of the document stating that "[e]mployees with alcohol or drugs in their systems can undermine workplace productivity and pose an unacceptable risk to the safety of passengers, fellow workers, and themselves" and was asked if he agreed with that. He said he did.³⁹ He agreed that the purpose of Operation RedBlock was to prevent employees who are impaired from drugs and alcohol from coming to work. He agreed that confidentiality is a critical feature of ORB. Tr. at 312-18.

Mr. Logue was asked about the ESC meeting in October 2013, and stated he did not recall anything about Complainant reporting a breach of confidentiality. He was asked what the "food fight" he referred to was about and said that he did not recall. He recalled that it was his first meeting and he thought it was a pretty bizarre meeting, people sniping at each other, having questions concerning Mr. Oathout, and Mr. Jagodzinski was answering questions. He said it was an acrimonious meeting. Mr. Logue testified that he does not remember speaking to the Complainant after the ESC meeting was over. He does not recall telling the Complainant that she should have followed the chain of command in making her report. He stated that he was pretty confident that he did not say that. Tr. at 318-21.

The witness was referred to RX 31, the email dated November 25, 2014 to him from Mr. Oathout regarding the conference call with Complainant. Mr. Logue said he did not remember speaking to Mr. Oathout about the conference call. The witness stated he did not know if he

³⁹ See footnote 15 regarding the substitution of a complete copy of RX 15 (*i.e.*, including page 9 of the document) for RX 15 as originally admitted. Mr. Logue testified that he did not know why page 9 was omitted from RX 15 as originally offered. Tr. at 318.

received emails prior to this from Mr. Oathout complaining about Complainant's behavior. He did not recall anything prior to November 25, 2014 regarding Complainant's behavior. The witness stated he did not have any personal knowledge of the incidents in the emails he started receiving in November 2014, other than the emails from Mr. Oathout and what he was told by Mr. Oathout. Tr. at 321-23.

The witness was referred to RX 9, an email Mr. Oathout sent him on January 16, 2015. Mr. Logue's understood that the counseling session Mr. Oathout had with the Complainant was on January 15. The extent of his knowledge about what happened on that day is from what Mr. Oathout told him. Mr. Logue stated he did not know who the copy recipients named in the email were. Mr. Logue was asked to look at JX 6, the May 26, 2015 investigative hearing decision. He was shown JX 5, the Notice of Investigation. He said he "suspect[ed]" he had seen it before. He said the information in the Specifications came from Mr. Oathout. He said he suspected that Mr. Oathout spoke to him about the letter before he gave it to the Complainant. He was asked about specification one on JX 5, relating to alleged misbehavior during the counseling meeting on January 15. He agreed that the information that was used to make that allegation came from Mr. Oathout. With regard to Specification two, relating to Complainant's alleged misbehavior on January 16, 2015, he was asked if that was the meeting at which Mr. Oathout removed the Complainant from her position, and responded that he didn't recall that specifically but it was probably around that time. The witness was shown JX 4, the removal from position letter dated January 16, 2015. He said he did not write this letter. He was asked if Mr. Oathout spoke to him before he gave her that letter he said that he suspects he probably did, based on standard operating procedure. When asked whether it would surprise him if Mr. Oathout testified at his deposition that he (Mr. Logue) prepared JX 4, he answered that it would surprise him because to his recollection he did not prepare it.⁴⁰ Tr. at 323-29.

Mr. Logue testified that he was not 100 percent sure whether he read the investigative hearing transcript before he made his discharge decision, but he suspected he did. He testified that in making the discharge decision he considered Complainant's prior behavior in the October, November, and December time-frame. He said he assumes that he took into consideration Mr. Oathout's emails and, he guessed, the tone and conversations with Mr. Oathout "and all." He said his source of information was probably discussions with Mr. Oathout. The witness was referred to RX 5, an email dated May 19, 2015 from Mr. Oathout to Steve Metz asking Mr. Metz to print out an email message for the hearing. He said he did not know if it was standard for the person making the allegations to send emails to the charging officer prior to the hearing. The witness was asked about earlier testimony about a conference call in September 2013 and said he did not have any knowledge of that. Tr. at 329-32.

Ms. Laing:

Mr. Logue testified that he did not participate in the conference calls that were the subject of Mr. Oathout's emails to him. He said that Mr. Oathout was one of his direct reports, and he (Mr. Logue) did not involve himself in the day-to-day administration of ORB. He testified that

⁴⁰ JX 4 was identified at Mr. Oathout's deposition as Oathout Exhibit 9. The deposition exhibits used by counsel for Complainant at Mr. Oathout's deposition are identified as "Oathout Exhibits" and the exhibits used by counsel for Respondent are identified as "Defendant's Exhibits."

his job as Chief Safety Officer was to be responsible for the safety of Amtrak's employees and the traveling public. He said that when he started with Amtrak there was not much of a safety department and he built the department into something that Amtrak could be proud of. When asked what percentage of his time was focused on the day-to-day running of ORB, he said it was "[m]iniscule, at best." He said that his management style is to allow those who report directly to him to manage and provide leadership to the employees who report to them. He said that he usually holds conference calls with his direct reports once every other week just to touch base with them, and if needed will talk to them more often. He said that by and large he allows those who are paid to do the job to do the job. They would bring him issues they thought he should know about. Mr. Logue stated he reviewed the decision letter of the hearing officer. He stated that in making his decision he relied upon material that was provided to him. He testified that he did not discuss with Mr. Oathout what discipline to impose. Tr. at 332-35.

Mr. Vlink:

Mr. Logue confirmed that in addition to the findings of the hearing officer he also relied on the other things that Mr. Oathout told him that happened in the October, November and December 2014 time-frame. Tr. at 335.

ALJ:

Mr. Logue testified that before deciding to impose discipline on the Complainant he did not look at her record prior to the October to December 2014 period. He said that is not something he would normally do in imposing discipline on an employee. When asked whether there is a policy at Amtrak that an employee's entire record should be considered before discipline is imposed, he replied that he did not believe there was. With respect to Operation RedBlock, it was his understanding that information concerning the identity of employees who marked-off under the program was to be kept confidential. When asked if he would have expected to be informed by Mr. Oathout if there was a breach of confidentiality, he said he would. He testified that he recalled Mr. Oathout conveying to him at some point, maybe in the 2015 time frame, that there was an alleged breach of confidentiality and that he needed to convey that to Mr. Jones, who was co-chair of the ESC and to Mr. Jagodzinski, the management co-chair. He stated that his sense is that one of the Labor Coordinators was likely involved in that but he did not recall who. He said Mr. Oathout would probably have told him which of the three Labor Coordinators it was. He did not recall Mr. Oathout telling him anything else about any other alleged breach of confidentiality. He recalled that there was an alleged event in October 2013 and other alleged event at some point later in time and Mr. Oathout conveying it to him as a heads-up. He was not sure if it involved Complainant. When asked what the alleged breaches he was told about were, he said that there was a probably a manager involved and Mr. Oathout probably contacted a Labor Coordinator because management wasn't supposed to get involved with the employees' names. He believed that was the incident where Mr. Oathout was alleged to have seen an employee's name. He believes he became aware of this probably couple of days or a week or so after it happened. He does not recall any other incident where Mr. Oathout was alleged to have seen ORB information he should not have seen other than somebody mentioned something about the October 2013 ESC meeting. He said he did not recall hearing about it at the time but if he did it did not leave an impact on him. Tr. at 335-40.

Ms. Laing:

The witness was shown RX 4, which he identified as the email dated November 17, 2014 Mr. Oathout sent to Mr. Jagodzinski and Mr. Jones concerning the situation that he testified about. Mr. Logue was copied on the email. He said the email notified him of a potential breach. Tr. at 340-41.

Mr. Vlink:

The witness clarified, after seeing RX 4, that the incident concerning the alleged breach of confidentiality that Mr. Oathout conveyed to him happened in 2014 and not 2015. Tr. at 341-42.

DEPOSITION TESTIMONY (Joint Exhibits 10 and 11)⁴¹

MICHAEL OATHOUT: (JX 10) (Questioning by Mr. Vlink at Tr. 7-101, 123-39; questioning by Ms. Lang at Tr. 101-23)

Mr. Vlink:

Mr. Oathout testified that he has been employed since March 2017 by the International Association of Machinists as a project coordinator/instructor. Before that he was employed by Amtrak as the ORB Manager. He began employment with Amtrak in October 2005 and held the position of Crew Manager Representative until May 2012, when he became the ORB Manager.⁴² He stated that he is currently on a leave of absence from Amtrak, which he requested in order to pursue other opportunities. The leave of absence continues while he is employed in any capacity with the union, and he can return to Amtrak if he chooses to. He said he was not sure if he will return to Amtrak. He said he left Amtrak because of the hostile work environment, specifically the way some executives at Amtrak acted towards him. Depo. Tr. at 7-15.

Mr. Oathout testified that he was Complainant's supervisor from June 2012 to January 2015 when she was removed from service. Her job title at the time was ORB Labor Coordinator for the central part of the country. She was one of three Labor Coordinators. He was the ORB Manager when Complainant became a Labor Coordinator, and he did not know her before that. Mr. Oathout's office was in Philadelphia and the Complainant was located in Beech Grove, Indiana. Their communication was through emails, phone calls and quarterly meetings. He saw her every two to three months. Mr. Oathout stated that Operation RedBlock is a labor-developed, company supported drug and alcohol peer prevention program. He believes the program was developed by Amtrak in 1987 or 1989. He agreed that the purpose of the program is to prevent employees who are under the influence of drugs or alcohol from coming to work, and also to encourage those employees who have problems with substance abuse to get

⁴¹ The depositions of both Mr. Oathout and the Complainant were taken on May 1, 2017. No explanation was offered for why Mr. Oathout did not testify in person at the hearing.

⁴² On some of his correspondence, Mr. Oathout is identified as "Manager of Employee Assistance Programs" (e.g., Oathout Exhibit 9, RX 30 and RX 38).

treatment. Mr. Oathout identified Oathout Deposition Exhibit 1⁴³ as the Operation RedBlock protocol document, adopted in February 2014, which covers the details of the ORB program. He stated the document was in effect in 2015. He said that the Executive Steering Committee previously went through multiple versions of the document. The document is signed by members of the ESC and union and company representatives. He stated that the ESC is the entity that oversees ORB, and the committee meets three to four times per year at various locations. He said that the people attending the meetings would vary from meeting to meeting, but that it was supposed to be all the people who signed the document⁴⁴ and that it had changed multiple times on the company side. He said that previously all three Labor Coordinators were always present but there was a change and they wanted only the Labor Coordinator for the area of the country they were meeting in. Therefore, if they met in the West they would have the Western Labor Coordinator, if they met in the east the Eastern Coordinator and if they met in the Central the Central Coordinator would be present. This change took place sometime before the Complainant was removed from her Labor Coordinator position.⁴⁵ Depo. Tr. at 15-22.

Mr. Oathout identified Oathout Deposition Exhibit 2⁴⁶ as the document that outlines the ORB mark-off procedures. He said the document was in effect the entire time that he was the ORB Manager. He was directed to the “Loop of Confidentiality” in the center of the page. He agreed that the information that is confidential is anything that could identify whether an employee marked-off or not. He stated that within the loop of confidentiality all the individuals identified are union employees except for an approved management contact in the lower left circle of the loop, identified as a “union selected Supervisor,” whom the Labor Coordinators call to backfill a job. He agreed that the ORB Manager is not within the loop of confidentiality and is not privy to the confidential information. He said that if the ORB Manager did become privy to such information it would not necessarily be a breach of the ORB protocols, because there may be a scenario where an employee is not happy with how they were treated or a manager in the field called him to confirm an employee was marked-off. He said if a manager in the field gave him a name of an employee who claimed to have marked-off he would give the name to the Labor Coordinator to follow-up with the manager. He stated that he believed that it was okay for him to have the name of an employee who marked-off if a manager called him to verify that the employee marked off. He was asked if he could instead simply direct the manager to contact the Labor Coordinator directly and not take the information from the manager himself, and he agreed that that could be done. Depo. Tr. at 22-33.

Mr. Oathout identified as Oathout Deposition Exhibit 3⁴⁷ a letter from the FRA (“FRA”) that Amtrak requested to ensure confidentiality of the program, *i.e.*, that the FRA would not request names and information. He said that he received a copy of this letter as the ORB Manager from Michael Logue, who was the Chief Safety Officer and a member of the ESC at that time. He shared the letter with others, including the ORB Labor Coordinators. He agreed that the confidential nature of the program is critical to ORB performing an important safety

⁴³ This document is also JX 1.

⁴⁴ Mr. Oathout was presumably referring to the ORB Protocol, Oathout Deposition Exhibit 1 (also JX 1).

⁴⁵ The Complainant testified that this change occurred after the October 3, 2013 meeting. Tr. at 90.

⁴⁶ This document, with slight variation, is also CX 3 (the deposition exhibit has additional language at the bottom of the page stating “For confidential mark-offs” and gives the telephone number to call).

⁴⁷ Also CX 4.

function. He testified that he believed that fewer employees would probably use Operation RedBlock if their information was not confidential. Depo. Tr. at 33-35.

The witness was shown Oathout Deposition Exhibit 4,⁴⁸ which he identified as the Complainant's Confidentiality Certification. He stated that there is nothing in paragraphs three and four that he disagrees with. He agreed that if Complainant became aware of anyone outside of the loop of confidentiality becoming privy to confidential information, she was under a duty to report that to the ESC. Depo. Tr. at 35-36.

The witness was asked about the webinar with ENKON in September 2013. He stated that there was a webinar that the Labor Coordinators had and there was a call that he had with ENKON before the webinar. He said the call started out with him and he then called Barry Eveland, the Labor Coordinator who was in Philadelphia office, to verify that the graphs that they were showing him were what Amtrak was paying for. He said that the webinar with the Labor Coordinators was a tutorial of what the system could do with the graphing function. He was given a demonstration of what the graphs would look like before that. The webinar was facilitated by a representative from ENKON. The three Labor Coordinators, the Complainant, Barry Eveland, and Martha Henderson, were on the call. Mr. Oathout testified that he was on a call before that and when the call went on for the Labor Coordinators he left the room after they got started. When asked if he was ever on the call with all three of the Labor Coordinators, he said that he did not recall the timing. He testified that he knows that he left after verifying that everything was set up to pay for what Amtrak purchased. He did not recall how long just he and Barry Eveland were on the phone with the ENKON representative, and he did not recall if he was on the phone any length of time while all three Labor Coordinators were also on the phone. When asked if he was on the phone when the Complainant claimed there was live data being used during the tutorial, he replied that he did not recall the timing. He said he had been told that the graphs ENKON showed him before the training for the Labor Coordinators was demo data with no live data. When asked if he recalled Complainant saying that he needed to leave the room because actual employee information was being used during the webinar, he said that it was something along those lines, that he did not recall exactly what was said but there was some concern and he left. He remembers Complainant saying that she was going to have to report this to the Executive Steering Committee. He told her that she could report whatever she needed to report. Mr. Oathout agreed that if actual names and other confidential information had been disclosed during the webinar, Complainant was under a duty to report that to the ESC. Depo. Tr. at 36-44.

Mr. Oathout stated that Complainant did report this incident at the next ESC meeting in October in New Orleans. He said that all three Labor Coordinators were present and members of the ESC were present. He identified certain members of the Executive Steering Committee who were present, including Michael Logue. Mr. Oathout remembered the Complainant saying something about him having had access to the system, and he explained that he had a call with the vendor to verify what the graphing report section would look like. He stated that he recalled that the Complainant was very upset during the meeting. There was a discussion and the ESC told him to make sure he did not access the system. He said when the Complainant reported that there had been a breach he thinks there was some discussion but it wasn't a real big deal. He

⁴⁸ Also CX 8.

said the discussion was maybe a few minutes and then it moved on. He stated that Joe Derillo, a union representative, was very upset with the continued discussion and with the Complainant repeating the same thing over again. There was a discussion with the entire ESC. Mr. Derillo said “shut up“ at the end. Mr. Oathout believed that both Barry Eveland and Martha Henderson commented but he did not recall what they said. Mr. Oathout did not recall any conversation about the breach other than at the meeting. Depo. Tr. at 44-51.

Mr. Oathout was asked about the Complainant’s allegation of another breach of confidentiality incident in October 2014. He testified that there was a training session in the Beech Grove shop and he received an email from a field manager (Mr. Greene)⁴⁹ asking about an employee who was claiming he had marked off using ORB. The manager asked him to verify this because they were going to charge the employee with violating the attendance policy if he had not marked off. The manager had emailed an individual in the EAP⁵⁰ department who told him to contact Mr. Oathout. Mr. Oathout then had a telephone conversation with the manager and was given the employee’s name. He wrote down the information on a piece of paper and gave it to Complainant and asked her to follow up with the manager because they didn’t have a record of a mark-off for the employee. Mr. Oathout testified that Complainant became very upset and animated and told Mr. Oathout that he was not supposed to have the information. He told her he got the phone call because she didn’t follow up. He said he does not know why he did not refer the manager to Complainant directly rather than taking the employee’s name. He said that the Complainant did not attend to her duties and mark-off the employee properly. He admitted that the error could have been because the union-selected supervisor did not do what he was supposed to do. Mr. Oathout did not know whether Mr. Greene, the manager who called him, was the union-selected supervisor. He did not recall whether anyone else who was around when he spoke to Complainant said anything. He did not remember if Complainant said she was going to report this at the next ESC meeting. He said he did not recall what she said. Mr. Oathout testified that he believed the next ESC meeting was in January 2015, after Complainant had been removed from service as a labor coordinator. Depo. Tr. at 51-60.

Mr. Oathout was shown Oathout Deposition Exhibit 5,⁵¹ and stated that he guessed this was the company’s formal discipline policy or part of it. He testified that he is sure that the collective bargaining agreement between Amtrak and the TCU also contained a provision regarding discipline, but he was not familiar with it. Mr. Oathout was shown Oathout Deposition Exhibit 6,⁵² which he said was part of the off corridor TCU agreement, and that he has seen it before but is not very familiar with it. He agreed that the rule requires a letter of intent to impose discipline before discipline can be imposed, and then a meeting between union and management at which the employee has the right to have a representative present. He agreed that an employee is entitled to a notice of investigation and a hearing before formal discipline is imposed. When asked if he issued any discipline to Complainant on January 15, 2015, he stated that they had a counseling session. Depo. Tr. at 60-68.

⁴⁹ See RX 4.

⁵⁰ EAP stands for Employee Assistance Program. Tr. at 40.

⁵¹ Also JX 8.

⁵² “Rule 24 – Discipline – Investigation – Appeal.” Rule 24 is also at pages 28-30 of CX 10.

The witness was shown Oathout Deposition Exhibits 7 and 8,⁵³ both letters from him to Complainant dated January 15, 2015. He testified that he prepared these and gave them to the Complainant on January 15th in the same meeting. He said he did not recall if he had given the Complainant any counseling letters before these. He said he knew that there was no formal discipline prior to this. The meeting on January 15th took place in Union Station in Chicago. No one else was present. He does not recall that he took any notes. He did not record the meeting and did not recall how long the meeting lasted. He stated that Oathout Deposition Exhibit 7 (JX 2) reflected counseling for teamwork. He said it was not for a particular incident, that there were some issues with her behavior, how she worked with other members of the team and conducted herself on conference calls, and that this was to help her improve her performance and excel in her role as a Labor Coordinator. He said there was an issue where she was very hostile and disruptive on a conference call, which he thought was in November 2014. He also stated that there was training session for treasurers in Philadelphia in December 2014 where there were concerns about her behavior at a meeting and how she was treating other members of her team. He did not recall whether he told Complainant during the January 15th meeting that Oathout Deposition Exhibit 7 was about the conference call in November and the training in Philadelphia in December. He said he thought it was just a general discussion to help her improve her performance. He agreed that those incidents and dates are not referred to in the exhibit. He said he was advised by Labor Relations that since it was not formal discipline there was to be no incident documented. He said he may have talked with Complainant during the meeting about those incidents. He said he did not recall the whole discussion. He said Complainant was very disruptive and hostile during the meeting and made threatening remarks to him. Depo. Tr. at 68-74.

Mr. Oathout stated that Oathout Deposition Exhibit 8 (JX 3) related to the incident in October (2014) where the Complainant did not notify the Manager (Mr. Greene) of an approved absence to backfill a job for an employee. He said he did not do any further investigation after October and before giving the Complainant Exhibit 8 to determine who actually made the error. He testified that the Complainant apologized and told him that she had mistaken the employee's craft and thought the employee was marked off by the dispatcher and put in the system by the dispatcher and she did not call the supervisor. He said she told him this sometime after October and before the counseling session. He said this incident was not identified in Exhibit 8 because it was not formal discipline and was just a counselling session. He did not remember if she told him this in a phone call or in person and he did not remember the date. He said it was before December. He then said that he thought it was the same day that they had the discussion in Beech Grove. He said it could have been the same day. He could not remember if she told him this by phone or in person. He did not directly answer a question as to whether he did an independent investigation of what happened. Mr. Oathout said they did not finish their discussion at the January 15th meeting because Complainant was "standing up, loud, reaching across the table, slapping the paper in my face." He said she was very upset, very hostile and negative, making threats against him and told him he was stupid and was digging his own grave. Depo. Tr. at 74-80.

⁵³ Oathout Deposition Exhibit 7 is JX 2 and Oathout Deposition Exhibit 8 is JX 3. However, RX 7 is JX 3 and RX 8 is JX 2.

Mr. Oathout testified about counseling letters he gave to Martha Henderson, another Labor Coordinator, in January 2015. He thought he gave her the two letters in the same session and that the counseling was related to teamwork. When asked if he believed it appropriate to give an employee two steps of progressive discipline at the same time, he stated that he was told by Labor Relations that written counseling and a counseling session were not formal discipline. The witness was directed to Oathout Deposition Exhibit 5, and stated that he did not think that counseling was part of the progressive discipline procedure. Depo. Tr. at 80-85.

The witness identified Oathout Deposition Exhibit 9⁵⁴ as a letter that was prepared by Mr. Logue, which he signed. He said he reported his concerns to Mr. Logue after the meeting on January 15th. He said there were a couple of discussions with Mr. Logue and that Labor Relations was involved. He said he spoke to Mr. Logue and Mr. Woodcock of Labor Relations on the morning of the 16th and was given the letter. He gave the letter to the Complainant that afternoon. He said the letter was based on Complainant's actions on January 15th. He gave her the letter in the afternoon after the divisional Central ORB ESC meeting. When asked if he agreed the letter constitutes discipline, he said he was not sure. He stated that Arlette Davenport from Amtrak's legal department was present when he gave Complainant the letter and Complainant then requested that some volunteers from the ORB Central division committee be present as her witnesses. Those persons were Linda Gaston, Michael McKenna and Brad Liggin. Mr. Oathout gave Complainant the letter and told her she was being removed from her position as an ORB coordinator. He said she was "really upset" and said that he couldn't remove her. He asked her to turn over her keys, computer and phone and asked her to erase her phone if she had any confidential information in it. Complainant gave her computer to Ms. Davenport. She did not have her keys with her. Mr. Oathout said that Complainant asked for a union representative to be present. He told her she could call one but she was being removed immediately as a Labor Coordinator. He said he reported to Mr. Logue that during the meeting Complainant was upset and loud and didn't want to take the letter. He told Mr. Logue she kept her phone and didn't have her keys with her. He also spoke to Labor Relations about the meeting. Depo. Tr. at 85-93.

Mr. Oathout identified Oathout Deposition Exhibit 10⁵⁵, a Notice for Holding Employee Out of Service, dated January 19, 2015. He said this was done by Steve Metz, who is indicated on the document as the Charging Office. Mr. Oathout did not know what his actual job title was. He said that as of the date of this exhibit the Complainant was no longer reporting to him. The witness identified Oathout Deposition Exhibit 11⁵⁶ as the Notice of Investigation to Complainant, dated January 20, 2015. The Notice contains two specifications, one regarding the January 15th meeting and one regarding the January 16th meeting. He said the hearing took place on another date, not on January 26th as indicated in the Notice. Mr. Oathout was shown Oathout Deposition Exhibit 12,⁵⁷ and stated that he had never seen it before, but it is a notice of the Complainant's termination. He said he testified as a witness at her investigative hearing. Depo. Tr. at 93-100.

⁵⁴ Also JX 4.

⁵⁵ Also JX 9.

⁵⁶ Also JX 5.

⁵⁷ Also JX 7.

Ms. Laing:

Mr. Oathout testified that prior to January 15, 2015 he thought there were other discussions with Complainant about her job performance. He stated that he talked to her regarding being rude or aggressive toward volunteers. He referenced an ORB rules meeting in Baltimore and said she was a little aggressive toward the other people that were on the rules committee. He said there was another incident in a Captains' committee meeting in Chicago Union Station where she was standing up and yelling at the ORB volunteer captains. He said there was an incident where Complainant was aggressive toward a former ORB chairperson for the South, Linda Gaston, and made a scene. He said there was no formal written counseling that he could think of. Depo. Tr. at 101-103.

He testified that he started supervising the Complainant in June 2012. He said there was a discussion about how the Labor Coordinators would handle calls when they were on vacation or on holidays. He said they let the Labor Coordinators set it up the way they wanted. Regarding vacations, he told them everybody could not be off at the same time. He said it was agreed in the beginning that if there were mark-off calls they would handle them and didn't have to come in to the office. He said Complainant agreed at the beginning of her tenure as a Labor Coordinator to take mark-off calls during holidays and vacations. He said the job description says they are supposed to take the calls at all times. Mr. Oathout was shown RX 28 and identified it as containing his email dated September 6, 2013, which he sent to the Labor Coordinators. His email notes the prior agreement regarding coverage during vacations. Depo. Tr. at 103-07.

Mr. Oathout identified RX 31 as an email he wrote to Mr. Logue on November 25, 2014. He said he had a conference call in November with the Labor Coordinators regarding coverage for mark-off calls. He said that Complainant was very loud, very hostile and argumentative on the call, didn't let anyone get a word in and then she informed everyone that she was recording the call. The witness identified RX 5 as his email to Complainant dated December 2, 2014 requesting a copy of the recording. He said he never received a copy and Complainant never told him that she was just kidding. Mr. Oathout identified RX 21 as an email he sent to the Complainant on December 11, 2014. He said wanted to talk to her about her attitude, about the conference call, and about her teamwork. He said she was in town for training for ORB treasurers in Philadelphia. Mr. Oathout said he stopped down and spoke with her and asked her to come back to his office to have a private discussion and she did not show up. He identified RX 32 as an email he sent to Mr. Logue on December 12, 2014. He identified RX 33 as an exchange of emails with Mr. Logue, dated December 16, 2014. Mr. Oathout identified RX 19 as an email from a Labor Coordinator, Barry Eveland, dated December 1, 2014, regarding the conference call on November 25, 2014. Mr. Oathout said it was a hostile call and Complainant used profanity. Depo. Tr. at 107-114.

Mr. Oathout testified that he was never disciplined following the October 3, 2013 Executive Steering Committee meeting for having seen confidential information, and no one gave him the impression he was in danger of receiving discipline. The witness identified RX 4 as an email chain, including his email of November 17, 2014, about the incident in October 2014 in Beech Grove regarding the mark-off that was not properly completed. He sent the email to Christopher Jagodzinski and Larry Jones with a copy to Mr. Logue. Mr. Oathout identified RX 9

as a January 16, 2015 email he sent to Mr. Logue following his attempted counseling session with the Complainant on January 15th. He identified RX 11 as a summary of his meeting with the Complainant on January 16th. He said that he asked the Complainant to accompany him upstairs after the meeting in Chicago Union Station so they could have a private discussion, but she refused. Mr. Oathout identified RX 30 as a counseling letter that he gave to Martha Henderson. He said she acted professionally during the meeting. He identified RX 38 as another letter he gave to Ms. Henderson on January 9, 2015. He testified that Ms. Henderson improved her performance and was not removed from her position as a Labor Coordinator. Mr. Oathout stated that he did not decide what discipline the Complainant would receive. With respect to the ENKON seminar, Mr. Oathout stated that he did not recall having seen any names. Depo. Tr. at 114-23.

Mr. Vlink:

Mr. Oathout could not recall the specific dates of the rules meeting in Baltimore, the Captains' committee meeting in Chicago or the incident in the Southern division that he testified about, but said he they were in 2013 or 2014. He said if they were in 2014 it was probably the first half of the year. With regard to the handling of calls on vacation when the Labor Coordinators were first hired, he said in the beginning everybody agreed they would take their calls on vacation. He said that lasted for the first couple rounds of vacation and then there were problems. He said there was an incident where one Labor Coordinator, Mr. Eveland, had to take the calls for the whole country because the Complainant and Ms. Henderson were both on vacation at the same time. He said Mr. Eveland wasn't happy about doing everybody's work. Depo. Tr. at 123-26.

Mr. Oathout testified that he typed RX 11 on January 16, 2015. He said he sent it to Mr. Logue that day. Mr. Oathout agreed that RX 30 refers to Ms. Henderson not getting approval for days off in advance. Depo. Tr. at 123-130.

MARLYNN TURNER-BYRDSONG (JX 11) (Questioning by Ms. Laing at Tr. 6-108)

Ms. Laing:

Complainant stated that she began working for Amtrak in 1990 in the clerical craft, which is TCU. She began with ORB as a volunteer in the mid-1990s. When she began as a Labor Coordinator her duties were to take the mark-off, coordinate with the divisions, be the liaison for the division between management and the volunteers, and she was also the national trainer for the national office. The process was that the employee wanting to mark-off would call a 1-800 number that would go to designated employees at CNOC. The CNOC employee would then contact the Labor Coordinator in the relevant region and the Labor Coordinator would contact the employee. All the calls went through CNOC. If the employee was an hours-of-service employee, CNOC would take care of it and if it was an agreement-covered employee the Labor Coordinator would contact a designated union-approved supervisor in their location and that person would cover the mark-off. Only designated union-approved supervisors who were part of ORB were permitted to know who marked-off. Complainant was paid for 50 hours

a week and was required to work at least 40 hours a week. Her hours were 8:00 to 4:00. When she was not dealing with mark-off calls, she coordinated with her divisions, which were the Central and Southern divisions, with the Captains, with the administrative committees from her divisions, and did training packets. She said in the Central division there were 20 Captains, and she would help them with promotional items and with their activities. She stated that there was never an agreement among the Labor Coordinators to take calls on vacations and holidays. Depo. Tr. at 6-16.

The witness identified RX 15 as Amtrak's Standards of Excellence. She identified RX 36 as her acknowledgment of receipt of the document. She understood when she began as a Labor Coordinator that as an Amtrak employee she could be disciplined for violating the standards of excellence. She identified RX 37⁵⁸ as the Amtrak discipline policy to which she was subject. She stated that from 2012 to 2015 she held unpaid positions in the union as a duly accredited representative and financial secretary-treasurer for local 464. She said she had been a union representative for probably 17 years and at the time of the deposition still held those positions.⁵⁹ The Complainant identified Exhibit 10 as her Complaint to the Department of Labor and was asked questions regarding the Complaint. The Complainant also testified about what she believed to be incidents of harassment by Mr. Oathout. She said these incidents began after she made her report to the ESC on October 3, 2013. She stated that prior to the October 3, 2013 report to the ESC, Mr. Oathout never counseled her or suggested that she change her work patterns. She said she believed that Mr. Oathout retaliated against her and that Mr. Logue assisted. Depo. Tr. at 16-31.

Complainant testified that she spoke directly with Mr. Logue only once, during a break in the October 3, 2013 meeting in New Orleans. He told her he did not like the way that she reported Mr. Oathout and that she did not follow the chain of command. She said Arlicia Jones was present when the conversation took place. Depo. Tr. at 32-33.

Complainant stated that she disagreed with the statements in RX 28 that the Labor Coordinators agreed in the beginning that everyone would take their own calls on vacation days and off days. The Complainant was shown RX 27. She did not remember participating in a September 10, 2013 conference call with Mr. Oathout and the other Labor Coordinators. However, she denied ever issuing threats and allegations in any conference call and said she would remember if she did. She said Mr. Oathout never spoke to her about anything like that. When asked why Mr. Eveland would write an email containing these allegations, she said that Mr. Eveland and Mr. Oathout had a pattern of doing "set-up" emails, where Mr. Eveland would write an email and Mr. Oathout would respond to it. She stated that Mr. Oathout and Mr. Eveland were friends before they came to ORB and they worked together on the same shift. She said that Mr. Eveland's personality "ruled the roost" over Mr. Oathout and told him what to do and that's what he did. She said that it seemed like every time an issue came up that Mr. Eveland was uncomfortable with, like the calls and vacation, it was always an issue for everyone else because Mr. Eveland was the junior person among the Labor Coordinators and, because of seniority, he always got the short end of the stick and he didn't like it. She said there was

⁵⁸ This document is also JX 8.

⁵⁹ This deposition was taken on May 1, 2017; the Complainant testified the case was in arbitration and therefore she still had an affiliation with Amtrak.

seniority among the Labor Coordinators as far as vacation, sick time and things like that. She denied that she ever issued threats during a conference call. With respect to making allegations, she said that she spoke her mind about what she thought was going on with the policies. She said Mr. Oathout never counseled her after a conference call about being more respectful to co-workers. She said they did talk about one incident with volunteers, involving a Captain from California who was on the rules committee. He came to the rules committee with a rule change and he didn't like the way the Complainant was explaining why she was against the change. The Captain told Mr. Oathout he didn't like the way the Complainant explained it to him. She said that's the only time they discussed an issue with a volunteer. She said this was in August of 2013 or 2014. Depo. Tr. at 35-43.

With respect to the ENKON webinar on September 26, 2013, the Complainant testified that she received an E-vite indicating the date and time it was scheduled for. When she and Martha (Henderson) logged in, Mr. Oathout and Mr. Eveland had been on the call or webinar an hour before she and Martha received the invitation. She identified Complainant's Exhibit 1 to the deposition as a copy of the invitation. Complainant said the call started at 10:00 a.m.⁶⁰ She said she knows it started on time because they asked when they got on the call. The purpose of the webinar was for the Labor Coordinators to decide how they were going to present data regarding usage of the program to the ESC, either graphs or charts. The ESC would present the data to the FRA. She said they were designing graphs indicating what information they wanted to report, *e.g.*, whether they wanted to report by craft, by region, whether they wanted to report multiple mark-offs, different scenarios. She said the presentation by ENKON was both on the computer and by phone, with an ENKON facilitator. The facilitator was teaching them how to navigate and build the pie charts and graphs. The facilitator was putting up the data. During the webinar Mr. Oathout saw confidential information, the names, employee numbers, crafts, union affiliation, and dates of the mark-offs. They started building charts and Complainant asked the ENKON facilitator whether this was dummy data or actual data, and he said it was actual data. The Complainant testified that she then said that they had to stop and she told Mr. Oathout that he should not be on the call because he was not supposed to have access to this information. She said there was an exchange between her and Mr. Oathout and Martha Henderson also said something. She said she reminded Mr. Oathout that she had signed a certificate of confidentiality and said that she was going to report this. She said Mr. Oathout was not initially agreeable to getting off the call. She said she was pretty adamant about it because they had recently signed the certificate of confidentiality that summer at the ESC meeting and the ESC went over the certificate with them in detail because they were going to hold them accountable to what the certificate said. She said eventually Mr. Oathout did get off the webinar and the webinar continued without him. She said she did not know if Mr. Oathout ever did anything with the information he learned on the webinar. Depo. Tr. at 43-53.

Complainant reported this incident to the ESC on October 3, 2013. She said that the ESC oversees the program and coordinates with the FRA regarding compliance with the FRA regulations. She identified Complainant's Exhibit 4 to the deposition as a list of the attendees at the meeting. She said she gave her report at the meeting and then told them that Mr. Oathout had seen into the system. Chris Jagodzinski, the management co-chair at the time for the ESC, asked her a couple of questions. She said there was disruption in the room because the union officials

⁶⁰ The Complainant apparently meant 10:00 a.m. Pacific time, as indicated on the E-vite.

got upset. She said Joe Novak was boisterous and very upset and used curse words. The Complainant said it was emotional for her because she knew her job could be in jeopardy. Depo. Tr. at 53-60.

Complainant testified that the ESC members took a break after they dismissed the Labor Coordinators. During the break Mr. Logue approached her and said he didn't like the way she reported the incident and that she didn't follow the chain of command. Complainant said she referenced the certificate of confidentiality and told him that that was the way she was supposed to report it, to the ESC. She said Mr. Logue did not respond. She said that this was Mr. Logue's first ESC meeting and the first time they met after he took over their department. She said he came from the outside and was not familiar with the program. Depo. Tr. at 60-62.

Complainant stated she did not know how many names Mr. Oathout saw on the webinar before she spoke up. She testified that she recognized her information, people she had entered into the system. She saw information that Martha and Barry had entered as well but didn't recognize that information because she did not enter it. The Complainant stated that she was told by Donald Boyd, an ESC member, that the issue was discussed again at the October 3 meeting after the Labor Coordinators were dismissed from the meeting. He said they asked Mr. Oathout why he didn't tell them that he had access to it. She said she thought Mr. Oathout told him it was dummy data and not actual data. The conversation with Mr. Boyd was maybe a week afterwards. She said Mr. Boyd was the liaison for the Central division and had been involved in the program since its inception. The Complainant stated that she was not disciplined or counseled between October 2013 and October 2014. Depo. Tr. at 62-66.

Complainant was asked about the meeting in October 2014. She said that Mr. Oathout approached her and handed her a piece of paper with the name, a staff number, a craft and a date. He told her that she didn't do this and handed her a piece of paper. He told her that he just received a call and this guy marked off and she didn't take care of it. Complainant testified that she recognized the name because she had gotten the call. She told Mr. Oathout that he wasn't supposed to have this information. He said that EAP⁶¹ was contacted and didn't know anything about it so EAP referred the manager to him and the manager sent him an email about it. Mr. Oathout called him and was told that this person was up for disciplinary action and that one of the dates they were using against him was when he said he was using ORB. This happened at Beech Grove. The Central division was having its fourth quarter meeting there and the Complainant was doing new-hire training. The Complainant said that she later determined that her management liaison person, the union-approved person, had not put the information for the individual in the system. The Complainant said she did not know whether anyone ever spoke to Mr. Oathout about the 2014 incident. She assumed that he reported the incident himself to the co-chairs of the ESC committee. Depo. Tr. at 67-73.

Complainant was shown RX 35, Complainant's Response to Interrogatories. Complainant was asked about her response to the interrogatory regarding acts of harassment she was subjected to, indicating that she was called by Mr. Oathout on November 24, 2014 telling her that she would have to take her calls during her vacation. She asked him why and he didn't give a reason. She said she told him she was on vacation and she had already told him she was

⁶¹ Employee Assistance Program.

on vacation and wasn't going to be taking her calls on vacation. She said he told her he was going to set up a call for us with their union representative. She said the call took place either that same day or the next day. The union representative was Larry Jones.⁶² They started discussing with Mr. Jones about taking the calls while we were on vacation. He was reading their job descriptions and noted that it does say you must be available at all times. Complainant referred to the ORB protocol that was signed by the ESC, which says that vacation, sick days and personal days would be governed by the agreements they worked under before becoming Labor Coordinators.⁶³ Mr. Jones then said that the Complainant was right and told Mr. Oathout that he would have to consult Labor Relations. Mr. Oathout said he would do that and get back to the Labor Coordinators, but never did. Complainant said that she did raise her voice during the call because she was upset and she did curse once. She agreed that she told Barry Eveland that he would not get Christmas off as long as she was working because he was the junior person. She said she always scheduled the month of December off and Barry wanted to. She said that an employee doesn't get that without seniority. Barry had taken their calls during December the last two years and he didn't want to. Complainant testified that it that the way it was left was that the junior person would take the calls. She testified that she said in jest that she should be recording the call. She asked Mr. Oathout if he was not approving her vacation and he said he was not disapproving her vacation. She said she believed Barry said he was going to file a grievance. Depo. Tr. at 74-81.

Complainant identified RX 21 as an email Mr. Oathout sent to her on December 11, 2014. She testified that she did not go to his office on December 11th and that she was never asked to come to his office or told that he wanted to talk to her about anything. She said she had been there (in Philadelphia) since December 8, and was in the office with him almost all day on December 8th. She testified that they were the last two that left the office and he really never said anything to her that whole week. She said she left early on the 12th. She said Mr. Oathout asked her on the 11th if she wanted to do an event in Philadelphia on the 12th and she informed him that she had an early flight on the morning of 12th. She said she did not see the email that day.⁶⁴ She said she was confused when she saw it because she didn't know what he was talking about. She said she did not call him when she got this email because she was getting ready to fly out and then her vacation started. She said she was gone for the rest of the month in December until January. She said she did not have a conversation with Mr. Oathout about this email. She said she thought it was one of the "set-up emails." Depo Tr. at 83-86.

The witness was asked about the counseling session with Mr. Oathout on January 15, 2015. She stated that after the meeting⁶⁵ he told her they needed to discuss some issues about the program and she said okay. They stayed in the conference room where they had the meeting, in Union Station in Chicago, and when everybody left he give her a letter. When she started reading the letter she had questions because it had no date in it indicating what he was accusing her of doing and no facts about what she was accused of, how she had violated the Standards of Excellence. The witness said that after she read the letter Mr. Oathout said a few things and she

⁶² The Complainant's response to interrogatory number 7 indicates that Mr. Jones was deceased at the time of the response. RX 35.

⁶³ See JX 1, section VI, p. 7.

⁶⁴ The Complainant appears to be referring to December 11.

⁶⁵ Referring to the Central Division ORB committee meeting.

was getting up ready to leave and he told her to hold on, that he had something else for her, and handed her the other letter. No one else was present during this conversation. The witness identified RX 7 and RX 8 (JX 2 and JX 3) as the two letters she received from Mr. Oathout during that meeting. She said the meeting lasted about 20 minutes. She denied saying that Mr. Oathout was stupid, but said she may have said "I think this is stupid." She testified that she said that because the letters did not indicate anything that she had done, and he did not tell her. She said she asked him and he said that she had not tended to her duties because she did not do the mark-off right on October 29th. She disagreed with him because she said she had done it properly. He didn't say anything else about what he thought were issues.⁶⁶ She denied telling him during the conference call that he was "digging his own grave," and said she wasn't sure whether or not she had implied something like that. She said she did not raise her voice. She said she may have threatened to bring an unjust treatment claim against him, because she felt that the letters were unjust because they had no criteria indicating what she had done. She denied saying that she would make sure he would lose his job. She denied standing in front of him and slapping papers together in his face. She said that after the meeting she called her union representative, Larry Jones, but could not reach him. She said also called Mitch Canter, the international representative. He told her to forward the documents to him, which she did. She also may have talked to Stephanie Reavis. Depo. Tr. at 87-93.

She said the following morning she was an hour late to a divisional meeting because she was handling a serious mark-off in Florida and was having trouble getting the management liaison person. She did not tell anyone she was going to be late. She was asked about the interaction between her and Mr. Oathout after the meeting. She said that after the divisional meeting Mr. Oathout told her he wanted to speak with her, so she stepped out to the hallway. He told her he wanted her to go to legal services with him. She asked him why and he would not tell her. She told him she needed to have union representation if he was taking her to legal. He kept saying no, she didn't need it and she didn't think that was proper. She went back to the conference room to get her phone. Mr. Oathout gave her a letter stating that he was removing her from her position as Labor Coordinator and told her to turn in company property. The witness stated that she turned in everything except for her phone and keys. She didn't have her keys with her because she was traveling. She didn't turn in the phone because she asked him to let her erase the phone and he wasn't giving her time to do that, he wanted the phone as it was. She believed that would be a breach of confidentiality because contact information of people who marked-off was in the phone, their telephone numbers and some names. She did turn in the phone on the day of her investigative hearing. She didn't turn it in before that because she had no further contact with Amtrak until that day. The Complainant testified that when he removed her from service Arlene Davenport, Linda Gaston, Bradley Liggins and Michael McKenna were present. They were asking Mr. Oathout questions, asking him to allow her to have union representation. She said that at one point she had her union representative, Stephanie Reavis, on the phone with her. Depo. Tr. at 94-99.

Complainant confirmed that the last date she worked for Amtrak was January 16, 2015. She stated she had only worked one day since then, on March 2016 as a driver for Uber. She

⁶⁶ In her hearing testimony she said he told her that JX 3 was related to the November 25, 2014 telephone conference. See Tr. at 128-29. Mr. Oathout testified that JX 2 and JX 3 related to the October 29, 2014 mark-off incident and the November 25, 2014 conference call. Oathout. Depo. Tr. at 71-75.

stopped because she was afraid to do it. She stated she has not looked for other work since then. She said she had two granddaughters at home she was raising, ages 15 and 19 then, and that taking care of them was a full-time job. The Complainant stated that in addition to lost wages she is seeking compensatory and punitive damages. She said it was very stressful for her when this happened and she went through treatment and a lot of counseling for about four months. She said she saw a psychologist and psychiatrist and was on medication during the period she was in counseling. She believed her counseling began the first of March and she was released the first of May. She said she suffered from serious depression, couldn't sleep, was very nervous, was anxious, her thoughts were not clear and she was very depressed. She also said her sexual relationship with her husband was affected. She said this lasted about four months. She said she previously saw a counselor when she lost her daughter in 2008. Complainant testified she is a high school graduate. She was asked if anyone else received "set-up" emails and she said she thought Martha and Arlicia did sometimes. They talked about it among themselves but never filed a grievance about it. Depo. Tr. at 98-108.

INVESTIGATIVE HEARING

The hearing on the two Specifications set forth in the Notice of Hearing (JX 5 and Exhibit A to JX 12, the hearing transcript) was held on May 19, 2015.⁶⁷ There were six witnesses: Complainant, Mr. Oathout, Arlette Davenport, a Senior EEO Compliance Specialist; Michael McKenna, a conductor at Chicago Yards and Chairman, Operation RedBlock Central division, Bradley Liggin, electrician at Beech Grove and Vice-Chairperson Operation RedBlock Central division, and Linda Gaston, R&I clerk⁶⁸ and Chicago Union Station and Treasurer, Operation RedBlock. Mr. Oathout, Ms. Davenport, Mr. McKenna and Mr. Liggin had prepared written statements that are attached as exhibits to the hearing transcript.⁶⁹ The testimony of the witnesses does not appear to have been taken under oath.

C. DISCUSSION

Facts not disputed or established by the evidence

I find the following facts to be established by the parties' stipulations, which I adopt,⁷⁰ or by the testimony and exhibits received in evidence:

Complainant began work for Respondent in 1990 and held a variety of positions for Amtrak within the Transportation Communications Union ("TCU") bargaining unit. At all relevant times, Respondent was a railroad carrier within the meaning of 49 U.S.C. § 20109 and Complainant was an employee within the meaning of 49 U.S.C. § 20109. The terms and

⁶⁷ The hearing was originally scheduled for January 29, 2015 but was postponed several times, apparently because of the Complainant's medical leave. Tr. at 142-43, 158-59, Investigation Hearing transcript (hereafter "IH Tr.") at 4 and exhibits to the investigation hearing transcript.

⁶⁸ This position was not further described.

⁶⁹ Exhibit G (by Mr. Oathout.), which is RX 9, his January 16, 2015 email to Mr. Logue; Exhibit J (by Arlette Davenport); Exhibit K (by Michael McKenna); and Exhibit L (by Bradley Liggin).

⁷⁰ With respect to stipulation 11, I reject that part of the stipulation that says the employee "may or may not" have used ORB. I find that the employee did use ORB.

conditions of Complainant's employment were governed by CX 10, the collective bargaining agreement in effect at the time of the events material to this proceeding. In June 2012, she applied for a position as a Labor Coordinator for the Operation RedBlock ("ORB") program. She was hired after an interview with a panel of both union and management personnel, and served as one of three Labor Coordinators. The other two Labor Coordinators were Martha Henderson and Barry Eveland. The Labor Coordinators' direct supervisor was Michael Oathout, the ORB Manager. A committee of management and labor leaders within Amtrak, called the Executive Steering Committee, oversaw the ORB program. Amtrak utilized a third-party vendor, ENKON, to maintain the mark-off database for employees using ORB. Under the ORB program, employees impaired because of alcohol or drug use could "mark-off," *i.e.*, not report to work, without fear of being disciplined. *See* JX 1 at p. 1. The mark-off program was confidential, including any identifying employee information such as names or employee number. JX 1, CXs 3, 4, 7; 8; testimony of Donald Boyd, Tr. at 22-26, 48; testimony of Michael Logue, Tr. at 318; testimony of Michael Oathout, Oathout depo. Tr. at 24-25; testimony of Complainant, Tr. at 73-78; 86-87; testimony of Barry Eveland, Tr. at 266. The three Labor Coordinators were required to sign an "Amtrak Operation RedBlock Confidentiality Certification." CX 8. The Complainant signed this certification on June 19, 2013. Tr. 99-101.

The ORB program was implemented pursuant to 29 C.F.R. Part 219, "Control of Alcohol and Drug Use."⁷¹ The purpose of Part 219 "is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 29 C.F.R. § 219.1 (2016). Railroads are required to adopt, publish and implement policies "to prevent the use of alcohol and drugs in connection with covered service." 29 C.F.R. § 219.401(a) (2016). The requirements for policies are set forth in 49 C.F.R. Subpart E, §§ 219.401 to 219.407 (2016). Amtrak instituted the ORB program pursuant these regulations. *See* CXs 4, 7; Tr. at 26-29.⁷² The protocol governing the operation of ORB is the Amtrak Operation RedBlock Protocols (JX 1). The "ORB Mark-off System," containing the "loop of confidentiality," was also part of the ORB program (CX 3). Tr. at 14-15, 24, 47-48, 73, Oathout Depo. Tr. at 19, 23. The Amtrak Standards of Excellence sets forth standards expected of Amtrak employees (RX 15). The Standards of Excellence also states that "Employees with alcohol or drugs in their systems can undermine workplace productivity and pose an unacceptable risk to the safety of passengers, fellow workers and themselves." RX 15 at p. 9. CX 2 and CX 3 state that the ORB mark-off procedures are for the purpose of providing a safe workplace. CX 2, 1st paragraph (ORB pamphlet); CX 3, last paragraph (ORB Mark-Off System). The April 22, 2015 letter to Mr. Logue from the FRA states that "FRA supports ORB and believes it meets confidentiality needs of employers and performs an important safety function." CX 4, 1st paragraph.

As explained by the testimony and set forth in the relevant exhibits, the ORB program worked as follows: The impaired employee calls a 1-800 number to reach a CNOC dispatcher. If the employee is a conductor, engineer or onboard service employee, the Chief Crew

⁷¹ 49 C.F.R. Part 219 was amended on June 10, 2016, effective June 12, 2017. *See* 81 FR 37894 *et seq.* The amendment affected the provisions discussed herein. The provisions cited and discussed herein are those in effect during the period relevant to this decision.

⁷² Respondent argued at the hearing that the ORB program was not required under 49 C.F.R. Part 219 because ORB includes use of the program by employees not required to be covered under Part 219. Tr. at 28-29. Although ORB may cover employees not required to be covered by Part 219, there is no dispute that it does cover employees who are required to be covered and that it was promulgated pursuant to 49 C.F.R. Part 219. *See* CX 4.

Dispatcher marks the employee off. See CX 3 “Loop of Confidentiality.”⁷³ For other employees, the Chief Crew dispatcher calls one of the Labor Coordinators and gives the Coordinator the mark-off information.⁷⁴ The Labor Coordinator calls the employee who has marked off to see if the employee needs immediate assistance, to see if the employee is safe, and to tell the employee that one of his or her peers will do a follow-up call to the employee. The Labor Coordinator also calls the union-selected supervisor, who goes into the system to indicate the absence is an approved absence, and back-fills the job.⁷⁵ The Labor Coordinator contacts the Team Captain to let the Captain know that he or she needs to do a follow-up call with the employee.⁷⁶ The Labor Coordinator is also responsible for entering the mark-off information in the ORB database. Tr. at 71-80; JX 1; CX 3.

On September 26, 2013, ENKON facilitated a webinar. The three Labor Coordinators and Mr. Oathout participated in the webinar. During the webinar, an issue arose concerning whether Mr. Oathout viewed confidential data that he was not supposed to see. Shortly after the webinar, on October 3, 2013, the ESC met in New Orleans. At that meeting, the Complainant told the ESC members that confidential data displayed during the webinar was viewed by Mr. Oathout.

On October 29, 2014, Mr. Oathout was contacted by a supervisor concerning an employee who claimed he had marked-off work using the ORB program. An issue arose in connection with this incident concerning whether Mr. Oathout saw confidential information that he should not have seen, including the name of the employee.

Complainant was issued two counseling letters on January 15, 2016. She was removed from her position as a Labor Coordinator on January 16, 2015. On January 19, 2015, she was removed from service pending an investigation. On January 20, 2015 she was issued a Notice of Investigation directing her to report for an investigative hearing. The investigative hearing was held on May 19, 2015, and the hearing officer’s decision was issued on May 26, 2019. On May 29, 2015, the Complainant was terminated by Respondent.

On January 23, 2015, Complainant timely filed her Complaint with the Department of Labor. The Secretary of Labor’s Findings were issued on August 25, 2016. The Complainant timely filed objections to the Findings and requested a hearing on or about September 20, 2016.

⁷³ The loop begins in the circle stating “Employee marks off Operation RedBlock. The next circle states “Chief Crew Dispatcher takes employee info. Marks UTU/BLE off from work.” UTU is the union for the conductors and BLE is the union for the engineers. The Chief Crew dispatcher also handles calls from on-board service personnel, *i.e.*, waiters, dining car staff, cook staff, and sleeping car and coach attendants and waiters. These employees are handled directly by the CNOC dispatcher so that their jobs can be back-filled immediately. Tr. at 11-12, 52, 74-76.

⁷⁴ In the circle below the “UTU/BLE” circle, stating “Chief Crew Dispatcher relates employee info. to ORB Coordinator.

⁷⁵ In the circle at the bottom left of the loop that says “ORB Coordinator marks all other employees off from work with a union selected supervisor.” The Complainant testified that the Labor Coordinators do not have the ability to go into the attendance system to reflect an approved absence for the employee. That must be done by the union-selected supervisor. Tr. at 78.

⁷⁶ In the circle at the bottom center of the loop indicating “ORB Coordinator contacts RedBlock Captain/Team member for follow-up call.”

Did Complainant engage in protected activity?

Complainant contends that she engaged in activity protected under 49 U.S.C. § 20109(a)(2) and 20109(b)(1)(A) related to alleged breaches of confidentiality by Mr. Oathout in connection with Operation RedBlock. Operation RedBlock is a labor-management drug and alcohol intervention program set up by Amtrak to prevent employees who are impaired by alcohol or drugs from reporting to work and to encourage them to obtain treatment. All of the unions are signatories to it. The program began in around 1986. The ESC, composed of both management and union Amtrak employees, oversees ORB. The Amtrak Operation RedBlock Protocols (JX 1), is the document that governs the operation of the ORB program. Tr. at 9-16 (testimony of Donald Boyd); Oathout deposition (“Oathout Depo.”) Tr. at 18-19; Tr. at 87 (testimony of the Complainant).

Protected activity under 49 U.S.C. § 20109(a)(2)

Section 20109(a)(2) of the Act provides that a railroad carrier subject to the Act may not discharge, demote, suspend, reprimand or in any other way discriminate against an employee because of the employee’s lawful, good-faith act done, or perceived by the employer to have been done or about to be done, to refuse to violate or assist in the violation of any federal law, rule or regulation relating to railroad safety or security.⁷⁷ Complainant contends that Respondent violated these provisions by disciplining her on January 15, January 16, and January 19, and by terminating her employment on May 29, 2015. Complainant alleges two separate instances of protected activity. She contends that Michael Oathout, the ORB Manager, breached the confidentiality of the ORB program on September 26, 2013 when he viewed employee names and employee numbers during a webinar at which he and the three Labor Coordinators were present. She also contends that she engaged in protected activity on October 29, 2014 when she complained to Mr. Oathout that he had breached confidentiality by obtaining the name of an employee who had used the ORB program and by telling him that she would report the breach at the next ESC meeting, to be held on January 21, 2015. *See* Complaint; Complainant’s Initial Brief at 21-23.

Respondent contends that Complainant did not engage in protected activity. With respect to 49 U.S.C. § 20109(a)(2), the Respondent argues that although the FRA requires railroads to treat referrals to counseling and subsequent counseling and treatment as confidential (citing 49 C.F.R. § 219.403(b)(2)), no provision of federal law prohibits the person charged with administering ORB from seeing the names of the users.⁷⁸ Therefore, Respondent claims it was not objectively reasonable for Complainant to believe that Mr. Oathout’s viewing of the names

⁷⁷ *See also* 29 C.F.R. § 1982.102(b)(1)(ii).

⁷⁸ The specific provision of Subpart E of 49 C.F.R. Part 219 pursuant to which the Operation RedBlock program was implemented is not clear. However, both parties agree it was implemented pursuant to 49 C.F.R. Part 219. *See* Tr. at 28-29; Complainant’s Initial Brief at 4, 21; Respondent’s Initial Brief at 19. Respondent’s argument is that the requirements of Part 219 are mandated only for “covered employees.” *See* Tr. at 28-29. As noted above, both covered and non-covered employees are included in the ORB program, and 49 C.F.R. § 219.401(b)(2) mandates that railroads adopt a policy that includes the participation of unimpaired co-workers, who may be non-covered employees.

of non-covered employees⁷⁹ was a violation of federal law. Respondent further argues that section 219.401 does not state that the *identity* of persons using the program confidential, but only that any referrals or subsequent treatment and counseling be treated as confidential. Further, according to Respondent, the fact that Mr. Oathout viewed the names of employees using ORB was known only within the ORB program and therefore remained confidential. Respondent also argues that with respect to section 20109(b)(1)(A), a reasonable person would not believe that Mr. Oathout's exposure to user names constituted a hazardous safety condition. Respondent's Initial Brief at 17-20.

Section 219.403 states that the section prescribes *minimum* standards for voluntary referral programs, and that the section does not restrict a railroad from establishing a policy that affords more favorable conditions to employees with alcohol or drug abuse problems. Further, section 219.401(b)(2) requires railroads to adopt policies "designed to foster employee participation in preventing violations of this subpart and encourage co-worker participation in the direct enforcement of this part (hereafter 'co-worker report policy')." The term "co-worker" is defined by section 219.5 as "another employee of the railroad, including a working supervisor directly associated with a yard or train crew, such as a conductor or yard foreman, but not including any other railroad supervisor, special agent, or officer." Thus "co-workers" are not limited to "covered employees." Further, under ORB, co-workers are permitted to mark-off for an impaired employee. See JX 1, section II. Section 219.401(c) states that a railroad may comply by adopting policies consistent with §§ 219.403, 219.05 or 219.07. Therefore, the regulations contemplate policies that may go beyond "covered" employees. It is undisputed that the policy adopted by Amtrak pursuant to 29 C.F.R. Part 219 was the ORB program, which requires that the name of *any* individual marking-off be held confidential, regardless of what his or her job is.⁸⁰ As Mr. Boyd testified, the program is open to all Amtrak employees. Tr. at 50-51.

Respondent also contends that no provision of federal law states that the *names* of those marking-off be kept confidential, only that referrals and treatment be confidential. However, nothing in the language of section 219.403(b)(2)⁸¹ excludes the name of the employee from the information to be kept confidential, nor would the requirement of confidentiality make sense if

⁷⁹ 49 C.F.R. § 219.5 defines "covered employee" as employees who are subject to the hours of service laws at 49 U.S.C. Chapter 11.

⁸⁰ Respondent asserts that the only names Mr. Oathout may have seen during the ENKON webinar were those of non-covered employees handled by the Complainant (Respondent's Reply Brief at 3), but it not clear that this is the case. Complainant testified that she knew the data being shown at the ENKON webinar included actual names of employees using ORB because she recognized the names of employees for whom she had handled mark-offs. She did not testify, nor did anyone else, that all of the names exposed during the webinar were those of non-covered employees.

⁸¹ 29 C.F.R. § 219.403(b)(2) (2016) says that the "referral and subsequent handling" must be treated as confidential. See April 22, 2015 letter from the FRA to Mr. Logue, stating, with respect to ORB, that "FRA would like to reemphasize that full confidentiality is key to a successful referral program to ensure confidence of any troubled employees who seek to use the program." CX 4, last paragraph, p. 1. See also CX 7, an "employee advisory" dated February 9, 2011 from Joe Boardman, President and CEO, stating "[i]t is not hard to understand that the name of someone marking off because they made a mistake should be kept in confidence." *Id.* at p. 1, 1st paragraph; see *id.* at p. 1, second column at top: "In fact, the lynchpin of the program, and what encourages employees to use the mark-off procedure, is that the process is confidential and does not have any 'consequences.'" Since any mark-off could result in a referral, all mark-offs would have to be treated as confidential.

section 403(b)(2) did not intend that the identity of the person referred be confidential. Even if it did, the ORB program by Amtrak pursuant to the Part 219 requires such confidentiality. Respondent also argues that there is no evidence that Mr. Oathout's viewing of the names of those using ORB was disclosed outside of the ORB "community." The record does not either prove or disprove whether Mr. Oathout disclosed the confidential information or whether others present at the October 3, 2013 ESC meeting may have disclosed to employees outside of ORB that there had been a breach of ORB confidentiality. Neither does the fact that Mr. Oathout had taken mark-offs in the past, before he became the ORB Manager, allow him access to confidential information in his role as ORB Manager when he is expressly excluded from such access. The ORB Mark-Of System (CX 3) clearly provides that Mr. Oathout, as the ORB Manager, was not included among those permitted to have access to confidential information, *i.e.*, information that would identify persons using the program. *See* CX 3; Oathout Depo. Tr. at 26. The Operation RedBlock Protocols state that the Labor Coordinators commit that mark-off information must remain confidential and is not to be disseminated. JX 1, paragraph VII.

As 49 C.F.R. Part 219 requires, and as Amtrak's President and CEO and the FRA acknowledged, the confidentiality required under the ORB program is "key" to the success of the program and is a "lynchpin" of the program (*see* footnote 82). This was emphasized to the Complainant when she was required to sign a "Confidentiality Certification" on June 18, 2013. CX 8. The certification requires the Complainant's acknowledgment that the ORB database "contains confidential personally identifiable healthcare information" and obligates her to report "any unauthorized use or disclosure of confidential information" to the Operation RedBlock Executive Steering Committee. *Id.* The confidentiality certification does not distinguish between "covered" and non-covered employees. The record establishes that Mr. Oathout was not authorized to view confidential ORB information. Mr. Oathout agreed that the names and employee numbers of employees who marked off is confidential. He agreed that the ORB Manager is not within the loop of confidentiality of CX 3 (depo. exhibit 2) and is not privy to the confidential mark-off information. Oathout Depo. Tr. at 23-25. He agreed that if a Labor Coordinator became aware of anyone outside the loop of confidentiality (CX 3 and Oathout Depo. Exhibit 4) becoming privy to confidential information, she was under a duty to report it to the ESC.

Mr. Oathout further agreed that the confidential nature of ORB is critical to it performing an important safety function and that fewer employees would probably use the program if their information was not confidential. *Id.* at 34-35. Mr. Boyd testified that one of the goals of the ORB program is to keep impaired employees from operating equipment or trains. Tr. at 13. Mr. Eveland testified that he believed the ORB program to be related to safety. Tr. at 279. The Complainant's Complaint states that if employees learned that confidentiality of the program had been breached, they would stop using the program and that would affect safety. The Complainant testified that she considered the disclosure of confidential information to Mr. Oathout to be a safety concern. She believed that if confidentiality were breached and names were disclosed, people would not have trust in the program and may not use it and show up impaired at work. Tr. at 99, 103, 179. Mr. Logue did not agree that ORB was a safety program. He stated that it was more of a wellness program, but he agreed that alcohol and drug use at Amtrak creates a safety concern. Tr. at 313-14. The Amtrak Operation RedBlock Protocols state that "Operation RedBlock is a labor-developed, Joint Labor/Management adopted drug and

alcohol Safety/Prevention program.” JX 1. The provision at 49 C.F.R. § 219.1(a) states that the purpose of Part 219 “is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” Section 219.1(b) provides that Part 219 “prescribes minimum Federal safety standards for control of alcohol and drug use.”

Complainant testified that during the ENKON webinar on September 26, 2013, Mr. Oathout viewed confidential, identifying mark-off information, specifically names and employee numbers of employees who had marked-off. She recognized certain names because they were employees she had put in the data base. She therefore knew that actual data was being used. She said that she was able to see the employees’ names, SAP number and location. She told Mr. Oathout he would have to get off the webinar because he was not permitted to have access to confidential information. She believed this to be a breach of confidentiality and felt obligated to report it. She told Mr. Oathout she would have to report the breach to the ESC. Tr. at 95-99; Turner-Byrdsong Depo. at 49-50. Mr. Oathout’s testimony about the webinar was less specific. When asked if he recalled during the webinar that the Complainant said there was a breach of confidentiality, that actual employee names were being used, he said he didn’t remember all the details. He said that the Complainant brought up a concern about live data and then he walked out of the room. He said he was not there for the whole training and he didn’t recall the timing. He stated that he had been told by the webinar facilitator before the webinar that dummy data would be used. He said there were just graphs on the screen and he didn’t see any names. He recalled that the Complainant told him something about him having to leave the webinar because actual employee names were being shown, and that she was going to have to report the incident to the ESC. Oathout Depo. Tr. at 36-44. Mr. Eveland testified that at some point during the webinar the Complainant expressed a concern that confidentiality had been breached. He said there was some confusion whether the data being shown was live data or dummy data. He said that in the past it had been dummy data. He said the webinar facilitator wasn’t a hundred percent clear on what was going on. He said the data was on the screen for “minutes.” Tr. at 246-49. He also testified that the data was on Mr. Oathout’s computer screen and he was able to view the screen. He said that the screen was showing the last 10 names that were on the database, which would include names and employee numbers. He did not recall specific names. He didn’t know if there were names on the screen but he said it should have been names and he assumes it was names. He didn’t know if it was live data or not. Tr. at 259-66. I credit Complainant’s testimony and I find that the actual data, including names and employee numbers, for certain individuals who had marked off was displayed, and that she knew this because she recognized some of the names as employees she had handled mark-offs for. Mr. Eveland agreed that names were shown, although he said he didn’t know if they were actual names or dummy data. Mr. Oathout’s recollection was vague and his testimony less precise.

Complainant testified that on October 29, 2014 Mr. Oathout breached ORB confidentiality again by obtaining the name of an employee who contended he marked-off using ORB. Complainant testified that Mr. Oathout handed her a piece of paper with the employee’s name, employee number and the date the employee marked-off. Complainant recognized the name because it was a mark-off she had handled. She told Mr. Oathout she was going to report the incident at the next ESC meeting because it was personal mark-off information that Mr. Oathout was not supposed to have. Tr. at 116-19. Complainant’s Depo. Tr. at 67-72. Mr. Oathout testified that he received an email from a field manager asking him about an employee

who claimed he had marked-off on a specific date. The manager asked Mr. Oathout to verify the mark-off because if he had not marked-off he would be charged with violating the attendance policy. Mr. Oathout had a telephone conversation with the manager during which he was given the employee's name. He wrote down the name and asked Complainant to follow-up. He said Complainant then became upset and told him he was not supposed to have this information. He said he did not remember if Complainant said she was going to report this at the next ESC meeting. Oathout Depo. Tr. at 51-59. Complainant was not able to make the report to the ESC because her employment was terminated before the next ESC meeting was held on January 21, 2015. I credit Complainant's testimony with respect to this incident and find that Mr. Oathout became aware of the employee's name and thereby breached confidentiality of the ORB program.

I find that Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(2) when she told Mr. Oathout at the ENKON seminar that he was not permitted to view confidential information and when she reported this breach of confidentiality by Mr. Oathout at the October 3, 2013 ESC meeting. The evidence shows that Mr. Oathout was not a person permitted to view confidential ORB information. I find that employee names and employee numbers constituted confidential information under the ORB program. I find that Complainant was obligated by ORB policy, including the Confidentiality Certification that she was required to sign, to report the breach of confidentiality to the Executive Steering Committee, and she did so on October 3, 2013. I find that Respondent was required by 49 C.F.R. Part 219 to adopt a policy that complied with 29 C.F.R. § 219.401. I find that the Operation RedBlock program was enacted pursuant to Part 219. The stated purpose of the regulation is to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 49 C.F.R. § 219.1(a). I find that the regulation and the ORB program were related to railroad safety. Section 20109(a) requires that the whistleblower's act be lawful and in good faith. Here, I find that Complainant's complaints to Mr. Oathout about the breaches of confidentiality on September 26, 2013 and October 29, 2014, her report to the ESC on October 3, 2013 concerning the September 26, 2013 breach, and her stated intention to report the October 29, 2014 breach at the January 21, 2015 ESC meeting, were lawful and made in good faith. Complainant was obligated to make such reports pursuant to ORB policy as evidenced by her Confidentiality Certification and the confidentiality of such information was consistent with the requirements of the regulations then in effect at 49 C.F.R. Part 219. I therefore find the Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(2).

Protected activity under 49 U.S.C. § 20109(b)(1)(A)

Section 20109(b)(1)(A) provides that a railroad carrier shall not discharge, demote, suspend, reprimand or in any other way discriminate against an employee reporting, in good faith, a hazardous safety or security condition.⁸² Respondent contends that Complainant's actions did not constitute protected activity for the reasons discussed above with respect to section 20109(a)(2). Respondent additionally argues with respect to section 20109(b)(1)(A) that Complainant could not reasonably believe "that Oathout's accidental exposure to a few user

⁸²See also 29 C.F.R. § 1982.102(b)(2)(i)(A).

names was a hazardous safety condition.” Respondent’s Initial Brief at 21. Respondent argues that Complainant was concerned that if Amtrak employees learned of the disclosure of the names of those marking-off under ORB they might stop using the program. *Id.* Respondent states that this was not a reasonable concern at the time Complainant reported Mr. Oathout’s breach because the only people who knew of the breach were all persons within the ORB. As noted above, ORB was a program related to railroad safety. 49 C.F.R. § 219.403(b)(2) says that the “referral and subsequent handling” must be treated as confidential. *See* April 22, 2015 letter from the FRA to Mr. Logue, stating, with respect to ORB, that “FRA would like to reemphasize that full confidentiality is key to a successful referral program to ensure confidence of any troubled employees who seek to use the program.” CX 4, last paragraph, p. 1. *See also* CX 7, an “employee advisory” dated February 9, 2011 from Joe Boardman, President and CEO, stating “[i]t is not hard to understand that the name of someone marking off because they made a mistake should be kept in confidence.” *Id.* at p. 1, 1st paragraph; *see id.* at p. 1, second column at top: “In fact, the lynchpin of the program, and what encourages employees to use the mark-off procedure, is that the process is confidential and does not have any ‘consequences.’” Mr. Boardman stated in the same advisory that:

I’ve received several e-mails and some personal comments on the changes, many of them were part of a ‘grassroots campaign’ that just spoke about the confidentiality issue, and the fear that causes among employees. I understand that fear, and I think it has been confused by a lack of understanding of what that means. I have tried to address that in this letter.

Id. at p. 2.

The requirement of confidentiality was emphasized to Complainant when she was required to sign the Confidentiality Certification on June 19, 2013. CX 8. The Certification requires Complainant’s acknowledgment that the ORB database “contains confidential personally identifiable healthcare information” and obligates her to report “any unauthorized use or disclosure of confidential information” to the Operation RedBlock Executive Steering Committee. *Id.* Clearly, Amtrak intended that the confidentiality requirement be taken seriously, and had a concern about the consequences of breaches of confidentiality. Moreover, Respondent admits that several witnesses, including Mr. Oathout, agreed that without confidentiality of the mark-off information, fewer employers might use the program. I find that Complainant’s concern that if employees learned of a breach of confidentiality they may be less inclined to use the program is a reasonable one. I do not find convincing Respondent’s argument that the only people who knew of the breach were persons within ORB. Regardless of his position with ORB, Mr. Oathout was not privileged to view mark-off information. Even if the identity of the names disclosed were not released outside the ORB, the risk of disclosure and the risk that Amtrak employees would learn of a disclosure and that such might result in reluctance to use the program, was a real one.⁸³

⁸³ Respondent states that an examination of the relevant statutes reveals that section 20109(b)(1)(A) is only applicable to actual, not threatened, reports, but does not further elaborate or cite support for this proposition. Respondent’s Initial Brief at footnote 1, p. 22. Complainant cites *Levia v. Union Pacific Railroad Co., Inc.*, ARB No. 14-016, -017, ALJ No. 2013-FRS-019 (ARB May 29, 2015). In *Levia*, the Board found that the Complainant engaged in protected activity under section 20109(b)(1)(A) where he reported an altercation with another employee and testified that he felt threatened by the employee before and after the altercation. The Board stated that the “discordant and potentially violent situation” between the two employees had the tendency to create a hazardous

I find that Complainant's complaint to Mr. Oathout about the breaches of confidentiality on September 26, 2013 and October 29, 2014, her report of the September 26, 2013 breach to the ESC on October 3, 2013, and her stated intention to report the October 29, 2014 at the next ESC meeting on January 21, 2015, were made in good faith and that she reasonably believed that such breaches constituted a hazardous safety condition. I therefore find that the Complainant engaged in protected activity under 49 U.S.C. § 20109(b)(1)(A).

Was Complainant's protected activity a contributing factor to Respondents' adverse actions?

In *Palmer v. Canadian National Railway/Illinois Railroad Co*⁸⁴, the Board held that in determining whether a complainant's protected activity contributed to the Employer's adverse action, the factfinder may consider all relevant, admissible evidence, including the employer's evidence of non-retaliatory reasons for the adverse action. *Id.*, PDF at 15, 29. The Board further stated:

We have said it many a time before, but we cannot say it enough: "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision'" We want to reemphasize how low the standard is for the employee to meet, how "broad and forgiving" it is. "Any factor really means any factor. It need not be "significant, motivating, substantial or predominant" – it just needs to be a factor. The protected activity need only play some role, and even an "[in]significant or [in]substantial" role suffices.

The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence.⁸⁵

Respondent contends that even if Complainant engaged in protected activity, such activity was not a contributing factor in the adverse employment action. Respondent states that although retaliatory motive may be proven by circumstantial evidence such as temporal proximity, pretext, shifting explanations, and change in attitude toward the employee after the protected activity,⁸⁶ such evidence is lacking here. Respondent's Initial Brief at 22.

Respondent states that Complainant's 2013 report of the breach of confidentiality at the September 26, 2013 ENKON webinar to the ESC on October 3, 2013 was more than 15 months

safety or security condition." PDF at 7. Here, the fact of the October 29th breach created a safety hazard because it could discourage others from using the ORB program, creating the possibility that they would report to work impaired. Additionally, I find that it is probable that, because of the Complainant's stated intent to report the breach at the next ESC meeting, Mr. Oathout reported the breach to two ESC members in his email of November 17, 2014 (RX 4).

⁸⁴ *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB No. 16-035, ALJ No. 2014-FRS-154, PDF at 53 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017), PDF at 53 (citations omitted). See also *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020 (ARB May 31, 2013).

⁸⁵ *Palmer*, PDF at 55; *Coates v. Grand Trunk Western Railroad*, ARB No. 14-019 (ARB July 17, 2015); *Rudolph v. National Railroad Passenger Corp.*, ARB Case No. 11-037, ALJ No. 2009-FRS-015 (ARB Mar. 29, 2013) (*Rudolph I*), PDF at 16; *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011), PDF at 13-14.

⁸⁶ Citing *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014).

before the Complainant was removed from her position, and that the October 29, 2014 incident which caused the Complainant to tell Mr. Oathout that she would report the breach at the next ESC meeting (scheduled for January 21, 2015) was two and one-half months before she was removed from her position and seven months before her discharge. Respondent also argues that the “cat’s paw” theory is inapplicable here because it requires retaliatory motive by Mr. Oathout, which Respondent says the record does not show. Respondent’s Initial Brief at 22-24.

Complainant argues that the unfavorable personnel actions began approximately two and one-half months after the protected activity on October 29, 2014. In *Warren v. Custom Organics*, ARB Case No. 10-092, ALJ No. 2009-STA-030 (ARB Feb. 29, 2012),⁸⁷ the Board remanded the case for the ALJ to determine, *inter alia*, whether temporal proximity between the protected activity in the spring and summer of 2008 and the adverse action in July 2008 was sufficient to establish the element of causation. The Board cited cases in which temporal proximity was found where there were intervals of time of 30 days, two months and seven to eight months. *Id.*, PDF at 11.⁸⁸ Here, the initial protected activity occurred on September 26, 2013 and October 3, 2013 when Complainant told Mr. Oathout he needed to leave the ENKON webinar because he was not permitted to view confidential mark-off data and that she would report the breach of confidentiality to the ESC, and when she did report the breach to the ESC on October 3, 2013. This incident was 15 months before the January 15, 2015 counseling session and the January 16, 2015 removal of Complainant from her position as a Labor Coordinator. The October 29, 2014 incident, the second protected activity, was 2 ½ months before the January 15th meeting.

At his deposition, Mr. Oathout identified RX 4, a November 17, 2014 email Mr. Oathout sent regarding the October 29, 2014 incident. Oathout Depo. at 115-16. Mr. Oathout’s email was to Christopher Jagodzinski, whom Mr. Oathout identified as the management co-chair of the ESC, and Larry Jones, who he identified as the ESC labor co-chair, with a copy to Mr. Logue. The stated purpose of the email was “to alert you to a situation that has been resolved but may come up at the next ESC meeting.” In the email Mr. Oathout states that Complainant told him that she was at fault for not completing the mark-off. Mr. Oathout also states in the email that “I consider this issue closed, but want to bring it to your attention because it does not need to be a point of interest at the next ESC meeting.” The quoted statement suggests some level of concern by Mr. Oathout about the Complainant’s intent to report the breach of confidentiality at the January 15th ESC meeting. Further, I find credible she testimony of Complainant and Arlicia Jones that Mr. Logue told Complainant after her report of the first breach on October 3, 2013 that he did not like the way she reported the breach of confidentiality because she didn’t follow the chain of command. Tr. at 108-109; 217-18. Mr. Logue stated that he did not recall speaking to Complainant after the meeting and denied that he made the statement to Complainant. Tr. at

⁸⁷ *Warren* involves a claim under the Surface Transportation Assistance Act., 49 U.S.C. § 31105), which also uses the Air 21 legal burdens of proof.

⁸⁸ Citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity of 30 days established nexus); *Nichols v. Bechtel Constr. , Inc.*, Case No. 1987-ERA-044, slip op. at 12 (Sec’y Oct. 26, 1992) (temporal proximity of about two months established nexus); *Goldstein v. EBASCO Contractors, Inc.*, No. 1986-ERA-036, slip op at 11-12 (Sec’y Apr. 7, 1992) (temporal proximity of seven to eight months established nexus).

319-21.⁸⁹ The testimony of the Complainant and Ms. Jones on this issue was specific and Mr. Logue's testimony about the meeting was fairly non-specific and vague.

Six witnesses testified about the October 3, 2013 ESC meeting and the Complainant's report of the breach of confidentiality. Donald Boyd, a member of the ESC, testified that when the Complainant reported at the ESC meeting that Mr. Oathout had viewed confidential mark-off information, "[e]veryone was pretty upset." Tr. at 31-32. He said the management team seemed to be more upset than the labor people. Mr. Boyd testified that after the Labor Coordinators left the meeting room, both management and labor "came down on him [Oathout] pretty hard." He said he "didn't think [Oathout] was going to be back after that particular meeting." *Id.* at 32-33. Arlicia Jones, a budget analyst within ORB who was also present at the October 3d ESC meeting, testified that when the Complainant reported the breach to the ESC, "there was a big commotion, or a big – there was chaos." She said Mr. Oathout denied that he had seen confidential information. Tr. at 215-17. Barry Eveland was present at the meeting, and testified that after the Complainant made the allegation, the ESC members wanted to hear about it, and "it really didn't seem to be that big of a deal." Tr. at 255. He said Complainant "continued to push it" to the point where one of the ESC members told her to "shut up." *Id.* Michael Logue was also at the ESC meeting and testified that he did not recall Complainant reporting that there had been a breach of confidentiality, but said that something came up and there was a lot of sniping, that the meeting seemed acrimonious, almost "a food fight." Tr. at 290-92; 318-19. Complainant testified that after she made her report of the breach to the ESC, Mr. Oathout initially denied it, and then the room "went kind of crazy," that the union members were mad, there were a few curse words, and the ESC began questioning Mr. Oathout. She said it was very chaotic. Tr. at 103-107. Complainant Depo. Tr. at 54-57. In his testimony about Complainant's report of the breach to the ESC, Mr. Oathout stated there was a discussion after her report, that Complainant was very upset during the meeting and that "it wasn't a real big deal." He said it was not a big discussion, and that the ESC just told him "to make sure I don't access the system." He said one of the union members was upset with the continued discussions about the breach and said shut up, it's done, we're moving on. Oathout Depo. Tr. at 47-49.

Of the six witnesses who testified about the October 3d ESC meeting, three (Mr. Boyd, Ms. Jones and Complainant) testified that Complainant's report resulted in a significant negative reaction among the ESC members. Mr. Logue stated that he did not recall the report but that something came up that created a lot of sniping and acrimony. Mr. Eveland and Mr. Oathout both testified that it wasn't a big deal. I find the testimony of the Complainant, Mr. Boyd and Ms. Jones about the meeting to be more credible than that of Mr. Oathout and Mr. Eveland. Mr. Logue's testimony that there was something that came up that created sniping and acrimony tends to support the testimony of the Complainant, Mr. Boyd and Ms. Jones.

Given the reaction to the Complainant's first report of a breach of confidentiality by Mr. Oathout, together with his comment in the November 17, 2014 email (RX 4) that the Complainant's threatened report concerning the October 29, 2014 breach "does not need to be a point of interest at the next ESC meeting," I find that Mr. Oathout was in fact concerned about the impact of a report of a second breach of confidentiality. Complainant's report to the ESC on

⁸⁹ Mr. Logue testified that he did not recall speaking to the Complainant after the ESC meeting or making the statement attributed to him, and then said that he was "pretty confident" that he did not say it. Tr. at 320-21.

October 3, 2013 about the September 26, 2013 breach of confidentiality gave added significance to her expressed intent to report the October 29, 2014 breach and both instances of protected activity must therefore be considered together. Had Complainant not reported the breach of confidentiality at the October 3, 2013 meeting, it is likely that Mr. Oathout would not have been as concerned about the report of the October 2014 breach.⁹⁰

The November 17, 2014 email (RX 4) states that Complainant told Mr. Oathout that it was she who made the mistake with respect to the mark-off that led to the October 29, 2014 incident. Oath. Depo. Tr. at 75-76. Complainant denied this, and explained in her testimony why it could not have been her. She stated that after the conversation with Mr. Oathout on October 29th she confirmed that she had done the mark-off and it was already in the system. She testified that she contacted the designated supervisor in Chicago (*i.e.*, the union-selected supervisor shown on CX 3 in the circle at the bottom left of the loop of confidentiality) to see if he had done his portion of the mark-off and he said he had not. She was asked to respond to Mr. Oathout's testimony that she told him that she had mistaken the employee's craft and thought the employee was marked-off and put in the system by the dispatcher⁹¹ and therefore she never called the supervisor to put in the approved absence and backfill the job (*see* Oathout Depo. Tr. at 75-77). Complainant testified that his testimony could not be true because the employee who marked-off worked at a facility that had no UTU, BLE (conductors and engineers) or onboard service employees, so they would not have been marked off by the CNOC dispatcher and she would not have been confused about that. She explained that the conductors, engineers and onboard service personnel are marked off by the Chief Crew Dispatcher and she did mark-offs for other employees. The employee who was not properly marked-off worked at a facility with no employees who would have been marked-off by the Chief Crew Dispatcher, who handled only UTU, BLE and onboard serve employees. Tr. at 120-24, 182. Mr. Oathout testified that he did not do an independent investigation regarding who was responsible for the mark-off error. Oathout Depo. Tr. at 76. The Respondent offered no evidence to rebut Complainant's testimony about why she could not have been at fault for the mark-off error and that it was the designated supervisor who made the error. I also note that during Mr. Oathout's initial testimony about this incident at the same deposition, Mr. Oathout did not say anything about Complainant admitting that it was her fault. Rather, he agreed that it could have been the fault of the union-selected supervisor. *See* Oathout. Depo. Tr. at 51-58.⁹²

⁹⁰ Mr. Boyd testified about the reaction of the ESC members at the October 3, 2013 meeting when the Complainant reported the first breach and testified that if they learned of a subsequent breach, the labor side "would have probably asked him [Mr. Oathout] to be removed from that position." Tr. at 33.

⁹¹ Referring to the Chief Crew Dispatcher in the circle at the top right of the loop in CX 3. Mr. Oathout made the same claim about the Complainant's responsibility in his email of November 17, 2014 (RX 4).

⁹² This prior testimony was extensive, and Mr. Oathout was asked why he thought the mark-off failure was the Complainant's fault. For example, he was asked:

"Q: Why didn't you just refer Mr. Green to call Marlynn directly rather than taking the employee's name down and writing it on a piece of paper? A: I don't, I don't know. Just, he called – I don't know whether I called him or he called me, but I know I wrote down, I gave it to her, said could you follow up, this is urgent. And what happened was since back through the loop of confidentiality that you presented me here on Exhibit 2, Molly didn't call the selected supervisor so she did not attend to her duties, so she never marked the employee off properly, and that's how this whole thing started. Q: How do you know that? A: Well, because if she marked off the employee properly we would have never been having that conversation, Mr. Green would have never reached out, the employee would have had an APA [approved absence] in the system, and for the approved absence, and he would

In a November 25, 2014 email to Mr. Logue, Mr. Oathout told him that Complainant became “very angry” during a conference call. RX 31. In a partially redacted email of December 12, 2014, Mr. Oathout told Mr. Logue that he was still planning on moving forward with charges for the Complainant for violating the Standards of Excellence for bad attitude, lack of teamwork and the way she spoke to him and others during the November 25th conference call. RX 32.⁹³ Mr. Oathout testified that Complainant was very loud, very hostile and argumentative on the call. Oathout Depo. Tr. at 107-09.⁹⁴ Barry Eveland, another of the Labor Coordinators, testified that during the Labor Coordinators’ frequent conference calls with Mr. Oathout, several times during such calls the Complainant was “rude and unprofessional.” He said she was opinionated, was generally the biggest voice in the room and was often aggressive during calls several times during conference calls, discussing incidents since 2013.⁹⁵ Tr. at 242-46; RX 27.

never have been facing charges for the, violating the national attendance policy. Q: How do you know that the union-selected supervisor didn’t put the information in on his end? A: Whatever, I don’t have any way to verify that, but there would have never been a discussion. If there was an approved absence in the system, there would have never been a discussion. And that’s why I asked Molly to follow up with the individual. Q: But my question is how do you know that the error wasn’t on the union-selected supervisor’s end of not actually putting in and marking off that day as an ORB day? Is that a possibility? A: It could have been. Then if it was, then why was he calling to verify it. Q: Was Mr. Green the union-selected supervisor? A: I don’t recall. Q: Okay. Is it possible that Mr. Green was not the union-selected supervisor? A: It’s possible.” After an objection, there was the following exchange: “Q: Okay. You said it’s possible that it could have been an error on the union-selected supervisor’s end. Did you just assume at that time that it must have been Molly’s error when you approached her at Beech Grove? A: I asked her to follow up with it. I didn’t assume anything. I asked her to follow up and address it and get it handled right away.” Oath. Depo. Tr. at 56-57. If Complainant had in fact told him at some point that it was her error, I find it difficult to understand why he would not have mentioned that fact during this portion of his testimony. Complainant determined that Mr. Greene was not the union-selected supervisor (*see* Complainant’s testimony at Tr. 74 (lines 13-17), 119-20), and Respondent did not refute this. She said the union-selected supervisor she contacted told her that he had not done his part of the mark-off (*see* Tr. at 119-20) (*see* CX 3, circle at bottom left of the page). If Respondent believed this was not true, it should not have been difficult for Amtrak to refute it. I find this to be a significant issue with respect to the credibility of Mr. Oathout.

⁹³ In *Palmer*, the ARB held that where the employer contends that the claimant’s protected activity played no role in the adverse action, as here, the factfinder must consider evidence of an employer’s nonretaliatory reasons for the adverse action in determining whether the claimant’s protected activity was a contributing factor in such action. *Id.*, PDF at 15, 29. *See* Employer’s Initial Brief at 22.

⁹⁴ Both Mr. Oathout and Barry Eveland testified about this conference call on November 25, 2014 and the Complainant’s behavior during the call. *See* Tr. at 249-53; Oathout Depo. Tr. at 108. The conference call related to whether the Labor Coordinators were responsible for taking mark-off calls on their vacations. Complainant admitted she was upset during the call and swore once. Tr. at 183; Complainant Depo. Tr. at 78. She said she was already on vacation at the time of the call. Tr. at 185. The Complainant testified that Mr. Oathout called her on November 24 and she told him she would not be taking calls on her vacation. Complainant Depo. Tr. at 75. During the conference call she explained her position, which was that the ORB Protocol (JX 1) provides that the Labor Coordinators’ vacation, sick days and personal days would be governed by the agreements they worked under previously. She said that Larry Jones, the union representative who was on the call, agreed with her and told Mr. Oathout he would have to consult Labor Relations. Mr. Oathout said he would and that he would get back to them, but never did. Complainant Depo. Tr. at 75-78. Complainant was apparently correct, because Mr. Logue testified that it was determined that the Labor Coordinators did not have to take calls on their days off. Tr. at 300. There was also an allegation that during the November 25th call the Complainant said she was taping it. The Complainant denied this, stating that she said she “should be” taping it. Tr. at 249-55; Oathout Depo. Tr. at 107-14; Tr. at 74-81; 182-86;

⁹⁵ Mr. Eveland was asked about a conference call on September 10, 2013. Tr. at 242-46; RX 27. The Complainant testified that she did not remember the call but denied the behavior alleged in RX 27. Complainant Depo. Tr. at 38-41. Mr. Oathout testified about a rules committee meeting in Baltimore where he said the Complainant was a little aggressive towards others, an incident at a Captain’s meeting at Chicago Union Station where he said she was very

It would seem that if Complainant's behavior were as bad as Mr. Oathout and Mr. Eveland testified, there would have been previous counseling letters and/or other discipline. However, there are no counseling letters to Complainant regarding her alleged conduct and both the Complainant and Mr. Oathout testified that he did not issue any formal counseling to the Complainant prior to January 15, 2015. Oathout Depo. Tr. at 103; Tr. at 115. There was no other evidence at the hearing of any prior formal counseling of Complainant by Respondent.

The two Specifications indicated in the Notice of Investigation⁹⁶ were: I, that Complainant was "unprofessional, rude and loud" during the meeting on January 15, 2015 with Michael Oathout, that she called him a liar and made threatening remarks as listed in Specification I; and II, that on January 16, 2015 Complainant reported an hour late to the ORB central steering committee, refused to accompany Mr. Oathout and Arlette Davenport to a conference room for a private discussion at which point she became unprofessional and loud, and that she refused in part to turn over company property.

Charge One was "Alleged violation of Amtrak's Standards of Excellence, 'Professional and Personal Conduct' 'Teamwork', the part that reads: Being polite to each other is one of the basics of teamwork, so it is important that we all are considerate and respectful of each other. Part of teamwork is properly performing your duties. Another part is following instructions. Therefore, you must comply with all company and departmental policies, procedures and rules as well as all instructions, directions and orders from supervisors and managers."⁹⁷

Charge Two was "Alleged violation of Amtrak's Standards of Excellence, 'Professional and Personal Conduct' 'Conduct', the part that reads: 'Therefore, boisterous conduct such as...rudeness...intimidation...is unacceptable. It is important to remain calm and be courteous to all customers...'"⁹⁸

Although Mr. Oathout stated in his email of December 12, 2015⁹⁹ that he was moving forward with charges against the Complainant for violating the Standards of Excellence for bad attitude, lack of teamwork and the way she spoke to him and others during the November 25th conference call, neither the November 25, 2014 conference call nor the October 29, 2014 mark-

aggressive towards Linda Gaston, former ORB chairperson for the South. He said he spoke to the Complainant after both these incidents. Oathout Depo. Tr. at 102-03. The Complainant testified that she remembered the Baltimore meeting. She said Mr. Oathout did not speak to her about her conduct, but told her that one of the rules committee members was offended by what she said. Tr. at 110. She said she did not remember the Captains' meeting in Chicago. She said this meeting must have occurred before October 2014 because there were no Captains' meetings at Chicago Union Station after October 2014. Tr. at 111. With respect to the incident Mr. Oathout testified to in the southern region with Linda Gaston, the Complainant testified that Linda Gaston was in the Central division, not the Southern division. She said that Linda Scotty was the ORB chairperson for the Southern division, and she recalled an incident when Ms. Scotty gave an award to an employee for marking-off another employee who was also present in the meeting. The Complainant told her to do it differently in the future because the employee who had marked off may not have wanted others to know he had marked off. Tr. at 112-13. I note that none of these incidents were included in the two Specifications set forth in the January 20, 2015 Notice of Investigation.

⁹⁶ JX 5.

⁹⁷ Quoting from the first paragraph under "Teamwork" at p. 8 of RX 15.

⁹⁸ Quoting in part from the first paragraph under "Conduct" at p. 8 of RX 15.

⁹⁹ RX 32.

off incident were specified in either of the specifications in the Notice of Investigation.¹⁰⁰ The specifications also do not include the previous incidents testified to by Mr. Oathout and Mr. Eveland. Mr. Logue testified that he considered the Complainant's prior behavior in the October-December 2014 period in assessing the Complainant's discipline. Tr. at 329-30, 335. I note that if any of these incidents had been specified in the Notice of Investigation it would have been inconsistent with the requirements of Rule 24 of the CBA, because of the thirty-day rule.¹⁰¹ Nevertheless, Mr. Oathout told the Complainant at the January 15, 2015 meeting that the two counseling letters he gave her (JX 2 and JX 3), were for the November 25, 2014 conference call and the mark-off incident on October 29, 2014. Tr. at 124-31; Complainant Depo. Tr. at 87-91. Mr. Oathout testified that RX 8 (JX 3) related to the October 29, 2014 mark-off incident and RX 7 (JX 2) related to the November 25, 2016 conference call. Oathout Depo. Tr. at 68-75.

Both Mr. Oathout and Complainant identified JX 8 as Amtrak's formal discipline policy. Tr. at 131-32; Oathout Depo. Tr. at 61. The policy sets forth two steps of "Counseling: 1) verbal" and 2) "written (warning letter)." It then identifies three steps of discipline: 3. "Reprimand or suspension of three (3) days or less," 4) "Suspension of ten (10) days or less (more serious violations of operating rules involving hazards or accidents or major inconvenience to passengers may result in up to 30 days suspension)," and 5) "Dismissal." A paragraph at the end of the document states: "These are guidelines only. For more serious offenses, this progression may start at Discipline steps 4 or 5, depending on circumstances. Further, the length of time between offenses, nature of offense, as well as an employee's overall service record, may impact what discipline is appropriate." I note that giving two written counseling letters at the same time, as here, appears to be inconsistent with the stated Amtrak policy, which requires verbal counseling as the first step and written counseling as the second step.

Mr. Logue stated that he selected termination based on "the material that was presented to me, looking at the charging officer and what he was suggesting, as well as prior behavior, that being in the October/November/December time frame of, I believe, 2014, bringing all that together, that's why I selected termination." Tr. at 311, 335. He confirmed that he had no knowledge of those incidents other than what Mr. Oathout told him either in conversations or by email. Tr. at 322-23. When asked if he recalled a conversation with Mr. Oathout after the November 25, 2014 conference call, Mr. Logue said he didn't recall the specifics but he recalled a conversation with Mr. Oathout concerning how some of the Labor Coordinators were taking the calls. He said he had a "cloudy" recollection that Mr. Oathout suggested that people were raising their voices. He was sent an email about the conference call by Mr. Oathout. RX 31. Tr.

¹⁰⁰ JX 5.

¹⁰¹ The Complainant testified that Rule 24 of the CBA provides that an employee is entitled to of an intent to impose discipline within thirty days of when Amtrak has knowledge of the offense. Amtrak has not disputed this interpretation. Rule 24(c) also provides that within seven days of receipt of the written notice of intent to discipline, subject to one postponement, the employee and his representative will meet with management's representative to try to resolve the matter. At the meeting Amtrak is to provide a list of all known witnesses and know documents related to the alleged offense. See CX 10(CBA), Rule 24(b) pp. 28-30. Tr. at 131-33; Oathout Depo. Tr. at 63-66. Because the Complainant was not given an intent to impose discipline letter, this provision could not be followed. Mr. Oathout testified that he was not familiar with these provisions in the CBA. Oathout Depo. Tr. at 62. He agreed that for formal discipline Rule 24 provides that an employee is entitled to a letter of intent to impose discipline, then a meeting between a union representative and management. Oathout Depo. Tr. at 64-66.

at 297-98. He vaguely recalled that Mr. Oathout told him he wanted to have an in-person conversation with the Complainant and that she did not show up. Tr. at 301; RX 32. He identified an email exchange with Mr. Oathout referencing his consultation with Labor Relations and moving forward with written counselling to the Complainant for violation of the Standards of Excellence and a second letter of insubordination for refusing to come to his office. In the email Mr. Oathout said Labor Relations also advised him to write up Martha Henderson for not responding to his requests to her to return his calls. RX 33; Tr. at 303.

Mr. Logue was asked about Mr. Oathout's January 15, 2015 meeting with the Complainant, and indicated his source of information about that meeting was a conversation with Mr. Oathout and an email from him (RX 9). Tr. at 305-06, 323. With respect to the hearing officer's Decision after the investigative hearing (JX 6), he said he didn't "review it 100 percent, but I looked it over." Tr. at 308. He later testified that he was not 100 percent sure whether he read the investigative hearing transcript before he made his discharge decision, but he suspected he did. Tr. at 329. Mr. Logue identified RX 34 as an email from Labor Relations attaching two discipline letters for him to choose from, one for termination and one for a 30-day suspension. Tr. at 310-11. He testified that before imposing discipline on the Complainant he did not look at her record prior to October 2014, and that that was not something he would normally do. He said he did not believe it was Amtrak policy to look at an employee's entire record before imposing discipline. He testified that he recalled an incident in October 2013 concerning an alleged breach of ORB confidentiality and an incident where Mr. Oathout called a manager about an employee who may not have shown up for work. He identified RX 4 as the email Mr. Oathout sent him concerning the latter incident. Tr. at 338-42. He testified that other than his attendance at the October 3, 2013 ESC meeting, his knowledge about the Complainant's job performance, and about what happened during the meeting on January 15, 2015, was from what Mr. Oathout told him or wrote to him in emails. Tr. at 322-23, 335. Mr. Logue also testified that information in the Notice of Investigation¹⁰² came from Mr. Oathout. Tr. at 325.

At the investigative hearing, Mr. Oathout submitted as his written statements Exhibit G, which is the text of RX 9, Mr. Oathout's email of January 16, 2015 to Mr. Logue regarding the January 15th meeting, and Exhibit H, (also RX 11), regarding the January 16th meeting. In Exhibit H, which Mr. Oathout testified he wrote after the meeting on January 16th, he states that he made the decision to remove Complainant from her position as a Labor Coordinator. Investigative Hearing ("IH") transcript at 10. Mr. Oathout testified at the investigative hearing (in part reading from Exhibit G) that on January 15th Complainant was very angry and yelled at him, threatened him with filing an unjust treatment claim against him, slapped the letter he gave her and told him he was stupid. IH Tr. at 7-10. With regard to the January 16th meeting, he testified (in part reading from Exhibit H) that Complainant was "very loud and yelling at me," was "making a scene with other employees," and "started yelling and making a scene again, this time with three ORB volunteers in the room – Mike McKenna, Brad Liggin and Linda Gaston." He stated that Complainant refused to turn over her phone, stating that she had confidential ORB information in it. He stated he told her to erase the data in her phone before turning it in and she refused. He told her if she was going to be insubordinate he would have to deactivate her phone. IH Tr. at 11-15. *See also* Mr. Oathout's testimony at Oathout Depo. Tr. at 68-86. Mr. Oathout testified that at the January 16th meeting Complainant was very disrespectful, very loud and

¹⁰² JX 5.

boisterous and did not act professional. He said she acted very similar to how she acted on January 15th. IH Tr. at 15. In his deposition testimony he testified that she was unprofessional and loud. Oathout. Depo. Tr. at 88-92.

Complainant testified at the investigative hearing regarding the January 15th meeting, stating that she was not rude or loud and did not act unprofessionally. She said she did not threaten Mr. Oathout and did not state that she would file an "unjust case" against him.¹⁰³ She denied stating that he was stupid¹⁰⁴ or telling him he would lose his job. She said she stayed for the whole meeting and did not abruptly walk out. IH Tr. at 54-57. *See also* Tr. at 124-31, 133; 189-95. Complainant Depo. Tr. at 87-91. With respect to the meeting on January 16th, she testified at the investigative hearing that she was late because she was handling a mark-off¹⁰⁵ and because of traffic from her hotel to the Chicago station. With regard to giving Mr. Oathout the Amtrak property in her possession at the January 16th meeting, Complainant testified at the investigative hearing that she gave him her laptop computer. She did not have her keys with her because she left them at home since she was travelling. She said she did not give him her cell phone because it had the phone numbers of people who had marked off who she had called back. She said she asked Mr. Oathout to give her time to erase them and he would not. She testified that at the end of the meeting he agreed she could retain the phone to erase the phone numbers and he would have the phone turned off. She stated that Mr. Oathout had never previously complained about her work, her teamwork, professionalism or how she did her job. IH Tr. at 57-60; *see also* Tr. at 133-39, 145-53, 195-98. Complainant Depo. Tr. at 95-98.

Mr. Oathout and the Complainant were the only two people present at the meeting on January 15th, and thus there is no other witness to their conversations testifying at the investigative hearing. With respect to the January 16th meeting, there were four others who witnessed that meeting and testified at the investigative hearing. Arlette Davenport, a Senior EEO Compliance Specialist, submitted a written statement (Exhibit J to the IH transcript), which she was asked to read at the beginning of her testimony. When she was asked to describe the Complainant's tone at the meeting, she stated: "She was just insistent that she wanted her union rep. I would say she was very insistent that she wanted – like she didn't want to talk to him unless she had her union rep there." She testified that the Complainant had mark-off information on her cell phone and didn't want to give Mr. Oathout the phone. She was asked whether the

¹⁰³ In her deposition the Complainant testified that she may have said she might bring an unjust treatment claim against him, and in her hearing testimony she said she may have said something about "an unjust treatment," but not in the context of threats. Complainant Depo. Tr. at 91; Tr. at 194. The Complainant testified at the hearing that the CBA gives an employee the right to file an unjust treatment claim against her supervisor, referencing page 44 of the CBA (CX 10). Tr. at 206, 208-09. She also testified that the CBA requires the employer to have just cause for disciplining a bargaining unit employee. Tr. at 206.

¹⁰⁴ The Complainant testified in her deposition that she may have said "I think this is stupid." She testified that she was referring to the pyramiding of the two letters. Complainant Depo. Tr. at 89, 191. The Complainant also said that she did not tell Mr. Oathout at the meeting that he was "digging his own grave" Tr. at 192. In her deposition she also said she did not say that but said she wasn't sure if she implied something like that. Complainant Depo. Tr. at 90.

¹⁰⁵ In her testimony at the hearing before me, the Complainant elaborated that the mark-off was a serious one and she had trouble making contact with her designated supervisor in that area. She said she therefore had to make several other calls to divisional management in the Southern division. She said she told Mr. Oathout this when she arrived. She said, however, that the division meeting had not started when she arrived because the division Vice-Chairman and Treasurer were with her, and she was therefore present for the whole meeting. Tr. at 134-35, 195.

Complainant was “completely compliant with all the directions” given by Mr. Oathout and she said “Just not at the end, when he asked her for the phone company materials.” IH Tr. at 32-38.¹⁰⁶

Michael McKenna, a conductor at the Chicago Yards and Chairperson for the Central Division of ORB, also testified. Mr. McKenna submitted his written statement (Exhibit K to IH transcript), which he was asked to read at the beginning of his testimony. Mr. McKenna was also asked to describe Complainant’s tone. He responded: “Her tone? She was just asking him to leave her alone. She was done talking to him. Her tone wasn’t any different than – yeah, I mean, she was irritated, but I don’t recall hearing any yelling or anything.” He was then asked: “When you say irritated, would you equate that tone or that demeanor with being professional and a calm individual?” He stated: “I would have to say yes, because, I mean, if you’re irritated, your – you know, your level may be slightly higher than – your tone of voice might be slightly higher than normal, but as for yelling or screaming, I didn’t hear that.” When asked if she complied with Mr. Oathout’s instructions to turn over the company-issued items, he stated that she and Mr. Oathout eventually agreed she could keep the phone and to his knowledge she complied with the rest of the items he requested. Mr. McKenna also testified that Complainant oversaw him in his position as ORB Chairperson and that he had known her for 20 years. He said he never had an issue with her performing her duties and that she has always been a team player and has always been professional. IH Tr. at 38-43.

Bradley Liggin, an electrician at Beech Grove and a Vice-Chairperson of the Central Division of ORB was also a witness. He was asked to read his statement (Exhibit L to IH transcript) at the beginning of his testimony. He testified that Mr. Oathout told Complainant to give him her laptop, keys and phone. He was asked if all those items were given to Mr. Oathout and he stated: “Yes, to an extent. I know there was personal RedBlock information on some of that – on some of the things she has.” He testified that Complainant was compliant and was “professional in her responses, in her reactions toward Mike Oathout during the disagreement or whatever, you know, was going on.” He also testified that he was waiting for Complainant after her counseling session with Mr. Oathout on January 15th because they were riding together. He was asked if Complainant came out of the meeting “irate, abruptly” and said she did not. He said he did not see her come out of the meeting room but was waiting outside the building. IH Tr. at 44-49.

Linda Gaston, an R&I clerk and the Treasurer for the Central Division of ORB also testified. She did not have a written statement. She testified that she also witnessed interaction between Mr. Oathout and Complainant at the January 16th meeting. She said she heard Complainant ask if she was going to get union representation and the answer was “no.” Complainant said she was entitled to union representation and Mr. Oathout said: “Just read the letter, and he slung the letter across the table. After that, I left.” She said she left the room and was gone for “quite a time,” and when she returned he heard Mr. Oathout tell her he needed her phone. The witness was asked whether during the time she was present for the conversation the Complainant was acting “irate, loud.” Ms. Gaston replied: “In my opinion, no. She asked a question in a normal voice. He gave her an answer. She just asked it again, but never, in my

¹⁰⁶ In RX 11 (IH Exhibit H), Mr. Oathout states that Ms. Davenport was at the meeting at his request.

opinion, was it unprofessional. You all may not want my opinion, but I'm just saying I didn't think it was unprofessional, and I didn't think that her asking was out of order." IH Tr. at 50-52.

Therefore, of the four other witnesses who testified about the January 16th meeting (Ms. Davenport, Mr. McKenna Mr. Liggin and Ms. Gaston), none testified to behavior by Complainant consistent with that described by Mr. Oathout in his testimony or in his account of the meeting in RX 11 (Exhibit H to IH transcript) (loud, yelling, making a scene, pushing her cell phone in his face). Mr. McKenna also testified that Mr. Oathout ultimately agreed she could keep the cell phone. IH Tr. at 40. Ms. Davenport did not mention an agreement to let her keep the cell phone, nor did Mr. Liggin, but they were not directly asked. Ms. Gaston testified that she left the room before the meeting was over and did not see the transfer of the requested items. Tr. at 51-52. Mr. Oathout also did not testify about such an agreement. In RX 11, Mr. Oathout also mentions inappropriate use of company laptop computer, but there is nothing in the Notice of Investigation about this nor was it mentioned in the testimony at the investigative hearing. Complainant explained the reason she was late to the ORB Central Committee meeting, indicating she had to handle a mark-off; I note that her testimony regarding this was not refuted. She turned over all the requested Amtrak-owned equipment except for her keys, which she did not have with her, and the cell phone. She testified, along with Mr. McKenna, that Mr. Oathout agreed to let her keep the phone so she could erase the confidential information because Mr. Oathout would not give her time to do so at the meeting. Respondent did not offer into evidence anything that shows that she was not supposed to have whatever information was on her cell phone. Mr. Oathout testified that she was not supposed to have the phone numbers of employees who had marked-off on her phone, but pointed to no policy that indicates this, and it is difficult to see how she could perform her job without having some of these phone numbers. Further, Complainant was bound by the Certificate of Confidentiality¹⁰⁷ she signed and by section VII of the Amtrak Operation RedBlock Protocols¹⁰⁸ not to disclose confidential information to anyone not privileged to receive it, which is what would have happened if she turned over her cell phone to Mr. Oathout without erasing the information. I also accept the testimony of Complainant and Mr. McKenna that Mr. Oathout agreed at the end of the meeting that she could keep the phone and he would have it turned off. Although they were not asked, none of the other non-party witnesses contradicted this statement.

Specification II of the Notice of Investigation also includes the allegation that Complainant arrived an hour late for the January 16th meeting without explanation, although this is not clearly included in Charge Two. Complainant testified that she was late because she had to handle a mark-off and that she informed Mr. Oathout of that when she arrived. Tr. at 134-35; Complainant Depo. Tr. at 94-95. Amtrak offered no evidence to refute her testimony regarding this. I find the Complainant's testimony about the January 16th meeting to be more credible than that of Mr. Oathout, and I find the Complainant's testimony in general to be more credible than Mr. Oathout's testimony.¹⁰⁹ This is based both on Complainant's demeanor at the hearing and

¹⁰⁷ CX 8.

¹⁰⁸ JX 1.

¹⁰⁹ I had the opportunity to observe the demeanor of Complainant, Mr. Boyd, Ms. Jones, Mr. Eveland and Mr. Logue at the hearing. Of course, I was unable to observe Mr. Oathout's demeanor, as his testimony was only by deposition and at the investigative hearing. The testimony of Ms. Davenport, Mr. McKenna, Mr. Liggin and Ms. Gaston was also only at the investigative hearing. Where I had the opportunity to observe the testimony, my credibility findings are based in part on the behavior, bearing, manner and appearance of the witness. With regard to both to the

on the other facts cited herein. The testimony of the four other witnesses at the investigative hearing supports Complainant's testimony about the January 16th meeting.¹¹⁰ Complainant's explanation of why she could not have been responsible for the October 29, 2014 mark-off failure was reasonable and was not refuted by contrary evidence from the Respondent other than Mr. Oathout's testimony. Mr. Oathout testified that he did not do an investigation to see who was responsible for the mark-off error. His testimony about the October 29th incident was vague and inconsistent, as discussed above. As noted, Mr. Oathout did not testify at the hearing, without explanation, and I therefore did not have the opportunity to observe his demeanor.

I have considered Mr. Eveland's testimony about the Claimant's behavior during conference calls and otherwise. I do not doubt that that at times Complainant may have been assertive, perhaps argumentative, and not reticent about expressing her views. She may also have spoken in a voice louder than others thought appropriate. However, if Complainant's behavior was consistently as poor as portrayed by Mr. Eveland, I believe that the record would show prior written counseling and perhaps other discipline.¹¹¹ No such evidence was offered at the hearing. I note that Complainant, who had worked for Amtrak since December 1990, was selected in 2012 as one of three Labor Coordinators after an interview with a panel of labor and management personnel. The position posting lists as requirements for the job, *inter alia*, a high level of integrity and credibility and good communication skills, team building and client

witnesses who testified at my hearing and those who did not, I have considered the consistency of the testimony with all of the evidence of record.

¹¹⁰ The hearing officer's Decision letter, dated May 26, 2015 is JX 6. The Decision finds that the charges in Specifications I and II of the Notice of Investigation (JX 5) were proven. The hearing officer's findings regarding the Complainant's conduct are contrary to mine. The hearing officer accepted as accurate Mr. Oathout's account of the January 15th and January 16th meetings. He said he found Mr. Oathout's version of events to be more credible because, when Complainant's representative asked for proof of when Mr. Oathout's written statements (Exhibits G and H) were composed, Mr. Oathout was able to show that they were written on January 15 and January 16. The hearing officer also relied on the fact that Complainant's representative contended the counseling letters were "fraudulent" because they recited "discussions" Mr. Oathout had with the Complainant that did not occur and Mr. Oathout explained that the content of the letters was based on his expectation of what would occur at the January 15th meeting. IH Tr. at 17-19, 21-27. The hearing officer also relied on the fact that Complainant's representative asked Mr. Oathout if he had any letters to Complainant concerning past earlier incidents he testified to and Mr. Oathout produced Exhibit N (RX 5) (his email to Complainant concerning the alleged recording of the November 25, 2014 conference call). IH Tr. at 66-69. The hearing officer thus did not address Complainant's testimony, but relied on collateral matters raised by her representative to find Mr. Oathout's testimony credible. Complainant was not asked about this at the Investigation hearing, but did testify at the hearing before me that she did not say she was recording the call but that she "should be" recording the call. IH Tr. at 183-84. The hearing officer also relied on the fact that Complainant did not turn over her cell phone. The hearing officer did not address Complainant's testimony that there was confidential information on the phone other than to state that she contended she had the right to retain the phone because of confidential information, even though both the Confidentiality Certification she was required to sign (CX 8 and IH Exh. 4) and section VII of the Amtrak Operation RedBlock Protocols (JX 1 and IH Exh. 5) were of record. IH Tr. at 58-59. He did not address the testimony of Complainant and Mr. McKenna that Mr. Oathout agreed she could keep the cell phone. He did not address the fact that Complainant could not turn over her keys because she understandably did not have them with her because she was travelling. He did not address the fact that none of the four other witnesses testified to the type of conduct testified to by Mr. Oathout. The decision thus appears to be a result of the hearing officer's willingness to uncritically accept Mr. Oathout's testimony and the Complainant's inadequate representation.

¹¹¹ Mr. Oathout referenced Mr. Eveland's unhappiness with having to cover mark-off calls for the entire country when Complainant and Ms., Henderson were on vacations, because they had more seniority. Oathout. Depo. Tr. at 126; *see also* Mr. Eveland's testimony at Tr. at 251, 269-72. Mr. Eveland also made certain accusations concerning Ms. Henderson. *See* RX 20 and Tr. at 276-79.

advocacy skills. RX 1. It seems unlikely that someone with the demeanor alleged by Respondent would have been given a job that requires extensive communication and coordination with others. See RX 1; Tr. at 164; Complainant Depo. Tr. at 13. Further, with respect to the November 25th conference call, there appears to be some justification for the Complainant's irritation because she was on vacation, and her contention that she should not have to work on vacation days appears to have been correct as indicated by Mr. Logue's testimony that ultimately the Labor Coordinators did not have to take calls on their vacations. See Tr. at 300. Although Complainant's testimony was not without some inconsistencies, her recollection was more specific than Mr. Oathout's testimony, which was often vague and nonspecific. As noted, I have credited Complainant's explanation of the October 29, 2014 mark-off incident over Mr. Oathout's, and this also detracts from his overall credibility. Based on all the above, I therefore credit Complainant's testimony concerning the January 16th meeting and the January 15th meeting and do not credit Mr. Oathout's account of those meetings with respect to Complainant's conduct and statements.

I asked counsel for the parties if all the documents that reflect the personnel and disciplinary policies applicable to the Complainant had been made exhibits. The parties responded that there are safety rules and anti-discrimination and anti-harassment policies and perhaps others that are applicable to employees, but both counsel believed that the relevant written disciplinary policies were exhibits. Tr. at 211-12.

It appears that Respondent ignored its stated procedures in imposing discipline on the Complainant. As noted above, Rule 24(b) of the CBA provides that an employee is entitled to notice of intent to impose discipline, that a copy of the intent to discipline must be sent to the employee's duly accredited representative, and that such notice must be given to the employee within thirty days of the date Amtrak has actual knowledge of the incident. The notice must advise the employee of the specific charges and the reasons for the intended imposition of discipline. Rule 24(c) provides that within seven days of receipt of the written notice of intent to discipline, subject to one postponement, the employee and his representative will meet with management's representative to try to resolve the matter. At the meeting Amtrak is to provide a list of all known witnesses and known documents related to the alleged offense. See CX 10(CBA), Rule 24(b) pp. 28-30. None of these provisions were followed with respect to the discipline imposed on January 15 (counseling letters) or January 16 (removal from position). Neither Complainant nor her accredited representative was given the thirty-day notice of intent to discipline advising Complainant of the specific charges and the reasons for the intended discipline. A meeting between Complainant, with her representative, and management was not held, and Complainant was not advised on the identity of witnesses and documents. Complainant was therefore deprived of her contractual right to receive notice and knowledge of the specific charges and relevant witnesses and documents. If Respondent had followed the procedures set forth in Rule 24, it is likely that Complainant would have had her duly accredited representative with her for the January 15th meeting, and at the January 16th meeting if there had been one. Mr. Oathout testified that JX 2 (Oath. Depo. Exhibit 7) was related to the November 2014 conference call¹¹² and his request in December to talk to her.¹¹³ He said that he does not

¹¹² *I.e.*, the conference call on November 25, 2014. See Oathout Depo. Tr. at 107-08 and RX 31.

¹¹³ Apparently referring to the request Mr. Oathout testified he made to the Complainant on December 11, 2014 to come to his office to talk. See Oathout Depo. Tr. at 110-11 and RXs 21 and 32.

recall if he told her what the letter was for. He also stated that it was “a general discussion” to improve her performance. Oathout Depo. Tr. at 71-74. He testified that JX 3 (deposition Exhibit 8) was for the incident on October 29, 2014 with the incomplete mark-off. *Id.* at 74-75. Mr. Oathout said he was told by Labor Relations that specific incidents should not be documented in the letters because this was counseling and not formal discipline. *Id.* at 73-74. Complainant testified that during the January 15th meeting Mr. Oathout told her that JX 2 and JX 3 were for not attending to her duties in October and November.¹¹⁴ Tr. at 126-131. When the Notice of Investigation (JX 5) was issued on January 20, 2015, it did not include either of these incidents. Rather, it specified only the Complainant’s conduct at the meetings with Mr. Oathout of January 15 and January 16.¹¹⁵

I find that Complainant’s counseling session on January 15, 2015, removal from her position on January 16, 2015 (JX 4), removal from service on January 19, 2015 (JX 9), and discharge on May 29, 2015 (JX 7) constitute adverse actions under the Act. In *Vernace v. Port Authority Trans-Hudson Corporation*, ARB No. 12-003, ALJ No. 2010-FRS-018 (ARB Dec. 21 2012), the ARB stated that it agreed with the ALJ’s reliance on the analysis of a similar regulation in *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010). In *Williams*, the Board clarified 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.” *Id.*, PDF at 15. The Board stated that “some actions are per se adverse (e.g., termination of employment, suspensions, demotions) without any need to ask whether a reasonable employee would be dissuaded from engaging in protected whistleblowing.” *Id.*, footnote 75. The Board stated that given the Air-21 regulation,¹¹⁶ it believed “that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.” *Id.*, PDF at 11.¹¹⁷ The language of the corresponding FRSA regulation is at least as broad with regard to prohibited activity.¹¹⁸ Amtrak’s Counselling and Discipline Guidelines Summary¹¹⁹ lists five progressive steps in its policy, with verbal counseling being the first step and written counseling (“warning letter”) being the second step of the five-step progression, and dismissal as the fifth step.¹²⁰ I find that the counseling letters given to Complainant on January 15th qualify as adverse action under *Williams* because verbal and written counseling is “routinely used” as the first steps in Amtrak’s progressive discipline policy. *Williams*, PDF at 11.

¹¹⁴ The Complainant testified that Mr. Oathout told her that JX 2 was for not attending to her duties in October 2014 and JX 3 was for the November incident (Tr. at 126-31), but it appears from the content of the letters that the reverse is correct, as Mr. Oathout testified (Oathout Depo. Tr. at 71-75. As previously noted, Oathout Deposition Exhibits 7 and 8 are JX 2 and JX 3, respectively, while RX 7 and RX 8 are JX 3 and JX 2, respectively.

¹¹⁵ I note that Mr. Oathout also testified at the Investigation hearing about incidents pre-dating January 15th. See IH Tr. at 65-66.

¹¹⁶ Citing 29 C.F.R. § 1979.102(b)

¹¹⁷ See also *Strohl v. YRC, Inc.* ARB No. 10-116, ALJ No. 2010-STA-035 (ARB Aug. 12, 2011).

¹¹⁸ 29 C.F.R. § 1982.102(b).

¹¹⁹ JX 8

¹²⁰ The last paragraph of the JX 8 states: “These are guidelines only. For more serious offenses, the progression may start at Discipline steps 4 or 5, depending on circumstances. Further, the length of time between offenses, nature of offense, as well as an employee’s overall service record, may impact what discipline is appropriate.”

Respondent not only ignored the CBA provisions discussed above, but it also ignored its own stated policy. With regard to Rule 24 of the CBA, even if verbal and written counseling is not considered discipline, her removal from her position on January 16, 2015 and being held out of service on January 19, 2015 clearly are, and the Complainant was not given the required thirty-day notice.¹²¹ With regard to the Amtrak progressive discipline policy, Complainant was given both steps one and two of the progression at the January 15th meeting. Mr. Logue testified that he did not review the hearing decision letter (JX 6) “100 percent” but “looked it over.”¹²² Tr. at 308. He said he was forwarded two letters from Labor Relations to choose from, one for a thirty-day suspension and one for termination. He testified that he selected termination because: “After reviewing the material that was presented to me, looking at the charging officer and what he was suggesting, as well as prior behavior, that being in the October/November/December time frame of, I believe, 2014, bringing all that together, that’s why I selected termination.” Tr. at 311. He said he “never even gave a thought” to Complainant’s report to the ESC in October 2013 regarding a breach of confidentiality. *Id.* With regard to the breach of confidentiality in October 2014, he stated that he had “some slight recollection of Michael Oathout conveying to me that there was an alleged breach.” He said the October 2014 incident played no role in his decision to terminate the Complainant. *Id.* at Tr. 311-12. He said he did not recall anything from Mr. Oathout about the Complainant before the November 25, 2014 email (RX 31.) He said his only knowledge about the incidents with Complainant was from Mr. Oathout’s emails and conversations with him. Tr. at 321-23; *see also* Tr. at 330; 335. He testified that he did not look at Complainant’s record prior to October 2014. He said that is not something he would normally do when imposing discipline. He said he did not believe Amtrak had a policy requiring that the employee’s entire record be considered. Tr. at 335-36. Notwithstanding the fact that he did not look at her prior record, the letter of termination states that his decision to terminate Complainant is based on the hearing officer’s decision “and in consideration of your prior record.” JX 7. He said that he had not been involved in the disciplinary process at Amtrak prior to this and was not “terribly familiar” with the way the agreements worked and what steps were to be taken. Tr. at 301. I note that Amtrak’s Counseling and Progressive Discipline Guidelines Summary, states that an employee’s overall service record “may impact what discipline is appropriate” (JX 8, last paragraph). This suggests that the employee’s service record should be considered in assessing discipline.

I find that Complainant’s protected activities were a contributing factor in the Respondent’s adverse actions as identified above. Based on the reaction at the October 3, 2013 ESC meeting to the report of the breach of confidentiality at the September 26, 2013 webinar and Mr. Oathout’s statements in the email of November 17, 2014¹²³, shortly after the October 29, 2014 breach, that Complainant was “adamant that I was trying to breach confidentiality and she would report me to the ESC” and that the October 29th breach “does not need to be a point of interest at the next ESC meeting,” I find that Mr. Oathout was concerned about Complainant’s

¹²¹ Complainant testified that she stopped being paid after she was removed from her position on January 16th. Tr. at 154-55, 161. She said when she was removed from her position she retained her seniority, which would allow her to return to the Beech Grove facility and use her seniority to obtain a position. When she was removed from service on January 19th, she lost all her seniority right. She testified that removals from service are typically done in conjunction with a notice of investigation. *See* Tr. at 139-40.

¹²² Later in his testimony he testified that he could not say with “100 percent confidence” that he read the investigative hearing transcript (Tr. at 329) and that he reviewed the decision letter (Tr. at 334).

¹²³ RX 4.

intent to report the October breach at the upcoming ESC meeting on January 21, 2015 and that his decision to issue counseling letters to Complainant was caused at least in part by the prospect of another report of a breach. I also note that Mr. Logue's comment to Complainant at the October 3, 2013 ESC meeting that she did not "follow the chain of command" evidences his unhappiness with her report.¹²⁴ Mr. Logue testified that he did not recall telling Complainant this but the evidence supports a finding that he did make the statement. Mr. Logue also testified that he recalled Mr. Oathout telling him about another breach that Mr. Logue said he needed to convey to Mr. Jagodzinski and Mr. Jones.¹²⁵ Tr. at 337, 342.

Mr. Logue had therefore been informed of both breaches of confidentiality. He testified that all of the information he relied upon in assessing discipline against the Complainant came from either conversations with Mr. Oathout or emails from Mr. Oathout. At the investigative hearing, Mr. Oathout testified that he made the decision, with Mr. Logue, to remove the Complainant from her position as Labor Coordinator. IH Tr. at 10. At his deposition he testified that Mr. Logue prepared JX 4 (Exhibit 9 to his deposition), the January 16, 2015 letter signed by Mr. Oathout removing the Complainant from her position as Labor Coordinator.¹²⁶ Mr. Oathout said he spoke to Mr. Logue concerning this matter on January 15th after the meeting with the Complainant and again on the morning of January 16th. Oathout Depo. Tr. at 84-87. The Notice for Holding Employee out of Service, dated January 19, 2015, was signed by Steve Metz as the Charging Officer. JX 9 (also Oathout Depo. Exhibit 10; *see* Oathout Depo. Tr. at 93-94.)¹²⁷ The letter discharging Complainant, JX 7, was signed by Mr. Logue. I note that Mr. Logue's testimony concerning the events related to Complainant's discharge was vague and nonspecific, and he appeared to be testify based largely on emails from Mr. Oathout that he was shown. I find that the information Mr. Logue relied upon in reaching his decision to discharge the Complainant was information he received from Mr. Oathout.

The Administrative Review Board ("ARB" or "Board") has ruled that a "chain of events" that is "inextricably intertwined" leading to adverse action may substantiate a finding of contributory factor.¹²⁸ Here, the protected activity lead directly to an adverse action. Both Mr. Oathout and Complainant testified that one of the counseling letters given to her on January 15th was for the October 29, 2014 mark-of incident, during which Complainant told Mr. Oathout she intended to report the breach of confidentiality at the next ESC meeting on January 21, 2015. The protected activity was thus inextricably intertwined with the adverse action. In *DeFrancesco v. Union Railroad Company*, ARB No. 13-057, ALJ No. 2009-FRS-009 (ARB Sept. 30, 2015) (*DeFrancesco II*), the Board noted that it held in *Henderson* that "because the

¹²⁴ Complainant did follow the chain of command, as she was required to report any breach of confidentiality to the ESC. *See* Confidentiality Certification, CX 8 (paragraph 3).

¹²⁵ Mr. Logue initially said this was in 2015 but after being shown RX 4 agreed it was in 2014. This was the October 29, 2014 breach.

¹²⁶ Mr. Logue denied that he wrote JX 4, but "suspected" that Mr. Oathout spoke to him about it. Tr. at 326-27.

¹²⁷ Mr. Oathout testified that Complainant was no longer reporting to him after she was removed from her position on January 16th.

¹²⁸ *See Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-102, PDF at 13-14 (ARB Oct. 26, 2012); *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, PDF at 6-7 (ARB May 31, 2013); *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 14-053, 14-056, ALJ No. 2009-FRS-15, PDF at 10 (ARB Apr. 5, 2016) (*Rudolph II*); *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, PDF at 3 (ARB Nov. 20, 2014).

adverse action and the protected activity were inextricably intertwined (due to the fact that the investigative resulting in disciplinary action arose directly from Henderson's injury report), his protected activity was a contributing factor in the adverse action against him, regardless of the employer's asserted rationale for its action." *DeFrancesco II*, PDF at 6-7. Complainant's protected activity related to the September 26, 2013 breach and the October 29, 2014 breach both contributed to Respondent's adverse actions because Mr. Oathout would not have been so concerned about Complainant's intended report to the ESC in January had the Complainant not already reported the prior breach. Mr. Oathout therefore had a strong incentive to prevent a second report of a breach to the ESC.

Respondent contends that Complainant must prove intentional retaliation prompted by her protected activity. Respondent's Initial Brief at 22 (citing *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014)). Complainant contends that where a complainant only needs to establish that the protected activity was a contributing factor in the adverse action, rather than a motivating factor, evidence of retaliatory motive need not be established. Complainant's Reply Brief at 4 (citing *Rudolph v. Amtrak*, ARB Case No. 11-037, ALJ No. 2009-FRS-015 (Mar. 29, 2013) (*Rudolph I*), decision after remand *Rudolph v. Amtrak*, ARB No. 14-053 and 14-056 (April 5, 2016) (*Rudolph II*)). In *Kuduk*, the Court stated that under the FRSA's contributing factor causation standard, the employee does not have to conclusively demonstrate the employer's retaliatory motive, but need only prove intentional retaliation prompted by the protected activity. *Kuduk*, 768 F.3d at 790. In *Rudolph I*, the Board stated that the Complainant could meet his burden of proving contributory causation through circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process. *Rudolph I* (ARB No. 11-037), PDF at 16; *see also Rudolph II* (ARB Nos. 14-053 and 14-056), PDF at footnote 29. Here, both Mr. Oathout and Mr. Logue were involved in the adverse personnel actions, and all of the information Mr. Logue used in making his decision to discharge the Complainant came from Mr. Oathout. Both Mr. Oathout and Mr. Logue were aware of the protected activity. Mr. Oathout was directly involved in the two breaches of confidentiality. Mr. Logue was present at the ESC meeting when Complainant reported the first breach on October 3, 2013 and told Complainant that he did not like the way she reported the breach; he was advised of the second breach by Mr. Oathout by Mr. Oathout's email on November 17, 2014 (RX 4), which states that Complainant would report the October 29, 2014 breach at the next ESC meeting. The adverse actions taken on January 15 and 16, 2015 were only about two and one-half months after Mr. Oathout was told by Complainant on October 29, 2014 that she intended to report the breach to the ESC at the next meeting on January 21, 2015, and only a month after Mr. Oathout's November 17, 2014 email to Mr. Logue concerning the October 29th incident (RX 4). Further, the adverse actions were only days before Complainant's intended report of the October 2014 breach to the ESC on January 21, 2015. I find that the counseling letters were issued, in significant part, because of Complainant's protected activities, both the October 3, 2013 report to the ESC and her stated intent to report the October 29, 2014 breach at the January 21, 2015 ESC meeting. Complainant was removed from her position as a Labor Coordinator on January 16, 2015 and was removed from service on January 19, 2015, two days before the ESC meeting at which she intended to report Mr. Oathout's October 29, 2014 breach of confidentiality.

I find that the record supports a finding that Complainant's protected activity, especially her intended upcoming report to the ESC of the October 29, 2014 breach of confidentiality,

contributed to Respondent's adverse actions on January 15, 2015 when he issued two counseling letters, one of which he stated related to the October 29th incident, and on January 16th, when he removed her from her position as Labor Coordinator. I also find that the protected activity contributed to the removal from service of Complainant on January 19, 2015 and the termination of her employment on May 29, 2015. Although I find that Mr. Logue was aware of the Complainant's protected activity when he and Mr. Oathout made the decision to remove the Complainant from her position and ultimately to discharge her, Mr. Logue relied on information from Mr. Oathout in deciding on her discipline. Mr. Oathout's hostility toward Complainant because of her October 3, 2013 report to the ESC and her stated intent to report the October 29th breach to the ESC at the January 21, 2015 meeting is evidenced by the content of his emails about her conduct to Mr. Logue. I have found that his most serious allegations are not supported by the evidence of record and that his testimony regarding such actions is not credible. I also note that Mr. Oathout forwarded an email to the charging officer, Mr. Metz, and asked him to print it out for use as evidence at the hearing. See Oathout Depo. Tr. at 12-27 and Defendant's Exhibit 5 to Oathout Deposition¹²⁹. This suggests a role in the investigative hearing beyond that of a witness and his interest in a decision unfavorable to Complainant. I find that Mr. Oathout had a retaliatory motive against Complainant because of her October 3, 2013 report of the breach of confidentiality to the ESC and her intended report to the ESC on January 21, 2015 of the October 29, 2014 breach of confidentiality. I find that because of Complainant's protected activity, Mr. Oathout's emails and verbal reports to Mr. Logue exaggerated Complainant's conduct. I find that the purpose of his reports was in part so that Complainant would be disciplined and either would be unable to make the intended report on January 21, 2015 or would be viewed as not credible if she did make the report. The discipline imposed by Respondent was thus retaliatory and motivated by animus. It was at least in part pretext and due to Complainant's protected activity.

In *Rudolph I*, discussing the "cat's paw" concept of liability recognized in *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011), the ARB noted that the Supreme Court rejected the argument that "an employer can shield itself from liability by isolating the personnel official responsible for the adverse employment action, who acted without discriminatory animus, from the animus of lower-level supervisors on whose advice and recommendations the company official relied in taking the personnel action." The Board further stated that where the complainant need show only that her protected activity is a contributing factor in the adverse action, proof of motivation is not required. *Rudolph I*, PDF at 17-18. The Board stated that in such cases the complainant would meet her burden of proof under the FRSA if the circumstantial evidence of record, including the knowledge of those advising the ultimate decision-makers "regardless of their motivation," establishes that any or all of the protected activity was a contributing factor in the adverse action. *Id.*, PDF at 18.¹³⁰ See also *Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-020, PDF at 7 (ARB May 31, 2013): "Neither motive nor animus is a requisite element of causation as long as protected activity

¹²⁹ Defendant's Exhibit 5 to Mr. Oathout's deposition is EX 5 and is a different document than Oathout Exhibit 5 to the deposition.

¹³⁰ The Board noted that the ALJ "failed to consider fully all of the evidence relevant to whether Rudolph's protected activity was a contributing factor in the adverse action taken, including especially the knowledge of other Amtrak personnel who advised the responsible decision-maker or who otherwise were involved in the decision-making process." *Id.*, PDF at 27-28.

contributed in any way – even as a necessary link in a chain of events leading to adverse activity.” In *Rudolph II*, the Board held that the ALJ committed reversible error by failing to consider the totality of the circumstantial evidence of the causal relationship of the complainant’s protected activities to the employer’s adverse actions, “including especially the question of ‘whether knowledge should be imputed to a decision-maker based on knowledge held by other relevant persons’ (citing *Bobreski v. J. Givoo Consultants, Inc.* (ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011 and *Klopfenstein v. PCC Flow Techs*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op at 18 (ARB May 31, 2006). Even if Mr. Logue did not intentionally retaliate against Complainant because of her protected activity when he decided to discharge her, in doing so he relied on information from Mr. Oathout. I find that the reasons for the adverse actions taken by the Respondent were at least in part pretext and intended by Mr. Oathout to prevent, or at least to mitigate the impact of, her report to the ESC on January 21, 2015.

Has Respondent proven by clear and convincing evidence that it would have taken the same adverse actions in the absence of Complainant’s protected activity?

Because the Complainant has proven that the protected activity was a contributing factor in Respondent’s adverse actions, I must determine whether Respondent has proven, by clear and convincing evidence, that it would have taken the same adverse actions in the absence of the protected activity. 29 C.F.R. § 1982.109(b); see *Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB Case No. 16-035, ALJ No. 2014-FRS-154, PDF at 56-57 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017); *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 13-057, PDF at 7-14 (ARB Sep. 30, 2015) (*DeFrancesco II*); *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-037, PDF at 14-17 (ARB Jan. 12, 2017). The ARB has stated that the “clear and convincing” standard of proof is the intermediate standard between “a preponderance” and “beyond a reasonable doubt,” and requires the ALJ to believe it is “highly probable” that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer*. ARB No. 2014-FRS-154, PDF at 56-57; see also *DeFrancesco II*, ARB No. 13-057, PDF at 7-8.

It appears that the decision to remove the Complainant from her position as a Labor Coordinator¹³¹ was a joint decision made by Mr. Oathout and his supervisor, Mr. Logue. Her removal from service was apparently the result of the issuance of the Notice of Investigation.¹³² Mr. Logue made the decision to discharge the Complainant and signed the letter of discharge.¹³³ In deciding to remove the Complainant from her position and in determining that discharge was the appropriate remedy, he relied entirely, according to his testimony, on conversations with Mr. Oathout and emails from him. Part of what he relied upon was Mr. Oathout’s reports of the November 25, 2014 conference call and the October 29, 2014 mark-off incident in which Mr. Oathout viewed confidential mark-off information. Mr. Oathout also testified about other earlier

¹³¹ JX 4.

¹³² JX 5. The Complainant testified that removals from service are typically done in conjunction with a Notice of Investigation. Tr. at 140. This is consistent with the fact that the removal from service (“Notice for Holding Employee Out of Service”) (JX 9) was issued by Steve Metz, the Charging Officer.

¹³³ JX 7.

incidents involving the Complainant, which have been previously discussed.¹³⁴ None of these incidents were the subject of counseling letters or any other form of discipline. With respect to the November 25, 2014 conference call and the October 29, 2014 mark-off incident, I have found the Complainant's version of events to be more credible, and I therefore find that these incidents did not justify the issuance of the two counseling letters. I have also found the Complainant's accounts of both the January 15 and January 16, 2015 meetings with Mr. Oathout to be more credible. Thus, based on the record before me, there appears to have been no justification for the discipline imposed by Mr. Logue, that of termination.¹³⁵

The relevant case law sets forth several factors to be considered in determine whether an employer has met its burden of proof to show that it would have taken the same adverse action in the absence of the protected activity. One is the independent significance of the non-protected activity relied on by Respondent to justify the discipline.¹³⁶ Complainant was issued two counseling letters on January 15th. The counseling letters were the result of Mr. Oathout's initiative. *See* RX 32. Oathout Depo. Tr. at 111. Both counseling letters purport to document discussions that did not actually occur, but, according to Mr. Oathout, were based on his expectation of what the discussions would be. JX 2¹³⁷ relates to that portion of Amtrak's Standards of Excellence¹³⁸ dealing with teamwork and conduct (RX 15, p. 8) and includes an instruction not to record conversations, presumably referring to the November 25, 2014 conference call. As discussed above, I find the Complainant to be more credible with respect to testimony concerning the events at issue. I accept her testimony that during the call she said that she should be recording the call and not that she was recording the call. The portion of the letter regarding teamwork and conduct apparently also refers to the November 25th conference call and to the other incidents prior to that about which Mr. Oathout testified, although none of these are specifically mentioned in JX 2. *See* Oathout Depo. Tr. at 101-03; Complainant's testimony at Tr. 109-15. These incidents have been discussed above and I have found Complainant's testimony regarding them to be more credible. I do not believe that Complainant's conduct was as characterized by Mr. Oathout (and Mr. Eveland with respect to the November 25th conference call). The other counseling letter, JX 3,¹³⁹ relates to the October 29, 2014 mark-off incident, and refers to the part of the Standards of Excellence dealing with Attending to Duties (RX 15, p. 7). Again, I have found that Complainant's account of this incident to be more credible than Mr. Oathout's account, particularly in view of her explanation of the incident, which is consistent with how the ORB mark-off procedure works, and Respondent's failure to investigate this incident to determine who was in fact responsible for the mark-off failure. I therefore find little or no justification for the issuance of the counseling letters. Further, I have found that the counseling letters constitute discipline, and the letters were not issued within 30 days of Amtrak's knowledge of the incidents as required by the CBA. No prior counseling letters about these incidents had been given to the Complainant.

¹³⁴ *See* footnote 95.

¹³⁵ I recognize that the relevant inquiry is not whether the discipline imposed was unfair or unjustified, but whether, because of the Complainant's protected activity, Respondent relied on the alleged violations in bad faith, as a pretext for the adverse action.

¹³⁶ *See Pattenaude*, ARB No.15-007, PDF at 16.

¹³⁷ Also RX 8 and Oathout Depo. Exhibit 7.

¹³⁸ RX 15.

¹³⁹ Also RX 7 and Oathout Depo. Exhibit 8.

Complainant's removal from her position by Mr. Oathout on January 16, 2015, according to Mr. Oathout, was the result of her conduct during the January 15th meeting. JX 4; Oathout Depo. Tr. at 84-90. See Specification I of the Notice of Investigation. Her January 19, 2015 Notice for Holding Employee out of Service¹⁴⁰ does not indicate a reason for the removal other than stating "Contained in the Notice of Investigation." With respect to Specification I, dealing with the January 15th meeting, Respondent did not give Complainant thirty days written notice of the intent to discipline her as required by Rule 24(b) of the CBA. She was not advised in advance of the specific charges and the reasons for the intended discipline as required by Rule 24. She was not afforded the benefit of the provision in Rule 24(c) that requires Amtrak to meet with Complainant and her representative within seven days of the written notice of intent to discipline for the purpose of resolving the matter. With respect to Specification II, relating to the January 16th meeting, again Complainant did not receive a notice of intent to discipline required by Rule 24(b), or the meeting between Complainant and management as required by Rule 24(c). Instead, she received the notice of removal from service dated January 19th and the Notice of Investigation dated January 20th.

I have accepted Complainant's account of the January 15th meeting, and of the January 16th meeting as supported by the witnesses other than Mr. Oathout at the investigative hearing. I therefore also find that the adverse action on January 16th, removal from her position as Labor Coordinator, was not justified. I do not doubt that at the January 15th meeting Complainant contended that the counseling letters were improper because of the noncompliance with Rule 24 of the CBA and with the Amtrak Counseling and Discipline Guidelines Summary¹⁴¹ and denied the merits of the substance of the charges, perhaps in a raised voice, but I have found her positions to be justified, and some leeway should be afforded to an employee who has been unjustly accused of wrongdoing.

As noted above, the removal from service on January 19, 2015 (JX 9) appears to be a consequence of the issuance of the Notice of Investigation (JX 5). As discussed, Respondent issued the Notice without meeting with Complainant and her representative as required by Rule 24 of the CBA. There was no testimony as to who initiated Notice of Investigation, but it was clearly a consequence of Mr. Oathout's reports to his supervisor, Mr. Logue, regarding Complainant's conduct during the January 15 and January 16 meetings. Mr. Logue's decision to terminate Complainant's employment with Amtrak was based on information from Mr. Oathout that I have found to be unreliable. Thus, the non-protected activity relied upon to justify the removal from service and the discharge did not justify such actions.

In *DeFrancesco II*, the Board stated that analysis of the employer's asserted lawful reasons for its action should be carefully assessed. *Id.*, ARB No. 13-057, PDF at 10. It stated that the assessment requires not only a determination of whether there exists a rational basis for the employer's decision but also a determination of whether such basis is "so powerful and clear that [the personnel action] would have occurred apart from the protected activity."¹⁴² The Board stated that the question of whether the same discipline would have occurred in the absence of the

¹⁴⁰ JX 9.

¹⁴¹ JX 8.

¹⁴² Citing *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-102, PDF at 14-15 (ARB Oct. 26, 2012).

protected activity requires examination of at least the following five factors, paraphrased as applicable to this case:

- 1) Whether Amtrak monitors for compliance with the work rules Complainant is charged with violating in the absence of protected activity?
- 2) Whether Amtrak consistently imposes equivalent discipline against employees who violate the work rules Complainant was charged with violating but who did not engage in protected activity.
- 3) Are the work rules Complainant was charged with violating routinely applied?
- 4) Are the work rules Complainant was charged with violating vague and thus subject to manipulation and use as pretext for unlawful discrimination?
- 5) Does other evidence suggest that in conducting its investigation Amtrak was genuinely concerned about rooting out problems related to conduct for which Complainant was charged, or does it suggest that the investigation was a pretext designed to unearth some plausible basis on which to punish Complainant for the protected activity?

DeFrancesco II dealt with violation of safety rules, while the issue here is whether the Complainant violated Amtrak's Standards of Excellence. As discussed above, Charge One of the Notice of Investigation alleges a violation of the "Professional and Personal Conduct" "Teamwork" part of the Standards, specifically "the part that reads: 'Being polite to each other is one of the basics of teamwork, so it is important that we all are considerate and respectful of each other. Part of teamwork is properly performing your duties. Another part is following instructions. Therefore, you must comply with all company and departmental policies, procedures and rules as well as all instructions, directions and orders from supervisor and managers.'" RX 15, p. 8. Charge Two of the Notice of Investigation alleges violation of the "Professional and Personal Conduct" "Conduct" part of the Standards of Excellence, specifically "the part that reads: 'Therefore, boisterous conduct such as ...rudeness...intimidation...is unacceptable. It is important to remain calm and be courteous to all customers...'" RX 15, p. 8. Charge One apparently relates to Specification I and Charge Two to Specification 2, although that is not clear from the description of each. Specification I states that Complainant called Mr. Oathout a liar and made threats as stated in the specification.¹⁴³ Charge One reads in part: "Part of teamwork is properly performing your duties," an allegation that appears to relate to Mr. Oathout's contention that Complainant did not properly perform the mark-off related to the October 29, 2014 incident. Yet, nothing in either of the Specifications says anything about Complainant not properly performing her duties.

¹⁴³ Specification I states that the Complainant said "you are digging your own grave;" "I will just file an unjust treatment case against you;" and "you are so stupid." These alleged statements have been addressed earlier. See footnotes 104 and 105. For the reasons discussed earlier in this Decision, I have found the Complainant's testimony concerning the January 15th meeting to be more credible than Mr. Oathout's testimony about the meeting. Specification I also says that the Complainant called Mr. Oathout a liar. See IH Tr. at 8 and RX 9. Mr. Oathout did not testify to this in his deposition. The Complainant denied this. Tr. at 193-94.

With regard to the fourth factor cited in *DeFrancesco II*, whether the relevant rule is vague and subject to manipulation, that is the case here. The language of the parts of the RX 15 cited in the Charges in the Notice of Investigation are non-specific and subject to interpretation, with the exception of the directive to follow company and departmental policies and instructions for supervisor, which may relate to Mr. Oathout's contention that the Complainant did not turn over her phone, discussed earlier. With regard to factors one, two and three, Amtrak offered no documentary or testimonial evidence of any employee being disciplined because of the type of conduct alleged in the Notice of Investigation. The only evidence of any other discipline imposed was with respect to Martha Henderson, one of the other Labor Coordinators.¹⁴⁴ Mr. Logue testified that prior to this situation, he had not been involved in imposing discipline at Amtrak and was not "terribly familiar" with applicable procedures. Tr. at 301. He stated he did not consider Complainant's past record, other than the information he was given by Mr. Oathout relating to the period since October 2014. Tr. at 311, 321-23, 330, 335-36. With regard to the fifth factor cited in *DeFrancesco II*, Respondent's investigation into this matter does not show a genuine concern about rooting out problems related to the conduct for which Complainant was disciplined. Mr. Oathout alleged that the Complainant had engaged in similar conduct in the past, citing incidents back to 2013. Oathout Depo. Tr. at 101-03. However, no counseling letters or other discipline was imposed for these incidents. The fact that Respondent took no action with respect to these prior incidents, assuming Mr. Oathout's allegations were true, but did issue counseling letters and further discipline shortly after Complainant's protected activity on October 29, 2014, along with Respondent's failure to investigate the October 29, 2014 incident and its failure to adhere to its own policies and contractual obligations under the CBA and the Amtrak Counseling and Discipline Guidelines Summary in pursuing discipline against Complainant, suggests a greater interest in punishing Complainant than a concern about inappropriate behavior.

As noted above, the only other instance of counseling of record is that of Martha Henderson. Mr. Oathout testified that she was not removed from her position because she improved. Presumably, the opportunity to improve is one reason for Amtrak's progressive discipline policy, which lists four steps prior to the fifth step of dismissal.¹⁴⁵ Ms. Henderson, a

¹⁴⁴ For the apparent purpose of showing that another employee was given two counseling letters at the same time, Mr. Oathout was shown two counseling letters to Ms. Henderson dated January 9, 2015 (RX 30 and RX 38). Oathout Depo. Tr. at 119-21. With respect to RX 30, it appears that Ms. Henderson had received prior verbal counseling in November, as referenced in the letter and as JX 8, Amtrak's Counseling and Discipline Guidelines Summary, seems to generally require. RX 30 appears to be for failure to obtain approval in advance before taking days off and cites the "Teamwork" part of the Standards of Excellence (RX 15, p. 8), the same part cited in Charge One of the Notice of Investigation to Complainant. RX 38 cites the section pertaining to "Attending to Duties" (RX 15, p.7) and appears to relate to travel authorizations and expense reports. Mr. Oathout testified that Ms. Henderson was "very professional" and that "things improved" after the counseling session. She was not removed from her position and apparently was not given any further discipline. Oathout Depo. Tr. at 122. I note that Complainant was removed from her position on January 16, 2015, the day after the January 15th meeting that was the reason given for the removal, and was not afforded an opportunity to "improve." No other information about the subject of these counseling letters was given, and it is difficult to determine from the letters how serious the offenses were, although failing to obtain approval for days off would appear to be an issue that might warrant significant discipline. As noted, RX 30 indicates that this issue had been previously discussed with Ms. Henderson in November. Neither of the counseling letters given to Complainant on January 15th references any counseling prior to January 15th.

¹⁴⁵ JX 8.

Labor Coordinator who did not engage in protected activity, was given the opportunity to improve, but Complainant was removed from her position and then from service within days of the January 15th and 16th meetings. One of the instances of protected activity was Complainant's statement to Mr. Oathout that she would report the October 29, 2014 breach of confidentiality at the next ESC meeting, to be held on January 21, 2015. The October 29, 2014 mark-off incident was one of the matters referred to in one of the counseling letters,¹⁴⁶ and in Charge One of the Notice of Investigation.¹⁴⁷ The Complainant was removed from service two days before she would have made that report to the ESC.

In *DeFrancesco II*, the Board stated that to meet the statutory affirmative defense in the case before it, it was not enough for the employer to show that the complainant had violated safety rules, that the employer had a legitimate motive for imposing the disciplinary action, or that it imposes appropriate disciplining against other employees for safety violations and unsafe behavior regardless of whether they reported an injury. The Board stated that instead, the employer failed to show that the discipline given was "applied consistently, within clearly-established company policy and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations" and did not engage in protected activity. *DeFrancesco II*, ARB No. 13-057, PDF at 13-14; *see also Pattenaude*, ARB No. 15-007, PDF at 17. As in *DeFrancesco*, Respondent here has not made that showing. I find that Respondent's adverse actions were not taken in good faith; rather, Respondent relied on the alleged violations in taking the adverse actions based in significant part on Complainant's protected activity. I find that Respondent has not met its burden to show it would have taken the same adverse actions against Complainant in the absence of the protected activity.

Remedies

The FRSA proves that "[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole." 49 U.S.C. § 20109(e)(1). This section states that relief shall include:

- (A) Reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) Any back pay, with interest; and
- (C) Compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

Section 20109(e)(1) also provides that relief may include punitive damages in an amount not to exceed \$250,000. *See also* 29 C.F.R. § 1982.109(d)(1).

Here, Complainant requests reinstatement to her Labor Coordinator position, or a substantially similar position with the same pay; back-pay from January 16, 2015 to the date of

¹⁴⁶ JX 3.

¹⁴⁷ JX 5.

reinstatement, calculated at the amount of \$1305.00 per week, plus interest; an order that Amtrak remove all references to the unlawful discipline from Complainant's personnel file and credit her pension for the time she was discharged; compensatory damages in the amount of \$50,000 based on Complainant's testimony regarding emotional distress due to Amtrak's actions; attorney fees and costs; and punitive damages in the amount of \$250,000.

In *Rudolph II*, the Board noted that, as with other whistleblower statutes, the FRSA's remedial purpose is to make a prevailing complainant whole. The goal of the Act is to compensate the whistleblower for losses caused by the employer's unlawful conduct and restore her to the terms, conditions and privileges of her former position that existed prior to the employer's adverse action. *Rudolph II*, ARB No. 14-253/14-056, PDF at 12.

Reinstatement

As noted above, the FRSA states that remedies "shall include" reinstatement with the same seniority status the employee would have had but for the discrimination. In its post-hearing brief, Amtrak states that the ORB program "has gone through a transition, with all positions as they were constituted in January 2015 being abolished in June 2017." Respondent therefore states that reinstatement is not possible. Respondent has not submitted any other evidence of this and gives no details about the change. Respondent does not state whether there are now positions that are comparable to the Labor Coordinator position held by Complainant prior to her removal from that position. I note that the relevant regulations appear to still require railroads to implement policies to encourage and facilitate the identification of employees who abuse alcohol and drugs and to foster employee participation in such programs. See 49 C.F.R. Part 219. Where reinstatement to the same position is not possible, reinstatement to a substantially similar position is appropriate. See *Hobby v. Georgia Power Company*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30 (ARB Feb. 9, 2001); *Talukdar and Virdee v. U. S. Department of Veterans Affairs*, ARB No. 04-100, ALJ No. 02-LCA-25 (ARB Jan. 31, 2007). Respondent is therefore to reinstate Complainant, with no loss of seniority, to her position as Labor Coordinator or, if such position no longer exists, to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits, within the Operation RedBlock Program (or any replacement program).

Back pay

Complainant testified that the last day for which she was paid by Amtrak was January 16, 2015. She testified that she was paid at the rate of \$26.10 per hour and was guaranteed pay for 50 hours a week. She had twenty vacation days, ten sick days and six personal days per year. She had company-provided insurance, to which she contributed \$186 per month, and a railroad retirement plan to which both she and Amtrak contributed. She has not been credited with time toward her pension since her discharge. Tr. at 155-56. This testimony was unrefuted. In her post-hearing brief, Complainant requested back pay at the rate of \$1305.00 per week, which is consistent with a fifty-hour week at \$26.10 per hour. Complainant's Initial Brief at 35.

Respondent does not take issue with Complainant's wage calculation, but argues that she has made no effort to mitigate her damages. Respondent argues that based on her experience,

Complainant should have been able to find a position with comparable pay within one to three months of January 16, 2015 and that any back wages should be limited to that period. Although an employee has a duty to mitigate damages by seeking suitable employment, the employer has the burden of showing that the award of back pay should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. *Rudolph II*, ARB No. 14-053, -056, PDF at 13.¹⁴⁸ The employer has the burden to prove that the employee failed to mitigate damages. The employer can satisfy its burden by showing the availability of substantially equivalent positions and that the complainant failed to use reasonable diligence in seeking those positions. *See Hobby*, ARB Nos. 98-166, -169, slip op. at 19; *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, PDF at 7 (ARB Mar. 31, 2005). *See also Johnson v. Roadway Express*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000); *Abdur-Rahman v. DeKalb Cty*, ARB No. 12-064, -067, ALJ No. (ARB Oct. 9, 2014). In *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ No. 2012-STA-011 (ARB April 30, 2014), respondents argued that the complainant failed to produce a single application proving that he sought other employment. The Board held that the ALJ correctly concluded that respondents failed to show that the complainant failed to mitigate where respondents offered no evidence establishing that substantially equivalent jobs were available to the complainant. *Id.*, PDF at 7. Here, Complainant testified that since her termination she only worked one day, as an Uber driver, and has not looked for work since. Tr. at 204; Complainant Depo. Tr. at 99. Although Complainant did not seek other employment, Respondent offered no evidence of suitable alternate employment, and therefore did not meet its burden of proof. I find that Complainant is entitled to full recovery for lost wages without deduction for failure to mitigate her damages.

Compensatory damages

Complainant seeks compensatory damages in the amount of \$50,000 for emotional distress. Complainant's Initial Brief at 35. Respondent argues that Complainant is not entitled to any recovery for emotional distress because she offered no medical records or medical testimony in support of this claim. Respondent also contends that the fact that she filed her *pro se* Complaint in this matter seven days after she was removed from her Labor Coordinator position shows that she was no longer experiencing emotional distress. Respondent's Initial Brief at 27. Damages for emotional distress are recoverable under the FRSA. *E.g., Rudolph II*, ARB Nos. 10-053, -056, PDF at 14 (April 5, 2016); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, PDF at 7-8 (ARB Aug. 31, 2011). Damages for emotional distress may be based solely on a complainant's testimony where it is found to be credible. *Ferguson*, PDF at 7-8; *Timex Logistics*, ARB No. 13-016, PDF at 7-8. An award of compensatory damages must be supported by substantial evidence. *Rudolph II*, PDF at 14. Complainant testified that she was distraught, nervous, couldn't sleep and was unable to concentrate after she was removed from her position and from service. She testified that she saw her primary care physician, who told her not to go back to work on January 19th. She was put on medical leave. She said her primary care physician diagnosed her with severe depression, anxiety and sleeplessness. Complainant testified that she saw a psychologist and a psychiatrist and was in counseling after her removal for about two months, and was on medication during that period. Her medical leave apparently lasted about four months. Tr. at 156-60; Complainant Depo. Tr. at 100-07. No

¹⁴⁸ Citing *Abdur-Rahman v. DeKalb Cty*, ARB No. 12-064, -067, ALJ No. 2006-WPC-002 (ARB Oct. 9, 2014); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No.1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000).

counseling records to show the frequency of her therapy or the severity of her condition were offered in evidence, so the only support for Complainant's claim for emotional distress damages is her testimony. I find that Complainant's testimony regarding how removal from her position affected her to be credible. Courts consider damage awards for emotional distress in other whistleblower cases in arriving at an appropriate amount.¹⁴⁹ I have therefore considered the amounts of other awards for emotional distress in whistleblower cases in determining the appropriate amount to award here. Complainant credibly testified to emotional distress as a result of her removal from her position and from service, and was in counseling and on medication for a period of time. I find an award of \$7,500 to be appropriate in this case.

Abatement

Complainant is entitled to expungement from her personnel records of the discipline received in this matter and of any other negative references relating to this matter.

Punitive damages

Complainant seeks an award of punitive damages in the maximum amount allowable, \$250,000. Complainant's Initial brief at 36. Respondent contends that no award of punitive damages is warranted because the record does not show that Amtrak acted with reckless or callous disregard for Complainant's statutory rights as a whistleblower. Respondent's Initial Brief at 27. The ARB has held that punitive damages are warranted where "there has been reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Youngerman v. United Parcel Service, Inc.*, ARB No. 11-047, 2010-STA-047 (ARB Feb. 27, 2013).¹⁵⁰ *Youngerman* noted that the Supreme Court has stated that while actual malice need not be shown, 'its intent standard, at a minimum, required recklessness in its subjective form.'¹⁵¹ As discussed above, I have found that Amtrak's discipline was at least in part pretext and due to Complainant's protected activity. In pursuing that discipline, Amtrak disregarded the Complainant's contractual rights under the CBA and ignored its own policies. Respondent disciplined Complainant on January 15, 2015 with formal counseling without having provided her with notice of the reason for the discipline, as required by the CBA. It again disciplined Complainant on January 16, 2015 by removing her from her position without the required notice of intent to discipline. It disciplined Complainant again on January 19, 2015 without the required notice of intent to discipline by removing her from service. It relied on allegations of alleged past incidents for which no formal counseling was given. It failed to adhere to its own counseling and discipline guidelines. It imposed its severest discipline, termination, without a documented record of past misconduct or a review of Complainant's past service record. Mr. Logue admitted that when he imposed the discipline he was not "terribly familiar" with Amtrak's discipline policy. Respondent conducted no investigation of the October 29, 2014 incident, which was one of the incidents for which it imposed discipline, to determine the accuracy of Complainant's explanation for the mark-off failure. Notably, it offered no evidence of similar discipline for similar conduct. Even if Respondent did not intend to violate federal

¹⁴⁹ See, e.g., *Ass't Sec'y & Bingham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-37 (Sept. 5, 1996).

¹⁵⁰ Citing *Ferguson*, ARB No. 10-075, PDF at 8, citing *Smith v. Wade*, 461 U.S. 30, 51 (1983).

¹⁵¹ Citing *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 527, citing *Smith*, 461 U.S. at 45-48.

whistleblower laws, it exhibited recklessness or callous indifference to Complainant's rights under the Act's whistleblower protections. Moreover, I find it difficult to understand how the individuals (Mr. Oathout and Mr. Logue) with the authority to discipline employees, including, with respect to Mr. Logue, the power to discharge employees, could be ignorant of the applicable contractual obligations and policies. At the least, Respondent has evinced reckless or callous disregard of Complainant's rights. I find an award of punitive damages in the amount of \$50,000 to be appropriate in this case.

Attorney Fees and Costs

The Act provides for recovery by a successful claimant of her litigation costs, including reasonable attorney fees, and therefore Complainant is entitled to such fees and costs in this matter.

Conclusion

Complainant has shown by a preponderance of the evidence that she engaged in protected activity, that Respondent had knowledge of the protected activity, that she suffered adverse actions, and that her protected activity contributed to the adverse actions. Respondent failed to show by clear and convincing evidence that it would have taken the same adverse actions absent the protected activity. Complainant is thus entitled to the remedies under the Act described above.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondent, National Railroad Passenger Corporation, shall reinstate Complainant, Marlynn Turner-Byrdsong, with the same seniority status she would have had but for Respondent's violation of the FRSA, to the position of Labor Coordinator. If such position no longer exists, Complainant is to be reinstated to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions and benefits, at the pay, within the Operation RedBlock program or any replacement program. Respondent is also to credit Complainant's pension for the period of her discharge.
2. Respondent shall pay Complainant back pay for the period from January 16, 2015 to the date of reinstatement, in the amount of \$1,305.00 per week, plus interest from the date such wages were unpaid until the date of payment, calculated at the interest rate for underpayment of taxes under 26 U.S.C. § 6621(a)(2), compounded daily.
3. Respondent shall pay to Complainant the sum of \$7,500.00 in compensatory damages for emotional distress.
4. Respondent shall expunge from Complainant's personnel file, and from any other records, the discipline received in this matter and any other negative

reference with respect to the charges against Complainant in the counseling letters dated September 15, 2015 (JX 2 and JX 3), in the Notice of Investigation dated January 20, 2015 (JX 5), and in the Decision dated May 26, 2015 (JX 6).

5. Respondent shall pay Complainant the sum of \$50,000.00 in punitive damages.
6. Respondent shall pay Complainant's litigation costs and reasonable attorney fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days of the date of this Decision and Order. A service sheet showing that proper service has been made on Respondent and Complainant must accompany the fee application. Respondent has twenty-one (21) days from the date of receipt of the fee application to file any objections.

SO ORDERED.

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE

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

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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

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

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

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

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