



Issue Date: 12 December 2017

CASE NO. 2016-FRS-77

IN THE MATTER OF

NATHAN WALKER
Complainant

v.

UNION PACIFIC RAILROAD COMPANY
Respondent

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IN THE MATTER OF

NATHAN WALKER,
Complainant,

vs.

UNION PACIFIC RAILROAD CO.,
Respondent.

DECISION and ORDER

Procedural History

This case comes under the Federal Rail Safety Act (FRSA)¹, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

On 6 Apr 16, Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA). In the complaint, Complainant alleged that Respondent retaliated against him by firing him for reporting safety issues. OSHA issued its decision on 11 Aug 16, dismissing the complaint. After Complainant filed a timely objection, the case was referred to the Office of Administrative Law Judges and assigned to me. On 20 Mar 17, I held a

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based on the entire record, which consists of the following:³

Witness Testimony of:

Complainant
Quentin Hudspeth
LaTanya Walker
Scott Newton

Exhibits:⁴

Joint Exhibits (JX) 1-11
Complainant's Exhibits (CX) 1-9
Respondent's Exhibits (RX) 2-11

STIPULATIONS⁵

1. Respondent is a railroad carrier within the meaning of the Act.
2. Complainant was an employee of Respondent within the meaning of the Act and, while so employed, made to Respondent various safety complaints protected by the Act of which Respondent was aware.
3. In October 2015, following an investigation hearing mandated by the applicable collective bargaining agreement, Respondent sustained multiple disciplinary charges against Complainant in connection with his use of a cell phone while on duty, resulting in his dismissal and qualifying as an adverse personnel action under the Act.
4. Respondent took no action as defined in its disciplinary policy against Gary Downey for using a cell phone on 17 Sep 15.

FACTUAL BACKGROUND

As an employee and union representative, Complainant made multiple reports about various unsafe conditions. On 17 Sep 15, as part of Respondent's standard compliance testing program, Complainant was tested on switch safety. Although he passed that test, when the testing official entered the locomotive cabin, he noted Complainant's cell phone was not properly stowed as required. The testing official imposed a low-level corrective counseling. However, a supervisor subsequently directed a review of the in-cabin video recording. Based on

³ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ Counsel were cautioned that since a number of exhibits appeared to be *en globo* collections of records, Counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. The same rule applies to the transcript deposition of any witness who also testified in person. Tr. 10.

⁵ JX-10; Tr. 11.

that recording, he determined Complainant had used the cell phone while the train was in motion in violation of safety rules. He directed that Complainant be charged with a terminable offense. Following a disciplinary hearing, Complainant was fired.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

The dispute in this case is straightforward. Complainant concedes that he may have committed a minor safety violation in failing to stow the phone. However, he contends that the decision to review the video, incorrect conclusion that he was wrongfully using his cell phone on 17 Sep 15, and ultimate decision to terminate were all related to his protected activity. Respondent counters that no one involved in any of those decisions were aware of his protected activity and, even if they had been, they would have made the same decisions in the absence of that protected activity.

LAW

Prima Facie Case

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition.⁶ It incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).⁷ To prevail under the Act, a complainant must prove: (1) that he or she engaged in protected activity; (2) that the employee suffered an adverse action; and (3) that the protected activity was a contributing factor in the unfavorable employment action.⁸ To avoid liability the employer must prove by clear and convincing evidence its affirmative defense that it would have taken the same action absent the employee's protected activity.⁹ An aggrieved employee must file his initial complaint with the Department of Labor (OSHA) for investigation and initial decision.¹⁰ Upon objection to that decision by either party, the case will be considered *de novo* by the Office of Administrative Law Judges (OALJ).¹¹

Contributing Factor

In establishing that a protected activity was a contributing factor to a subsequent adverse action, it is not necessary to show that the employer had animus against the complainant, held any retaliatory motive, was motivated by the activity, or even gave any significance to the activity. Indeed, an employer may be held liable for its actions, even if it sought to protect the

⁶ 49 U.S.C. § 20109(b)(1)(A) (2011).

⁷ 49 U.S.C. § 42121 (2011).

⁸ The Board has recognized that at times the *prima facie* case has been interpreted to include **four** elements: (1) the complainant engaged in protected activity; (2) **the employer knew that the complainant engaged in the protected activity**; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Powers v. Union Pacific Railroad Co.*, 2010-FRS-30, (ARB Apr. 21, 2015) (*en banc*) (*reissue*). (emphasis added).

⁹ *D'Hooge v. BNSF Railways*, 2014-FRS-2 (ARB Apr. 25, 2017).

¹⁰ 49 U.S.C. § 20109(d)(1); 29 C.F.R. § 1982.103.

¹¹ 29 C.F.R. § 1986.106.

complainant.¹² The central question is whether the activity played any part in the adverse action. In certain circumstances, a chain of events may be all that is necessary to satisfy the contributing requirement.¹³

In determining if the protected activity was a contributing factor, the fact finder may consider any admissible and relevant evidence, including evidence that the adverse action was taken for other reasons.¹⁴ A factfinder may determine that evidence of temporal nexus is sufficient to carry the complainant's burden of proof.¹⁵ He may also consider evidence such as shifting or false explanations for the adverse action as evidence that the reasons offered by the employer were inconsistent and pretextual, making it more likely that the protected activity contributed to the adverse action.¹⁶

Respondent's Burden

Even if a complainant is able to establish a factual link of causation between the protected activity and adverse action, an employer may still avoid liability by presenting clear-and-convincing evidence that it would have taken the same adverse action even in the absence of the protected activity.¹⁷ That evidentiary standard is more rigorous than the preponderance-of-the-evidence standard and denotes a conclusive demonstration that the thing to be proved is highly probable or reasonably certain.¹⁸

EVIDENCE

Complainant testified at hearing in pertinent part that:¹⁹

As a union legislative representative he met with Respondent's managers on a regular basis to relay safety concerns. He did that job for about a year and met with managers more than 50 times. Except for a conference for an improper clocking out in November 2013, he had no discipline until 17 Sep 15.

CX-4 is the letter that he submitted to LaTanya Walker. After he submitted that letter, they had a face-to-face meeting, where she told him that she thought the letter was kind of abusive. She didn't like the way he used the exclamation points and underlining. She did not mention anything about submitting things in writing, but always said she had an open door policy. She told him to just come to her and tell her about problems. In his

¹² *Menendez v. Halliburton, Inc.*, 2007-SOX-005, slip op. at 13-14 (ARB Mar. 15, 2013) (reissued Mar. 20, 2013).

¹³ *Hutton v. Union Pac. R.R. Co.*, 2010-FRS-020, slip op. at 6-7 (ARB May 31, 2013). (Citing *Smith v. Duke Energy Carolinas, LLC*, 2009-ERA-007 (ARB June 20, 2012) (where complainant's disclosures were "inextricably intertwined" with the investigations that resulted in his discharge). See also *Rudolph v. National Railroad Passenger Corp* 2009-FRS-015 (ARB April 5, 2016).

¹⁴ *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 18 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), *erratum with caption correction* (Jan. 4, 2017).

¹⁵ *Vieques Air Link, Inc. v. United States DOL*, 437 F.3d 102, 109 (1st Cir. 2006) (per curiam).

¹⁶ *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012).

¹⁷ An apt parallel seems to be the inevitable discovery rule applied to evidence obtained in criminal cases. See, e.g., *Nix v. Williams*, 467 U.S. 431 (1984) (evidence otherwise inadmissible as "fruit of the poisonous tree" remains admissible if it would inevitably have been discovered by law enforcement through legal means).

¹⁸ *DeFrancesco*, ALJ No. 2009-FRS-009, slip op. at 8.

¹⁹ Tr. 242-308.

experience as a legislative representative, he found the verbal reporting was never effective and would always result in their word against his.

CX-5 has pictures of the yard. He took the pictures because they had so many reports from employees about the bad conditions. Employees were telling the management team about the bad conditions. That included Hudspeth, Walker, and Chris Papillion. The answer was always that the problem was above their pay grade. He gave the photos to Mario Ramos and LaTonya Walker. He doesn't recall too much happening at that time. Eventually, he called LaTonya and David Duplchene, the Louisiana State Director for the union, who came down to look at the conditions. He reported unsafe conditions about other yards also. He didn't get any pushback as much as nothing was ever getting done. Eventually, they did start fixing a little bit of it. He doesn't know if they finished the project. They never contacted him to say they were working on it.

He knows that he mentioned safety issues to Quentin Hudspeth on several occasions. That included issues about the yard. He never had sit down meetings with Hudspeth, but they did see each other in passing, which is when he would have made the comments about safety.

When he testified at his deposition, he said he told LaTonya Walker and the State Director about the problems. When asked if he raised the photos to any manager other than Walker, he answered Mario Ramos. When asked if there was anyone else who he could specifically identify who would have fielded his safety complaints other than Walker and Ramos, he said not that he knew of. However, there is a difference between mentioning something to someone in passing and specifically sending pictures and making complaints.

At the time of his field text exercise, his phone was out on his desk. Quentin Hudspeth was professional and respectful with him throughout the process and he never disputed what had happened. He understood that having the phone out was a technical violation and thought that counseling was an appropriate response, so he didn't push back on that and write down anything on the form to try to explain or justify what happened. Based on the conversation he had with Hudspeth in the cab of locomotive, he figured that a conference was all that would be done about the incident. He thinks he mentioned it one other time and Hudspeth said they were still going with a conference.

However, a termination under Rule 1.6 was a totally different thing. He had never heard of a conductor being charged with Rule 1.6 in connection with the Rule 2.21 violation. He also understands he was the first one to have inward facing cameras used against him in an investigation. He does not know who was responsible for the decision to escalate his discipline from Rule 2.21 to Rule 1.6. He knows he was allowed to work for almost 20 days after the actual incident. All of his interactions with Hudspeth have been professional and respectful. The same is true of his interactions with Lane Blasingame, Mario Ramos, and Chris Papillion. He does not know Jack Huddleston and has never met Kenneth Garcia.

He was on the phone while it was moving. The phone was powered on, but they were checking a rule, which was an authorized use. He could not at his disciplinary hearing or deposition and still cannot today recall what rule they were looking at. He thinks maybe they were looking up something about a problem with the DP unit. He never mentioned that possibility at his investigation. He did break a rule by not stowing his phone, but didn't break a rule by using the phone while the train was in motion.

He understood that the discipline had gone to a Rule 1.6 violation when he was removed from service. However he didn't find out when his hearing would be until that morning. However, he did know his union representatives had come in. JX-1 is the notice of investigation, but he didn't receive it until after the investigation had taken place. He put his faith in his union representatives. His investigation hearing lasted over six hours and he had a representative from the union. He was allowed to enter exhibits and testify. He did not suggest that the charges were in retaliation for his safety reports.

RX-8 is a form indicating that he had a formal conference on 1 Nov 13 for a violation of Rule 2.21. It was for an improper clocking out. It wasn't really a Rule 2.21 violation.

He was pulled from service on 8 Oct 15. As of that time, he no longer had any income from Respondent. He has been out of work for about 18 months and not earned any income from any other employer since that time. He applied for jobs at Target, Best Buy, Matthew's Landscape, other railroads, Old Navy, Home Depot, and Lowe's. He was looking for loss prevention jobs because of his experience in that area. He worked in law enforcement prior to joining the railroad, spending time with the Shreveport Police Department, Shreveport Airport, and Caddo Parish Sheriff's office. He thinks he could go back and get a job with them, but he's afraid to do that if he ends up leaving right away to get his job back with the railroad. That would ruin his chances if he ever did want to go back to law enforcement. He doesn't know when his union arbitration will happen or when this litigation will finish and he might be ordered back to work with Respondent. He was making about \$50,000 a year working for the sheriff's office in 2012. He guesses that he might have been making \$56,000 after 5 years with them. CX-6 and 7 show how much money he made working for Respondent. In 2014, he made \$71,546 and in 2015 he made \$58,886 through the date of his termination. With seniority, his income would have increased.

Quentin Hudspeth testified at hearing in pertinent part that:²⁰

He hired on with Respondent in June 2005 and has been a manager of operating practices for more than four years. He is responsible for compliance with federal and railroad rules, regulations, and policies. He regularly pulls event recorders off of locomotives to check for proper procedures. He tests for compliance with field training exercises. He rides with engineers and checks them for compliance and train handling.

²⁰ Tr. 33-169.

The Federal Railroad Administration requires railroads to have a field training exercise plan. Each exercise is designed to check for compliance with one or more rules. Depending on their performance, employees they can be assessed as having complied, requiring some coaching, or having engaged in at risk behavior, which would trigger discipline. He has probably administered more than 1000 field training exercise tests as a manager for Respondent.

He is in the Shreveport office and his direct supervisor is Kenneth Garcia. Garcia reports to Jay Everett and the principal regional bosses are Kelly Seaport and James Robinson. Garcia is the director of road operations and essentially the safety manager over the entire service unit of about 1000 employees.

He is familiar with the Reisor Yard. CX-5 accurately shows how the yard appeared in the early part of 2015. The total track covered in the yard is about two miles of distance with 220 lines of track. The yard is old and under continuous improvement to maintain the tracks. There were various tracks out of service with a few cones here and there, some broken rail, and missing rail. Those conditions developed over a period of time and fixing them involves a significant amount of work. Respondent has safety protocols in place to ensure trains do not use unsafe tracks until they can be permanently fixed.

He does not recall a specific large project coming through the yard to fix the problems. They have track inspectors and track gangs that work throughout the South. Those gangs bounce around from one area to another, depending on the risk. A major problem that could not be fixed on a local level could be escalated to Garcia.

He is basically the safety manager for Shreveport and regularly receives safety reports. He has a monthly meeting with his safety team. They have a rewards program for employees who identify problems. He doesn't recall specifically any one report of safety conditions for the yard in January 2014 through March 2015, but he would have passed such reports along to the maintenance people or track inspectors.

Page 15 of JX-5 is an appendix with rule categories for employees. The railroad has many operating rules that are designed to maintain safety. All of the rules are designed to prevent injuries and property damage. Respondent's zero tolerance policy means employees may be fired for a violation of a critical safety rule. For instance, Rule 5.13 is blue signal protection, which keeps trains away from a track that is being worked on. Rule 6.5 deals with shove movements, which is when a locomotive pushes a series of railcars from behind such that the locomotive engineer cannot see what's in front of him and must rely on another employee to be his lookout. Rule 2.21 is a critical rule for electronic devices. A violation of Rule 2.21 is not, by itself, a termination level rule violation. However, given the particular circumstances, a first level offense violation of certain rules such as Rule 2.21 may also fall within Rule 1.6, which does allow termination. He cannot recall a previous instance of a Rule 2.21 violation which was considered to be so egregious that it justified a termination level offense.

He understood that Complainant had a position with the union, but did not know what specific position. Complainant never came directly to him to report a safety problem and he was not aware that from time to time Complainant would report safety issues to Respondent. Ms. Walker was his senior terminal manager and Complainant may have brought issues to her and she could have dealt with it herself. Complainant never reported any specific safety conditions to him.

On 17 Sep 15, he conducted a field training exercise switch tag test on a train. At the time he selected the train, he did not know Complainant would be on it. He placed the tag on a switch to see if Complainant was correctly and completely checking the switch. He saw Complainant climb off the engine and properly identify the switch tag. While Complainant was completing that task, he climbed up into the unit to check on the engineer. As he observed the cabin for anything out of the ordinary that might be safety-related, he noticed Complainant's cell phone on the conductor's desk. He does not recall whether the phone was face up or face down, but it would have been a foot or two away from Complainant's eyes as he did his job. Given the timing, he concluded that there was a violation of Rule 2.21. Whenever an employee was outside of the cab, performing a task such as working on a switch, he must have electronic devices stowed.

He started talking to the engineer, who did not want to have anything to do with the cell phone issue. When Complainant reentered the cab, he asked what was going on with his cell phone. Complainant did not say anything, but grabbed the cell phone and stowed it in his bag. He notified Complainant of the violation. He did not specifically ask Complainant why the phone was out and does not know if the phone was on or off, but that would have typically been the time for Complainant to give him any excuses or justifications. After Complainant put his phone up, they rolled the train down the track to clear the main. He then initiated the disciplinary process, arranged for a drug test, and got a crew to secure the train. Critical rule violations are triggering events that call for drug testing. The drug testing is standard procedure.

Under the collective bargaining agreement, there's a specific procedure to follow in order to charge an employee with the rule violation. The company must charge the employee within ten days of discovering the violation. In this case, no charge letter was issued over the cell phone incident. Complainant could not have been charged under the collective bargaining agreement for anything happening that day. Complainant did sign a conference memorandum as a first level discipline, since he had no prior discipline and was eligible for a conference only. RX-9 is the form he used in his post exercise conference with Complainant and accurately summarizes their conversation. Complainant did not deny the violation or claim that his phone was not powered on. Complainant did not attempt to explain or justify his access to the phone, indicate he was reviewing operating rules, or claim that there was an emergency situation. He accepted the conference as corrective action.

After he completed his debrief with Complainant, he called Kenneth Garcia to notify him of the rule violation and double checked that he had handled it properly. He described for Garcia exactly what had happened and Garcia responded that it sounded like the situation had been handled properly. At that point, it appeared that conferencing was a sufficient corrective action.

A couple days later, Garcia told him to see if he could go pull the camera tape for the engine that Complainant had been on. He doesn't know why Garcia decided to do that. They had not discussed anything about the cell phone incident in the meantime. Respondent apparently had a policy that required, in cases of electronic device rule violations, pulling both the inward and external facing locomotive cameras. They were able to obtain camera data and send it to Omaha for review. He does not know who specifically retrieved the camera. That may have been the first time they used the inside camera in a disciplinary proceeding. They definitely had used outward cameras before. Respondent first started using inward facing videos in disciplinary proceedings sometime between 2014 and 2015. Access to the inward facing cameras is a sensitive and touchy subject, requiring higher level management approval.

JX-3, page 68 discusses the use of inward facing cameras in disciplinary proceedings. It indicates that the regional vice president would approve the process for the use of inward looking cameras in disciplinary investigations. He doesn't know when that level review was done to put the process in place. Page 69 indicates that, subject to regional vice presidential approval, management will review and determine whether inward video will be included as evidence for disciplinary investigations that involve electronic device use on a moving locomotive.

After the video was reviewed in Omaha, it was sent to Garcia. At some point, Garcia called him and told him to remove Complainant from service and proceed with the termination disciplinary proceeding under Rule 1.6. Garcia told him that the video showed Complainant on the phone multiple times during the trip and sent him screen shots. He was able to match the screen shots with the down loaded data to determine what the train was doing at the time of the screen shot. At the investigation, he testified that Complainant had appeared to have ear buds in place, but his subsequent review of the video did not show any buds. From what he understands about the video, it would be fair to say that Complainant was on the phone for a total of about 45 seconds and the train was going less than 5 miles per hour. Garcia didn't mention anything about the engineer being on the phone for 34 minutes. He didn't actually see the video until the investigation.

He first was able to review the video the day before testifying in this matter. Once he was able to review the video, he determined that it appeared the train was stopped on a siding and waiting. Rule 2.21 does allow employees who have conducted a preliminary safety briefing on the matter to use the phone function if there are no sensitive tasks taking place and the cab is stopped. However, no texting or online work is allowed.

JX- 6 is the video from the inward facing camera. The segment from 2:24 to 2:26 shows Complainant and the engineer in the locomotive cabin. It appears that the locomotive is stationary and the engineer stows his phone when he is done with it. That is compliant with Rule 2.21. The segment from 3:08:53 to 3:09:40 shows the train in motion and while the engineer stows his phone, Complainant uses his while the train accelerates and then places it on the desk in front of him. The segment from 4:13 to 4:14 was the end of the trip, where they had arrived at the yard. It shows Complainant stowing his phone. Based on what he saw in the video, it appears that Complainant's phone was out on his desk for over an hour. There were times where his phone was covered up by paperwork and other things, although it still would not be considered stowed.

He did not sit through the entire video in real time, but fast forwarded through certain periods. He believes that what he saw was sufficient to escalate discipline from an entry-level Rule 2.21 violation to a Rule 1.6 termination violation. The video shows multiple violations with the cell phone during the trip.

RX-2 is a series of pictures showing what was going on in the cabin at specific points in time. The pages of RX-2 match the data in the corresponding page of RX-11, which shows the train data for the corresponding time. Taken together, the exhibits show that Complainant was still on his cell phone while the train was moving. He reviewed those exhibits before Complainant's formal investigation and presented them in that proceeding.

Complainant engaged in willful neglect and carelessness which impacted safety. Everyone has to take annual rules exams and there was no question about the fact that it was a violation. The nature of the train business means employees cannot be distracted by the many applications that now exist on cell phones. At the time Complainant was terminated from the railroad, he was not aware of any specific safety complaints that Complainant had raised. He didn't know anything about any safety concerns by Complainant about power generators or track issues.

A safety briefing requires all crew members agree that nothing safety sensitive is taking place and they are aware of the tasks at hand. It applies in many instances and not just to electronic device use. It may have been that the engineer should have conducted a safety briefing before moving the train. Complainant's problem was not using the phone while the train was stopped, but that he was still on the phone when the train started moving again. When he finished he did not stow the phone but placed it on his desk. Even if Complainant didn't realize the engineer was going to move the train and was caught on the phone when the train moved, when he turned the phone off, he should have stowed it.

As a manager of operating practices, he does not have the authority to charge an employee with a termination level offense. He is required to go to his supervisor or above to get permission to make that charge. When he charged Complainant with the termination level offense, he obtained that authority from Garcia. Although he was the charging official in Complainant's proceeding, the ultimate termination decision was not his. It would have been the superintendent, but since he wasn't available the decision was

made by Jack Huddleston. He does not personally know Jack Huddleston and has never met him. He had no communication with Huddleston about Complainant or his case.

He was basically prosecuting the termination case that Garcia told him to pursue. He talked to Labor Relations to make sure that he was correctly preparing for the investigation. Garcia and Labor Relations are the only people he talked to about Complainant. Respondent held a formal investigation of Complainant in October 2015. Garcia was supposed to be at Complainant's investigation, but did not actually appear. He was called away for some sort of emergency on the service unit, but was available by conference call. No one objected to that.

The investigation was to determine discipline and he testified at that investigation. The investigation process starts with the charge of a rule violation. A different manager presides over the investigation and rules on objections. Ultimately the investigation transcripts and exhibits are sent to a different official to decide whether discipline should be imposed. If the result of the formal investigation process is to terminate the employee, there is an opportunity for the employee to appeal through the union.

JX-3, page 75 is a statement that he secured from the engineer of the train that Complainant was on. He does not recall bringing the wrong Rule 2.21 to the formal investigation. He does recall that on 15 Sep 15, Rule 2.21 was amended to add exceptions. JX-7 is the version of 2.21 that was in effect on the day of the cell phone incident with Complainant. JX- 3, page 41 is the rule he took to the formal investigation. The changes didn't make any difference as far as whether Complainant had committed a violation with his cell phone.

There was another employee in a similar situation who was given the same test and passed it. Like Complainant, that employee also had his cell phone out, although it was on top of his backpack being charged with alligator clips. They went through the same process and pulled the train up and called drug testing. He called Garcia to confirm that they wanted to pull the camera, just like as they did with Complainant, but by that time the locomotive was under another railroad jurisdiction. The camera just got away from them before they could get it. That employee was charged with a 2.21 violation and resulted in discipline. He does not recall whether the discipline was accepted or went to a formal investigation. He does not recall if that employee had prior discipline problems. Had they gotten the camera and it revealed the same behavior as Complainants, that employee would have been subject to the same discipline.

LaTanya Walker testified at hearing in pertinent part that:²¹

She is Respondent's senior manager of terminal operations and is responsible for day-to-day operations of her yard. She is currently in Fort Worth, but was in Shreveport from September 2014 to April 2016. During that time, she was responsible for the Reisor Yard and Complainant was the legislative representative for his union. He was the point person for bringing up safety concerns of union members. He would come to her with safety

²¹ Tr. 169-205.

concerns about twice a month. The concerns would deal with a variety of track and facility issues that they might not have been aware of. Some of those problems would be easy to fix.

One of the more significant problems they had in the yard in early 2015 related to not having generators. CX-4 is a letter that she received from Complainant in February 2015. He slid it under her door. She took no issue with the content of the letter and thought it raised valid concerns, but she also thought it was aggressive, given that she had an open door policy and he had never raised the issue before. She was just taken off guard by the tone of the letter. She didn't mention the tone of the letter when they met to discuss the issue. Their meeting did not have the same tone as the letter and at the end of the meeting she encouraged him to call her any time. She recalls asking him to discuss safety issues with her, rather than simply writing them up and turning them in. It was a professional and pleasant conversation.

She took the letter and filed it. She did not send a copy of or scan it or fax it to any central reporting system. Except for the fact that she put it in her file, it was the same as a verbal complaint.

After the meeting, she called her direct supervisor, Bonita Gibson, Director of Transportation Services. She said to contact Telecommunications and she called Derek Jordan. Jordan agreed that they needed to address that problem. They worked hand-in-hand to get a generator in place. She never discussed the generator issue or any other safety complaint raised by Complainant with Garcia or anyone else in Respondent's management team. The funds for the generator came out of the Telecommunications fund and the generator was installed a few months later.

Her rule of thumb was not to mention anyone's name when she made inquiries about issues raised by employee safety complaints. If it was a rules violation she would mention the name. She would call the union leadership first. In the case of the generators or yard conditions, she would not mention anyone's name, because it did not involve a rule violation. She would then call her safety team, which consisted of union employees. However she would not have mentioned Complainant's name. The last group she would contact would be her fellow management team. Again, she would have no reason to reveal Complainant's name.

She recognizes CX-5 as photographs of the yard, but does not recall receiving a copy of them. She does not know if he submitted them to Respondent. They do accurately reflect the conditions of the yard. There are broken and missing rails and areas with no ballast and ties sunk in mud. Some of them were still within operational limits. When she got to Shreveport in September 2014, she had been told that one of the reasons the yard was in that condition was because of a derailment.

She would say that four or five different people came to her complain about conditions at the yard. She told them what the plan was to fix the issues and that she would update them during the process. Complainant was one of them. She doesn't recall hearing from

anyone else that Complainant had complained about conditions at the yard. At the time, she was working to get additional regional resources in to Shreveport to handle some of the issues. It took a lot of coordination to try to get those tracks back in service. She never had any discussions about the issue with Superintendent Everett or Kenny Garcia. She did talk to Glenn Caddell and his boss about the repair work. Before she left Shreveport, they had only one contract left to return to service.

She would discuss rule violations and safety issues with Garcia. She would talk to Superintendent Everett about issues that could not be solved at the lower level.

As a manager, she was required to participate in field training exercises with her other managers. She was required to conduct ten tests per month and assist in ten more. They will occasionally conduct a safety blitz after multiple derailments or rule violations, to assess the scope of the problem. Instead of doing one or two tests per day, they may do four or five. They had a number of safety-related incidents in the spring of 2015. As a result, they increased by almost 100% the number of tests they were doing.

She first learned Complainant had been pulled from service with a pending Rule 1.6 termination charge a couple days after the actual incident. She came back from a work trip or vacation and was briefed on what had happened. She was told that Complainant had a Rule 2.21 violation and was surprised, but that was the extent of it. Her understanding of Rule 2.21 is that if an employee is on duty, his cell phone should be off and stowed. Cell phone use is permitted if the train is stopped and a safety briefing is conducted. However the cell phone should be once again turned off and stowed.

She had no involvement in the decision to discipline Complainant. She never spoke with Quentin Hudspeth about the decision to discipline Complainant. She never spoke with Garcia about the decision to discipline Complainant. She never spoke with anyone involved in the decision to bring disciplinary charges against Complainant. She was not involved in any way in the decision to sustain disciplinary charges against Complainant. She never spoke with Jack Huddleston about the decision to sustain the disciplinary charges against Complainant. She had no role or involvement whatsoever in the charging or disciplining of Complainant.

She is not aware of any employees before September 2015 being charged with the Rule 1.6 termination for using an electronic device. At times she was involved in charging and potentially disciplining employees. Prior to September 2015 she hadn't heard of any instances of using inward facing cameras to support charges for a violation of Rule 2.21.

*Scott Newton testified at hearing in pertinent part that:*²²

He has been an engineer with Respondent since 2008. Before that he was a conductor. He is a member of the union. In October 2015, he was local chairman and vice general chairman. He remains in those positions. Complainant was a legislative representative for the union. Typically, legislative representatives worked hand-in-hand with local management on safety issues.

In late 2014 and 2015 he became aware of safety issues related to the yard in Shreveport. CX-5 contains photographs that show the conditions in the yard. He understands that Complainant provided those photographs to Respondent. The problems in the yard were fairly well known between crew members and the management. The consensus was that the overall condition of the yard was pretty bad. The problems were all relayed to LaTonya Walker. He also knows that Maria Ramos was aware of the concerns. He cannot identify any individual who would have known specifically about Complainant's safety complaints. Over time, the crews became concerned that nothing was being done to fix the conditions. That led to Complainant, as a legislative representative, presenting the concerns to management. He believes that happened in the spring of 2015.

Eventually, Respondent did have a major project and corrected the conditions. It was a major project in size and scope. Respondent didn't just call some employees out of maintenance one day and have them lay some rock down. It was an in-depth project. It probably took about two weeks.

He helped represent Complainant in the discipline hearing. Normally, he sends out a discovery letter asking to review all the material that's going to be considered at the investigation. He did that in Complainant's case and was able to review the material with Mr. Garcia and Mr. Hudspeth. He does not recall if Mr. Hudspeth was in the room while he watched the video excerpts with Mr. Garcia. That may have been a couple of days before the hearing. He did not have a chance to watch the entire video. He only looked at those segments that were connected to the exhibits that were offered at the investigation. He finally looked at the entire video the day before coming to testify at this hearing. One thing that impressed him was that the engineer was on the phone for a little more than a half an hour. He had not been aware of that at the hearing.

He has participated in close to a couple of hundred hearings. This was the first one that involved the use of inward facing camera evidence. At the hearing, they presented JX- 3 page 71, which indicates that before inward facing cameras can be used on a regular basis for disciplinary purposes, there would be notice to the union. As far as he knows, that notice was not provided and the pilot program did not end. He cannot recall ever seeing Respondent charge an employee with a Rule 1.6 violation for electronic device usage prior to Complainant's case.

²² Tr. 205-242.

The version of Rule 2.21 relied on by Respondent at the hearing was outdated, because it had been amended two days before the actual incident. The updated rule removed the condition that the train had to be stopped any time the cell phone was not stowed. The amended rule allowed digital storage devices to be used to refer to railroad rules, special inspections, timetables or other directives while the train was in motion. He did not catch that change himself until the day of the disciplinary hearing.

Mr. Hudspeth testified at the hearing that he had not seen the video. They had expected Kenneth Garcia, who had seen the video, to appear and testify. Mr. Garcia did not appear. Mr. Hudspeth stated that Garcia was unavailable because he had to respond to an emergency within the unit service unit. He thought Respondent should have found someone else to respond to the emergency and make sure Mr. Garcia was present, since they were ending the career of one of their employees. The hearing officer could have canceled the investigation and put Complainant back to work or rescheduled the hearing. If he remembers correctly, the possibility of continuing the hearing for Mr. Garcia may have been brought up, but he can't remember whether it was on or off the record. He believes they did talk about it, but decided not to do it, because union officials had come in from a distance to assist Complainant. He is pretty certain that if they would have asked for a continuance, they would have been given one. The hearing officer they had that day was fair. They also had the option to talk to Mr. Garcia by conference call.

RX-7 was entered into evidence at the disciplinary hearing. According to page 2, in instances where there was an allegation that a crewmember used an electronic device on a moving locomotive, Respondent's policy allowed the pulling and use of inward facing cameras. He understood, however, that Respondent wasn't to look at the inward facing cameras footage unless it was being used as evidence in an investigation.

John Huddleston testified at deposition in pertinent part that:²³

He has worked for Respondent for 25 years and is general superintendent for the Houston service unit. He is responsible for the safety of about 2000 employees and budgeting. He has oversight of all three crafts of engineering. One of his jobs as superintendent is to make final decisions on discipline.

²³ JX-11. Respondent objected to a number of topics covered in the deposition. Specifically, it objected to questions related to the witness's involvement in two other cases and references in one of those cases to yet a third employee. It is true that the witness made a very broad statement that he had never and would never discipline an employee for making a safety report. That opened the door for Complainant to offer evidence to attempt to rebut the statement by asking questions about other cases. Complainant took that opportunity and the witness answered his questions and offered an explanation of why he imposed discipline in those cases. However, Complainant goes beyond that to argue that I should consider the opinion of another fact finder in one of those cases as to the witness's credibility. Even though the formal rules of evidence do not apply in these administrative hearings, the same principles are helpful as general guidelines. Complainant's attempt to offer a different ALJ's opinion as to the witness's credibility would fail under either the rules regarding character or reputation evidence. It might be more properly viewed as prior bad act impeachment, but that does not allow for extrinsic evidence. (F.R.E. 608). In short, the evidence as to the findings and opinion in the other case are likely inadmissible. However that ruling is moot, as I find them, even if admissible, of little, if any, probative value and they would not change any aspect of my decision.

The procedural disciplinary process begins when a manager believes that a rule has been violated. When an event that leads to disciplinary charges occurs, the management team conducts an initial review. If they elect to charge the employee with the violation, Respondent sends a notice of investigation to the employee and the union. If the charge is going to be a termination Rule 1.6 violation, the superintendent must approve making it. A formal investigation hearing is scheduled with one of Respondent's managers acting as the presiding officer. That individual rules as to the admissibility of evidence and appearances of witnesses. If a key witness cannot appear, the hearing officer can postpone the hearing or take the witnesses testimony by telephone. The superintendent then reviews the record of the hearing to decide whether to sustain the charge and impose discipline.

In the case of conductors and engineers, they have ten days from knowledge of the event to decide whether to conduct an investigation hearing. After the investigation hearing, he has ten days to issue a decision. If the superintendent of the region in which the charged employee works is unavailable, Respondent will have another superintendent review the record and issue the disciplinary decision.

Complainant was within the region of Superintendent Jay Everett. He assumes that either a director or Everett coordinated on the decision to charge Complainant with a Rule 1.6 termination violation. He has no idea if that individual knew anything about Complainant or his situation. For some reason that he does not know, he was asked to be the decision officer. He does not know Complainant and has never met Complainant. At the time he considered Complainant's case, he had never heard anything about Complainant and never heard anybody talk about Complainant. He had no involvement in the initial decision to charge Complainant.

JX-4 is his decision. The only things he reviewed in reaching his decision were the transcript of and exhibits from the disciplinary hearing. In reading the record, he did not markup or highlight portions. He doesn't have any notes that he took while he was reviewing the record. He has not reviewed the video. In his experience, the actual video is not in evidence. Normally, they use snapshots from the video. As a general matter, high-level management officials are the only individuals with access to the inward facing video. If he wanted to review inward facing video for a locomotive in his service unit, he would have to contact someone at headquarters in Omaha. The charged individual and union officials do not have direct access to the videos. Other than what Respondent puts on its website, he does not have any specific information about information being provided to employees concerning the initiation of the use of inward facing video in disciplinary proceedings.

Respondent instituted a new disciplinary policy in September 2015. It replaced the prior progressive discipline policy. Respondent has a committee that sets the rules. Rule 2.21 specifically relates to the use of electronic devices. Rule 1.6 does not specifically mention anything about electronic device use. A first charge of a Rule 2.21 violation with a clean record would trigger a conference. A second Rule 2.21 violation within months would result in training. A third violation of Rule 2.21 would lead to second-level training. The

three failures could be deemed to be a failure to comply with instructions under Rule 1.13 and could result in a dismissal subject to the regional vice president's decision. A fourth violation would result in a Rule 1.6 violation and possible termination.

The Federal Railroad Administration certifies engineers and conductors. That certification can be lost for certain misconduct or rule violations. Respondent's disciplinary policy and the federal standards for certification are not the same and there may be conduct for which Respondent may terminate an individual, even though under the federal rules he might not be decertified. One example of that is Rule 2.21.

He did not speak with anyone else about the decision. He did not consider anyone else's opinion of Complainant in making his disciplinary decision. No one submitted any suggestions or write ups to him in this case and he doesn't recall that having happened in other cases.

Respondent's policy is cell phones must be stowed during movement of the train. After reviewing the record in the case, he concluded that Complainant was using his cell phone on a moving locomotive and in doing so was negligent and careless, consistent with the Rule 1.6 charge. He believed that Mr. Hudspeth's testimony and the video photos and event recorder were persuasive. He also understood that Complainant had a previous conference training for a cell phone violation. Cell phones distract employees from doing their primary job of ensuring train safety. His understanding is that there have been incidents of train accidents related to cell phone use. After one such event Respondent began to view cell phone usage as a much more serious problem and changed its policy on discipline. Respondent would allow for the limited use of the cell phone to refer to a rule while the train was stopped as long as it was stowed afterwards.

He is aware of one case where a locomotive engineer was removed from service based on a Rule 1.6 charge for use of the cell phone on a moving train. That was within the last ninety days and happened in the Houston service unit. He does not know if it involved a charge of Rule 2.21 in addition to Rule 1.6. It did involve an allegation that the engineer used an electronic device on a moving train. There was a trespasser incident and while they were examining downloads on the data recorder and cameras, they discovered the engineer had been on his phone during movement. The trespasser incident involved a severe injury or fatality. He assumes the charge was levied within ten days. He does not know whether the hearing has occurred yet. It could have been postponed. As a result, he doesn't know what the final discipline decision either was or will be. He isn't aware of any other termination charges over electronic device usage within his service unit.

He is not now, nor was he at the time of his discipline decision, aware Complainant raised safety concerns about the yard in Shreveport or the absence of a power generator. He was unaware that Complainant had submitted photos of the Shreveport yard or made any safety complaints. He does not know LaTanya Walker, Mario Ramos, or Quentin Hudspeth. He recognizes some of the names like LaTanya Walker, because he was involved with her on an interview for a position, but never met any of them face-to-face. He never discussed Complainant with LaTanya Walker.

Safety is Respondent's primary concern. Respondent tries to develop a strong total safety culture with various hotlines and programs. He has never disciplined an employee for making a safety report and would never do so.

He recalls the case of Lenny Schow, who was a conductor in a locomotive and reported after a trip that the train had gone over a rough section of track and caused a personal injury to the elbow of the engineer. He concluded that Schow had failed to make a timely report on that condition for many hours, which could have possibly endangered other trains running over that section of track. He was the decision maker in charging and terminating Schow for that failure. He recalls testifying in front of a judge in that case. He does not recall anything about the decision that the judge issued or whether Schow came back to work. His approach to employee discipline remains the same as it was at that time. He disciplined an employee named Spurgeon for submitting a late injury report.

He does not recall anything about a specific employee named David Bush. He recalls an employee charged with multiple Rule 2.21 violations on multiple days that led to a termination. The time had expired to charge some of the violations but there were three left that could be charged. He made the decision to fire that employee. He later found out that that employee had made communications to the Mayor of Corpus Christi warning him about the transport of hazardous material by Respondent. He doesn't recall any director telling him they brought the employee in to have a discussion about his communicating directly to the Mayor of Corpus Christi. He does not know if that employee filed a whistleblower complaint against Respondent.

He doesn't know if, after winning a whistleblower case, an employee was ordered back to work, he would have any input on whether to accept that employee.

Respondent's policies and records state in pertinent part that:

Complainant was hired by Respondent on 31 Dec 12. His work location was Shreveport and he started as a switch man/break man, eventually becoming a conductor.²⁴

On 1 Nov 13, Complainant was given a conference corrective action for failing to comply with instructions report deadheading in a tie up.²⁵

On 6 Feb 15, Complainant submitted a letter to "Union Pacific Management" emphasizing that the absence of a power generator in the yard is a major safety consideration.²⁶

Under Rule 1.6 of its operating rules, willful disregard or negligence affecting the interests of the company or its employees is cause for dismissal.²⁷

²⁴ RX-3.

²⁵ RX-8.

²⁶ CX-4.

The version of Rule 2.21 effective as of 15 Sep 15 provided that:

Employees shall not use an electronic device while on duty if that use would interfere with the performance of safety-related duties. Personal electronic devices must be powered off and properly stowed while on duty. Use of personal electronic devices is prohibited by any crew member in the cab of a controlling locomotive when the train is moving, any member of the crews on the ground or on moving equipment, or any employee's assisting in preparation of the train, engine, or on track equipment for movement.

However, limited use is permitted after conducting a safety briefing with all crew members in consensus that such use is safe if necessary to respond to an emergency; in case of a radio malfunction; to view railroad rules, instructions, timetables or other directives (provided the wireless function of the device is disabled), or for voice communication as long as the device is turned off as soon as the call is completed.²⁸

Respondent's discipline policy provided that Rule 2.21 is a critical rule, but that employees who do not have a critical rule category triggering event on their records will not be charged with a rule or policy in violation, but instead will participate in a conference unless the rule violation resulted in reportable property damage.²⁹

On 17 Sep 15, Complainant passed a field training exercise, but was found at risk for failing to have his cell phone stowed and turned off.³⁰

Also on 17 Sep 15, Quentin Hudspeth sent a message to Kenneth Garcia and Jay Everett informing them that when he entered the locomotive cabin while conducting a field text exercise, he noticed Complainant's cell phone on the conductor's desk still powered on.³¹

On 16 Oct 15, Respondent sent a letter to Complainant notifying him of the disciplinary hearing to be held on 22 Oct 15. The letter indicated that the incident to be investigated occurred on 17 Sep 15 while he was employed as a conductor. It alleged he was careless and negligent by using his personal electronic device on multiple occasions while the train was moving and while other crew members were not in the cab of locomotive during his tour of duty. The letter notified him that the charges included violations of Rule 1.6 for carelessness and negligence and Rule 2.21 for electronic device use. It further noted that Rule 1.6 violations were cause for termination. The letter indicated that Kenneth Garcia would appear as a witness and a copy was provided to Scott Newton.³²

At the hearing, when examined by the presiding officer, Quentin Hudspeth explained that by matching still shots from the cabin video with the train data recorder, he was able to establish that Complainant was accessing his phone while the train was moving and

²⁷ JX-8.

²⁸ JX-7.

²⁹ JX-5 (as cited, see n.4).

³⁰ RX-9.

³¹ RX-10.

³² JX-1.

continued using the phone after the train was stopped. Complainant testified that he did not have any ear pieces in and was using his device to look up a rule while the train was moving.³³ The copy of Rule 2.21 used as an exhibit at the hearing had an effective date of 1 Apr 15.³⁴

Respondent's installation of locomotive cabin cameras was prompted by a fatal collision in 2008. During a period of initial operations, cabin video was not to be used in disciplinary investigation hearings unless approved by a regional vice president and related to an allegation that a crewmember used an electronic device while on a moving locomotive.³⁵

The engineer on Complainant's train on 17 Sep 15 reported that he was focused on his job and didn't notice anything concerning electronic device usage until Quentin Hudspeth boarded the cabin and pointed out Complainant's phone face down on the conductor's desk. He only recalled Complainant using it when they were stopped on a few sidings during the trip.³⁶

On 30 Oct 15, John Huddleston issued a notice that Complainant had been terminated, based on his findings that the charges alleged had been sustained.³⁷

There is no indication of DP problems in the maintenance records for Locomotive 3977 from 22 Dec 14 to 12 Jan 16.³⁸

DISCUSSION

The parties stipulated that Complainant engaged in protected activity and suffered an adverse action by Respondent, thus satisfying two of the three elements required to meet a whistleblower's *prima facie* case. The central dispute between the parties relates to the third element, which requires Complainant to show that his protected activity contributed to Respondent's adverse action against him.

Applicable Legal Standard

The parties have some disagreement on what it means for a protected activity to be a factor contributing to an adverse action. Indeed, the definition of contributing factor has been the subject of much appellate litigation with at times inconsistent and ambiguous case law issuing from various appellate authorities.

Complainant at one point seems to suggest that the case law holds that he need not show that Respondent knew of the protected activity. However, the Administrative Review Board has observed without objection or correction that at times the contributing factor element has been

³³ JX-2 (as cited, see n.4).

³⁴ JX-3 (as cited, see n.4).

³⁵ *Id.*

³⁶ *Id.*

³⁷ JX-4.

³⁸ RX-12.

articulated as two elements: first, that the respondent knew of the protected activity and second, that the protected activity contributed to the adverse action.

Moreover, if it is not necessary for the respondent to be aware of the protected activity, the protected activity need only be part of the chain of events ending in the adverse action. Take for example, a hypothetical employee who identifies a significant hazard missed by everyone else. His employer corrects the hazard and promotes him for his insight, sending him to corporate headquarters. Unfortunately, his skill set is not a good match for that level of management and he fails miserably. Headquarters management, totally unaware of his protected activity or why he was promoted in the first place, demotes him, sending him back to his field position. Under a “chain of events” definition of contributing factor that requires no knowledge element, the employee has a *prima facie* case as a whistleblowing victim.

Some of the language in decisions endorsing that view suggests that it does no ultimate harm to employers, because they can avoid liability by showing clear-and-convincing evidence that they would have taken the adverse action even in the absence of the protected activity. However, that logic is illusory at best, since if the chain of events definition still applies, it is impossible for an employer to show it would have done the same thing in the absence of the protected activity. Even if a knowledge requirement is applied at that stage, the burden flips to the employer to show a negative by clear-and-convincing evidence.

Indeed, one of the main cases cited in support of the proposition that knowledge is not required refers to “certain circumstances” where the protected activity was “inextricably intertwined” with the investigations resulting in adverse action. However, in those cases someone involved in the decision would, by definition, be aware of the “inextricably intertwined” protected activity. The case law used to argue that a respondent need not be aware of the protected activity was actually intended to emphasize that direct evidence that the respondent knew of the protected activity or the protected activity was a contributing factor is not required.

That language simply recognizes the real difficulty the vast majority of complainants have in obtaining direct “smoking gun” evidence linking protected activity to the decision to impose adverse action. The same line of cases also specifically recognizes the relevance of timing, possible pretext, shifting explanations, and other ancillary factors as circumstantial evidence that should be fully considered by the fact finder. If a chain of events were all that was required, evidence of pretext would not be particularly relevant. The relevance of pretext is that it serves to show that the explanation for the adverse action offered by the employer is so incredible that the real reason must be elsewhere; specifically, in the protected activity (at least in some part). Implicit in that logic is the predicate that the employer’s reason for the protected activity must matter.

Thus, knowledge, whether established by direct or circumstantial evidence, is an intrinsic part of the contributing factor element. Complainant has the burden to show that it is more likely than not that the individual or individuals who made the decision to take the adverse action were aware of the protected activity or relied upon others who themselves were aware of that protected activity. Given the understandable reticence of managers to admit a retaliatory motive,

Complainants are often forced to rely on circumstantial evidence, which must be fully considered along with direct evidence from the decision makers.

Direct Evidence

Naturally, a determination of who knew of the protected activity would start with a complainant's testimony concerning to whom he reported the hazardous conditions. In this case, Complainant's position as a union legislative representative meant that he not only communicated his own concerns, but also passed along those of other employees.³⁹ At hearing, Complainant testified that employees were telling the management team, including Quentin Hudspeth, LaTonya Walker, and Chris Papillion about the safety problems. The letter that Complainant submitted was addressed to Union Pacific Management and presented to LaTonya Walker, with whom he had a specific conversation about the conditions. He also testified that he gave the photos of the yard to Mario Ramos and LaTonya Walker. Complainant said that on several occasions he mentioned safety issues to Quentin Hudspeth, but conceded they never had any sit down meetings and he mentioned the conditions in passing. At his deposition, Complainant testified that he could not identify any one other than Walker and Ramos who would have fielded his safety complaints.

Quentin Hudspeth did not dispute that there were significant safety issues in the yard, although he maintained that Respondent had protocols in place to prevent any accidents. As the safety manager, he regularly received safety reports and had a monthly meeting with his safety team. He did not recall any one specific report concerning safety conditions, but said he would have passed such reports along to the maintenance staff or track inspectors. Hudspeth testified that Complainant never came directly to him to report a safety problem and he was not aware that Complainant would from time to time report safety issues to Respondent. He understood Complainant had a union position, but did not know what that specific position entailed. He noted that Ms. Walker was the senior terminal manager and said that Complainant may have taken issues directly to her to deal with. Hudspeth added that even at the time Complainant was terminated, he was not aware of Complainant having raised any specific safety complaints.

LaTonya Walker was clearly aware of Complainant's protected activity. Complainant came to her with safety concerns on a regular basis. She received his letter and discussed it with him. However, she also testified that she placed the letter in her personal file and did not forward it to anyone else. Moreover, she said she never discussed the generator issue or any other safety complaint raised by Complainant with Kenneth Garcia or anyone in Respondent's management team. She further explained that her rule of thumb was not to mention any name when she made inquiries about employee safety complaints. The only exception would have been rules violations, in which case she would call the union leadership first. In the case of complaints about the generators and yard conditions, she did not mention anyone's name, because neither complaint involved a rule violation. Instead, she called her safety team, which consisted of union employees and her fellow management team. In neither case did she mention Complainant's name.

³⁹ Both of which would qualify as protected activity.

Walker noted that a number of different people, including Complainant, voiced concerns about conditions at the yard. She was working to get resources to address the problems and never discussed the issue with Superintendent Everett or Kenneth Garcia. Although she was involved in general in the training exercise program, she testified that she had no involvement in the decision to charge or discipline Complainant. She also said that she never spoke with Hudspeth, Garcia, or Huddleston about the decision to discipline Complainant and had no role or involvement whatsoever in that process.

Scott Newton testified that although Complainant provided photographs to demonstrate the conditions in the yard, those conditions were fairly well known between crew members and the management, and there was a consensus that the yard was in bad shape. He testified that the problems were relayed to LaTonya Walker and he knew that Mario Ramos was also aware of the concerns. However he could not identify any individual who specifically would have known about Complainant's safety reports.

John Huddleston, who was the focus of Complainant's primary credibility attacks, is the general superintendent for the Houston service unit, and Complainant was not within his chain of command or supervision. Huddleston testified that he does not know and had never met Complainant. He was not aware of any reports by Complainant concerning yard safety or the absence of a power generator. He also testified that when he considered Complainant's case, he had never heard anything about Complainant and had no involvement in the decision to charge Complainant. He said the only things he reviewed in reaching his decision to sustain the termination were contained in the record from the disciplinary hearing and he neither received nor relied on anyone else's opinions, suggestions, or write-ups about the case.

The overwhelming weight of the direct evidence is that the only individuals who would have been aware of Complainant engaging in protected activity were Mario Ramos and LaTonya Walker. The strongest evidence to contradict that conclusion would be Complainant's testimony that on several occasions he mentioned safety issues to Quentin Hudspeth in passing, but Hudspeth denied any recollection of that happening.⁴⁰ That portion of Complainant's hearing testimony is diminished by his deposition concession that he could not identify anyone other than Walker and Ramos who would have fielded his safety complaints.

Circumstantial Evidence

Typically, the timing of the adverse action, as it relates to the protected activity, is a major component of the circumstantial case for a finding of a contributing factor. Complainant was having ongoing safety-related discussions with Walker that would have extended up to his termination. However, that had been the case since he took on the job as union legislative representative and, as such, provides no strong temporal link between Complainant's submission of a letter in February or any specific protected activity and his termination the following October.

⁴⁰ Indeed, Complainant and Hudspeth's testimony is relatively consistent, since the brief passing interactions recalled by Complainant could easily have failed to make any lasting impression on Hudspeth.

Complainant submits that the proffered reason for his termination is no more than a pretext designed to hide the actual reason, which in the absence of any better explanation, must be his protected activity. He concedes having committed a minor offense and was willing to accept the initial counseling as a reasonable corrective action. However, he sees no reasonable and non-retaliatory explanation for the decision to change from counseling to termination. In making the argument that his termination was at least in part about more than his use of a cell phone, he cites procedural irregularities, evidentiary missteps, inconsistent treatment of other employees, and the fundamental argument that the discipline in his case was totally disproportionate to his admitted failure to stow the phone.

Among the procedural defects that Complainant cites as evidence of pretext were the fact that he did not find out when his hearing would be until the morning of the hearing and Respondent's failure to make Kenneth Garcia available to testify. However, the union officials who represented him clearly knew about the hearing date, since they specifically traveled to attend it. Similarly, Scott Newton testified that they declined to continue the hearing and allow Garcia to attend because they did not want to inconvenience the union officials who had traveled for the hearing. Indeed, Newton also testified that the hearing officer provided by Respondent was fair. While Complainant may not believe he had an opportunity to take advantage of his full procedural rights at his disciplinary hearing, the blame for that would rest more on his union officials than on any attempt by Respondent to stack the procedural deck against him because of his protected activity.

Complainant also points to the irregular use of cabin video as evidence of pretext. The record does indicate the cameras had recently been installed as part of an industry response to a fatal accident. Respondent was still working through an appropriate protocol for the use of those videos, which was a sensitive issue to the union and management. In that process, Respondent announced that during the initial period, video would not be used for disciplinary hearings, absent approval by a regional vice president and, only then, to show use of an electronic device on a moving locomotive.

Scott Newton testified that it was the first hearing he was involved in that included the use of cabin video. He was unaware of any notice given to the union that the initial period had terminated and videos were available for unrestricted disciplinary use. Quentin Hudspeth testified that the use of cabin videos started in 2014 or 2015 and Jack Huddleston could not testify to whether the initial period had ended, but simply suggested referring to the information on Respondent's website. It is not clear whether the union raised the improper use of the video in Complainant's disciplinary hearing or has included it as a grievance in regards to the collective bargaining agreement. The record does indicate that cabin videos have been used since that time.

The evidence does establish to a certain extent some question as to whether the pilot program had ended and cabin videos could be properly used in disciplinary proceedings without specific vice presidential authorization. It may be that irregularity was due to problems with the implementation period or an indication that Respondent was more interested in terminating Complainant than following its own rules, which, in turn, may suggest the possibility that the proffered reason for the discipline was pretextual.

The same general analysis applies to the fact that the engineer appears to have been captured on video using his own cell phone. There is no testimony from Kenneth Garcia to explain why no action was taken or even if any was considered in the case of the engineer. However, that circumstantial weight is diminished by evidence that Garcia later tried to get the cabin video in a similar case, but they lost jurisdiction over the locomotive.

Complainant also cites the fact that Respondent presented and relied on an outdated rule in his disciplinary hearing. While that is true, it is significant to note that the effective date of the rule change was two days before the date of the charged misconduct. Even Scott Newton testified that he did not catch the mistake until the day of the hearing and the primary impact of the rule change was to allow, while the train is in motion, the use of electronic devices to refer to railroad rules or other relevant, operationally-related data. Respondent counters that the change of the rule made no difference in Complainant's culpability.

That issue relates closely to the argument Complainant makes in support of his position that the cell phone use was a pretext for his termination: that it was wholly disproportionate. Complainant insists that his only real failure was to properly stow the phone, which may have justified counseling, but in no way explains his termination.

One of the few factual questions in the case is whether the video shows Complainant using his phone while the locomotive was moving in violation of the rule. Complainant testified he was using it to look up operational data and was therefore in compliance with the rule that had become effective two days earlier. At his disciplinary hearing and deposition, Complainant testified that he could not recall what data they were looking at. At hearing, he testified that he still could not recall, but thinks he was perhaps looking up something about a problem with the DP unit. He agreed that he never offered that explanation at the time of his counseling, but explained that since it was just counseling for a technical violation there was no point in doing so.

Respondent offered maintenance logs to show no corresponding problem with the locomotive and clearly does not accept Complainant's explanation. Ultimately, the real inquiry for the purposes of this litigation is not whether Complainant was using his phone in violation of the rules or not. The relevant question is whether Respondent's refusal to accept his explanation and conclusion that he was violating the rule appears so irrational as to create some inference that it is a pretext. Since the video had not been pulled yet, there would have been little reason for Complainant to explain what was on it and the absence of an explanation at the time of the counseling has little probative value. The same is not true of Complainant's inability to recall at his disciplinary proceeding, deposition, or hearing, what rule was being researched, particularly since the disciplinary proceeding was within weeks of the incident.

As a result, I do not find Respondent's determination that the video disclosed cell phone use in violation of Rule 2.21 while the train was in motion to be so unrelated to the evidence or so unreasonable that it was made in order to provide a pretext for discipline for other reasons.

There is also circumstantial evidence that weighs against a finding of Complainant's protected activity as a contributing factor. The record is clear that the problems complainant raised were well known to both management and employees and apparently the topic of regular discussions between them. Moreover, management never suggested that the problems did not need to be fixed or didn't exist, but explained that the appropriate resources needed to be obtained. Eventually that happened and the problems were resolved. There is no indication that Respondent disagreed with or was unhappy about Complainant's identification of safety problems.

Ultimately, the critical adverse action in this case was the decision to pull the video and then go from a Rule 2.21 violation to a Rule 1.6 violation for which Complainant could be fired. The evidence clearly indicates that both of those decisions were made by Kenneth Garcia, who was acting on information provided by Quentin Hudspeth. However, the evidence indicates that Hudspeth was not aware of any protected activity by Complainant. Moreover, even if he had been, he believed the counseling was sufficient and played no role in the decision to review the video or amend the violation to include Rule 1.6. LaTanya Walker, who was the one witness clearly aware of the protected activity, was adamant that she never mentioned Complainant's name in connection with any safety issues to Garcia. There is no evidence of any significant weight to the contrary. Neither party elected to call Garcia to testify at hearing or depose him and offer that transcript as an exhibit.

The same analysis applies to the role of John Huddleston in reviewing the record and sustaining the termination. He relied on the work product of Kenneth Garcia and Quentin Hudspeth, neither of whom were aware of any protected activity. The fact that Complainant was in a different work unit and not within Huddleston's supervisory chain would make it even less likely that he would be aware of anything Complainant did, much less filing safety complaints. Huddleston also testified that he understood that Complainant had a previous counseling for cell phone use. I found Complainant's testimony that the November 2013 counseling should not have been for cell phone use, but for improper clocking out to be credible. However, Respondent's records did indicate a Rule 2.21 counseling, which is all Huddleston would have known and there is no reasonable argument that the mistake in recordkeeping could be attributed to any protected activity.

Complainant does not believe he was treated fairly. That may or may not have been the case. He may have wandered into Kenneth Garcia's cross hairs at the moment Garcia decided to make an example out of the next illicit cell phone user. Although whether he was treated fairly may offer some circumstantial evidence of pretext, the ultimate inquiry is whether his protected activity contributed in some way to how he was treated.

This case does not present a fact pattern where the protected activity and adverse action are "inextricably intertwined." Indeed, the evidence would fail to establish contributing factor under a chain of events test, since there is no factual trail of causation linking any complaints about the yard or generators to the field exercise test and subsequent investigation.

Consequently, this case would require a finding that either the individuals making the adverse action decision or those providing information to the decision makers more likely than not knew of the protected activity. The direct evidence that they did not is persuasive, and I found LaTanya Walker, Quentin Hudspeth, and Scott Newton to be credible. There was some circumstantial evidence that drew into question why Kenneth Garcia elected to pull the video and change the charge to a Rule 1.6 violation, but yet did not discipline the engineer. However, that evidence was significantly outweighed by the direct evidence. Considering both direct and circumstantial evidence, Complainant failed to carry his burden or even reach equipoise, since I find it far more likely that no one involved in the decisions that ultimately led to his termination was aware of his protected activity.

Therefore, the evidence fails to establish that it is more likely than not that Complainant's protected activity contributed to the adverse action.

ORDER

The complaint is dismissed.

ORDERED this 12th day of December, 2017 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

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

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

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

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

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

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

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

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

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