



## **2. Statement of the Case.**

Complainant contends he suffered an adverse action under the FRSA when Respondents subjected him to private surveillance after he engaged in the protected activities of reporting a work-related injury occurring on September 3, 2015 and filing a complaint with OSHA on September 11, 2015 pursuant to 49 U.S.C. § 20109(a)(3)-(4). In addition, Complainant alleges he suffered an adverse action on September 9, 2015 when Respondent caused a delay, denial, or interference of his requested medical treatment in violation of 49 U.S.C. § 20109(c)(1). Specifically, Complainant asserts that Respondent failed to promptly transport him to a hospital and required him to speak with a company nurse before obtaining requested medical treatment. Complainant further argues a company nurse attempted to dissuade him from obtaining medical treatment at an emergency medical facility.

In response, Respondent argues initiating private surveillance on Complainant following his report of a work-related injury is not an adverse action under the FRSA. Further, Respondent contends it did not take an adverse action against Complainant because he was promptly transported to the hospital immediately after requesting medical treatment. Respondent maintains that Complainant's voluntary conversation with a company nurse did not constitute a denial, delay, or interference of requested medical treatment.

**3. Stipulated Facts and Issues.** The parties stipulated to a number of uncontested matters in this case. As a result, the undersigned makes the following specific findings of fact and conclusions of law:

- a. Respondent is a "railroad carrier" within the meaning of 49 U.S.C. § 20109.
- b. Complainant was and is an "employee" within the meaning of 49 U.S.C. § 20109.
- c. Complainant engaged in "protected activity" under 49 U.S.C. § 20109(a)(4) when he reported on September 9, 2015 that he had been injured in a derailment that occurred on September 3, 2015.
- d. Complainant engaged in "protected activity" under 49 U.S.C. § 20109(c)(1) by requesting transportation to a hospital on September 9, 2015.
- e. Complainant engaged in "protected activity" under 49 U.S.C. § 20109(c)(2) from September 9, 2015 through October 20, 2015 by following the treatment plan of his physician, which restricted him from working full duty for Respondent.
- f. Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(3) by filing his complaint with OSHA on September 11, 2015.
- g. Following the September 3, 2015 derailment, Complainant worked September 4, September 8, and September 9, 2015 before reporting his personal injury on the evening of September 9, 2015.
- h. Complainant went "on duty" for work on September 9, 2015 in Hearne, Texas at 5:00 p.m. as a conductor on a train traveling from Hearne, Texas to Ft. Worth, Texas.
- i. On September 9, 2015, while the train was stopped at a signal near Riesel, Texas, Complainant called Respondent's Manager of Operations (MOP), Mr. Steffan Storbeck, at approximately 7:39 p.m. to report that he might have been injured in the September 3, 2015 derailment.

- j. On September 9, 2015, at 10:34 p.m., Mr. Storbeck called Respondent’s Occupational Health Nurse, Ms. Lupe Koch. The call lasted for three minutes. At 10:37 p.m., there was another one minute call between Mr. Storbeck and Ms. Koch. At 10:38 p.m., there was another 10 minute call. During some or all of the calls, Ms. Koch spoke to Complainant.
- k. Mr. Storbeck transported Complainant to the emergency room at Waco Hillcrest Hospital Medical Center, where he arrived at 11:06 p.m. on September 9, 2015.<sup>3</sup>
- l. Respondent placed Complainant on a medical leave of absence effective September 10, 2015.
- m. Complainant is not seeking lost wages for the time period of September 9, 2015 through October 29, 2015.

In addition, during an administrative conference at the hearing, the undersigned directed the parties to jointly file a stipulation detailing and explaining the acronyms used at the hearing and contained in the administrative file documents and record. (Tr. pp. 123, 326) The parties jointly filed a document styled “Stipulated Railroad Acronyms and Terminology” on May 26, 2017.<sup>4</sup>

**4. Contested Facts and Issues.** At the hearing, in the prehearing statements, and in the post-hearing briefs, the parties identified the following contested facts and legal issues in this case:

- a. Whether Respondent denied, delayed, or interfered with Complainant’s need for “prompt medical attention” as contemplated by 49 U.S.C. § 20109(c).
- b. Whether Respondent violated the FRSA by performing surveillance on Complainant.

**5. Relevant Evidence.** In making this decision, the undersigned reviewed and considered all reliable and material documentary and testimonial evidence presented by Complainant and Respondent. The undersigned made all reasonable references to be drawn therefrom and resolved all issues of credibility. This decision is based upon the entire record.

a. ***Exhibits Admitted Into Evidence.*** The undersigned fully considered the exhibits admitted at the hearing. However, as specifically provided in the Notice of Case Assignment and Prehearing Order issued on August 9, 2016 and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information for chronological context to cited relevant evidence. (Tr. pp. 26-27, 322-323)

1) **Joint Exhibits.** The parties jointly offered 14 exhibits, which the undersigned admitted into evidence. Each exhibit was admitted into evidence without objection. (Tr. pp. 7, 9)

(A) *Respondent’s Report of Personal Injury or Occupational Wellness – Form 52032.*<sup>5</sup>

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<sup>3</sup> Respondent’s post-hearing brief provides that Respondent stipulated that Complainant was admitted to the emergency room at 11:06 p.m. on September 9, 2015. (RB-1, p. 2) However, the parties jointly stipulated on November 18, 2016, the Complainant *arrived* to the emergency room at 11:06 p.m. on September 9, 2015.

<sup>4</sup> The parties’ “Stipulated Railroad Acronyms and Terminology” is marked JX-12.

On September 12, 2015, Complainant completed Respondent’s Report of Personal Injury or Occupational Illness – Form 52032. On this form, Complainant indicated that on September 3, 2015 at 8:00 a.m., while working on Respondent’s property at the Knife River yard, Complainant was involved in a train derailment. Complainant reported he “had to jump [from the railcar] to protect [himself] from the car that was coming at [him].” As a result, Complainant believed he suffered a “bad sprain” in his ankle. Complainant first noticed “soreness” on September 5, 2015. He first received medical treatment at Baylor Scott & White Medical Center and was prescribed Naproxen 500 mg and Tramadol 50 mg. (JX-1, pp. 1-2)

(B) *Cellular Telephone Record of Mr. Steffan Storbeck.*

The following chart details the relevant incoming and outgoing phone calls that Mr. Steffan Storbeck, one of Respondent’s Manager of Operating Practices (MOP), placed or received on his cellular telephone on the evening of September 9, 2015.

Date	Time <sup>6</sup>	Duration	Type	Caller
9/9/15	7:39 p.m.	8:00	Incoming	Complainant
9/9/15	7:48 p.m.	1:00	Outgoing	Mr. Randy Lang <sup>7</sup>
9/9/15	7:49 p.m.	1:00	Outgoing	Mr. Ronald Glenister <sup>8</sup>
9/9/15	7:49 p.m.	1:00	Outgoing	Mr. Randy Lang
9/9/15	7:51 p.m.	6:00	Outgoing	Mr. Mickle Lee <sup>9</sup>
9/9/15	7:56 p.m.	4:00	Incoming	Mr. Randy Lang
9/9/15	8:05 p.m.	5:00	Incoming	Complainant
9/9/15	8:10 p.m.	1:00	Outgoing	Mr. Ronald Glenister
9/9/15	8:10 p.m.	11:00	Outgoing	Dispatcher <sup>10</sup>
9/9/15	8:21 p.m.	3:00	Outgoing	Mr. Ronald Glenister
9/9/15	8:24 p.m.	2:00	Incoming	Hdc Corr Mgr Nw
9/9/15	9:47 p.m.	2:00	Outgoing	Dispatcher
9/9/15	9:49 p.m.	3:00	Outgoing	Hdc Corr Mgr Nw
9/9/15	9:52 p.m.	3:00	Outgoing	Mr. Randy Lang
9/9/15	9:54 p.m.	9:00	Outgoing	Mr. Ronald Glenister
9/9/15	10:31 p.m.	1:00	Incoming	Mr. Randy Lang
9/9/15	10:31 p.m.	3:00	Outgoing	Mr. Randy Lang
9/9/15	10:34 p.m.	3:00	Outgoing	Ms. Guadalupe Koch
9/9/15	10:37 p.m.	1:00	Outgoing	Ms. Guadalupe Koch

<sup>5</sup> A “52032” is Respondent’s form for reporting a personal injury or occupational illness. (JX-12, p. 1) JX-3 contains a partially completed 52032 form. Complainant did not complete this form until September 12, 2015 because he was taken to the hospital on September 9, 2015 prior to fully completing it. (Tr. pp. 54-64, 130)

<sup>6</sup> The times contained in this chart have been converted from the originally formatted military times to standard times. (JX-2)

<sup>7</sup> Mr. Randy Lang is Mr. Storbeck’s director supervisor and the Director of Road Operations (DRO). (Tr. pp. 46, 101)

<sup>8</sup> Mr. Ronald Glenister is Complainant’s direct supervisor and a Manager of Terminal Operations (MTO). (Tr. p. 102)

<sup>9</sup> Mr. Mickle Lee is a Manager of Operating Practices (MOP) for Respondent. (Tr. p. 101)

<sup>10</sup> See Tr. p. 103.

9/9/15	10:38 p.m.	10:00	Incoming	Ms. Guadalupe Koch
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(JX-2, pp. 1-2; Tr. pp. 94-104, 321)

(C) *Respondent’s Occupational Health Nurse Consultation Record.*

On September 9, 2015, Occupational Health Nurse (OHN) Guadalupe Koch (Nurse Koch) completed Respondent’s “OHN Clinical Consultation Record” form. She reported receiving a phone call from Complainant at 10:40 p.m. on September 9, 2015. Complainant reported pain in his left ankle. Complainant stated “last Thursday, I rolled my ankle when I was shoving cars and lost my balance during a derailment.” The form indicates Complainant was transported to a medical facility in a non-emergency vehicle. Nurse Koch noted that Complainant had reported this injury to a manager and she advised him to follow the instructions of the emergency or personal medical provider. (JX-4, p. 1)

(D) *Respondent’s Reporting Requirements and Whistleblower Policy Memorandum.*

On May 29, 2015, Mr. Cameron Scott, Respondent’s Executive Vice President of Operations (EVPO), sent a memorandum to all Operating Department management employees. The memorandum contained two attachments styled “Policy Statement and Complaint Procedures”<sup>11</sup> and “Whistle Blower Policy & Directives.”<sup>12</sup> These documents detailed Respondent’s reporting obligations related to injuries and occupational illnesses and “long-standing policy and practice of no retaliation against employees for reporting injuries, illness or safety concerns as well as no interference with an employee’s medical care or the reportability of an injury or illness.” (JX-6, p. 1)

(E) *Respondent’s OSHA Whistleblower Policy and Directive Memorandum.*

In relevant part, Respondent’s OSHA Whistleblower Policy and Directive memorandum provides the following:

When an employee reports a work-related personal injury or illness, Union Pacific’s expectations include, but are not limited to the following: 1) ensure the employee receives necessary medical attention, without delay. If transportation to the hospital is requested, the manager shall arrange transportation to the nearest hospital where the employee can receive safe and appropriate medical care.

(JX-8, p. 2)

(F) *Respondent’s Occupational Health Nurse – Clinical Protocols.*

Respondent’s Health and Medical Services Department has a handbook for its OHNs. Section A 2.3, Clinical Intervention, contains a general approach for its OHNs to follow. This

<sup>11</sup> This document is included in the record as JX-7.

<sup>12</sup> This document is included in the record as JX-8. JX-9 contains a document styled “FRSA Whistleblower Frequently Asked Questions” and is also referenced in Mr. Scott’s May 29, 2015 memorandum. (JX-6)

guidance provides for OHNs to “provide for the general comfort of the employee consistent with the OCPs, as appropriate while waiting for EMS to arrive, non-EMS transport to a medical facility, or for symptoms to improve so the employee can return to activities.” (JX-10, p. 12)

2) Complainant Exhibits. Complainant offered six exhibits for identification. CX 1-3 were admitted into evidence without objection. (Tr. pp. 12-16)

At the hearing, Respondent objected to CX-4. (Tr. pp. 15, 177) The undersigned reserved ruling on the objection until issuing this Decision and Order and directed the parties to address this objection in the post-hearing briefs. (Tr. pp. 16-17, 180) Respondent did not object to CX-4 in its post-hearing brief. Therefore, Respondent waived its right to object to CX-4. Nevertheless, formal rules of evidence do not apply in FRSA cases pending before OALJ, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. 29 C.F.R. § 1982.107. Because CX-4 contains information probative to whether Complainant suffered an adverse action under the FRSA, it is admitted into evidence despite Employer’s oral objection at the hearing.

(A) *Email from Mr. Steffan Storbeck to Mr. Kurt Zalar.*

On September 10, 2015 at 12:32 a.m., Mr. Storbeck sent Mr. Zalar, Respondent’s Fort Worth Superintendent, an email regarding Complainant’s alleged injury. Mr. Storbeck’s email stated:

I received a phone call around 758 PM from Mr. Walls while he was working the MHOFW-08 at Harrison stopped to meet trains, that he wanted to let me know that he sprained his ankle around a week ago while working the RPHWA-02. He declined any Medical and so I stopped the train at Waco Siding to interview him and asked if he had ever reported this to anyone prior in which he said no just wanted to let me know. Anyhow, I have completed the required report and am in the process of entering the AIRS as we speak. More to follow, Thanks

(CX-3)<sup>13</sup>

(B) *Respondent’s Private Investigator Report on Complainant.*

On October 6, 2015, Ms. Vanessa Thompson, a Respondent Claims Agent, obtained an “Investigation Report” from Mission Investigations. Mission Investigations performed private surveillance on Complainant on the following dates: September 17, September 22, September 26, and September 30, 2015. The summary of the report provided the subject: (1) was active; (2) drove to a doctor’s appointment and also drove his family around town; (3) spent a lot of time away from his residence; and (4) was observed without the boot on his foot. Surveillance on each day began at 7:00 a.m. or 8:00 a.m. and concluded no later than 3:00 p.m. (CX-4, pp. 1-3)

3) Respondent Exhibits. Respondent offered nine exhibits. Respondent withdrew

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<sup>13</sup> This document is also contained in the record as JX-11.

RX-4, RX-8, and RX-9. RX 1-3 and 5-7 were admitted into evidence without objection. (Tr. pp. 17-25)

(A) *Transcript of Mr. Cedric L. Brown's Interview by Respondent.*<sup>14</sup>

On September 15, 2015, Respondent's Risk Management Representative, Ms. Vanessa Thompson, obtained a recorded statement from Mr. Cedric L. Brown. Respondent obtained Mr. Brown's statement as a result of Complainant's injury sustained on September 3, 2015. (RX-2, p. 1)

Mr. Brown is an engineer employed by Respondent. (RX-2, pp. 1-2) On September 9, 2015, Mr. Brown was working as the engineer on the same train in which Complainant was working as the conductor. (RX-2, p. 5) This was the first time Mr. Brown had met Complainant. Complainant never mentioned to Mr. Brown that he was in pain any point during the trip from Hearne to Fort Worth. (RX-2, p. 6) Complainant later mentioned to Mr. Brown that he suffered an injury one week earlier after Complainant spoke with his supervisor earlier that evening. (RX-2, pp. 7, 22, 24)

When the train approached the Waco siding area at approximately 9:00 or 10:00 p.m., it was signaled to stop. (RX-2, pp. 19-20) Complainant told Mr. Brown that his supervisor, Mr. Storbeck, would meet him at the Waco siding area because Complainant reported he was injured. (RX-2, p. 32) Mr. Storbeck was in the area when the train arrived. (RX-2, p. 37) First, Mr. Storbeck and Complainant exited the train and had a conversation. Mr. Storbeck and Complainant then boarded the train and Mr. Brown heard Mr. Storbeck ask Complainant if he was injured or needed medical treatment. Mr. Brown did not hear Complainant's response, but Mr. Storbeck mentioned that Complainant needed medical attention. (RX-2, p. 38) Second, Mr. Storbeck and Complainant exited the train again and went to Mr. Storbeck's truck to have a conversation. (RX-2, p. 39) Complainant returned to the train and began completing the accident report. (RX-2, p. 40) Mr. Storbeck again asked Complainant if he was injured or needed medical attention. Mr. Brown did not hear Complainant's response, but believed he was "undecided." (RX-2, pp. 41, 44) Before Complainant finished completing the accident report, Mr. Storbeck returned to the train. (RX-2, p. 47) Mr. Brown then learned that Mr. Storbeck would take Complainant to the emergency room. (RX-2, p. 45) Mr. Brown never heard Complainant say he needed medical treatment. (RX-2, p. 53) After Complainant left with Mr. Storbeck, Mr. Brown gathered Complainant's luggage. (RX-2, p. 54)

(B) *Transcript of Telephone Call Between Mr. Steffan Storbeck and Dispatcher.*

On September 9, 2015 at 8:14 p.m., Mr. Storbeck called the Dispatcher.<sup>15</sup> Mr. Storbeck told the Dispatcher that Complainant called him and stated he "possibly injured himself" a week earlier. Mr. Storbeck told the Dispatcher that Complainant's train needed to be stopped so that he could speak with him personally and determine if he was injured. Mr. Storbeck told the

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<sup>14</sup> RX-2 is a transcript of Mr. Brown's recorded statement.

<sup>15</sup> The phone log contained in the record as JX-2 does not provide that Mr. Storbeck called the Dispatcher at 8:14 p.m. Rather, the phone log provides that Mr. Storbeck called the Dispatcher at 8:10 p.m. for the first time on the evening on September 9, 2015.

Dispatcher that he asked Complainant if he was injured or needed medical care. Complainant said he was not injured and did not need medical care. Mr. Storbeck stated Complainant “just wanted to let [him] know.” Mr. Storbeck then called his supervisor. Mr. Storbeck believed he could not get a “straight answer” from Complainant. (RX-3, pp. 1-3) Based on the train’s location at the time, Mr. Storbeck decided to personally meet with Complainant in Waco. (RX-3, p. 5)

(C) *Complainant’s Emergency Room Records.*<sup>16</sup>

On September 9, 2015 at 11:06 p.m., Complainant arrived to the emergency room at Baylor Scott & White Medical Center-Hillcrest in Waco, Texas. He complained of left ankle and back pain. (RX-6, p. 5) Complainant reported his injury occurred six days prior to September 9, 2015 after he jumped from a railcar. (RX-6, p. 6) The emergency room discharged Complainant on September 10, 2015 at 1:57 a.m. (RX-6, p. 4)

b. ***Testimonial Evidence.*** The undersigned fully considered the entire testimony of every witness who appeared at the hearing. These witnesses provided, in pertinent part, the following relevant testimony:

1) Complainant.

Complainant is currently employed by Respondent and has worked for Respondent for the past five years. He began working for Respondent as a brakeman-conductor in November 2011. (Tr. pp. 157-158)

On September 3, 2015, Complainant testified he jumped out of the railcar in which he was traveling because he felt the railcar “pop” and believed he was in danger. Complainant notified the engineer and the Dispatcher. Mr. Ronald Glenister, a manager for Respondent, came to the scene after the derailment. (Tr. pp. 159-160) Mr. Glenister asked Complainant if he was injured. Complainant “did not have an answer” and stated he “thought he was okay.” Complainant testified he was “emotional” and felt “shook up” after the derailment. (Tr. pp. 161, 186)

Following the derailment on September 3, 2015, Complainant completed the remainder of his scheduled shift. Complainant was working on a train traveling from Fort Worth to Hearne, Texas. Complainant worked his scheduled shift the following day on September 4, 2015. Complainant testified his back and ankle felt “sore,” but he did not tell any manager that his ankle was bothering him. Complainant thought he was just feeling “general soreness.” Complainant was able to carry his bags, grips, and every other object he normally carries. (Tr. pp. 162, 187) After returning to Fort Worth, Complainant was still “pretty shook up” and decided

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<sup>16</sup> At the hearing, Complainant’s counsel initially objected to the admission of RX-6 into evidence, unless Respondent agreed the evidence would only be offered to establish Complainant’s “arrival and discharge times” to and from the emergency room. (Tr. pp. 19-21) Respondent agreed RX-6 would be admitted only to establish Complainant’s arrival and discharge times. (Tr. p. 21) In Complainant’s responsive post-hearing brief, Complainant argues Respondent attempted to use RX-6 to establish the time Complainant was admitted to the hospital, rather than the time he arrived to the hospital. (CB-2, p. 5) Further, the parties stipulated that Complainant arrived to the hospital at 11:06 p.m. Consequently, the undersigned will only consider RX-6 to establish the time Complainant arrived to and was discharged from the hospital.

to take a few days off. While at home during this time, his ankle was bothering him and he used heat and ice to treat his ankle pain. He did not call a doctor or speak with a manager. (Tr. p. 188) On September 8, 2015, Complainant completed another shift traveling from Fort Worth to Hearne, Texas. On September 9, 2015, Complainant reported for work to conduct a train from Hearne to Fort Worth. On September 9, 2015, Complainant testified he “could feel it a lot worse” and “everything was hurting.” He was carrying bags and grips, moving, climbing, and his leg began “really hurting.” (Tr. pp. 163-164, 188) Complainant recalled hearing “popping and crackling” sounds in his ankle and foot. He did not tell any managers about his pain upon presenting for work that day. (Tr. p. 191) Complainant was concerned about the consequences of reporting a job-related injury because a close friend of his previously reported an injury and was terminated. (Tr. pp. 164, 185) Complainant also believed another employee had been terminated for reporting a late injury. (Tr. p. 165)

Approximately two hours and 40 minutes after beginning his shift, at 7:39 p.m. on September 9, 2015, Complainant first called Mr. Storbeck on his cellular phone because his ankle pain was becoming more severe. (Tr. pp. 191-192, 210) Complainant was nervous when he first called Mr. Storbeck because he was concerned he might be terminated, but he felt comfortable calling Mr. Storbeck because he thought he would provide friendly advice. (Tr. pp. 165, 192) Complainant testified that, during this initial phone call, he briefly told Mr. Storbeck that he “might be injured” and “need[ed] to know what to do about reporting it.” Complainant testified he did not tell Mr. Storbeck that he had sprained his ankle; rather, he told Mr. Storbeck that he needed to have his foot “checked out.” (Tr. p. 164) Complainant told Mr. Storbeck it was not a “life-threatening emergency.” (Tr. p. 186) According to Complainant, Mr. Storbeck asked him if he was injured. In response, Complainant said he did not know how to answer that question and that he desired to speak with Mr. Storbeck in-person. (Tr. pp. 166, 185) Mr. Storbeck then told Complainant that he would meet him in Waco. During a second phone call with Mr. Storbeck, Complainant told him that he received the signal to move to the Waco siding; they did not discuss any other subjects during this phone call. (Tr. p. 167)

Complainant next spoke with Mr. Storbeck in Waco on the train. (Tr. p. 167) After Mr. Storbeck boarded the train, he asked Complainant if he was injured. Again, Complainant did not know how to answer this question. Complainant told Mr. Storbeck that he was “worried about his job” and asked Mr. Storbeck if he would “get [him] for delayed reporting.” Complainant wanted to “make sure [he was] safe and secure at [his] job.” (Tr. pp. 167-168, 185) Mr. Storbeck did not provide Complainant with any details about what would happen. After speaking with his union representative, Complainant decided to complete an injury report and have his foot “checked out.” (Tr. p. 168) Mr. Storbeck immediately told Complainant “let’s go.” (Tr. pp. 168-169) Complainant testified he requested that Mr. Storbeck take him to the hospital while on the locomotive filling out the 52032 form. (Tr. p. 220) Mr. Storbeck told Mr. Brown to take Complainant’s bags back. Immediately afterwards, Mr. Storbeck and Complainant went to Mr. Storbeck’s truck. (Tr. pp. 169-170) While walking to the truck, Complainant testified that Mr. Storbeck was speaking with Nurse Koch on his cellular phone. Mr. Storbeck told Complainant Nurse Koch was on the phone and handed him the cellular phone. Nurse Koch asked Complainant how he was doing and told him to apply heat and cold packs, keep his foot elevated, and take ibuprofen and Tylenol. Complainant specifically testified the phone call with Nurse Koch occurred prior to leaving for the hospital; he never spoke with Nurse Koch while

driving to the hospital. (Tr. p. 176) Complainant explained the area near the Waco siding had poor cellular service and the phone was “dropping calls.” (Tr. p. 173) Prior to Mr. Storbeck handing Complainant the cellular phone to speak with Nurse Koch, Complainant observed Mr. Storbeck in his truck “making phone calls the whole time.” When Complainant was speaking with his union representative, Mr. Storbeck was in his truck making phone calls. (Tr. p. 170) Complainant did not hear any of these phone calls because he “wasn’t around.” (Tr. p. 171) Complainant estimated he remained in the Waco siding area for 15 or 20 minutes before he left to go to Mr. Storbeck’s truck. (Tr. p. 204)

Complainant testified he did not request for Mr. Storbeck to call Nurse Koch. Complainant did not give Mr. Storbeck his permission to call Nurse Koch. Prior to September 9, 2015, Complainant had spoken with Nurse Koch on approximately two occasions by telephone. Complainant had also seen Nurse Koch in-person on several occasions in her office and had spoken with her about his wife applying for a nursing position with Respondent. (Tr. p. 171)

On September 9, 2015, Complainant testified that Mr. Storbeck told him to “shy away from prescription drugs, to take ibuprofen, Tylenol, to just kind of shy away from prescriptions because it would make it a reportable injury.” According to Complainant, Mr. Storbeck made this statement after leaving the Waco siding area and before arriving at the hospital. (Tr. p. 172)

Complainant testified Mr. Storbeck did not ask Complainant if he desired to speak with Nurse Koch; rather, Mr. Storbeck “handed [Complainant] the phone.” (Tr. p. 199) Complainant recalled speaking with Nurse Koch outside of Mr. Storbeck’s truck. Nurse Koch told Complainant what to do and “asked [Complainant] if [he] would wait.” Paraphrasing, Complainant testified that Nurse Koch asked him if he could “wait and go to our clinic or our doctor.” (Tr. p. 172) Complainant could not recall Nurse Koch’s specific statement, but believed she wanted him to wait until the following day. Complainant also testified that Nurse Koch told him taking prescription medication would make the injury FRA-reportable. (Tr. pp. 172-173) Complainant believed Nurse Koch was “trying to sway [him] from going to the emergency room.” (Tr. p. 201) Complainant did not tell Nurse Koch he was on the way to the emergency room. (Tr. p. 200)

It took approximately 15 or 20 minutes to arrive at the hospital after leaving the Waco siding area. The hospital took X-rays, placed Complainant in a cast, and prescribed pain medication, which alleviated the pain. (Tr. p. 175) Complainant arrived at the hospital at 11:06 p.m. on September 9, 2015. (Tr. p. 205) After being discharged, Complainant used crutches for at least two weeks. (Tr. p. 216) He was diagnosed with a heavy sprain. (Tr. p. 219)

Complainant described the phone call with Nurse Koch as “useless” and the call would not have stopped Complainant from going to the hospital. Complainant believed this phone call resulted in him not obtaining pain medication more quickly. (Tr. p. 176)

After reporting this injury and receiving medical treatment, Complainant believed he “was being watched.” He continued “seeing the same vehicles in [the] neighborhood that shouldn’t be there that was just erratic.” (Tr. pp. 176-177) Complainant observed vehicles driving through his neighborhood that would stop at his house. These vehicles followed Complainant and his wife

“everywhere” they went, which was “stressful” for him and his wife. (Tr. p. 177) Complainant acknowledged viewing a private investigator report ordered by Respondent.<sup>17</sup> (Tr. p. 181)

Complainant acknowledged he heard his ankle pop and crack for five days before reporting this injury to Mr. Storbeck and did not seek treatment from the emergency room. Complainant did not believe this injury was “major.” (Tr. p. 192)

Complainant confirmed Respondent did not discipline him for his role in the September 3, 2015 derailment, nor was he disciplined for late reporting an injury. Respondent did not terminate Complainant’s employment or officially discipline him in any way. (Tr. p. 193) Complainant was off work for approximately two months before returning to full-time duty. (Tr. p. 218)

Complainant believes his medical treatment request was delayed for 14 minutes. Complainant “was ready to go” as soon as he was filling out the injury report on the train. (Tr. p. 194) Complainant testified that Mr. Brown offered to bring Complainant’s bags home and Mr. Storbeck did not make this request to Mr. Brown. (Tr. p. 196-197)

## 2) Mr. Steffen Storbeck.

Mr. Steffen Storbeck is employed by Respondent as a Manager of Operating Practices (MOP) and has held this position for the past 12 years. (Tr. pp. 43-44) In September 2015, Mr. Storbeck worked for Respondent in Waco, Texas. (Tr. p. 44) Safety is Mr. Storbeck’s primary employment-related responsibility. (Tr. p. 47) As a Waco-based employee, Mr. Storbeck’s direct supervisor is Mr. Randy Lang, the Director of Road Operations (DRO). Mr. Lang’s supervisor is Mr. Kurt Zalar, the General Superintendent. (Tr. p. 46)

Mr. Storbeck testified a derailment occurred at the Knife River plant on September 3, 2015. Complainant was on board the railcar that derailed. (Tr. p. 45) Mr. Storbeck did not see the derailment occurring on September 3, 2015. (Tr. p. 46) On September 9, 2015, Mr. Storbeck explained that he first received a telephone call from Complainant regarding the September 3, 2015 derailment. This telephone call occurred at 7:39 p.m. and lasted approximately eight minutes. (Tr. p. 131) Complainant told Mr. Storbeck “I just want to let you know that – you remember that derailment that happened at Knife River I believe September 3<sup>rd</sup> . . . I sprained my ankle or something.” Mr. Storbeck asked Complainant if he was injured or if he needed medical assistance or an ambulance. Mr. Storbeck also asked Complainant if he was able to perform his job. (Tr. pp. 47, 131, 141-142) In response, Mr. Storbeck testified that Complainant responded “No, I just want to let you know.” (Tr. pp. 48, 132) According to Mr. Storbeck, Complainant also stated “I don’t need an ambulance, I don’t need any medical attention.” (Tr. p. 131)

After initially speaking to Complainant on the telephone, but before speaking with him in person, Mr. Storbeck called the corridor manager and requested additional crew in the event Complainant was injured and unable to work. (Tr. pp. 49-50) Out of concern for Complainant, Mr. Storbeck also called the Dispatcher to stop Complainant’s train in Waco so that he could meet with him personally. (Tr. pp. 49-50, 132) Mr. Storbeck again called the Dispatcher, Mr.

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<sup>17</sup> The private investigator report is included in the record as CX-4.

Jensen, to immediately obtain a “ride order” for a van, if necessary. (*See also* RX-5, p. 1) Mr. Storbeck also called his direct supervisor, Mr. Lang. Mr. Storbeck explained that standard operating procedure requires him to contact his direct supervisor when an incident is reported in his territory. Mr. Storbeck could not recall if his telephone conversation with Mr. Lang occurred before or after personally meeting with Complainant. (Tr. pp. 49-50)

Following the telephone call between Mr. Storbeck and Complainant, on his own initiative, Mr. Storbeck called the Dispatcher to stop the train on which Complainant was riding so that he could personally see Complainant. Mr. Storbeck did not request a personal meeting with Complainant. Mr. Storbeck also obtained a 52032 form prior to boarding the train and discussing the derailment with Complainant. Mr. Storbeck drove to a designated area and waited for Complainant’s train to arrive in a Waco siding area. (Tr. pp. 48, 133) Mr. Storbeck testified the gravel road on which he was required to drive was “very narrow, and it ha[d] kind of a drop-off, and there’s like a bunch of rain.” (Tr. p. 51) The road leading to the siding area is one-lane and surrounded by a chain-link fence. (Tr. pp. 52-53)

Mr. Storbeck called Complainant again around 8:00 p.m. on September 9, 2015. This call lasted for approximately five minutes. Mr. Storbeck again asked Complainant several times if he needed medical attention. (Tr. p. 133)

After the train arrived in Waco, Mr. Storbeck boarded the train. Before speaking with Complainant, Mr. Storbeck said hello to the engineer, Mr. Cedric Brown; he did not explain to Mr. Brown why he was there. (Tr. pp. 53, 143) Mr. Storbeck did not ask Mr. Brown if he had observed Complainant indicate any type of injury. (Tr. p. 143) He then immediately located Complainant and asked him if he was injured or needed medical attention or an ambulance. In response, Complainant refused medical treatment and stated he was not injured several times. (Tr. pp. 49, 52-53, 143) Complainant also stated he was not in any pain. (Tr. p. 52) Mr. Storbeck believed that Complainant was concerned about losing his job. (Tr. p. 54) Next, Mr. Storbeck decided to retrieve the 52032 from his truck so that it could be completed. (Tr. p. 52) When Mr. Storbeck entered the train, Complainant was hanging up his cellular phone. Then, Complainant told Mr. Storbeck that “I just want to get checked out.” Complainant did not state that he was injured. (Tr. pp. 55, 143) Immediately after hearing this statement, Mr. Storbeck told Complainant to stop completing the 52032 and get in his truck so that he could take Complainant to the hospital. (Tr. pp. 54, 56, 64) Mr. Storbeck’s truck was parked approximately 400 feet from the train. (Tr. p. 146) Complainant did not demonstrate any difficulty or inability to walk or ambulate when exiting the train. Complainant also did not have any problems entering Mr. Storbeck’s truck. (Tr. p. 146) Mr. Storbeck testified that he interpreted Complainant’s statement in the “most restrictive” way. Complainant did not specifically tell Mr. Storbeck that he wanted to go to the emergency room or to a hospital “to get checked out.” Complainant did not specify a location where he wanted to “get checked out.” Mr. Storbeck testified he knew Baylor Scott & White in Waco would be the closest hospital from their location. (Tr. p. 55)

After Mr. Storbeck and Complainant walked to Mr. Storbeck’s truck to go to the hospital, Mr. Storbeck testified that he “offered” for Complainant to speak with a “comfort nurse” while on the way to the hospital. After offering Complainant the opportunity to speak with Nurse Koch, Complainant stated that he knew her well and was going to call her. Complainant

indicated he knew Nurse Koch from a prior injury. (Tr. pp. 147-148) Complainant was unable to obtain his cellular phone, so Mr. Storbeck offered his cellular phone to Complainant if he desired to speak with Nurse Koch. (Tr. pp. 56, 64, 147) Complainant did not request for Mr. Storbeck to call a nurse, but Complainant agreed to speak with Nurse Koch after this option was made available and used Mr. Storbeck's cellular phone to place the call. (Tr. p. 63) Mr. Storbeck spoke with Nurse Koch first before handing the cellular phone to Complainant. Mr. Storbeck explained that Respondent employs nurses on each service unit. (Tr. p. 57) As a matter of policy, employees have the option to speak with a company nurse, but it is not a requirement. (Tr. pp. 57-58)

Mr. Storbeck then began driving Complainant to the emergency room. (Tr. p. 57) This required him to drive his truck in reverse down the single-lane road. Mr. Storbeck then realized a PTI<sup>18</sup> van had blocked the truck. The PTI van had arrived at 10:44 p.m. on September 9, 2015. (Tr. p. 138; RX-5, p. 4) Mr. Storbeck located the van's driver and requested the PTI van be moved out of the way. (Tr. pp. 57, 138)

Mr. Storbeck was driving the truck while Complainant spoke with Nurse Koch. Mr. Storbeck only recalled overhearing "something about ice versus heat versus his wife being a LVN." Nurse Koch spoke with Complainant from her location in Fort Worth, Texas. (Tr. pp. 89-90)

Mr. Storbeck testified he has been aware that nurses are available to speak with injured employees as a resource during his 12 years of employment with Respondent. (Tr. p. 69) Mr. Storbeck has never been instructed that there is a requirement for him to call a nurse and there is no written policy regarding the use of nurses. (Tr. pp. 70-71) Mr. Storbeck understood nurses should be contacted for "general medical" information. (Tr. p. 71) Mr. Storbeck testified he has never heard the phrase "call the nurse first." (Tr. p. 73) Mr. Storbeck never advised Complainant on September 9, 2015 that his injury would be FRA-reportable if he received prescription medication. (Tr. p. 75) When Mr. Storbeck personally met with Complainant, he did not have any discretion to remove Complainant from work due to any potential rule violation that Complainant may have committed. (Tr. pp. 87-88)

The emergency room was 14 or 15 miles away and the drive took approximately 15 or 20 minutes after accessing to the main road, assuming the PTI van had not blocked Mr. Storbeck's truck. (Tr. pp. 90, 124, 138) After the PTI van moved, Mr. Storbeck testified that he drove Complainant directly to the closest hospital. (Tr. pp. 108, 124)

Mr. Storbeck participates in weekly "safety calls" with other similarly situated managers in his territory. (Tr. pp. 109-110) A company nurse also participates in these calls. (Tr. p. 110) During a 27 minute safety conference call on September 10, 2015, Mr. Storbeck did not recall specifically discussing Complainant's injury. (Tr. pp. 110-111)

Mr. Storbeck reiterated that speaking with an OHN is voluntary and "strictly [for] comfort." If an employee agrees to speak with an OHN, then the OHN might be able to provide advice

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<sup>18</sup> PTI is an acronym for Professional Transportation, Inc., a van company with whom Respondent contracts to transport its engineers, conductors, and brakemen from one location to another. (JX-12, p. 1)

such as recommending elevating the leg while on the way to the hospital to relieve some of the pain. (Tr. p. 111)

Mr. Storbeck confirmed he received a May 29, 2015 memorandum issued to all management employees from Mr. Cameron Scott, Respondent's EVPO, regarding reporting requirements and whistle blower policy.<sup>19</sup> (Tr. p. 113) Mr. Storbeck also confirmed he reviewed Respondent's "Policy Statement and Complaint Procedures" and "Whistle Blower Policy and Directives," as required by the memorandum. (Tr. p. 114)

Mr. Storbeck testified he has reviewed Respondent's document styled "FRSA Whistleblower Frequently Asked Questions."<sup>20</sup> (Tr. p. 119) Based on this document, Mr. Storbeck was aware that, as a manager, he must "not delay medical care" and not "require the employee to first speak with an Occupational Health Nurse, or provide a statement, or complete a 52032 form, if doing so would delay the medical care the employee is seeking – even for a moment." (Tr. p. 120; JX-9, p. 1)

As a part of Mr. Storbeck's employment duties, he notifies RMCC<sup>21</sup> to report potential personal injury claims. Mr. Storbeck understands this process "basically compensate[s] the employee for their medical, since it's an on-duty or on-property, that they take up the medical bills." (Tr. pp. 125-126)

Mr. Storbeck testified he took the 52032 form he provided to Complainant on the locomotive from Complainant before it was completed. (Tr. p. 130)

Mr. Storbeck testified he did not force Complainant to speak with Nurse Koch; rather, he offered Complainant the option to speak with Nurse Koch. Mr. Storbeck further testified he did not deny or delay taking Complainant to the hospital. (Tr. p. 139)

Mr. Storbeck was aware that, in the past, some Respondent employees were concerned about being discharged due to reporting an injury. (Tr. p. 144)

Mr. Storbeck recalled that he called Nurse Koch on behalf of another Respondent employee approximately five years ago after a bee sting. (Tr. p. 152) Thus, in Mr. Storbeck's 12 years of employment with Respondent, he has only called a nurse on behalf of an employee on two occasions to "offer comfort." If an employee reports an injury, Mr. Storbeck calls 911. (Tr. p. 153)

### 3) Ms. Guadalupe Koch.

Nurse Koch has been employed by Respondent for the past 17 years as an OHN. Her

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<sup>19</sup> This document is also included in the record as JX-6.

<sup>20</sup> This document is also included in the record as JX-9.

<sup>21</sup> RMCC is an acronym for Response Management Communications Center, which is Respondent's 24 hours a day, 7 days a week communication or call center that processes emergency and non-emergency calls such as those concerning injuries, property damage, derailments, crossing accidents, environmental incidents, work place violence, and criminal activity. RMCC notifies appropriate Respondent managers, employees, local law enforcement agencies, local emergency response agencies, and federal agencies, as appropriate. (JX-12, p. 2)

employment duties primarily concern employee wellness, prevention, health education, health screenings, CPR classes, AED training, medical monitoring, and the return-to-work program. (Tr. pp. 226-227, 258)

Nurse Koch testified Respondent does not employ “company doctors” or have “preferred medical providers” for its employees. (Tr. p. 228) Nurse Koch did not receive any whistleblower training until approximately two months before the hearing. Nurse Koch has never been told by Respondent during the course of her employment that an employee is required to speak with her first, as an OHN, before the employee can obtain medical treatment. (Tr. p. 231)

Nurse Koch recalled receiving a phone call from Mr. Storbeck. Mr. Storbeck told her that he had an employee who he was taking to the emergency room. She estimated this call lasted approximately 14 minutes; she believed she spoke with Mr. Storbeck for two or three minutes and with Complainant for 11 or 12 minutes. Nurse Koch recalled hearing Mr. Storbeck ask Complainant if he desired to speak with her. Nurse Koch heard Complainant say “I’ll talk to Lupe.” (Tr. pp. 231-233, 246) By the time she received this phone call, Mr. Storbeck and Complainant had already decided to go to the hospital. Nurse Koch explained her role under these circumstances was to “offer any type of comfort, first aid, between the time they call [her] and to the ER.” (Tr. p. 233) She did not suggest that Complainant delay medical treatment so that he could see a company doctor or clinic. (Tr. p. 261)

Nurse Koch did not recall telling Complainant at any point during their conversation that going to a clinic, rather than the hospital or emergency room, would be the preferred path to obtain medical treatment; rather, Nurse Koch testified that she told Complainant that he would “need continuation of care, which would be at a clinic.” (Tr. p. 251) Nurse Koch testified it was not possible that she told Complainant that visiting a clinic would be preferred. (Tr. p. 252)

Nurse Koch did not know if Mr. Storbeck and Complainant had left for the hospital when Mr. Storbeck called her on September 9, 2015. She testified she could hear “noise,” “crackling of a phone breaking up,” and wind in the background during the call. She did not ask Mr. Storbeck or Complainant if they were on their way to the hospital during the phone call. (Tr. pp. 235-236, 260) While speaking with Complainant on the phone, she did not mention that taking prescription medication would make Complainant’s injury FRA-reportable. (Tr. p. 244)

Nurse Koch and Respondent do not direct injured employees to any specific preferred medical treatment providers. Rather, Respondent provides its injured employees with several options if they are unable to see their primary care physician. These facilities include Harris Occupational Health, Concentra, and Care Now. (Tr. pp. 236-237, 260)

Nurse Koch testified that, as a Respondent OHN, she is unable to tell an employee that he or she should not go to the emergency room. She is also unable to tell an employee to wait before going to the emergency room. She does not tell, and never has told, employees that they should see a company doctor or clinic. (Tr. pp. 259-260) Her supervisors have never told her to try to convince an injured employee from going to the emergency room. (Tr. p. 261) According to Nurse Koch, the employee always makes the decision where to obtain medical treatment. (Tr. p. 262) During the course of her employment with Respondent, Nurse Koch has never heard of

managers telling employees that they must speak with an OHN before seeing a physician. (Tr. p. 266)

4) Mr. Kurt Zalar.

Mr. Zalar has been a management employee for Respondent since 1996. (Tr. p. 296) Mr. Zalar became a Superintendent for Respondent's Fort Worth service unit in November 2011. He was the highest level manager in the Fort Worth unit. He held this position in September 2015. After some time as a "non-active employee," in February 2017, Mr. Zalar became Respondent's Network Superintendent over all three service regions. (Tr. pp. 272-274)

When Respondent's employees are charged with a rule violation, there is a formal investigation process. If the evidence supports a finding there is a potential rule violation, then an employee may be charged in order to ascertain the facts and determine if a rule violation occurred. The applicable Superintendent must approve the decision to charge an employee with a termination-level offense. Next, a hearing officer, which is a Respondent manager, will convene a hearing after a formal investigation. The Superintendent then determines the discipline, if any, that is taken against an employee. (Tr. pp. 276-281)

Mr. Zalar testified he did not terminate Mr. Steven Terrell for late reporting an injury approximately two years ago; rather, he terminated Mr. Terrell for dishonesty and falsification of the 52032 form. He explained, per Respondent policy and the collective bargaining agreement, Respondent cannot terminate an employee for late reporting an injury. (Tr. pp. 281-284, 297-298) If an employee late reports an injury, the employee must participate in a one week paid training course. (Tr. p. 298) Although Mr. Zalar concluded Mr. Terrell did not timely report an injury, he was terminated for falsifying the 52032 form. (Tr. p. 285) Mr. Zalar could not recall if he has ever disciplined an employee for late reporting an injury. Mr. Zalar also confirmed that he terminated Mr. Justin McGowan under nearly identical circumstances as Mr. Terrell. (Tr. pp. 287, 297)

Mr. Zalar testified he never approved a charge against Complainant. Complainant was never charged with a rule violation or disciplined after the September 2015 derailment. (Tr. pp. 288, 299) Mr. Storbeck did not recommend to Mr. Zalar that any disciplinary action be taken against Complainant. (Tr. p. 304) Mr. Zalar was notified via email within a few hours of Complainant's report of injury. (Tr. pp. 288-289; CX-3; JX-11) He received this email the following morning. (Tr. p. 307) Mr. Zalar was never informed by telephone of Complainant's injury. (Tr. p. 308)

Prior to September 2015, Mr. Zalar had received whistleblower training and receives such training annually. As of September 2015, Mr. Zalar understood it was unlawful to deny, delay, or interfere with an employee's medical treatment for an on-the-job injury. (Tr. p. 290) He was also aware that if an employee requests transportation to the hospital for an on-duty injury, then Respondent must promptly arrange for that transportation. (Tr. pp. 290-291) Mr. Zalar also explained he knows that if an employee suffers an on-duty injury and is prescribed prescription medication, then the injury is automatically FRA-reportable. (Tr. p. 291) If a management employee interferes with an employee's ability to report a personal injury, the management employee will be disciplined or terminated. (Tr. p. 301) If an employee reports an injury, managers are expected to provide medical treatment as quickly as possible if needed. (Tr. p. 302)

When an employee is injured, the employee makes the decision where to obtain treatment or the employee is taken to the closest available medical facility. (Tr. pp. 302-303)

Mr. Zalar has never told Nurse Koch not to send an employee to the emergency room or not to allow employees to take prescription drugs. Mr. Zalar has never instructed his managers to require injured employees to speak with a nurse before receiving medical treatment. (Tr. p. 304) Respondent does not have a “nurse-first” policy. (Tr. pp. 304-305) Mr. Zalar explained the purpose of offering an injured employee the option to speak with a nurse is to “make the employee comfortable and stable as much as we can to get them to the emergency room so he can get medical care he needs.” (Tr. p. 305) The nurse can provide suggestions for the employee on the way to the hospital. The nurse may also call the hospital before the employee’s arrival and explain the employee’s symptoms so that the hospital can better prepare for the employee’s arrival. (Tr. p. 306)

Mr. Zalar is often paid bonuses based on his performance. (Tr. p. 291) The bonus is, in part, based on the number of “incidents,” which includes anything from a scraped knee to a FRA-reportable injury. (Tr. p. 295) Whether an incident is FRA-reportable or not does not affect Mr. Zalar’s bonus. (Tr. p. 296)

Mr. Zalar testified he has never directed or requested that private investigation be conducted on an employee who has reported an injury. (Tr. p. 309) He has seen private investigator reports before, including Complainant’s report. Respondent’s Claims Department initiates these investigations, but it does not solicit Mr. Zalar’s input before initiating an investigation. (Tr. p. 310) Upon review of CX-4, Mr. Zalar identified Ms. Vanessa Thompson as a claims agent for the Fort Worth area. (Tr. p. 311)

## **6. Credibility and Relevant Findings of Fact.**

a. ***Credibility Analysis.*** The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw his own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh’g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

### 1) Complainant.

The undersigned found Complainant generally credible. Respondent made no specific or direct attempts in its post-hearing brief or reply brief to undermine Complainant’s credibility.

However, the undersigned found Complainant’s testimony unpersuasive due to the equivocal nature of his reports following the September 3, 2015 derailment. For example, immediately

following the derailment on September 3, 2015, Complainant testified he “did not have an answer” at that time if he was injured and believed he was “okay.” Later, Complainant testified his ankle and back became sore and he used ice and heat packs to treat his ankle pain. He did not seek treatment from a medical care professional. On September 9, 2015, six days following the derailment, he testified “everything was hurting,” including his ankle and also his legs. However, when he called Mr. Storbeck to report that he might have been injured as a result of the derailment, Complainant was vague and nonspecific with Mr. Storbeck about the extent of his claimed injuries. Complainant did not tell Mr. Storbeck about any specific type of pain; rather he only told Mr. Storbeck that he wanted to have his foot checked out. Notably, this was after Complainant told Mr. Storbeck on several occasions that same evening he was uninjured and did not desire to obtain medical treatment. Although not directly relevant to whether Respondent denied, delayed, or interfered with Complainant’s subsequent request for medical treatment, his equivocation, lack of specificity, and inconsistent reports regarding the extent of his claimed injuries make his testimony about the version of the events occurring on the evening of September 9, 2015 unpersuasive, including the timing and content of the telephone conversations with Nurse Koch.

2) Mr. Steffen Storbeck.

The undersigned found Mr. Storbeck largely credible. Respondent has employed Mr. Storbeck as a MOP for the past 12 years. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. There is no indication in the record that he expressed any animus towards Complainant. In fact, Complainant testified he felt comfortable notifying Mr. Storbeck about the accident and believed he would offer friendly advice about possibly late reporting an injury. Accordingly, the undersigned accords significant weight to Mr. Storbeck’s testimony.

Complainant alleges Mr. Storbeck’s testimony is discredited by the phone records contained in the record because they reveal that immediately prior to calling Nurse Koch, Mr. Storbeck placed a three minute call with Mr. Lang. Complainant argues that “given this sequence of events the reasonable inference is that DRO Lang directed Mr. Storbeck to route [Complainant] to the nurse first.” (CB-1, p. 8) However, the undersigned finds such an inference speculative and conjectural. Because Mr. Lang is Mr. Storbeck’s direct supervisor, Mr. Storbeck is required to report all injuries to Mr. Lang. Also, as the phone records make clear, Mr. Storbeck made outgoing calls to and received incoming calls from Mr. Lang throughout the course of the evening on September 9, 2017. The fact that Mr. Storbeck made a phone call to Mr. Lang immediately prior to placing a call to Nurse Koch does not establish or reasonably suggest that Mr. Lang directed Mr. Storbeck to require Complainant to speak with Nurse Koch as a prerequisite to obtain medical treatment and transportation to the hospital.

Complainant testified the entire 14 minute conversation with Nurse Koch occurred prior to leaving for the hospital with Mr. Storbeck. Complainant argues in his post-hearing brief that Mr. Storbeck required him to speak with Nurse Koch before he would transport Complainant to the hospital. Complainant’s testimony is wholly inconsistent with other undisputed testimony and documentary evidence in this case. The record reveals, and Complainant does not dispute, that Mr. Storbeck, without Complainant’s request, arranged for the train to stop so that Mr. Storbeck

could personally speak with Complainant immediately upon learning that Complainant might have been injured in a derailment six days earlier. Mr. Storbeck also asked Complainant on several occasions that evening if he was injured or needed medical treatment. It is also undisputed that Mr. Storbeck did not permit Complainant to finish completing the 52032 form because while filling out the form Complainant stated he desired to have his foot checked out. After making this statement, Mr. Storbeck immediately told Complainant “let’s go” to the hospital. Complainant subsequently completed the 52032 form three days later on September 12, 2015. In addition, Mr. Storbeck also secured other employees to work on Complainant’s behalf in the event Complainant was unable to continue with his work. Such actions demonstrate that Mr. Storbeck proactively took steps necessary to promptly secure medical treatment for Complainant even before Complainant made the request to have his foot checked out.

Consequently, Mr. Storbeck’s testimony concerning the phone calls with Nurse Koch is more persuasive and credible than Complainant’s testimony. The undersigned finds the most reasonable interpretation of the evidence is the telephone calls with Nurse Koch were placed or received shortly before Complainant and Mr. Storbeck began driving to the hospital and concluded during the drive to the hospital. The undersigned specifically rejects Complainant’s testimony that the entire duration of his telephone conversation with Nurse Koch occurred prior to leaving for the hospital. This finding of fact is further supported by the Mr. Storbeck’s cellular telephone records.

3) Ms. Guadalupe Koch.

The undersigned found Nurse Koch largely credible. Respondent has employed Nurse Koch for the past 17 years as an OHN. Her testimony was straightforward and forthright. There were no apparent inconsistencies in her testimony. Additionally, her testimony regarding the nature of the phone conversation with Complainant is corroborated by Mr. Storbeck, and the length of the discussion is corroborated by the cellular phone records. The evidence presented in this case does not suggest a motive or personal interest by Ms. Koch to mischaracterize the timeline of details for her phone conversation with the Complainant. The undersigned finds her testimony persuasive regarding the details and her purpose of her conversation with Complainant.

Complainant argues Ms. Koch’s testimony “as to what was discussed with [Complainant] is clearly unreliable.” (CB-1, p. 9) This assertion is based on Respondent’s counsel’s letter to OSHA in which Respondent stated that Nurse Koch “may have told [Complainant] that an initial clinic visit may be the preferred path as the injury (which occurred six days prior) was non-acute.” However, Respondent’s letter to OSHA further specifically provided that Nurse Koch “did not try to persuade [Complainant] to go to a clinic rather than the emergency room – per well-known [Respondent] policy, [Complainant’s] preferred medical treatment was his own prerogative.” (JX-14, p. 5)

4) Mr. Kurt Zalar.

The undersigned found Mr. Zalar largely credible. Respondent has employed Mr. Zalar in several management positions since 1996. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony.

Complainant suggests Mr. Zalar's testimony lacks credibility because he testified that during the course of his career, his bonus has not been tied to reportable injuries. Complainant cites several cases, which Complainant suggests stand for the idea that other Respondent managers have testified that their bonuses are tied to reportable injuries. Complainant further contends that "the quality of Mr. Zalar's testimony and his highly defensive demeanor make him an incredible [sic] witness." (CB-2, p. 10) The undersigned finds Mr. Zalar's bonus structure is irrelevant to this claim. Furthermore, Mr. Zalar's testimony was largely irrelevant as to whether Complainant suffered an adverse action due to a delay, denial, or interference with prompt transportation to the hospital or requested medical treatment. Mr. Zalar was not present on the evening of September 9, 2015 and had no direct interaction with Complainant or Mr. Storbeck on that evening. Mr. Zalar's testimony as to whether the private surveillance conducted on Complainant following his report of injury was also largely irrelevant because he was not involved in making the decision of initiate the private surveillance.

## **7. Applicable Law and Analysis.**

a. *The Parties' Arguments.* Complainant alleges Respondent engaged in adverse action when it "began surveillance on [Complainant] and his family, shortly after [Complainant] engaged in protected activity" pursuant to § 20109(a)(3)-(4). Complainant suggests the close temporal proximity of Respondent's initiation of private surveillance and Complainant's report of a work-related injury and filing of his OSHA complaint establishes the private surveillance was directly connected to his protected activity. Complainant argues hiring a "private investigator to spy on [Complainant], his wife, and his children is materially adverse as it 'might have dissuaded a reasonable worker' from reporting an injury or seeking medical treatment." (CB-1, p. 10; CB-2, p. 9) In response, Respondent argues private surveillance is not an adverse action under the FRSA. Respondent asserts ordering surveillance is a "way to test the validity of injuries claimed by an individual who seeks compensation."<sup>22</sup> Respondent further argues that because Complainant "first claimed he might be injured nearly a week after allegedly twisting his ankle, and then had a potential claim for compensation from both [Respondent] and its customer, surveillance was reasonable and lawful under the FRSA." This is a way for Respondent to "shed light on the employee's off-work activities." (RB-1, pp. 15, 17; RB-2, p. 6)

In addition, Complainant alleges Respondent violated § 20109(c)(1) because Mr. Storbeck refused to promptly transport him to the hospital and "attempted to dissuade [Complainant] from going to the hospital." Specifically, Complainant contends Mr. Storbeck required him to speak to an OHN before taking him to the hospital, which resulted in a 14 minute delay in obtaining medical treatment that constituted an adverse action. Additionally, Complainant argues Nurse

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<sup>22</sup> In his reply brief, Complainant contested Respondent's assertion that Complainant sought compensation as a result of the September 3, 2015 derailment. Complainant explained the 52032 form is not a "claim form." Rather, the 52032 form is "Respondent's designated form on which the Federal Rail Administration requires Respondent to record employees' personal injuries." According to Complainant, he did not file a personal injury claim against Respondent under the Federal Employers' Liability Act (FELA). (CB-2, p. 8)

Koch interfered with his requested medical treatment “by trying to convince him to further delay treatment another day so that he could be seen at a [Respondent] preferred clinic.” (CB-1, pp. 6-7) In response, Respondent asserts it did not deny, delay, or interfere with Complainant’s report of injury or request for medical treatment; rather, Complainant delayed his medical treatment by waiting six days to report his injury and requesting medical treatment from Respondent. Respondent contends it offered medical treatment immediately after Complainant’s request, promptly transported him to the hospital, and offered to let him consult with an OHN while on the way to the hospital. (RB-1, p. 3)

b. ***Elements of FRSA Claim.*** FRSA section 20109, entitled “Employee protections,” incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry. 49 U.S.C. § 42121(b); *see also* 49 U.S.C. § 20109(d)(2)(A). To prevail, a FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); *see Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant’s protected behavior. 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010), citing *Brune*, ARB No. 04-037, slip op. at 13.

1) Protected Activity.

In this case, the parties stipulated that Complainant engaged in protected activity when he did the following: 1) reported on September 9, 2015 that he had been injured in a derailment that occurred on September 3, 2015 pursuant to 49 U.S.C. § 20109(a)(4); 2) requested transportation to the hospital on September 9, 2015 pursuant to 49 U.S.C. § 20109(c)(1); 3) followed the treatment plan of his physician from September 9, 2015 through October 20, 2015, which restricted him from performing full-time work for Respondent pursuant to 49 U.S.C. § 20109(c)(2); and 4) filed a complaint with OSHA on September 11, 2015 pursuant to 49 U.S.C. § 20109(a)(3). Consequently, based on the parties’ joint stipulations of fact, the undersigned concludes Complainant engaged in a protected activity under the FRSA.

2) Adverse or Unfavorable Personnel Action.

The FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, in whole or part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying the respondent of a work-related illness, or denying, delaying or interfering with the complainant’s request for medical treatment or care. *See* 49 U.S.C. § 20109.

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR-21, incorporated into the FRSA. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). To be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57. Moreover, "adverse actions" refer to unfavorable employment actions that are "more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (citing *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010))(emphasis added)(holding that a performance rating drop from "competent" to "needs development" was more than trivial and was an adverse action as a matter of law).<sup>23</sup>

(A) *Private Surveillance as Adverse Action Under Section 20109(a)(3)-(4).*

On October 6, 2015, Missions Investigations submitted an "Investigation Report" to Respondent employee Ms. Vanessa Thompson. According to the report, private surveillance was conducted on Complainant for four days: September 17, September 22, September 26, and September 30, 2015. The report detailed the physical movements and travel of Complainant, his wife, and children. The report detailed Complainant's visits to two medical facilities. The report noted that Complainant did not use crutches or a boot on his foot. (CX-4, pp. 1-3)

After reporting his injury, Complainant testified he believed he "was being watched." He recalled "seeing the same vehicles in [the] neighborhood that shouldn't be there that was just erratic." Complainant observed vehicles driving through his neighborhood that would stop at his house. These vehicles followed Complainant and his wife "everywhere" they went, which was "stressful" for him and his wife. (Tr. pp. 176-177) Mr. Zalar testified he has never directed or requested that private investigation be conducted on an employee who has reported an injury. (Tr. p. 309) Mr. Zalar has seen private investigator reports before, including Complainant's report. Respondent's Claims Department initiates these investigations, but it does not solicit Mr. Zalar's input before initiating an investigation. (Tr. p. 310)

The undersigned has not identified any controlling legal authority that holds, as a matter of law, that a respondent-employer who hires a private investigator to conduct private surveillance on a complainant constitutes an adverse action under the FRSA. However, given the ARB's expansive view of adverse employment actions, the undersigned concludes that non-tangible

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<sup>23</sup> In *Fricka*, the ARB concluded that the *Williams* definition of adverse personnel action also applied to FRSA claims. In this case, the Board determined the respondent (Amtrak) engaged in "discrimination" against the complainant when it misclassified his injury as "non-work" related, which was originally reported by the complainant as "work related." Specifically, the ARB held that the respondent's reclassification of the injury was "unfavorable and more than trivial—it led to the respondent not paying the complainant's medical bills totaling \$297,797.21." *Fricka*, at 7-8.

activity, such as private surveillance, is included in the definition if it is unfavorable and non-trivial, either "as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 5 (ARB Nov. 24, 2015). In *Fordham*, the ARB affirmed the administrative law judge's finding that claimed "intrusive surveillance" conducted by the respondent on the complainant, which included management attempts to locate the complainant by e-mail communications, visits to her desk, and questions about absences from meetings and work, did not constitute an adverse action.<sup>24</sup> *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 12, 37 (ARB Oct. 9, 2014).

In this case, Complainant testified the Respondent-ordered private investigator surveillance was "stressful" for him and his family because unknown vehicles followed him "everywhere [they] went." However, a review of the private investigator's report reveals the length of surveillance conducted on Complainant was minimal. The surveillance was conducted on four days, beginning on September 17, 2017, which was eight days after reporting his September 3, 2015 accident. The surveillance was conducted for approximately six hours per day over the course of approximately two weeks. The report makes clear that the private investigator followed Complainant to his doctor's appointments and parked outside his home during the daytime hours only. There is no indication the private surveillance caused Complainant to alter his daily living activities in any manner or resulted in Complainant or any of his family members having any personal encounters with unknown persons. Consequently, the undersigned concludes that, based on the facts presented in this case, the private surveillance of Complainant was not an adverse action and would not dissuade a reasonable worker from bringing a charge of discrimination.

(B) *Denial, Delay, or Interference With Medical Treatment as Adverse Action Under Section 20109(c)(1)*.

Section 20109(c)(1) of the FRSA provides:

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

As the Administrative Review Board (ARB) has stated in FRSA cases, the words "deny, delay, or interfere, should be applied as they are commonly understood. *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 16 (ARB July 25, 2012). "These are prohibitive words simply meaning to impede, slow down, or prevent medical treatment from moving forward or occurring. *Id.* "An act that causes medical treatment to be rescheduled necessarily means that the treatment was delayed." *Id.* "Any obstacle placed in the way of treatment necessarily results in interference." *Id.* "Denial means to refuse or reject a

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<sup>24</sup> The claimed "intrusive surveillance" in this case did not involve private surveillance at Complainant's residence.

request for medical care.” *Id.* “This subsection of the statute simply focuses on whether the railroad carrier interfered with medical treatment and thereby engaged in adverse action.” *Id.* Thus, under subsection 20109(c)(1), the act of committing the restricted activity related to medical treatment by its very nature constitutes adverse action.

Therefore, to prove that a railroad carrier violated subsection 20109(c)(1), “an employee must prove that (1) the carrier inserted itself into the medical treatment and (2) such act caused a denial, delay, or interference with medical treatment.” *Id.* at 17.

As stipulated by the parties, Complainant was involved in a derailment during the course and scope of his employment with Respondent on September 3, 2015. Following this derailment, Complainant returned to work and completed his scheduled shifts on September 4 and September 8, 2015. On September 9, 2015 at 5:00 p.m., Complainant reported for his scheduled shift to work as a conductor from Hearne to Fort Worth. Prior to reporting for work on September 9, 2015, Complainant had not reported his claimed injury occurring on September 3, 2015 or requested medical treatment from his supervisor or other Respondent employee.

As the phone records contained in the record detail, Complainant placed an eight-minute call to Mr. Storbeck at 7:39 p.m. on September 9, 2015. Mr. Storbeck testified that, during this phone call, Complainant reported he may have sprained his ankle following the derailment on September 3, 2015. Complainant testified he decided to call Mr. Storbeck on September 9, 2015 because the pain in his ankle was becoming worse and he was in pain. As Complainant testified, he told Mr. Storbeck that he “might be injured” and “need[ed] to know what to do about reporting it.” According to Complainant, he told Mr. Storbeck he wanted to have his ankle “checked out” during this phone call.

The phone records also confirm that Complainant placed another call to Mr. Storbeck at 8:05 p.m. later that evening. During this phone call, Mr. Storbeck informed Complainant that he had directed the Dispatcher to stop the train in which Complainant was traveling in order to personally speak with Complainant at a siding area in Waco.<sup>25</sup> Mr. Storbeck drove his personal truck to the Waco siding area and waited for Complainant’s train to arrive.

The parties stipulated, and the phone records confirm, three phone calls were placed between Mr. Storbeck’s cellular phone and Nurse Koch. At 10:31 p.m., Mr. Storbeck placed a three minute outgoing call to Nurse Koch. At 10:34 p.m., Mr. Storbeck placed a one minute outgoing call to Nurse Koch. At 10:38 p.m., Mr. Storbeck received a ten minute incoming call from Nurse Koch. The parties stipulated that during all or some of these phone calls, Nurse Koch spoke with Complainant. Mr. Storbeck testified he offered to let Complainant use his cellular phone to speak with Nurse Koch for his “comfort.” Complainant testified Mr. Storbeck simply handed him the cellular phone with Nurse Koch on the line. Nevertheless, according to Complainant, Nurse

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<sup>25</sup> Mr. Storbeck’s phone records reveal he spoke with Complainant at 7:39 p.m. and 8:05 p.m. on September 9, 2015. However, Mr. Storbeck testified that he had already spoken with the Dispatcher regarding stopping Complainant’s train in the Waco siding area before receiving the 8:05 p.m. phone call from Complainant. However, Mr. Storbeck’s phone call to the Dispatcher did not occur until 8:10 p.m. Thus, it is unclear how Mr. Storbeck would have known Complainant’s train would stop at the Waco siding area prior to speaking with the Dispatcher. Nevertheless, the undersigned need not further address this discrepancy as Complainant does not argue that this in any way resulted in a delay, denial, or interference in obtaining medical treatment. (*See* JX-1; JX-2, p. 1)

Koch told Complainant to apply cold and hot packs, keep his foot elevated, and take ibuprofen and Tylenol. Mr. Storbeck also recalled hearing something about applying heat and cold to Complainant's foot during the conversations between Nurse Koch and Complainant. Furthermore, Nurse Koch testified that she received a phone call and spoke with Complainant after he reported his injury to Mr. Storbeck and decided to go to the hospital. She estimated that she spoke with Complainant for 11 or 12 minutes during the total 14 minute connection time during the three phone calls. Nurse Koch completed an OHC Clinical Consultation note based on her conversation with Complainant. Therefore, the undersigned concludes Respondent inserted himself into Complainant's medical treatment when Complainant used Mr. Storbeck's cellular phone to speak with Nurse Koch in which he received treatment instructions or recommendations relating to reported injury that occurred on September 3, 2015 following a derailment.

During the first phone call from Complainant to Mr. Storbeck on September 9, 2015, Mr. Storbeck testified he asked Complainant if he needed medical care or treatment. In response, Complainant stated he did not need medical care and was calling to "let [Mr. Storbeck] know" about the September 3, 2015 derailment. As previously discussed, and without Complainant's request, Mr. Storbeck decided on his own initiative to direct the Dispatcher to stop Complainant's train at a siding area in Waco so he could personally speak with Complainant about any present symptoms related to the derailment occurring six days prior to September 9, 2015. With the concern that Complainant may have been unable to perform his work, Mr. Storbeck arranged to have additional employees available to work the remainder of Complainant's shift. Despite the fact that Complainant had not requested medical treatment at this time, and had previously stated that he was uninjured to Mr. Storbeck, the evidence demonstrates that Mr. Storbeck immediately began taking the initial necessary steps to secure Complainant with medical treatment and transportation to the hospital.

It is unclear from the record at what exact time Mr. Storbeck boarded the train at the Waco siding area to speak with Complainant in person. However, it is undisputed that Mr. Storbeck was already present at the Waco siding area when Complainant's train arrived. When the train arrived, Mr. Storbeck boarded it and began speaking with Complainant. He asked Complainant if he was injured, needed medical care, or required an ambulance. In response, Complainant refused medical treatment and said he was not injured. Subsequently, Mr. Storbeck went to his truck to obtain the 52032 form to properly document and report Complainant's September 3, 2015 work-related accident. When he returned to the train, Mr. Storbeck observed Complainant hanging up his cellular phone. Then, according to Mr. Storbeck, Complainant told him that he wanted to "get checked out." Complainant corroborated this portion of Mr. Storbeck's testimony and testified he agreed to have his foot "checked out" after speaking with his union representative. Mr. Storbeck testified he interpreted Complainant's statement in the "most restrictive" manner and immediately decided to take Complainant to the closest hospital emergency room. He immediately told Complainant "let's go." Mr. Storbeck even instructed Complainant to stop completing the 52032 form in an effort to leave for the hospital as promptly as possible. Importantly, Complainant does not dispute this portion of Mr. Storbeck's testimony. Mr. Storbeck's conduct strongly indicates he did not delay or deny Complainant with requested medical treatment and promptly transported him to the hospital.

At this point, the testimony of Mr. Storbeck and Complainant begins to differ materially. Mr. Storbeck testified he called Nurse Koch while he and Complainant were in his truck on the way to the hospital. Conversely, Complainant testified he spoke with Nurse Koch before leaving for the hospital and did not speak with Nurse Koch on the way to the hospital. Nurse Koch did not know if Mr. Storbeck and Complainant were on the way to the hospital at the time of the phone calls.

Complainant's testimony that all of the phone calls with Nurse Koch occurred before leaving for the hospital with Mr. Storbeck is highly unlikely. The last phone call with Nurse Koch began at 10:38 p.m. and lasted for ten minutes. Thus, it was completed by 10:48 p.m. The hospital records indicate Complainant arrived at the hospital at 11:06 p.m. As a result, under Complainant's version of events, it would have only taken 18 minutes for Complainant to arrive at the hospital following the completion of the last phone call. Complainant and Mr. Storbeck both testified it took 15 or 20 minutes to travel to the hospital after arriving at the main road from the train's location, which required travel down a single-lane gravel road. Mr. Storbeck's truck was also parked approximately 400 feet away from the train's location. The drive to the hospital was delayed by the PTI van that had blocked Mr. Storbeck's truck. Consequently, Complainant's account of the events, although not impossible, is improbable. The undersigned finds Complainant's conversation with Nurse Koch began before leaving for the hospital and concluded while Mr. Storbeck was driving Complainant to the hospital.

According to Complainant, Mr. Storbeck did not ask if him if he desired to speak with Nurse Koch; rather, Mr. Storbeck "handed [Complainant] the phone." Mr. Storbeck testified he did not force Complainant to speak with Nurse Koch; rather, he offered this option to Complainant. Although Complainant did not request that Mr. Storbeck call Nurse Koch, Complainant testified he agreed to speak with her and acknowledged he knew Nurse Koch from a previous injury. Notably, Nurse Koch testified she heard Complainant say "I'll talk to Lupe." Nevertheless, the parties stipulated there were three calls between Mr. Storbeck and Nurse Koch on the evening on September 9, 2015 and that Complainant spoke with Nurse Koch during some of all of these phone calls. There is no evidence that suggests Mr. Storbeck required or forced Complainant to speak with Nurse Koch as a prerequisite to obtain medical treatment or transportation to the nearest hospital. Significantly, Complainant did not testify he declined to speak with Nurse Koch or that it was a prerequisite for him to obtain medical treatment or transportation to the hospital. Complainant's testimony is contrary to the argument raised in his post-hearing brief that Respondent "made him" consult with Nurse Koch. (CB-1, p. 7) By the time Mr. Storbeck placed the first phone call to Nurse Koch, he had already decided to transport Complainant to the closest hospital. The evidence establishes that Mr. Storbeck did not cause Complainant's transportation and medical treatment to be denied or delayed after Complainant told Mr. Storbeck he desired to have his foot "checked out." Further, the undersigned concludes Complainant voluntarily spoke with Nurse Koch and Mr. Storbeck did not require Complainant to speak with Nurse Koch as a prerequisite to secure transportation to the hospital. Furthermore, speaking with Nurse Koch did not result in a denial or delay of transporting Complainant to the hospital and securing medical treatment.

The crux of Complainant's argument in this case is the three phone calls with Nurse Koch, which in total lasted 14 minutes, resulted in delay or interference with Complainant's medical

treatment. (CB-1, pp. 7-8) Other than the phone calls and conversations with Nurse Koch, Complainant makes no well-articulated argument that any other action on the part of Respondent or other Respondent-employee delayed, denied, or interfered with his medical treatment and transportation to the hospital. However, to the extent any argument raised by Complainant in his post-hearing brief can be construed that Mr. Strobeck's actions on the evening of September 9, 2015, unrelated to placing the phone calls to Nurse Koch, constitutes a delay, denial, or interference of medical treatment, the undersigned rejects such an argument. As noted above, Mr. Strobeck testified he interpreted Complainant's statement that he wanted to "get checked out" in the most restrictive manner. Immediately after Complainant made this statement, Mr. Strobeck testified he told Complainant he was taking him to the hospital. Notably, Complainant did not fully complete the 52032 form because Mr. Strobeck decided to take Complainant to the hospital before Complainant was able to fully complete it. (Tr. pp. 168-169; *see also* RB-2, p. 3; JX-1; JX-3) Complainant testified that he was "ready to go" to the hospital as he was filling out the 52032 form, and this was when Mr. Strobeck decided to transport Complainant to the nearest emergency room.

Similarly, the evidence establishes Nurse Koch did not interfere with Complainant obtaining medical treatment when she spoke with him on Mr. Strobeck's cellular phone. Mr. Strobeck explained that Respondent's employees, as a matter of corporate policy, have the option to speak with an OHN after reporting an injury to obtain "general medical" information. Mr. Strobeck could not recall any specific details of the conversation between Complainant and Nurse Koch; rather, he only recalled overhearing something about using ice and heat and Complainant's wife also being employed as a nurse. Nurse Koch explained her role under these circumstances was to "offer any type of comfort" or first aid before Complainant arrived to the emergency room. Nurse Koch also testified she told Complainant that he would need continued care following any treatment he might receive that evening. Nurse Koch's testimony is supported by Respondent's OHN Clinical Protocols, which contain a general approach for Respondent's OHNs to follow. Specifically, the guidance provides "for the general comfort of the employee . . . as appropriate" while in transport in a non-emergency vehicle to a medical provider. Nurse Koch's testimony is further corroborated by the "OHN Clinical Consultation Record" form, which she completed after her conversation with Complainant on September 9, 2015. On this form, Nurse Koch noted Complainant was transferred to a medical facility in a non-emergency vehicle and she advised Complainant to follow the instructions of the emergency or personal medical provider. In addition, other than Complainant's self-serving testimony, there is no evidence that establishes that Nurse Koch attempted to dissuade Complainant from going to the emergency room so that he could instead be seen by a Respondent preferred clinic at a later date and time. The evidence establishes that Nurse Koch properly followed Respondent's standard operating procedures for its OHNs, and by following these procedures, Nurse Koch did not dissuade or interfere with Complainant from obtaining medical treatment.

Therefore, the undersigned concludes Complainant failed to carry his burden by a preponderance of the evidence to establish that Respondent caused a delay, denial, or interference of Complainant's medical treatment and transportation to the hospital. The evidence of record demonstrates that Respondent did not impede or place any obstacle in the way of the transportation of Complainant to the hospital to obtain medical treatment. Consequently, Complainant did not establish that Respondent engaged in activity that delayed, denied or

interfered with Complainant's request for medical treatment and thus would constitute adverse action under § 20109(c)(1).

**8. Ruling.** Complainant failed to carry his burden to prove he suffered an unfavorable or adverse personnel action under the FRSA. The private surveillance was not an adverse action. Respondent did not delay, deny, or interfere with Complainant's transportation to the hospital or requested medical treatment and thereby did not engage in adverse action. This claim is denied and this case is dismissed.

**SO ORDERED** this day at Covington, Louisiana.

**TRACY A. DALY**  
**Administrative Law Judge**

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

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

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

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