

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 03 August 2018

ALJ NO.: 2017-FRS-00071

In the Matter of:

CLOVIS COLLEY,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Fredric A. Bremseth, Esq., Bremseth Law Firm, P.C., Minnetonka, Minnesota, for the Complainant

Sierra Poulson, Esq. and Ryan Wilkins, Esq., Union Pacific Railroad Company, Omaha, Nebraska, for the Respondent

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises from a complaint filed by Clovis Colley (“Complainant”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Union Pacific Railroad Company (“Union Pacific” or the “Respondent”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

The FRSA complaint filed with OSHA alleged Respondent issued Complainant a Notice of Investigation for dishonesty in December 2015 for reporting a workplace shoulder injury. On June 6, 2017, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found that there was no reasonable cause to believe Respondent violated the Act. On June 21, 2017, Complainant objected to the Secretary’s findings and requested a *de novo* hearing before the Office of Administrative Law Judges (“OALJ”).

The case was referred to OALJ, and a hearing was held before me in Omaha, Nebraska, on January 16 & 17, 2018, at which time the parties were afforded the opportunity to present evidence and arguments. The parties' Joint Pre-Trial Statement was admitted into evidence as Administrative Law Judge Exhibit ("ALJX") 1, and the parties' documentary evidence was admitted as Joint Exhibits ("JX") 1-9, Complainant's Exhibits ("CX") 1, and Respondent's Exhibits ("RX") 1-15.¹ Hr'g Tr. ("TR") 5, 11-12, 155. Testimony was heard from Complainant, Michael Russell, Daniel Torres, and Paul Hinton.

A post-hearing conference call was held with the parties on January 25, 2018, to discuss the possibility of admitting limited medical evidence into the record. *See* On-the-Record Conf. Call Tr. 1/25/18. Following a discussion with the parties, post-hearing medical evidence was not allowed, and the record was closed. *Id.* at 9. On March 30, 2018, I issued an Order Granting Respondent's Motion to Reopen the Record, admitting RX 16, the arbitration decision in Complainant's formal grievance filed pursuant to his collective bargaining agreement.

The parties submitted post-hearing briefs ("Compl. Br." and "Resp. Br." respectively), and the record is closed.

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

1. Union Pacific is a railroad carrier within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102;
2. Complainant was a Union Pacific "employee" within the meaning of 49 U.S.C. § 20109 at all times relevant to his Complaint;
3. Complainant submitted a personal injury report on November 25, 2015; and
4. Following an investigation hearing on October 27, 2016, as mandated by Complainant's collective-bargaining agreement, Union Pacific sustained multiple disciplinary charges against Complainant which resulted in his dismissal from service in connection with his use of a cell phone while on duty on November 17, 2015, and for falsifying a personal injury report he contended occurred on the same date.

ALJX 1. At hearing, parties further stipulated that Complainant's dismissal constituted an adverse action. TR 7.

The issues before me are: (1) whether Complainant's personal injury report was made in good faith, as required to qualify as protected activity under the FRSA;² (2) whether

¹ Respondent withdrew RX 16 at hearing. TR 155.

² At hearing, parties agreed that if the injury report is found to have been made in good faith, it would qualify as protected activity. TR 7.

Complainant's good-faith injury report (if any) was a contributing factor in his dismissal; and (3) if so, whether Respondent established that it would have taken the same adverse action absent the protected activity.³ ALJX 1; TR 7-8.

Based on the record as a whole, I find that Complainant engaged in protected activity by reporting a work-related injury and his protected activity was a contributing factor in Respondent's decision to dismiss Complainant. I further find that Respondent has failed to prove that it would have taken the same adverse action in the absence of the protected activity, and thus Complainant is entitled to relief under the FRSA.

III. EVIDENCE PRESENTED

A. Witness Testimony

1. Complainant

Complainant was hired by Union Pacific in 1990 as a brakeman and was promoted to locomotive engineer in 1993. TR 24. He worked as a train dispatcher from 1998 to 2000/2001, then returned to an engineer position until his dismissal from Union Pacific in November 2016. TR 24. He was 48 years old at the time of the hearing. TR 25.

On November 17, 2015, Complainant testified he ran a locomotive from North Platte, Nebraska to Missouri Valley, Iowa, commencing shortly after midnight. TR 29, 32. He stated he had done this run hundreds to thousands of times before. TR 29. He testified he was aware there was an inward facing camera on the train. TR 30. The inward facing cameras were new and he was "acutely aware of them, kind of scared of them . . . we felt a bit scrutinized." TR 30. He knew he was on camera during his run on November 17, 2015. TR 30.

Complainant stated that when riding along the track, the locomotive "is going to be riding left and right a little bit on the shock system or the absorber system . . . you're going to be rocking back and forth pretty generally most of the time." TR 40. He stated he sat about 12 to 14 feet above the ground and the side to side movement would be amplified from that vantage point. TR 40-41. He testified in particular when the train goes over a crossing there can be more lateral forces, because the tracks tend to be out of alignment at crossings. TR 42. He testified it was not out of the ordinary to have rough crossing and he could hit rough track several times throughout a trip. TR 187-88.

Complainant explained the whistle lever on the locomotive is "almost directly to my left, and maybe just back slightly, depending on if I had the seat slid forward or slid backwards." TR 35. He testified the seat slides back and forth and can be adjusted up and down about six or eight inches. TR 44. He testified his chair position changes his relationship to the whistle lever, so it

³ The parties phrased the issues in dispute in the Joint Pre-Hearing Statement as "whether Complainant's personal injury report was made in good faith, as required to qualify as protected activity under the FRSA" and "whether Complainant's good-faith injury report (if any) was a contributing factor in his dismissal – or instead if Union Pacific's sincere belief that Complainant falsified such report was the sole motivator for its actions." ALJX 1. This is not the correct legal standard under the FRS, and parties were made aware at hearing that the issues were whether Complainant engaged in protected activity, whether the protected activity was a contributing factor in Complainant's dismissal, and if so, whether Respondent established by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. TR 7, 8.

can be variable. TR 45. He testified when he needs to blow the whistle more frequently, he slides his seat back to be more comfortable. TR 37. When he approaches a crossing, he starts blowing the horn at 50 miles per hour at the whistle board (a small sign notifying engineers to blow the horn) and keeps blowing the horn⁴ until the locomotive is all the way through the crossing. TR 42-43. Complainant explained how he would blow the whistle:

I would be pulling down on this lever that would be sticking up directly towards the side of my head about, oh, three inches long, about the diameter of my finger. And I would hold on to this lever and I would pull down on it, or push up on it, but of course, pulling down in this case is more comfortable. And I would sequence through that two long blows, a short blow, and then a long blow. And I would repeat that until we're all the way through the crossing.

TR 44. He stated on the run from North Platte there are approximately 150 crossings. TR 43.

Complainant testified on November 17, 2015, he had his left hand placed on the whistle at about shoulder level, slightly stretched,⁵ when he hit a rough track on a crossing causing a severe lateral movement on the locomotive and his chair twisted on its axis, rotating clockwise and counter-clockwise. TR 47, 50-51. He stated when the chair rotated clockwise, it "stretched my shoulder area out a bit, flexed it backwards." TR 50. He testified: "I had my hand on the horn at the right time with the right harmonic and the . . . lateral movements back and forth, just – it was just all kind of perfect to give a sharp blow, acute stretch or blow . . . to probably cause that rotator cuff to tear." TR 77. He testified "it was just that I had the seat adjusted perfect, the arm kind of in the right position to be leverage for this rotator cuff tear." TR 188. He stated the lateral movement rocked him in the chair, but it did not throw him out of the chair, or throw his head against the window. TR 77. Complainant testified that the lateral movement was a "little rougher than usual" but not to the level of a threat of derailment. TR 76.

Complainant testified that when the injury occurred, he felt a pop, or a "tug, a level of discomfort, that I would call on a scale of one to [ten], . . . maybe a three." TR 53, 101. He had hoped it was just a sprain that he would "get over" and he could avoid filling out a personal injury report. TR 53, 186. Complainant testified before he started his run on November 17, 2015, his left shoulder was fine. TR 32.

Complainant continued the run following his injury and used the whistle and all other controls throughout the remainder of the trip. TR 54. He did not tell the conductor, Mike Jenkovich, who was sitting near him in the cabin, that he had injured his shoulder. TR 119, 127. He testified Mr. Jenkovich "is not a guy I would discuss anything with at any time unless it had real direct relation to what was going on with that train, and then I'd have to be super careful" because he "could get carried away with absolutely anything." TR 195. Complainant acknowledged he did not call the safety hotline, dispatcher, or Risk Management Conference

⁴ The terms whistle and horn are used interchangeably throughout this decision.

⁵ Complainant described the position of his arm as follows: "my hand is maybe forward the plane of my body a couple of inches. My elbow is back behind the plane of my body a couple of inches. . . And there's a 25 degree bend in my elbow." TR 51-52.

Center to report the track conditions on November 17, 2015.⁶ TR 116-17, 119, 203. He testified that rough track is fairly common and “if I reported every piece of it . . . I would have a bit of a target on my back.” TR 206. Complainant testified that he did not believe the camera footage from the end of his trip showed him leaning on his left arm, or lifting his left arm up to put his coat on; he stated his left arm is “about level” when sliding on his coat.⁷ TR 124, 126. He stated he lifted his bag only to waist level, and then dragged the bag down the stairs. TR 129, 196.

When Complainant finished his trip around 9 A.M., he took a van ride to Council Bluffs, Iowa, where he entered his times and reporting information on the computer, and then he went home. TR 56. He testified all during this time he had a dull pain in his shoulder. TR 57. He was still hopeful that it was a minor injury that would resolve in a day or two and he would not need to fill out an injury report. TR 188-89. Complainant went to bed around 10 or 11 A.M. and slept for about seven hours. TR 56. He testified he woke up, made dinner and checked his computer, and after moving around for an hour, his shoulder went from a dull ache to an acute, sharp pain.⁸ TR 56, 59, 134. He went to the emergency room around 8 P.M. that night, and he was diagnosed with a labral tear, prescribed pain medication, and referred to an orthopedist. TR 59-60.⁹

Complainant called Mike Russell around 5:30 A.M. on November 18, 2015, and reported the shoulder injury. TR 57-58, 60. He testified he told Mr. Russell that he wanted to make sure he was hurt before he filled out a personal injury form and Mr. Russell suggested Complainant wait until he got an MRI. TR 61. The MRI taken the following Saturday showed a torn supraspinatus rotator cuff, which Complainant reported to Mr. Russell. TR 62. The following Monday or Tuesday Complainant filled out a 705 Report and Report of Personal Injury (Form 52032). TR 48, 62; JX 3; JX 5. Complainant testified he was on Oxycontin at the time he filled out the injury reports. TR 64. Complainant testified he did not want to report a personal injury and tried to work with Mr. Russell not to fill out a personal injury form, for fear of retaliation. TR 188.

Complainant testified he filled out the injury reports in good faith and was being honest to the best of his ability. TR 48, 65-67. He testified no one with railroad experience would assume that he was trying to say in his narrative report that the actuating level was two inches away from his ear and any experienced railroad employee would know where the horn actuator is located. TR 39, 54. He testified when he filled out the injury report, he told Mr. Russell he was unsure of the mile post, but Mr. Russell insisted that he come up with an exact mile post and

⁶ Complainant acknowledged that he had called the safety hotline in the past about the quality of hotel pillows and mattresses, picnic tables at Missouri Valley, and a noisy hotel air conditioner. TR 118-19.

⁷ At Respondent’s investigative hearing, Complainant similarly testified that he never lifted his left arm above the “horizontal plane.” RX 13 at 71, 81, 89.

⁸ Complainant agreed that at his deposition, he testified he woke up with beads of sweat from the pain and a severe ache in his shoulder, “pushing 10” on a scale of 1 to 10. TR 132-33. The deposition transcript is not in the record. At Respondent’s investigative hearing, Complainant testified he read when he woke up and when he was reading, his shoulder pain worsened to the point that he knew he had sustained an injury. RX 13 at 50.

⁹ At his investigative hearing, Complainant testified he went to the Emergency Room around 10:00 or 11:00 P.M. TR 134; RX 13 at 49.

write it down to the best of his recollection. TR 68, 201. Complainant testified he could not pin down the exact time of the injury but made a fair guess. TR 69. He stated the first time he talked with Mr. Russell about specific timing or location of the injury was when he filled out the injury reports. TR 180.

Complainant testified that he had surgery on his left shoulder in December of 2015. TR 70. Following surgery, he developed a staph infection and he spent a week in the hospital. TR 70. After discharge, he continued to receive antibiotics for a month and did physical therapy for several months thereafter. TR 71. He was released back to work on September 30, 2016. TR 71; JX 9.

In the interim, Complainant received a Notice of Investigation on December 4, 2015 from Union Pacific, claiming Complainant was dishonest in his injury report and improperly used his cell phone during the run on November 17, 2015. TR 71-72; JX 4. Complainant testified there was no communication between himself and Mr. Russell or other supervisors after he filed his injury reports until the Notice of Investigation. TR 72. The investigative hearing was held in November of 2016, after Complainant had been released to return to work. TR 73. Complainant testified he reviewed the inward and outward facing camera footage a week prior to the investigative hearing and he saw lateral movement on his trip. TR 75-76.

Complainant acknowledged at the investigative hearing he stated the injury occurred at Mile Post 230.1 at the Kearney Sub, at 2:49 A.M. TR 113; *see* RX 13 at 65-67. He explained he was relying on his local chairman and vice-local chairman, who compared latitudes and longitudes to determine which section of the video showed the injury. TR 80, 108, 201. Complainant testified that after reviewing the tape with his attorney in connection with this claim, he believes the injury in fact occurred at a different time and location and not at Mile Post 230.1. TR 113, 122. Complainant instead pointed to 2:43 A.M. as the time of the injury.¹⁰ TR 181-82.

Complainant testified engineers are allowed to use cell phones when the train is stopped and no one is engaged in a safety sensitive activity. TR 78. He stated on November 17, 2015, he used his cell phone when the train was stopped and no one was engaged in a safety sensitive activity, and he believed he was in compliance with Respondent's cell phone rules. TR 79. Complainant acknowledged that if the train is not stopped, the cell phone was required to powered off and stowed. TR 159.

Complainant acknowledged he made seven prior reports of personal injuries over the course of his career and was never charged with dishonesty in connection with those reports. TR 88. In 1995, he did receive discipline following a report of a back injury, for failing to report rough track. TR 89, 203. Complainant signed a waiver of an investigative hearing in exchange for lesser discipline. TR 89, 165-66, 203. He received a settlement from Union Pacific in connection with the 1995 back injury. TR 90. In 2014, Complainant reported a right rotator cuff injury at Union Pacific. TR 90. He could not recall if he was disciplined; he stated if he was disciplined, it was negligible and did not affect his progressive discipline scale. TR 90-91, 94.

¹⁰ In Complainant's Answers to Interrogatories dated September 7, 2017, he stated he injured his arm at 3:00 A.M. and the location was approximately at Mile Post 230, Kearney Sub. RX 11. He described the injury as "I was running the locomotive, reached for the whistle which was up and behind me. There was lateral movement in the locomotive at the same time I flexed my arm backwards which caused my left rotator cuff tear." *Id.*

He testified he reported the 2014 injury about eight hours after it occurred. TR 468. He did not believe they had inward facing cameras at the time of his 2014 injury. TR 97. Complainant testified he believed employees can become intimidated not to turn in personal injury reports for fear of retaliation. TR 165.

Complainant testified at the time of his November 17, 2015 injury he was working out “fairly frequently,” and his gym regimen included bicep curls, shoulder presses, and kettlebell exercises. TR 147-48. He stated the kettlebell weighs about 45 pounds, and he would swing, not press, the kettlebell. TR 148. Complainant acknowledged a picture of himself he posted on Facebook on October 31, 2015, on which he commented: “Hitting the kettlebells speed rope and speed bag to get the tummy off.” TR 150-51; *see* RX 15. He testified his comment that he was using a speed bag was incorrect; he stated he does not know how to use a speed bag and he meant to say a punching bag. TR 150-51. He acknowledged that speed bags are hit rapidly above one’s head. TR 152. He testified he did not hurt his shoulder at the gym. TR 161.

Complainant testified his dismissal from Union Pacific caused him “a lot of stress . . . we’re talking about a 27-year career.” TR 83. He testified he was worried about his future and his reputation and was embarrassed to be terminated for dishonesty. TR 83. He was never diagnosed with a mental or emotional condition in connection with the dismissal. TR 158. Complainant testified he lost wages for two years and three months and the wage loss is ongoing. TR 84. Prior to being terminated, Complainant testified his gross annual earnings at Union Pacific were approximately \$100,000.00. TR 84. Complainant stated he also has higher health insurance costs as a result of his termination. TR 85, 176.

Complainant testified he is currently a full-time hypnotist and helps clients with issues including smoking cessation and weight loss. TR 139-40. Complainant bought a hypnosis business in March of 2016, prior to his dismissal from Union Pacific in November 2016. TR 140. He stated he earns between \$14,000 and \$10,000 per month from his hypnosis business. TR 141-42. From that amount, his expenses include \$2,000 for a mortgage on the business, \$437.75 in rent, \$1,200 for a part-time assistant, \$340 to \$350 per month for phone, cable and internet, \$500-\$1000 for advertising, and \$700 for web fees. TR 142-44. He testified that his net take home pay is about \$50,000 to \$60,000 annually. TR 176.

2. Michael Lee Russell

Mr. Russell started working for Respondent in 1990 and has held the following positions: brakeman/switchman; through freight conductor; locomotive engineer; manager of operating practices; and manager of road operations. TR 208. In 2013, he became Director of Road Operations. TR 208. In 2016, he became the Senior Manager of Terminal Operations in Council Bluffs, Iowa for the North Platte Service Unit, and he is currently in this position. TR 208.

Mr. Russell was the Director of Road Operations at the time of Complainant’s alleged injury in November 2015. TR 209. As the Director of Road Operations, Mr. Russell was in charge of developing safety action plans, field training exercises, investigating personal injuries, derailments, and crossing accidents, and anything to do with the safety side of the operation. TR 209.

Mr. Russell testified that he received a call from Brandon Filer on November 19, 2015, the Director of Terminal Operations at the time, who informed him Complainant had injured himself on a trip home from North Platte. TR 210. Mr. Russell testified he did not recall speaking to Complainant on the phone directly. TR 212. Mr. Filer arranged for Complainant to meet with Mr. Russell on November 25, 2015, to fill out a 705 Report. TR 212. Mr. Russell testified that during this meeting he and Complainant discussed how the injury occurred. TR 215. Mr. Russell testified Complainant told him that he reached three to four inches up and behind his back when blowing a whistle and after a lateral movement, he felt pain. TR 215-16. Mr. Russell testified Complainant told him the injury occurred between 2:30 A.M. and 3:30 A.M., and the pain worsened as the trip progressed. TR 215, 294, 296. Mr. Russell stated it was odd to him that the whistle would be behind Complainant and he discussed this with Complainant. TR 219-20. However, later in his testimony, Mr. Russell stated he did not recall whether he asked Complainant to explain what he meant by the horn being three to four inches behind his ear. TR 290-91.

Mr. Russell testified he asked Complainant whether he reported the rough track and Complainant stated it was not anything out of the ordinary to him. TR 216. Mr. Russell testified any lateral movement is a precursor to track misalignment, which could result in derailment, so when there is rough track, they want to know to protect employees as well as the equipment and goods they transport to their customers. TR 216.

Mr. Russell testified he asked Complainant during their conversation whether he lifted weights because he “wanted to make sure that maybe there wasn’t something else that was contributing to this because it just seemed so odd, what he attributed [] his injury to just didn’t seem to me, from my background, to have been able to have occurred.” TR 220. Mr. Russell stated Complainant indicated he did lift weights. TR 220. Mr. Russell testified that the locomotives have “a little lever that is two to three inches long, and you can move it with your index finger and blow the whistle with no trouble.” TR 221. He testified “[t]here shouldn’t be anything difficult about sounding a whistle or the horn on a locomotive.” TR 222. Mr. Russell testified he “was concerned with some of the language [in the injury reports] and some of the things that [Complainant] attributed his injury to.” TR 302. Mr. Russell testified he did not tell Complainant he had to put a particular mile post and time on the injury report, but acknowledged the form calls for a time of the accident. TR 296.

Mr. Russell stated there is protocol in place for investigating personal injuries. TR 211. He testified he investigates personal injuries, derailments, crossing accidents, and anything involving operating practices or rule violations. TR 348. He testified that if there is a crossing incident or derailment, he would investigate it even if there was not an associated personal injury. TR 349. He stated the purpose of investigating is for fact finding, mitigating risk in the future and to develop plans to stop an incident from happening in the future. TR 211, 349.

Mr. Russell stated after meeting with Complainant, he had the claims representative retrieve the inward and outward facing cameras and send it to the event recorder center for review. TR 211, 230. Mr. Russell testified he told the event recorder center how the injury allegedly occurred and asked them to review the video to determine whether such an injury occurred as alleged. TR 230-31. After the event recorder center reviewed the video from Complainant’s run, they notified Mr. Russell that they could not find anything consistent with Mr. Russell’s description of how Complainant alleged he injured his shoulder by pulling the

whistle. TR 230-31. At that point, Mr. Russell was given access to review the camera footage. TR 232.

Mr. Russell testified that when he was reviewing the video, he was “looking for any kind of action where Mr. Colley was positioned where he had to reach up and behind his head to blow the whistle” and for “any indications of severe . . . rough track.” TR 234. He had also been told by the event recorder center that there was a cell phone violation, so he was looking for the parts of the video that showed Complainant using his phone in violation of company policy. TR 234.

Mr. Russell reviewed inward and outward camera footage and compared the video with Complainant’s statements. TR 222, 224. Mr. Russell testified the inward facing camera showed Complainant blowing the whistle several times around 3:00 A.M. when Complainant alleged the injury occurred, without reaching or stretching his arm back as he reported in his 705 Report. TR 244-45. Mr. Russell further testified that footage from around 7:00 A.M. showed Complainant continuing to blow the whistle the same way he did during the 3:00 A.M. time frame. TR 246. Mr. Russell testified the video from 8:00 A.M. to 9:00 A.M. also showed Complainant continuing to blow the horn with ease and without any evidence of pain. TR 250. During this time frame, Mr. Russell testified Complainant “walks over, puts weight on his left arm, goes back and grabs his coat, puts it on with what appeared to me to be relative[] ease without grimacing in pain.” TR 252. He stated Complainant “did not appear to be a person that had an injury to his shoulder.” TR 252. Mr. Russell stated Complainant also reached for his backpack with his left arm and “appears to grab it, pick it up, walk out of the cab, and doesn’t appear to be showing any pain, in my opinion.” TR 254. Mr. Russell stated the whistle did not appear to be behind Complainant as alleged in the 705 Report. TR 250.

Mr. Russell testified he reviewed the entire eight hour video because in the time frame that Complainant had alleged the injured occurred, he could not find anything that showed a significant lateral movement or where Complainant reached back and upward to blow the whistle. TR 255, 308. After reviewing the entire video, Mr. Russell did not believe Complainant had injured his shoulder on the trip. TR 255-56. He notified his supervisor, Daniel Torres, of what he believed were inaccuracies or misleading statements in Complainant’s report of injury and recommended a Rule 1.6 (dishonesty) hearing. TR 256-57, 310. Once the hearing was authorized by Mr. Russell’s superiors, he issued a Notice of Investigation. TR 258. Mr. Russell testified that he believed he notified Complainant’s union representative before the Notice of Investigation was sent out. TR 258. Mr. Russell testified, to the best of his recollection, he told the union representative that after reviewing the video of the trip, he was not convinced Complainant injured himself on the trip and that Complainant violated the company rule on cell phone use. TR 260.

Mr. Russell testified company policy does not allow talking or having a cell phone out while the train is moving and accessing data on a cell phone is never allowed. TR 262. He testified the only time an employee can use a cell phone is if the train is stopped and no one is performing a safety sensitive activity. TR 263. He stated: “So basically, the only instance you’re allowed to use a cell phone is if you talk to the crew members, you agree it’s safe, you turn your phone on, you make the call, you shut it off and put it away.” TR 263. He stated the cell phone cannot be in plain sight and must be safely stowed and powered off. TR 263.

Mr. Russell testified Complainant violated the cell phone rule because the video showed Complainant remove his cell phone during a stop and either read or text on the phone; he testified Complainant never lifted the phone to his ear to make a phone call. TR 264, 271, 338. Mr. Russell also explained that the cell phone channel on the inward facing camera shows data entering the train when Complainant was holding his phone. TR 264. He testified that a first time cell phone use violation would result in an employee being sent home for the day, a conference with the manager, and a return to work the next day. TR 342. Mr. Russell acknowledged Complainant did not get fired for his cell phone use. TR 342.

Mr. Russell testified he charged Complainant with dishonesty because Complainant's "recollection and the information he provided me was not consistent with what I saw on the video." TR 279. He testified he did not believe Complainant was injured during his run on November 17, 2015. TR 280. He stated the video did not show Complainant reaching for the whistle behind him or a lateral movement out of the ordinary that caused Complainant's arm to flex backwards, as Complainant alleged in his injury reports. TR 280-81. He also stated that the video did not show the whistle in a wrong location, as alleged by Complainant in his injury report. TR 281. Mr. Russell did not see any evidence that Complainant was in pain during the trip, contrary to Complainant's statement that his arm was stiffening and he was in a lot of pain when he got off the train. TR 325.

Mr. Russell acknowledged engineers often change positions in their chairs during a trip and the chair swivels three to five inches. TR 284-85. He also agreed the position of an engineer's hand on the horn changes depending on how he or she is swiveled in the chair. TR 287. He acknowledged there is "variable" lateral movement on locomotives during trips and the video at 2:43 A.M. showed lateral movement while Complainant's hand was on the whistle, but testified it was normal lateral movement. TR 297, 309. Mr. Russell testified that he does not have any medical training, nor did he consult someone with medical training about Complainant's alleged injury. TR 318, 320, 353. He testified he did not think the video at 2:43 A.M. showed a rotator cuff injury because:

It's my understanding of the shoulder is that you can injure your rotator cuff lifting heavy weights. My daughter, who I mentioned . . . was an outside hitter in volleyball. She ended up tearing her labral, and it was from repetitive motion over the top, exerting pressure over the top. And it just didn't seem to me that the action that he did there would, in any way, and I'm moving back and forth my chair, would in any way be significant enough to harm a grown man's rotator cuff.

TR 355. He testified that if Complainant had said "I had my arm on the horn and we hit some lateral, and I felt a twinge in my shoulder" it would have sounded plausible to him, but because Complainant said the horn was too far back and behind his ear, it did not seem logical or plausible. TR 301-02.

Mr. Russell testified that he was acquainted with Complainant prior to November 17, 2015, and knew him "in passing." TR 275-76. He stated he was also involved in the investigation of Complainant's 2014 work injury. TR 276, 344. He reviewed the data retrieved in relation to the 2014 injury, but there was no video associated with the injury. TR 277, 344.

He stated Respondent did not initiate discipline as a result of the 2014 injury because there was no evidence that Complainant was untruthful or misleading. TR 278, 346.

3. Daniel Torres

Mr. Torres is currently a General Superintendent for the Fort Worth service unit. TR 356. He was first employed with Respondent in 2012, and prior positions with Respondent included director of operation practices, general director of network planning, superintendent for Council Bluffs, and superintendent for San Antonio. TR 357. He has worked in the railroad industry for twenty-two years, starting out as a brakeman. TR 357.

Mr. Torres was the acting superintendent for Council Bluffs at the time Complainant reported his injury. TR 360. Mr. Torres testified he heard about the injury from Mr. Russell. TR 360. As the superintendent, Mr. Torres is notified of all safety concerns, including personal injuries, derailments, crossing accidents, de-certifications, and major rule violations. TR 360. Mr. Torres testified Mr. Russell's description of Complainant's injury seemed a "little odd" and he had not heard of an injury occurring as described by Mr. Russell in his twenty-two years with the railroad. TR 162. Mr. Torres stated Mr. Russell investigated the injury and concluded there were some inconsistencies with the way the report was made on the 705 Report and 52032 Form with what was viewed on the video surveillance camera. TR 363-64.

Mr. Torres testified he brought Mr. Russell's recommendation of a 1.6 hearing to the regional vice president, labor relations, and the service unit attorney, because these individuals must approve the 1.6 hearing before a Notice of Investigation can be sent out. TR 364, 368. Mr. Torres testified a 1.6 hearing is not just for dishonesty, but can also be brought for physical fights, verbal altercations, or stealing time. TR 364-65. He stated in his three years as superintendent with Union Pacific, he considered twenty 1.6 hearings. TR 365.

Mr. Torres stated after authorization was received for the Notice of Investigation, he no longer had any involvement in the investigation. TR 369. Mr. Torres testified he did not review the surveillance video because he did not want to develop a bias before the investigation hearing. TR 369, 378. He stated labor relations, the regional vice present, and the service unit attorney also did not review the video. TR 369. Mr. Torres agreed the decision to proceed with the 1.6 hearing was based only on Mr. Russell's assessment of the evidence. TR 370, 381, 390.

Mr. Torres testified he supported the charge of dishonesty because he believed the injury was fabricated based on the information Mr. Russell provided him; specifically, the manner in which the 705 Report and 52032 Form were filled out, the video surveillance findings from the time the alleged injury occurred until Complainant completed his trip, the fact that Complainant did not immediately report the injury to the conductor or anyone else as required by the rules, and the fact that Complainant did not report a safety concern regarding the severe lateral movement. TR 377, 392. Mr. Torres acknowledged he has no medical expertise with respect to rotator cuff injuries and did not seek any medical input when deciding to recommend a 1.6 hearing. TR 382, 384. He also testified he did not speak with Complainant before moving forward with the recommendation for a 1.6 hearing. TR 384. He acknowledged he could have talked with Complainant about the case, but then he would not have been able to assess discipline because of his involvement in the investigation. TR 385. He agreed he could have

had Mr. Russell talk to Complainant to provide further explanation of how the injury occurred, but did not. TR 384.

Mr. Torres stated at the time he recommended a 1.6 hearing, he was not fully committed to finding Complainant fabricated the injury, because he was waiting for the entire investigative process to unfold, so that he could make a determination based on all the evidence presented at the hearing. TR 393-94. Ultimately, however, Mr. Torres was not the decision maker after the investigative hearing, because a month after Complainant was removed from service, Mr. Torres transferred from Council Bluffs to San Antonio. TR 374.

Mr. Torres explained the investigative hearing process occurs pursuant the collective bargaining agreement between the railroad and its union employees. TR 395, 400. The employee is represented by a union representative, and railroad management personnel act as the advocates for the company and as the decision maker. TR 398. Mr. Torres testified the investigative process allows for all the evidence to come together and for a fair and impartial decision to be made on whether to assess discipline. TR 390.

Mr. Torres testified during his time as the superintendent for Council Bluffs, nine injuries were reported to him, and just one report of injury, Complainant's, resulted in discipline. TR 374. Mr. Torres stated during his eleven-month period as superintendent for San Antonio, twelve injuries were reported and none of them resulted in discipline. TR 377.

4. Paul Jerome Hinton

Mr. Hinton was hired by Union Pacific in 1990 as a national customer service representative. TR 405. In 1994, he was selected for the management development program, and following completion of the program, he held positions of supervisor of yard operations, manager of yard operations, manager of train operations, quarter manager, quarter director, quarter superintendent, director of transportation services, and superintendent of the St. Paul, Minnesota service unit. TR 406. In February 2016, Mr. Hinton was transferred to Council Bluffs to replace Mr. Torres as superintendent of the Council Bluffs service unit. TR 407, 410. In February 2017, he transferred to the superintendent position for the St. Louis service unit, and he is currently in this position. TR 408.

Mr. Hinton testified in his role as the transportation executive for the service unit, he reviews all investigative hearing transcripts, no matter the discipline level, and determines whether the charges should be sustained or dismissed. TR 410-11. Mr. Hinton testified after being notified of Complainant's investigative hearing, he was not involved in the investigation until he received the hearing transcript. TR 411. He stated in a case like Complainant's involving a potential dismissal, he likely reached out to Mr. Torres to ask him what he knew about the investigation before he read the transcript per protocol. TR 411. He stated he would have also reached out to the company attorneys, labor relations, and Mr. Russell before reading the transcript. TR 412, 429. Mr. Hinton testified he did not remember the specifics of these conversations. TR 412, 428. He testified he did not speak with Complainant. TR 429-30.

Mr. Hinton testified he reviewed Complainant's hearing transcript to determine whether the rule violations on the Notice of Investigation should be sustained or dismissed. TR 413. He stated he read the transcript more than once and reviewed the exhibits. TR 413. He also

reviewed the inward facing camera video, but not in its entirety. TR 414. He testified he watched the portions of the video that were referenced in the transcript. TR 414, 450. He acknowledged the video was not a hearing exhibit, but after the hearing he asked Mr. Russell to set up the video for him to watch. TR 448-49.

Mr. Hinton testified there were several inconsistencies between the transcript testimony and the video that “caught [his] eye.” TR 415, 431. He stated he was not concerned with which location the injury happened or how it happened, but rather whether Complainant left the train injured.¹¹ TR 416. He stated based on ambiguities between what he read and saw, he did not believe Complainant left the train injured. TR 416. Mr. Hinton stated he was a former athlete and had shoulder injuries in the past, and he could recall exactly where it happened, how it happened and the pain he felt. TR 416. Mr. Hinton testified he did not see Complainant try to “work [his] shoulder through” or make any kind of movement which suggested he was in pain during the video. TR 417. Mr. Hinton referred to Complainant’s testimony in the investigative hearing transcript that when he put his coat on he pointed his left arm to the ceiling and used his right hand to pull the sleeve onto his left arm. TR 419. Mr. Hinton stated the video does not show this occurring.¹² TR 419. Mr. Hinton also identified as inconsistencies, Complainant lifting up his bag to get off the train and leaning on the counter with his left arm near the end of the trip. TR 438. Mr. Hinton testified if Complainant’s pain was a 9 out of 10 as he testified to at the investigative hearing, Mr. Hinton would not expect Complainant to lift the bag with his left arm. TR 465-66. Mr. Hinton testified Complainant seemed to move the bag with his left arm effortlessly at the end of the trip. TR 465-66. He did not see Complainant favoring his left arm at any point of the trip. TR 440.

After reviewing the transcript, Mr. Hinton decided to sustain the charges, based on the ambiguities and inconsistencies in Complainant’s statements and the video at the end of the trip showing how Complainant exited the locomotive. TR 420. He testified the video showed Complainant leaning on his left arm, throwing his coat on, and lifting his bag off the chair, inconsistent with his investigative hearing testimony that his pain was a 9 out of 10 at the end of the trip. TR 421. He testified he did not see any evidence of an injured employee leaving the locomotive. TR 423. As for the cell phone violation, Mr. Hinton testified he thought the violation was clear cut. TR 416. He stated the thumb motions that he saw on the video were not putting a password, but rather looked like Complainant was scrolling through emails. TR 416.

Mr. Hinton testified he had two 1.6 hearings this year where he did not sustain the charges after reviewing the transcript. TR 422. He acknowledged he does not have any medical training and did not consult anyone with medical training in connection with Complainant’s case. TR 434.

¹¹ Later in his testimony, Mr. Hinton clarified that he paid attention to the location that was indicated in the transcript, Mile Post 230 and looked at this portion of the video clip. TR 440.

¹² Mr. Hinton misconstrues Complainant’s testimony. At the investigative hearing, Complainant testified that normally when he puts his coat on, he puts his hand inside the sleeve, then raises his arm up to the ceiling and allows the coat to fall down onto his arm. RX 13 at 71. In contrast, he testified when he put his coat on the day of the injury, his hand was lower than his shoulder with his arm extended straight outward and below the horizontal plane. *Id.*

B. Documentary Evidence

1. Video Footage

The parties submitted the inward and outward facing video footage of Complainant's trip on November 17, 2015. JX 1. At 2:43 A.M.,¹³ the inward facing video shows Complainant holding onto the whistle when a lateral movement causes his left shoulder to move right and left several times. *Id.* (2:43 A.M.). The bags hanging in the train also move significantly. *Id.* The whistle does not appear to be behind Complainant's ear, but rather to the left and slightly to the front of him. *Id.* Most of Complainant's arm is out of view behind the control panel, making it difficult to determine the exact positioning of his arm. *Id.* In the seconds after Complainant takes his hand off the whistle, he is seen adjusting his left shoulder back and forth. *Id.* (2:43 A.M. – 2:44 A.M.). Outward facing camera footage from the same time, 2:43 A.M., shows the train travelling over a crossing and some back and forth motion in relation to the train tracks.

There does not appear to be any injury at 2:49 A.M. (Mile Post 230 where Complainant originally alleged the injury occurred). No lateral movement is seen when Complainant has his hand on the whistle. JX 1 (2:49 A.M.).

At 2:51 A.M., Complainant slightly stretches his left arm from left to right across his chest. JX 1 (2:51 A.M.). At 3:02 A.M., Complainant again stretches his shoulder, this time by bending his elbow above his head with his hand behind his head, holding the stretch for several seconds. *Id.* (3:02 A.M.). At 3:51 A.M., Complainant appears to itch the back of his head with his left arm. *Id.* (3:51 A.M.). His elbow is at shoulder level. *Id.* At 7:03 A.M., Complainant stretches both arms above his head. *Id.* (7:03 A.M.). At 7:37 A.M., Complainant lifts both arms and places his hands behind his head. *Id.* (7:37 A.M.). His elbows are aligned with his ears. *Id.* He holds this position for about 26 seconds. *Id.*

At 7:58 A.M., Complainant removes his phone while the train is stopped. JX 1 (7:58 A.M.). He powers down the phone at 7:59 A.M. and puts it away. *Id.* (7:59 A.M.). He again takes his phone out at 8:04 A.M. and keeps it in his hand until 8:14 A.M. *Id.* (8:04 A.M. – 8:14 A.M.). Throughout the time Complainant has his phone in his hand, he appears to be scrolling with his thumbs.¹⁴ *Id.* He does not put the phone to his ear, and the only time he is seen talking is when he is conversing with the conductor.¹⁵ *Id.* He powers down his phone and places it back in his bag when the train starts to move again. *Id.*

At 8:36 A.M., Complainant bends down to reach something out of view with his right arm, and as he reaches his left arm is leaning on a table. JX 1 (8:36 A.M.). At 8:37 A.M., Complainant reaches upward with his left arm to grab his coat off a hook, and he puts on his coat

¹³ While the camera footage in JX 1 shows the time as Eastern Standard Time, any reference to times in this decision will be Central Standard Time, as the injury occurred in the Central Time Zone, and the parties have cited to the Central Standard Time throughout this case.

¹⁴ Screenshots from the video presented at Union Pacific's investigative hearing show at the top of the image cell data being used during this time. RX 14 at 21-23.

¹⁵ At the investigative hearing, Complainant testified that he called his girlfriend during this time period. RX 13 at 78, 129. He stated he used the speaker phone because his arm hurt. RX 13 at 129.

without any noticeable discomfort. *Id.* (8:37 A.M.). He lifts his left arm upward to some degree when putting on the left sleeve of his coat, but he does not lift it straight up. *Id.* At 8:43 A.M., Complainant reaches for his bag and grabs it from the chair with his left arm, lifting no further than waist level. *Id.* (8:43 A.M.). He then drops the bag to the ground and drags it out the door with his left hand. *Id.* He drags a second bag with his right arm. *Id.*

Throughout the trip, Complainant changes positions in his chair, and changes the position he is in when holding the whistle. JX 1; *see also* JX 14 at 9-17.

2. Medical Records

The record contains a November 19, 2015 office note from Dr. Samar K. Ray. CX 1 at 1. In History of Present Illness, Dr. Ray wrote:

Clovis . . . injured his left shoulder two days ago. He is a train engineer. He was running the train and trying to start the horn. He has to use the left arm in a backwards extended position and he immediately felt pain in the shoulder. Since then, he has had acute pain in the shoulder and he can hardly move the shoulder. His pain is so bad that he cannot go to sleep at night. He did end up in the emergency department and was given Percocet. His main problem is not only the pain in the shoulder but also his inability to raise the arm up

CX 1 at 1. Dr. Ray found a possible acute rotator cuff tear in the left shoulder and arranged for an MRI. *Id.*

The record also contains an office note from Dr. David E. Brown, dated December 1, 2015. CX 1 at 2. In Dr. Brown's History of Present Illness, he wrote:

Clovis had hurt his left shoulder on 11/17/2015. He continues to be a train engineer. He was running train along a bumpy track sounding the horn with his left shoulder overhead and extended and wrenched his shoulder. He had immediate onset of pain He had a very irritable shoulder at the time

CX 1 at 2. Dr. Brown noted an MRI showed a left shoulder supraspinatus tear. *Id.* at 3. Complainant's pain was reported as a 9 out of 10. *Id.* at 4.

On September 30, 2016, Mr. Hinton sent Complainant a letter stating Health and Medical Services had determined that based on medical documentation, he could return to work in his usual position, effective September 26, 2016. JX 9.

3. Injury Reports

On November 25, 2015, Complainant filled out a 705 Report, which stated he suffered an injury on November 17, 2015 at 3:00 A.M., at Mile Post 2.30, Kearney Sub. JX 3. In his statement he wrote: "At approx. ¼ of way into trip I reached back for whistle level which was up and three to four inches behind my ear. Coincidentally, we hit rough track causing my chair to twist, flexing my arm back, stretching rotator cuff." JX 3.

Complainant also filled out a Form 52032, Report of Personal Injury or Occupational Illness. JX 5. He stated on November 17, 2015 at 3:00 A.M., he injured himself at Mile Post

230, Kearney Sub. *Id.* He indicated his shift started at 12:05 A.M. *Id.* He described his injury as follows: “Reached for whistle which was up and behind me. We had lateral movement in locomotive flexing my arm backwards.” *Id.* In response to the question “Did equipment or tools cause or contribute to the cause of the accident/injury?” Complainant responded yes, “having whistle lever to [sic] far back.” *Id.* He described his injury as a left shoulder rotator cuff tear, and noted that he was prescribed OxyContin. *Id.*

4. Union Pacific’s Investigation

On December 4, 2015, Union Pacific sent Complainant a Notice of Investigation, signed by Mr. Russell. JX 4. The Notice informed Complainant there would be a hearing on December 14, 2015, to develop facts and determine his responsibility in connection with the following charge:

On 11/17/2015, at the location of Milepost 90 on the Columbus Subdivision, at approximately 08:00 hours, while employed as a Engineer, you allegedly used your cell phone to send and retrieve data while engaged in a Safety Sensitive Activity. You also misrepresented the events as reported with an On Duty Personal Injury Report concerning the events of 11/17/2015. This is a possible violation of the following rule(s) and/or policy:

1.6: Conduct – Dishonest

2.21: Electronic Devices

JX 4. The Notice warned that if violations were found, dismissal may result. *Id.* Complainant was withheld from service pending the hearing results. *Id.*

Union Pacific’s General Code of Operating Rules, Rule 1.6: Conduct prohibits certain conduct by employees, including dishonesty. RX 4. The rule further states: “Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal.” *Id.* Union Pacific’s Policy for Managing Agreement Professionals for Success (MAPS) states employees may be removed from service and subject to potential dismissal from employment for a single violation of Rule 1.6 conduct. RX 2 at 4. It further states the Regional Vice President, Department Head, or designee must be consulted prior to charging an employee with potential dismissal from service for violation of Rule 1.6. *Id.*

Union Pacific’s General Code of Operating Rules, Rule 2.21: Electronic Devices states that personal electronic devices must be powered off and properly stowed while on duty and may not be used on a moving train. RX 3. Limited use of a personal electronic device for voice communication is permitted while the train is stopped “[a]fter conducting a safety briefing with all crew members and agreeing the limited use of the device is safe,” and on the condition that the device must be turned off as soon as the call is completed. *Id.* at 3. A personal electronic device may also be used to review a railroad rule, special instruction, timetable or other directive if the wireless capability of the device is disabled. *Id.*

An investigative hearing was held on October 27, 2016.¹⁶ RX 13. Mr. Russell acted as the charging manager/company witness, and Mr. T.W. Brown was the Conducting Manager. *Id.* at 2. Complainant was represented by the Vice Local Chairman, Mr. B.S. McCoy. *Id.* The surveillance video was admitted as an exhibit, but was not available to be viewed at the hearing. RX 13 at 23; TR 238. Instead, the company presented still shots from the video. TR 238.

On November 3, 2016, Union Pacific sent Complainant a Notification of Discipline Assessed, notifying Complainant that the following charge had been sustained:

On 11/17/2015, while employed as a Engineer, you used your cell phone to send and retrieve data while engaged in a Safety Sensitive Activity. You also misrepresented the events as reported with an On Duty Personal Injury Report concerning the events of 11/17/2015[.] This is a violation of the following rule(s) and/or policy:

- 1.6: Conduct – Dishonest
- 2.21: Electronic Devices

JX 7. The Notification of Discipline stated: “Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad.” *Id.* The letter was signed by Mr. Hinton. *Id.*

Complainant pursued a grievance under his union’s collective bargaining agreement, challenging his termination by Respondent, and the grievance was sent to arbitration, pursuant to the Railway Labor Act. RX 16. The Public Law Board No. 7173 upheld Complainant’s termination. *Id.*

5. Personnel Records

Complainant suffered a work-related injury on July 31, 2014, and was unable to work from July 31, 2014 to March 15, 2015. RX 7 at 2. Complainant signed a Report of Employee Claim Settlement on July 19, 2015. *Id.*

In 2010, Complainant was suspended for 60 days for passing a red board and entering the limits of a Form B without authorization while employed as an engineer, and the Public Law Board upheld the discipline. RX 7 at 3-4.

In 1997, Complainant was charged with failing to properly inspect his train after emergency application of brakes. RX 7 at 7. Complainant signed a waiver of hearing and received discipline in the form of five days off work and the development of a corrective action plan to modify behavior. *Id.* at 7-8.

On July 31, 1995, Complainant sustained an injury and was out of work from August 1, 1995 to September 21, 1995. RX 7 at 11. He signed a Report of Employee Claim Settlement as

¹⁶ Prior to the investigative hearing, Union Pacific obtained a statement from the conductor, Mike Jankovich, who was on the train with Complainant on the day of the alleged injury. RX 1. Mr. Jankovich stated he “vaguely” remembered the trip with Complainant and that Complainant never mentioned he injured his shoulder during the trip. *Id.* at 2, 4-5.

a result of the injury. *Id.* Complainant was charged with failing to promptly report a personal injury in connection with the July 31, 1995 injury. *Id.* at 12. He signed a waiver of a hearing and was assessed discipline in the form of up to one day or one round trip alternative assignment with pay to develop a Corrective Action Plan to modify behavior. *Id.*

In 1994, Complainant suffered an on-duty injury. RX 7 at 17. Union Pacific held a Personal Injury Conference regarding the injury to “identify those factors which may have contributed to the incident and can work together to reduce and/or eliminate the possibility of recurrence.” *Id.*

In 1992, Complainant reported a work injury and was unable to work from February 12, 1992 to February 14, 1992. RX 7 at 23. Complainant signed a Report of Employee Claim Settlement on February 24, 1992. *Id.*

In 1990, Complainant was charged with failing to control movement of locomotive. RX 7 at 25. Complainant signed a discipline waiver and agreed to participate in the ADEPT Program and accept ninety days of actual suspension including five days of classroom instruction as an alternative to 180 days suspension. RX 7 at 24, 25.

6. Other Employees Disciplined

Respondent submitted a list of Council Bluffs Service Unit employees disciplined from January 1, 2015 to January 1, 2016. RX 6. The list identifies the rules that were violated, and some cases, a brief description of the violation. *Id.* The list does not indicate the amount of discipline assessed, nor does it indicate whether the violations were preceded by a report of injury. The list indicates that six employees including Complainant were disciplined for cell phone violations during this period, and five employees including Complainant were disciplined for Rule 1.6 violations. *Id.* None of the Rule 1.6 violations pertained to an allegation of dishonesty, except for Complainant. *Id.*

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. 49 U.S.C. § 20109(a). Protected activity under the FRSA includes notifying or attempting to notify the railroad carrier of a work-related personal injury. 49 U.S.C. § 20109(a)(4). The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

To succeed in an FRSA whistleblower claim, a complainant must demonstrate by a preponderance of the evidence¹⁷ that his or her protected activity under the Act was a

¹⁷ The “[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ

contributing factor in the adverse action alleged in the complaint. 49 U.S.C. § 42121(b)(2)(B)(iii); *see also* 29 C.F.R. § 1982.109(a). Specifically, a complainant must establish: (1) he or she engaged in protected activity as set forth in the statute; (2) the employer took an adverse action against the employee; and (3) the protected activity was a contributing factor in the adverse action. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 15-16 (ARB Sept. 30, 2016), *reissued* Jan. 4, 2017 (en banc).

If a complainant proves that his or her protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.109(b). If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. § 42121(b)(2)(B)(iv). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011) (*quoting Brune*, ARB No. 04-037 at 14).

Accordingly, I must consider all the evidence presented and determine whether Complainant has established that he engaged in protected activity and that protected activity was a contributing factor to the adverse action taken against him. If Complainant meets his burden, then I must determine whether Respondent has established that it would have taken the same adverse action absent the protected activity.

A. Protected Activity

Protected activity under the FRSA encompasses an employee’s good faith actions taken to “notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.” 49 U.S.C. § 20109(a)(4). Respondent acknowledges that Complainant notified the railroad of an alleged work-related injury, but disputes that the report of injury was made in good faith. Respondent conceded at hearing that if the undersigned finds the report was made in good faith, it would constitute protected activity under the Act. TR 7.

In order for a report of injury to be made in good faith, a complainant must have “actually believed, at the time he reported the injury, that it was work-related.” *Davis v. Union Pacific Railroad Co.*, No. 12-cv-2738, slip op. at 15-16 (W.D. La. July 14, 2014); *see also Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-00007, slip op. at 15 (ARB Mar. 30, 2017). If the complainant knew the report was false at the time he or she provided it, the report was not made in good faith. *Ray v. Union Pacific Railroad Co.*, 971 F. Supp. 2d 869, 883 (S.D. Iowa 2013). The FRSA, however, “does not apply the good faith requirement to all of an employee’s interactions with a railroad” but rather, the good faith requirement only applies to the “singular ‘act done . . . to notify . . . the railroad carrier . . . of a work-related personal injury.’” *Id.* at 883-84. Accordingly, “even assuming that Plaintiff was dishonest with Defendant on one occasion or another, the relevant inquiry remains whether, *at the time he reported his injury to*

No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black’s Law Dictionary* 1201 (7th ed. 1999)).

Defendant, Plaintiff genuinely believed the injury he was reporting was work-related.” *Id.* at 884 (emphasis in original).

I find the inward and outward facing camera footage at 2:43 A.M. lends support to a finding that Complainant made his report of injury in good faith. JX 1. At this time, there was significant lateral movement on the train as it went through a crossing, jolting Complainant’s shoulder back and forth approximately four times as he held onto the whistle lever.¹⁸ Outward facing camera footage also shows lateral movement as the train travels through a crossing. After Complainant took his hand off the whistle, he shifted in his chair and readjusted his left arm twice, by moving it back and forth. Again at 2:51 A.M. and 3:02 A.M., Complainant stretched his left arm, first from left to right across his chest, and then by bending his elbow above his head with his left hand behind his back. These left arm-only stretches in the minutes following the alleged injury support a finding that Complainant had some discomfort with the left arm.

Respondent argues the video shows Complainant was dishonest in his report of injury because the whistle was not located behind Complainant as he alleged in the 705 Report and the Form 52032. Complainant wrote the whistle was “up and three to four inches behind my ear” in the 705 Report and “up and behind me” in the Form 52032. JX 3; JX 5.¹⁹ I agree with Respondent that Complainant’s description in his report of injury forms that the whistle was located behind him is not consistent with the video. *Id.* Complainant himself testified that it would not make sense for the horn to be located behind him. TR 39, 54. Complainant testified, however, that he was not being dishonest, but rather was just inarticulate in how he described his position. Complainant asserts the remainder of his description of the injury was reasonably accurate. I agree that aside from his comments about the location of the whistle, his description is consistent with what occurred at 2:43 A.M., namely that his hand was on the whistle, there was lateral movement, and his shoulder flexed backwards. JX 3; JX 5; CX 1; TR 47, 50-51.

Respondent also argues Complainant’s change of position as to when the injury occurred supports a finding that he did report an injury in good faith. Complainant initially informed Mr. Russell that the injury occurred sometime between 2:30 A.M. and 3:30 A.M. on November 17, 2015. TR 294, 296. On the 705 Report and the 52032 Form, Complainant indicated the injury occurred at 3:00 A.M. at Mile Post 230, and on the 705 Report he additionally stated the injury occurred approximately ¼ of the way into his trip. JX 3; JX 5. At Respondent’s investigative hearing, after viewing camera footage, Complainant stated the injury occurred at Mile Post 230.1, which was at 2:49 A.M. RX 13 at 65-67. Conversely, at the hearing before me, Complainant testified that after reviewing the video with his attorney, they determined the injury occurred at 2:43 A.M. I do not find the discrepancy on timing to be critical to the determination of good faith. Complainant testified that when he filled out the injury forms he did not know the

¹⁸ Mr. Russell acknowledged that there was lateral movement at 2:43 A.M., but stated it was normal lateral movement. TR 297, 309.

¹⁹ While Respondent asserts Complainant confirmed in his in-person conversation with Mr. Russell that the whistle was positioned behind him, the testimony on this point is inconsistent. Mr. Russell initially testified that he and Complainant discussed Complainant’s description of the whistle location. TR 215, 219. However, Mr. Russell later testified he could not recall whether he asked Complainant to explain what he meant when he said the whistle was behind him. TR 291, 293.

exact time of the injury but made a fair guess, and this is consistent with his report of injury stating “*approx.* ¼ of way into trip.” TR 68-69, 201; JX 3 (emphasis added). Complainant further testified that at the investigative hearing, he relied on his union representative’s representation that the longitudinal and latitude lines showed the injury occurred at Mile Post 230.1. TR 80, 108, 201. The time of injury Complainant is now asserting, 2:43 A.M., is within the 2:30 A.M. to 3:30 A.M. range he told Mr. Russell, only 17 minutes earlier than stated on the report of injury forms (out of a nine hour trip),²⁰ and roughly consistent with his estimate that the injury occurred ¼ through the trip in the 705 Report. TR 294, 296; JX 3; JX 5.

Respondent also focuses on Complainant’s actions at the end of his trip, namely leaning on his left arm, putting on his coat, and taking his bag off his chair and dragging it on the floor, to discredit his alleged injury. However, Complainant testified when his injury occurred, his pain was only a 3 out of 10, and after the trip, it was a “dull pain.” TR 53, 57, 101. I do not find Complainant’s limited use of his left arm at the end of his trip to be inconsistent with his description of his pain level, and it is noteworthy that Complainant dragged his bag out of the train, rather than lifting and carrying it with his left arm. While Mr. Hinton testified Complainant indicated at the investigative hearing that his pain was a 9 out of 10 by the end of the trip, this is in fact not indicated anywhere in the investigative hearing transcript. TR 421, 465-66; *see generally* RX 13.

Respondent additionally points to Complainant’s changing description of the severity of the lateral movement that occurred at the time of his alleged injury and the fact that he did not report the rough track. I find overall, Complainant was consistent in his description of the lateral movement, explaining that it was more than the typical lateral movement, but not severe enough to be a risk of derailment. TR 47, 50-51, 76-77, 187-88, 206. Consistent with his testimony, the video shows occasional lateral movements during the trip, as seen by the slight back and forth motion of either Complainant or the bags hanging in the train behind him, but the lateral movement seen at 2:43 A.M. is distinguishable, with a more pronounced back and forth motion of Complainant and the bags.²¹

Lastly, Respondent argues Complainant’s denial that he used data on his cell phone during the November 17, 2015 trip sheds light on his credibility. It is concerning Complainant testified at the investigative hearing that he only used his phone to make a phone call to his girlfriend, despite a complete lack of evidence on the video that Complainant ever raised his phone to his ear, or that he was talking at all, aside from a brief discussion with the conductor.²²

²⁰The time of injury at 2:43 A.M. is also only 6 minutes early than the time alleged at the investigative hearing (2:49 A.M.). RX 13 at 18, 24.

²¹ To the extent Respondent is additionally arguing Complainant’s delay in reporting the injury shows bad faith, I do not find this argument to be persuasive. Complainant credibly testified he did not report his injury immediately because he was hoping it was just a sprain that would go away on its own and he could avoid filing an injury report. TR 53, 186. When the pain worsened instead of improved, Complainant called Mr. Russell the day following his injury, and based on Mr. Russell’s suggestion, he waited to fill out the official injury forms until he received his MRI results. TR 57-58, 60, 61. Complainant was not charged any violations based on an untimely report of injury.

²² Notably, at the hearing before me, Complainant no longer made the assertion that he made a phone call while the train was stopped.

With that said, I find the *Ray* decision, cited by both parties, provides guidance on this issue. In *Ray*, the court noted “even assuming that Plaintiff was dishonest with Defendant on one occasion or another, the relevant inquiry remains whether, *at the time he reported his injury* to Defendant, Plaintiff genuinely believed the injury he was reporting was work-related.” *Id.* at 884 (emphasis in original). Thus, I find Complainant’s testimony as to his cell phone use is insufficient standing alone to establish Complainant reported his injury in bad faith.

Although there is no medical evidence in the record as to whether a rotator cuff injury could occur as described by Complainant and seen in the video at 2:43 A.M., there is evidence that Complainant went to the Emergency Room the same day he alleges the injury occurred and there is no dispute Complainant did in fact suffer from a left rotator cuff tear. There is no evidence, beyond speculation, that the rotator cuff tear occurred outside of the work trip on November 17, 2015. Furthermore, Complainant knew that there were inward facing cameras during his trip, making it less likely that he would fabricate an injury knowing the cameras could be reviewed.²³ TR 30. Based on the totality of the evidence, particularly the corroboration between Complainant’s testimony of how his injury occurred and the video at 2:43 A.M., I find Complainant reported the injury in good faith and Complainant therefore engaged in protected activity under the FRS.

B. Adverse Action

A complainant has the burden to show the respondent took some adverse action against him or her. *See Araujo*, 708 F.3d at 157. The parties have stipulated Complainant’s termination constituted protected activity under the FRSA, and this is consistent with the plain language of Section 20109, which states employers “may not discharge . . . an employee” for engaging in protected activity under the Act. TR 7; RX 9; 9 U.S.C. § 20109. Thus, Complainant has established adverse action.

C. Contributing Factor

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Palmer*, ARB No. 16-035 at 18; *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 6 (ARB Feb. 29, 2012) (*quoting Williams*, ARB No. 09-092 at 5). A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer’s adverse action. *DeFrancesco*, ARB No. 10-114, PDF at 6; *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, PDF at 7 (ARB May 31, 2013). In establishing the contributing factor element, a complainant need not “prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action” but only that his protected activity “tends to affect in any way the outcome of the [employer’s] decision.” *Araujo*, 708 F.3d at 158 (*quoting Marana v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)). This is a low standard for an employee to meet, as “[t]he protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” *Palmer*, ARB No. 16-035, at 18 (alteration in original).

²³ Furthermore, management could easily check where the whistle was located on the train, making it less likely Complainant would purposely lie about the whistle location.

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *See Araujo*, 708 F.3d at 157; *Williams*, ARB No. 09-092 at 6; *DeFrancesco*, ARB No. 10-114 at 6-7; 29 C.F.R. § 1984.104(e)(3). Direct evidence “conclusively links the protected activity and the adverse action and does not rely upon inference.” *Williams*, ARB No. 09-092 at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114 at 6. A complainant may also rely upon circumstantial evidence, which:

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

DeFrancesco, ARB No. 10-114 at 7; *see also Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-05, ALJ No. 2005-SOX-00033, PDF at 13 n.69 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011); 29 C.F.R. § 1984.104(e)(3). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057 at 13-14. This is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (*quoting Sylvester v. SOS Children’s Vill. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

When considering direct or circumstantial evidence, the ALJ must make a factual determination based on all of the relevant, admissible evidence and must be persuaded that it is more likely than not that the complainant’s protected activity played some role in the adverse action. *See Palmer*, ARB No. 16-035, slip op. at 17-18, 55-56. Where an employer suggests the only reasons for its adverse actions were nonretaliatory reasons, the ALJ must take the nonretaliatory reasons into consideration. *Id.* at 53, 55. However, in order to establish contributing factor, a complainant does not necessarily need to prove the respondent’s articulated reason for the adverse action was a pretext, because a complainant alternatively can prevail by showing that “the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Bechtel*, ARB No. 09-052 at 12. “Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.” *Palmer*, ARB No. 16-035 at 53.

The parties in their briefs focus on the issue of pretext, specifically whether Respondent’s stated reason for dismissal, dishonesty, was a legitimate reason for Complainant’s ultimate dismissal. In support of pretext, Complainant relies on the following: (1) management did not seek out medical advice from a physician at any point prior to making their determination that Complainant lied about his injury; (2) management did not make the actual video footage available at the investigative hearing; (3) it was unreasonable for management to believe Complainant would fraudulently report the whistle location when the location was easily

verifiable; (4) Complainant has been disciplined in the past following prior work related injuries; and (5) management never sought clarification from Complainant as to his description of the injury following his report of injury and instead chose to charge Complainant with dishonesty. Compl. Br. 14-17. Conversely, Respondent asserts the charge of dishonesty was not pretext for retaliation against Complainant and there is ample evidence to support a finding that management reasonably and sincerely believed Complainant lied about his injury, based on numerous inconsistencies between Complainant's statements and the camera footage. Er. Br. at 14-17.

I find there is some circumstantial evidence that supports a finding of pretext, or at the very least, a finding that the report of injury played some role in Respondent's decision to terminate the Complainant. Most concerning is the fact that management never sought medical opinions from trained medical experts as to whether Complainant's injury could have occurred as he described, or what his limitations would have been immediately following the injury. TR 318, 320, 353, 382, 384, 434. Instead, Mr. Russell, Mr. Torres, and Mr. Hinton, despite admittedly not having any medical training, independently determined that a rotator cuff injury could not be caused by hitting lateral moving while blowing the train whistle. TR 318, 320, 353, 355, 382, 384, 416, 434. It is also telling that Mr. Russell decided to proceed with serious charges against Complainant with the risk of dismissal without ever informally sitting down with Complainant to ask for an explanation of the inconsistencies seen on the video.²⁴ TR 72, 384-85. Additionally, despite the fact that the charge of dishonesty was based primarily on the video footage, management did not present the actual video at the investigative hearing and instead relied on still shots.

The testimony of Mr. Hinton also undercuts the reasonableness of the decision to terminate Complainant for dishonesty. Mr. Hinton, the final decision maker, testified he was not concerned with which location the injury happened or how it happened, but rather whether Complainant left the train injured. TR 416. This testimony is striking, given that the dishonesty charge was based on the fact that the alleged injury was not observed on the video as described by Complainant in his report of injury forms. It is also concerning that Mr. Hinton testified he relied primarily on the fact that Complainant's actions at the end of the trip were inconsistent with a pain level of 9 out of 10, when Complainant never testified at the investigative hearing that his pain was a 9 out of 10.²⁵ TR 465-66.

²⁴ Further, in deciding to charge Complainant with dishonesty, Mr. Russell seemed to rely primarily on the minor discrepancy between Complainant's description of the whistle location and its actual location. While Respondent asserts that it was not just Complainant's statement that the horn was located behind him that led to the dishonesty charge, there is evidence that the description of the horn location on the report of injury was the driving catalyst for the charge of dishonesty. Mr. Russell admitted that if Complainant had simply said he had his arm on the horn and hit lateral movement, causing a twinge in his shoulder, it would have sounded plausible to him, but because Complainant said the horn was too far back and behind his ear, it did not seem plausible. TR 301-02. In addition, at the investigative hearing, the majority of the still shots Mr. Russell presented as evidence were for the purpose of showing that the horn was never positioned behind Complainant. RX 13.

²⁵ As discussed above, Complainant testified that his pain level at the time of the injury was a 3 out of 10 and at the end of the trip, he had a "dull ache" in his left shoulder. I find this level of pain is not inconsistent with Complainant's actions at the end of his trip.

Even assuming Respondent's stated reason for the adverse action, namely dishonesty, was true and not a pretext, this does not preclude Complainant from establishing contributing factor. Complainant need only show that the protected activity was an additional contributing factor in the adverse action. *Palmer*, ARB No. 16-035 at 53; *Bechtel*, ARB No. 09-052 at 12. I find Complainant has met this burden.

The Administrative Review Board has held that if the protected activity and the adverse action are "inextricably intertwined," this can establish contributory factor. *See Palmer*, ARB No. 16-035 at 102-03; *Henderson*, ARB No. 11-013 at 13 (finding a presumptive inference of causation where complainant's investigation and discipline directly stemmed from his report of injury); *DeFrancesco*, ARB No. 10-114 at 7 (finding because complainant's report of injury triggered the employer's review of his personnel records and led to his suspension, his report of injury was a contributing factor to his suspension as a matter of law); *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007, PDF at 8 (ARB June 20, 2012) (holding because complainant's protected disclosures prompted the employer's investigation that led to complainant's discharge, the complainant's disclosures were "inextricably intertwined" with the investigations that resulted in his discharge and complainant established the "contributing factor" element of his claim). The protected activity and adverse action are inextricably intertwined if the basis for the adverse action cannot be explained without discussing the protected activity. *See Palmer*, ARB No. 16-035 at 102-03; *Hutton*, ARB No. 11-091 at 15 (Corchado, J., concurring).

I find the adverse action and protected activity in the present matter are "inextricably intertwined" as the dishonesty and cell phone violation charges, investigative hearing, and ultimate dismissal would not have occurred but for Complainant's protected activity of filing a report of injury. The charge of dishonesty was based solely on statements made in the personal injury report. If not for the report of injury, the train camera footage would not have been pulled, leading directly to the charge that Complainant was dishonest in his report of injury and the secondary charge that Complainant violated company rules regarding cell phone use. Thus, I find that Complainant has established contributing factor as his report of injury was "inextricably intertwined" with his ultimate termination.²⁶ *Henderson*, ARB No. 11-013 at 13; *Marano*, 2 F.3d at 1143 ("[An] employee only needs to demonstrate by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action.").

Considering the totality of the evidence, I find Complainant has proven by a preponderance of the evidence that his protected activity of reporting a work injury was a contributing factor in his ultimate termination. Accordingly, the burden shifts to Union Pacific to establish that it would have taken the same action absent the protected activity.

²⁶ In addition to evidence that the protected activity and the adverse action were "inexplicably intertwined," it is undisputed that Respondent had knowledge of Complainant's protected activity, as Mr. Russell was present when Complainant filled out the personal injury reports, discussed the forms with Complainant, and recommended discipline based on statements made in the injury reports. There is also temporal proximity between the filing of the injury reports on November 25, 2015, and the Notice of Investigation on December 4, 2015. *Araujo*, 708 F.3d at 160.

D. Respondent's Affirmative Defense

If a complainant proves that his or her protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b); *Palmer*, ARB No. 16-035 at 56-57. The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco*, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. Respondent’s burden of proof is purposely a high one. *See Hutton*, ARB No. 11-091 at 13; *Araujo*, 708 F.3d at 159-160 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a “tough standard” for employers to meet). Thus, “[i]t is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.” *Palmer*, ARB No. 16-035 at 57 (emphasis in original); *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014).

An ALJ must consider all relevant, admissible evidence in determining whether the employer has proven it would have taken the same adverse action absent the protected activity. *See Palmer*, ARB No. 16-035 at 52, 57. This can be shown by direct or circumstantial evidence of what the employer “would have done.” *See Speegle*, ARB No. 13-074 at 11. “The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee’s work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.” *Speegle*, ARB No. 13-074 at 11; *see Palmer*, ARB No. 16-035 at 57 & n. 236.

Respondent asserts it had a lawful and valid reason to terminate Complainant pursuant to its Code of Operating Rules, Rule 1.6 prohibiting dishonesty, based on numerous inconsistencies between Complainant’s report of injury forms and the video of his trip on November 17, 2015. RX 4. However, in establishing the affirmative defense, “it is not enough to confirm the rational basis of [Respondent’s] employment policies and decisions. Instead, [the ALJ] must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity.” *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-00012 (ARB Oct. 26, 2012); *see also DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-00009, slip op. at 10 (ARB Sept. 30, 2015); *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-00149, slip op. at 14 (ARB Sept. 29, 2017). Thus, even assuming Respondent reasonably and sincerely believed that Complainant violated company rules on dishonesty and had a legitimate and rational basis for imposing discipline as a result of the dishonesty, this alone does not satisfy Respondent’s burden on the affirmative defense. Respondent must also establish “through factors extrinsic to [complainant’s] protected activity that the discipline to which [complainant] was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured.” *DeFranscesco*, ARB No. 13-057 at 13-14.

The Board has held that extrinsic factors to consider in determining whether a respondent has sufficiently demonstrated its affirmative defense in the context of a reported injury include: “(1) whether the respondent railroad routinely enforces the work rule the complainant is charged with violating, in the absence of an injury; (2) whether the respondent enforces the rule more stringently against injured employees than non-injured employees; (3) whether the work rule at issue is vague and therefore subject to manipulation and use as pretext for retaliation; and (4) whether the evidence suggests that the respondent railroad was genuinely concerned about rooting out safety problems or whether, instead, the evidence suggests that its conduct was pretext designed to unearth a plausible basis on which to punish the complainant for filing an injury report.” *Stallard*, ARB No. 16-028, ALJ No. 2014-FRS-00149, slip op. at 14 (ARB Sept. 29, 2017) (citing *DeFrancesco*, ARB No. 13-057). I find that the evidence of record does not sufficiently address these extrinsic factors.

Respondent submitted a list of Council Bluffs Service Unit employees disciplined from January 1, 2015 to January 1, 2016. RX 6. The list includes the rules that were violated and in some cases, a brief description of the violation. RX 6. While the list shows that four employees other than Complainant were charged with Rule 1.6 violations, it does not establish the other employees were “similarly situated” because none of the Rule 1.6 charges pertained to an allegation of dishonesty and the list does not indicate the ultimate discipline received for the violations or whether or not the charges arose after the employees filed a report of injury. *Id.*

The list provided by Respondent also shows that five employees other than Complainant were disciplined for cell phone violations. Again, the list does not indicate what the ultimate discipline was or whether the charges were preceded by a report of injury. Further, even if Union Pacific could prove that it would have disciplined Complainant for a cell phone violation absent his protected activity of filing a report of injury, this would not be sufficient for Respondent to meet its burden on the affirmative defense. Mr. Russell testified that a first time cell phone use violation results in a one day suspension, a conference with the manager, and a return to work the next day. TR 342. He testified Complainant was not terminated for a cell phone violation. TR 342. Thus Respondent cannot establish that absent Complainant’s protected activity it would have fired Complainant based on the cell phone violation.

Respondent also presented evidence that Complainant filed reports of injury in the past without any resulting disciplinary action, namely his 2014 right rotator cuff injury. TR 278, 346; RX 7. While Complainant may not have been disciplined after each report of injury, he was disciplined for failing to promptly report a personal injury after reporting a work-related injury in 1995. RX 7 at 8, 11, 12, 17. There is also testimony from Mr. Torres that during his time as superintendent for Council Bluffs and San Antonio, he had 21 injuries reported and none of them resulted in discipline, except in Complainant’s case. TR 374, 377. However, evidence of times when employees filed reports of injuries but were not disciplined does not address the critical question of how Respondent treats employees who engaged in conduct similar to Complainant’s and did not file a report of injury. *See DeFrancesco*, ARB No. 13-057 at 12-13.

Respondent’s Rule 1.6, which states “employees must not be dishonest,” without any qualifications, is broad and vague. RX 4. There is no evidence of any guidelines for determining what type or extent of dishonesty warrants charges and/or dismissal, lending to the potential for manipulation and use as pretext. *See Stallard*, ARB No. 16-028; *DeFrancesco*,

ARB No. 13-057 at 13 n.43. Without evidence from Respondent establishing that it consistently enforces the rule prohibiting dishonesty, or that it has disciplined similarly situated employees in the past for dishonesty absent protected activity, I find Respondent has failed establish its affirmative defense.

Based on the foregoing, I find Respondent has failed to establish by clear and convincing evidence that it would have taken the same adverse action absent Complainant's protected activity. Therefore, Complainant is entitled to relief under the FRSA.

V. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-3, 4, PDF at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act). Punitive damages up to \$250,000 are also authorized. § 20109(e)(3).

At the outset, I note that the parties presented minimal evidence on damages, Complainant only addressed damages briefly in its proposed order, and Respondent failed to address remedies at all in its post-hearing brief, making my analysis on remedies challenging at best. With that said, I will assess damages based on the evidence available in the record.

To make Complainant whole, he is entitled to have his disciplinary record expunged of any reference to the dishonesty and cell phone use charges stemming from the November 25, 2015 report of injury forms, including his investigation and termination. Complainant is further entitled to be reinstated with the same seniority status that he would have had but for the discrimination. 49 U.S.C. § 20109(e)(2)(A).

Complainant is also entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). Complainant was not discharged until November 3, 2016, but was taken out of service pending an investigation as of December 4, 2015 (the date Respondent issued the Notice of Investigation). JX 7; JX 4. Thus, I find Complainant is entitled to back wages commencing on December 4, 2015. Complainant testified his gross annual earnings were \$100,000.00 prior to his termination. TR 84. The record also contains a Monthly Wage History for Complainant from January 1, 2013 through March 31, 2017. JX 6. I rely on Complainant's Monthly Wage History rather than Complainant's testimony as to his wage loss as it is more reliable and precise. To determine Complainant's wages as an Engineer with Respondent, I look to the year preceding his injury in November 2015. From November through December of 2014, Complainant's only earnings were FELA Claim Payments, presumably for his 2014 right rotator cuff injury, and there are no reported wages for January or February of 2015. According to

Complainant's personnel records, he was out of work until March 15, 2015 for his right shoulder injury. RX 7 at 2. Thus the months of November 2014 through March 2015 cannot be used in calculating Complainant's average monthly earnings. As such, I will use the gross monthly earnings from the seven months preceding Complainant's injury – April through October of 2015.²⁷ Averaging Complainant's gross monthly earnings from April through October 2015, I find that Complainant's average monthly earnings for the purpose of calculating back wages is \$6,546.74.

Interim earnings must be deducted from the back wages owed to Complainant. *See Smith v. Lake City Enterprises, Inc.*, ARB No. 11-087, ALJ No. 2006-STA-00032 (ARB Nov. 20, 2012) (“Since the purpose of the STAA’s remedies is to return the wronged employee to the position he would have been in had his employer not retaliated against him, back-pay awards are ordinarily reduced by the amount of an employee’s interim earnings prior to reinstatement. Without such reduction, a back-pay award could place the employee injured by his employer’s discrimination in a better position than he was when employed.”).²⁸ Complainant purchased a hypnosis business in March of 2016 and currently works full-time as a hypnotist. TR 139, 141. Complainant testified from his hypnosis business, he earns \$14,000 a couple months out of the year, \$12,000 for another couple of months of the year, and about \$10,000 for the remaining months of the year. TR 141-42. Considering this uncontroverted testimony, I find Complainant, on average, earns \$11,000 per month.²⁹ TR 141-42. From that amount of earnings, he has the following expenses: \$2,000 mortgage payment, \$437.75 in rent, \$1,200 for his part-time assistant, \$350 for phone, cable and internet, \$1,000 for advertising, and \$700 for web fees.³⁰ TR 142-44. Subtracting these expenses from his earnings of \$11,000 per month results in a monthly gross income of \$5,312.25.³¹

Subtracting Complainant's interim gross monthly earnings of \$5,312.25 from his average monthly earnings at Union Pacific of \$6,546.74, I find Complainant is entitled to back wages in the amount of \$1,234.49 per month commencing in March of 2016, when he purchased the

²⁷ In June 2015, in addition to Complainant's regular earnings, he received an additional FELA Claim Payment of \$51,064.16. This payment was excluded from his earnings for the month. JX 6 at 4.

²⁸ Complainant's counsel in his post-hearing brief did not make deductions for interim earnings despite being aware of the need to mitigate back wages. *Cf.* Cl. Br. at 18 with TR 176 (Counsel for Complainant asking “could you tell us to the best of your estimate, what – taking into consideration what you would have made as an engineer, and making – and into consideration what you’ve earned doing your alternative mitigation, what your loss [is].”

²⁹ To calculate this average, I added two months with earnings of \$14,000, two months with earnings of \$12,000, and eight months with earnings of \$10,000, and divided the total by twelve months, resulting in an average monthly earnings of \$11,000.00.

³⁰ Complainant testified his phone, cable and internet bill was \$340 to \$350 per month and his monthly advertising costs were between \$500 to \$1,000 per month. In both instances, I granted Complainant the benefit of the doubt and used the higher end of the range.

³¹ I note the only evidence of record regarding Complainant's earnings and expenses associated with the hypnosis business is Complainant's own testimony. While I find Complainant's testimony to be credible, it would have behooved Complainant to submit earnings statements and documentation of expenses to more precisely reflect his gross earnings.

hypnosis business and continuing until his reinstatement at Union Pacific.³² He is also entitled to back wages for the three months prior to purchasing his business, December 2015 through February 2016, for a total of \$19,640.22. Prejudgment interest is to be paid from the date Complainant was taken out of service, December 4, 2015, until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made.³³

Complainant seeks compensatory damages for his pain and suffering. Compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.” *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (quoting Restatement (Second) of Torts § 903, pp. 453-454) (1979)). Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Ferguson*, ARB No. 10-075 at 7 (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-00032 (ARB Sept. 24, 2010)). A complainant must prove compensatory damages by a preponderance of the evidence. *Id.* at 7. An award is “warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury.” *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). A complainant’s credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; see also *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007); *Ferguson*, ARB No. 10-075 at 7. Complainant credibly testified his dismissal caused him “a lot of stress,” especially in light of his 27-year railroad career, and he was worried about his future and his reputation. TR 83. He also testified he was very embarrassed that his family and friends were aware he was terminated for dishonesty. TR 83. He acknowledged he never sought professional treatment for his emotional distress and was never diagnosed with a mental or emotional condition in connection with the dismissal. TR 158. I find Complainant is entitled to some compensatory damages for emotional distress in light of his credible and unrefuted testimony at hearing and the severity of his discipline. However, because his testimony was limited and non-specific as to how the dismissal impacted his daily life and emotional well-being, coupled with the fact that he never sought any medical treatment for emotional distress, I find that \$2,000.00 is an appropriate award for Complainant’s pain and suffering resulting from his dismissal.³⁴

³² Complainant testified he works full time in the hypnosis business, and there is no evidence he could have made these earnings in addition to his full time engineer position with Union Pacific.

³³ While Complainant additionally testified that he has higher health care costs since his termination, he never provided evidence of the amount of the increased costs and did not seek payment for these costs in his post-hearing brief. TR 85, 176. Thus, Complainant has not established entitlement to payments for increased health care costs.

³⁴ I find an award of \$2,000.00 is consistent with other whistleblower decisions where damages are based solely on testimony and no medical evidence. See *Jackson v. Union Pacific Railroad Co.*, ARB No. 13-042, ALJ No. 2012-FRS-00017 (ARB Mar. 20, 2015) (awarding \$500.00 for emotional distress based on minimal evidence of emotional distress as a result of a temporary suspension); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, -053, ALJ No. 2005-STA-00035, PDF at 7-8 (ARB Jan. 31, 2008) (awarding \$5,000.00 for emotional distress in discharge case based on complainant’s testimony); *Jackson v. Butler & Co.*, ARB Nos. 03-116,-144, ALJ No. 2003-STA-00026, PDF at 9 (ARB Aug. 31, 2004) (awarding \$4,000.00 in discharge case based on testimony from complainant and his wife); *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-00022 (ARB Nov. 30, 2009) (awarding \$2,000.00 for emotional distress in discharge case based on testimony from complainant and his fiancée).

Complainant also seeks punitive damages as permitted by the FRSA. Punitive damages are to punish unlawful conduct and to deter its repetition. *Campbell*, 538 U.S. at 416; *see also BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Campbell*, 538 U.S. at 418; *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving “reckless or callous disregard for the [complainant’s] rights, as well as intentional violations of federal law” *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075 at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

Although Respondent’s actions were sufficient to prove Complainant’s claim, under the circumstances of the present case I do not find the record establishes Respondent acted with reckless or callous disregard for Complainant’s rights or intentionally violated federal law. *See Bailey v. Consolidated Rail Corp.*, ARB No. 13-030, ALJ No. 2012-FRS-00012 (ARB Apr. 22, 2013) (upholding finding of no punitive damages). There is insufficient evidence to support a finding of retaliatory animus or hostility on behalf of management in this matter, or that actions by Respondent put Complainant’s health and safety at risk. Nor is there any evidence of a pattern or practice of retaliatory conduct by Respondent. Thus no punitive damages shall be awarded in this matter.

Complainant’s counsel is entitled to submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent’s counsel has 20 days from receipt of the fee petition to file a response.

ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against him in violation of the Federal Rail Safety Act for reporting safety concerns. It is hereby ORDERED:

1. Respondent shall expunge Complainant’s personnel file of any disciplinary record or negative references related to the dishonesty and cell phone use charges and discipline arising from the November 25, 2015 report of injury;
2. Respondent shall reinstate Complainant with the same seniority status that he would have had but for the discrimination. *See* 49 U.S.C. § 20109(e)(2)(A);
3. Respondent shall pay Complainant back wages with interest in the total amount of \$19,640.22 for the period of December 2015 until February 2016, and shall pay back wages with interest in the amount of \$1,234.49 per month from March 2016 until the date of reinstatement. 49 U.S.C. § 20109(e)(2)(B). Prejudgment interest

is to be paid from the date Complainant was taken out of service on December 4, 2015, until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until payment of back pay is made;

4. Respondent shall pay compensatory damages in the amount of \$2,000.00 for Complainant's pain and suffering as the result of his dismissal; and
5. Respondent shall pay Complainant's reasonable attorney's fees and costs. Complainant shall file a fee application within **20 days** of the date on which this order is issued. Should Respondent object to any fees or costs requested in the application, the parties shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, Respondent's objections shall be filed not later than **20 days** following service of Complainant's fee application. **Any objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with Complainant prior to the filing of the objections.**

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

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

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

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

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

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

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

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

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