U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 May 2018

Case No.: 2017-FRS-00007

In the Matter of:

DESMOND HUNTER
Complainant

v.

CSX TRANSPORTATION, INC.
Respondent

APPEARANCES: Joseph M. Miller, For Complainant; Nikki L. McArthur, Jacqueline M. Holmes, For Respondent

BEFORE: HON. TRACY A. DALY
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

1. <u>Jurisdiction and Procedural History.</u> This case arises under the employee protection provisions of the Federal Railroad Safety Act of 1982 as amended (FRSA). 49 U.S.C. § 20109 (2016), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 (2016), brought by Complainant against Respondent (CSX Transportation, Inc.). Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated the FRSA by terminating his employment. OSHA investigated, concluded Respondent did not violate the FRSA, and dismissed the complaint. Complainant objected and requested a hearing before the Office of Administrative Law Judges (OALJ). The undersigned conducted a formal hearing on May 24, 2017 in Covington, Louisiana. The parties were afforded a full opportunity to adduce testimony and offer documentary evidence.[1] Complainant and Respondent filed post-hearing briefs with

[1] Exhibits are marked as follows: JX for Joint Exhibits. CX for Complainant Exhibits. RX for Respondent Exhibits. Reference to an individual exhibit is by party designator and page number (e.g. CX-1, p. 4). Reference to the hearing transcript is by designator Tr. and page number (e.g. Tr. p. 3)

legal analysis and factual arguments on September 29, 2017 and October 2, 2017.[2] Complainant and Respondent filed supplemental reply briefs on October 30, 2017.[3]

2. <u>Statement of the Case.</u>

Complainant contends he suffered an adverse action under the FRSA when Respondent terminated his employment after he engaged in the protected activity of reporting a hazardous safety condition, pursuant to 49 U.S.C. § 20109(b)(1)(A). Specifically, Complainant argues that his report of a wheel slip alarm to his supervisor resulted, or was a contributing factor, in his employment termination. Complainant asserts that Respondent's stated reason for terminating his employment, leaving work without permission from a supervisor, is a pretext for retaliation based on Complainant's protected activity. In further support of this assertion, Complainant argues that another employee, who committed the same employment policy violation, was not terminated from employment like Complainant. (CB-1; CB-2)

In response, Respondent avers that Complainant did not engage in a protected activity because Complainant only reported a frequently recurring routine operational issue and Complainant did not reasonably believe it presented a hazardous safety condition. Respondent further argues that, even if Complainant establishes that he engaged in protected activity, it was not a contributing factor in the adverse action because Complainant violated an employment rule that requires employees to obtain permission from a supervisor before leaving work and the decision-makers who terminated Complainant's employment had no knowledge of the alleged protected activity. Furthermore, Respondent claims it would have taken the same adverse action against Complainant in the absence of any protected activity. (RB-1; RB-2)

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

a. Respondent is a freight railroad operating over 20,000 route miles of track in 23 states, the District of Columbia, and two Canadian provinces.
b. Respondent is a rail carrier subject to the FRSA.
c. Complainant was at all times relevant to this case an employee covered under the FRSA.
d. The terms and conditions of Complainant's employment with Respondent were at all times relevant to this case governed by a collective bargaining agreement between Respondent and the Brotherhood of Locomotive Engineers and Trainmen.[4]
e. On July 9 and 10, 2016, Complainant was working as a locomotive engineer in Gentilly Yard, which is a Respondent-owned rail yard in New Orleans, Louisiana.
f. At or around 9:55 p.m. Central time on July 9, 2016, Complainant and Respondent employee Trainmaster Lowell Oswald communicated over the radio with each other.[5]

[2] Complainant's post-hearing brief is marked CB-1. Respondent's post-hearing brief is marked RB-1.
[3] Complainant's reply brief is marked CB-2. Respondent's reply brief is marked RB-2.
[4] A copy of excerpts of this collective bargaining agreement is included in the record as JX-1.
[5] A recording of the radio communications is included in the record as JX-2.

g. On July 19, 2016, Respondent issued a letter to Complainant informing him of disciplinary charges against him.[6]
h. On August 11, 2016, Respondent held a hearing regarding the July 19, 2016 charges against Complainant.[7]
i. On September 9, 2016, Respondent dismissed Complainant from employment.[8]
j. Complainant's dismissal constitutes an adverse action under the FRSA.

(JX-49)

In addition, during an administrative conference at the hearing, the undersigned directed the parties to jointly file a stipulation detailing and explaining the acronyms used at the hearing and contained in the administrative file documents and record. The parties jointly filed a document styled "Stipulated Railroad Acronyms and Terminology" on September 29, 2017. (Tr. pp. 259-260; JX-50) The undersigned admitted JX-50 into evidence without objection. (Tr. pp. 264-265)

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

a. Whether Complainant engaged in protected activity.
b. Whether Respondent, and management employees who decided to terminate Complainant's employment, were aware that Complainant engaged in protected activity before taking an adverse action against Complainant.
c. Whether Complainant's protected activity contributed to his termination of employment.
d. Whether Respondent's decision to discipline and terminate Complainant's employment for leaving Respondent's property without approval during his shift on July 9, 2016 was a pretext for Complainant's protected activity.
e. Whether Respondent reasonably believed Complainant committed a rule violation for which he was disciplined.
f. Whether Respondent can establish by clear and convincing evidence that it would have taken the same personnel action in the absence of protected activity.
g. Whether Complainant is entitled to damages.

(Tr. pp. 9-11)

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

a. Exhibits Admitted Into Evidence. The undersigned fully considered the exhibits

[6] A copy of this document is included in the record as JX-3.
[7] A copy of the transcript and exhibits from that hearing is included in the record as JX-4.
[8] A copy of the letter of dismissal is included in the record as JX-5.

admitted at the hearing. However, as specifically provided in the Notice of Case Assignment and Prehearing Order issued on November 16, 2016 and as expressly articulated to the parties at the hearing, only exhibit content directly cited in a post-hearing brief by specific exhibit and page number was considered material and relevant evidence. All other information contained in the exhibits, but not specifically cited in the briefs, was regarded as non-relevant background information for chronological context to cited relevant evidence. (Tr. pp. 321-322)

On October 2, 2017, the parties jointly filed a "Motion to Reopen the Record." The motion provides that, during the pendency of this case, Complainant also "grieved his termination under the applicable collective bargaining agreement." According to the parties, a Public Law Board (PLB), an arbitration panel created pursuant to the Railway Labor Act, sustained Complainant's grievance in part and reinstated him without back pay. In accordance with the PLB's decision, Respondent informed Complainant of the steps he needed to take in order to be reinstated. The parties stipulated that Complainant declined reinstatement on September 28, 2017. The motion requests that the PLB's decision and Respondent's reinstatement offer be admitted into the record as JX-51 and 52, respectively. Pursuant to 29 C.F.R. 18.90(b), the administrative law judge may admit additional evidence after the record is closed upon a showing that "new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed." The PLB's decision and Respondent's offer of reinstatement was not available when the record closed at the conclusion of the formal hearing on May 24, 2017. Therefore, the parties' motion is granted and JX-51 and JX-52 are admitted into evidence.

1) Complainant Exhibits. Complainant offered two exhibits into evidence. Complainant offered pages one through six of CX-1 into evidence without objection. Pages seven through twelve of CX-1 remained marked for identification, but these pages were not admitted into evidence. In addition, Complainant withdrew CX-2 from the record at the hearing. CX-2 remains marked in the record for identification, but it was not admitted into evidence or considered as substantive evidence. (Tr. pp. 12-14)

2) Joint Exhibits. The parties jointly offered 49 exhibits, which the undersigned admitted into evidence. Each exhibit was admitted into evidence without objection. (Tr. pp. 6-9)

(A) *Audio Recording of Radio Communication Between Complainant and Mr. Lowell Oswald on July 9, 2016.*

The parties stipulated that at or around 9:55 p.m., Central Standard Time, on July 9, 2016, Complainant and Respondent employee Trainmaster Oswald communicated over the radio with each other. (JX-49)

A recording of this conversation is contained in the record. In this conversation, Complainant contacted Mr. Oswald on the radio to ask him about the status of a U.P. power engine.[9] Initially, Complainant stated that "[Mr. Oswald] was explaining to [Mr. Jiles] what was going on with this U.P. power." In response, Mr. Oswald told Complainant that an engine had displayed a "wheel slip" message. He told Complainant that a machinist had checked the engine the night before and it was a "faulty message" and that was "all [Mr. Oswald] knew at this point." (JX-2)

[9] U.P. is an acronym for the Union Pacific Rail Company. (JX-50)

Complainant asked Mr. Oswald who was "taking the train out of here?" Mr. Oswald said U.P. would take the train because they have to get the engine back somehow. Complainant asked if he should ignore the wheel slip alarm. In response, Mr. Oswald stated Complainant could ignore the alarm because the engine would not be needed for puling power.[10] Complainant then stated he "would try something else." (JX-2)

(B) *Respondent's Charge Letter to Complainant.*

On July 19, 2016, Respondent sent a letter to Complainant informing him that Respondent's formal investigation and hearing would occur on July 26, 2016. The letter provided that the "purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with information received that on July 10, 2016, at approximately 0350 hours, while working Y205-09,[11] in the vicinity of milepost 000801, you left CSX property without permission, and all circumstances relating thereto." The letter further provided that Complainant was being placed on administrative leave pending this investigation. Mr. William Keogh signed the letter. (JX-3)

(C) *Respondent's Internal Investigation Transcript and Exhibits*.

On August 11, 2016, Respondent conducted its own internal investigation and hearing regarding Complainant's conduct that occurred on July 9, 2016.

In relevant part, Mr. David Laney, Respondent's Hearing Officer, questioned Mr. Jermaine Jiles about the events surrounding Complainant's departure from work on the evening of July 9, 2016. Mr. Laney asked Mr. Jiles if it was his understanding that he was free to leave work after moving the engines from I609. Mr. Jiles stated "I'd say yes, based on everything we had done in the yard condition, and that we were aware of." Mr. Jiles did not recall the Trainmaster or Yardmaster specifically telling him that he could leave work after the move was completed. (JX-4, p. 21)

Mr. Jiles further explained that the Yardmaster relieves the crewmembers. He explained that each Yardmaster relieves crewmembers differently. Some Yardmasters do not verbally tell crewmembers that their shifts are over; other Yardmasters specifically inform a crew about the last move of a shift. (JX-4, pp. 23-24)

Complainant stated that after leaving work on July 9, 2016, no one contacted him; however if Respondent had contacted and instructed him to return, he could have returned to work in a matter of minutes and completed the additional move with the crew. If Complainant had known about the additional move, he would not have left work without fully completing his work responsibilities. (JX-4, p. 33)

(D) *Complainant's Employment Termination Letter from Respondent.*

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[10] Power refers to the use of a locomotive engine to pull or shove rail cars. (JX-50)

[11] Y205 refers to Yard Job 205, which is a regularly assigned transfer job in Respondent's Gentilly Yard. (JX-50)

On September 9, 2016, Respondent sent Complainant a disciplinary letter. The letter stated that Respondent determined that Complainant violated Respondent's Operating Rule 104.7. As a result, and "due to the serious nature of the infraction," Complainant's employment was terminated effective immediately. This letter did not reference any insubordination. (JX-5)

(E) *Respondent's Individual Development and Personal Accountability Policy (IDPAP) for Operating Craft Employees.*

Respondent's IDPAP requires managers to "provide fair and consistent treatment to all employees under their charge and to use an alternative to formal discipline whenever appropriate."

Respondent's IDPAP identifies three categories of offenses: 1) minor; 2) serious; and 3) major.

Under Part I of the IDPAP, "minor" offenses include failing to wear personal protective equipment, wearing inappropriate clothing and jewelry, and committing violations of general safety rules for mounting and dismantling equipment, operating handbrakes, operating switches, and derails. Initially, a corrective instruction will be used to alert an employee about the minor offense. Five minor offenses, within a three-year period, will be considered a serious offense.

Under Part II of the IDPAP, "serious" offenses include rule violations resulting in a derailment or damage to equipment, poor performance, or violation of Respondent's policies not classified as minor or major. A single serious offense is not considered sufficient to warrant dismissal. Subsequent serious offenses within a three-year period are handled progressively. Two serious offenses in a three-year rolling period result in either a formal reprimand or three days actual suspension. Three serious offenses in a three-year period will result in dismissal or suspension for 30 days.

Under Part III of the IDPAP, "major" offenses include rule violations resulting in a major operating incident, speeding 10 miles per hour greater above the authorized speed limit, theft, insubordination, dishonesty, and other acts of blatant disregard for the rights of employees of the company, and acts that cause harm to other persons or recklessly endanger the safety of employees of the public. If an employee is guilty of one major offense, he or she is subject to removal from service and dismissal, or 30 days of suspension.

The IDPAP does not specifically classify Operating Rule 104.7 as a minor, serious, or major offense. (JX-6, pp. 1-5)

(F) *Complainant's "Employee History" of Rule Violations and Disciplinary Action.*

Complainant's "Employee History" report provides he did not have any disciplinary infractions classified as minor, serious, or major during the three years prior to July 9, 2016. All of Complainant's prior offenses were removed from consideration due to the three-year rolling period or because they were cancelled. (JX-7, pp. 1-7)

(G) *Email From Mr. Lowell Oswald to Mr. David Laney.*

On July 10, 2016, at 3:54 a.m., Mr. Oswald sent Mr. Laney an email with the subject "call me about Desmond Hunter." The email stated that Complainant "was working Y205-09 and left work without being relieved at 0353."[12] (JX-8)

(H) *Handwritten Statement of Mr. Lars Simonson.*

On July 10, 2016, Mr. Lars Simonson, one of Respondent's Yardmasters, executed a written statement. His statement provides that on July 10, 2016, a crew was bringing an engine to the pit for service. At approximately 3:50 a.m. (CSX/Eastern Time) he went to the crew room to give the crew an engine move. The conductor said the engineer, Complainant, had left for the night at approximately 3:50 a.m. (CSX/Eastern Time) without asking the Yardmaster for permission to leave work. At approximately 4:15 a.m. (CSX/Eastern Time), he told the conductor to "put off" because Complainant had left the property without permission. (JX-9)

(I) *Conducting Officer's Notice of Findings.*

Mr. David Laney, in a document styled Conducting Officer's Notice of Findings, found that Complainant was "guilty" of violating Operating Rule 104.7. In reaching this conclusion, Mr. Laney considered the testimony of Mr. Oswald, Mr. Simonson, Mr. Jiles, and Complainant. Based on this testimony, Mr. Laney concluded Complainant left the property prior to the completion of his work duties without being relieved of duty. Mr. Laney further found that Complainant's assertion that he would have returned to the property if contacted was both "hypothetical and irrelevant to the fact that [he] abandoned his duties without being relieved by someone with the authority to do so." Mr. Laney's findings do not reference any insubordination by Complainant. (JX-13, pp. 1-2)

(J) *Respondent's Operating Rule 104.7(a).*

In relevant part, Respondent's Operating Rule 104.7(a) provides employees must have the permission of a supervisor to "leave work before designated off-duty time." (JX-18, p. 3)

(K) *Email from Field Administration Office to Mr. Mark McGee and Mr. William Keough.*

On July 19, 2016, Respondent's Field Administration Office sent Mr. Mark McGee and Mr. William Keough an email regarding Complainant's conduct on July 10, 2016. Complainant's charge was described as leaving Respondent's property while working the Y205 without permission from the Trainmaster or Yardmaster on duty. The "Incident Type" was described as "conduct/dishonesty/theft." The "Violation Category" was listed as "Minor." The "Document Selected" was listed as "Charge Major." (JX-22, p. 1)

[12] 0353 refers to 3:53 a.m. Eastern time. Thus, Mr. Oswald was under the impression Complainant left work at approximately 2:53 a.m. local time or Central Standard Time. (Tr. pp. 111) Respondent operates on Eastern Standard Time. (JX-50)

(L) *Respondent's Charge Letter to and "Employee History" of Rule Violations and Disciplinary Action of Mr. Stan Capers.*

On June 7, 2016, Respondent sent Mr. Capers a letter stating there would be an investigation into his conduct occurring on June 4, 2016. The letter alleged that while working in the Gentilly Yard on June 4, 2016, Mr. Capers "failed to mark off sufficiently in advance to allow the vacancy to be filled and failed to receive permission from a supervisor to leave work before designated off-duty time . . . ." Mr. Capers was held out of service pending the investigation. (JX-27, p. 1)

On June 8, 2016, Respondent afforded Mr. Capers the choice to admit his violation, execute a waiver, and receive a formal reprimand for his conduct. (JX-27, p. 2)

Mr. Capers's "Employee History" report provides he had no disciplinary infractions in the three years prior to his June 4, 2016 charged offense. All offenses were "removed from consideration due to Agreement provisions" or removed from consideration due to the three-year rolling period. (JX-26, pp. 1-5)

(M) *Respondent's Air Brake Train Handling & Equipment Handling Rule Book.*

Respondent's Air Brake Train Handling & Equipment Handling Rule Book provides requirements to employees regarding reporting "non-complying conditions." In relevant part, Respondent's policy states that when a non-complying condition is discovered, the employee must "promptly report the details of the condition, including any restrictions placed on the locomotive, to: 1) train dispatcher or yardmaster; 2) mechanical desk; and 3) all other crewmembers." (JX-30, p. 2)

(N) *Deposition of Mr. Mark McGee.*

The parties deposed Mr. McGee on March 31, 2017. Mr. McGee has worked for Respondent since 1999 and has worked as a Division Manager for the past two years. Mr. McGee believed that leaving the property without permission of the supervisor amounted to insubordination. However, he explained Respondent does not make any formal distinction between an employee who is willfully insubordinate and inadvertently insubordinate. (JX-45, pp. 6, 20-21) Mr. McGee stated that, Complainant's entire record was available to him when he was determining what type of discipline to impose. Mr. McGee did not remember if Complainant's past rule violations affected his decision. Mr. McGee stated he would not consider leniency for Complainant due to his prior rule violations. (JX-45, pp. 35-36)

b. Testimonial Evidence.

1) <u>Complainant.</u>

Complainant began working for Respondent in 1994 and most recently worked for Respondent as an engineer. He became a certified locomotive engineer in 1997. In his current position, he is required to perform locomotive inspections. Respondent inspects engines daily

and every time it takes possession of an engine. Respondent's own rules, as well as the Federal Rail Administration, require engine inspections. Complainant is trained to look for engine defects. Complainant is required to report a defect, even if a train is not moving, because it could later cause a safety problem. Complainant testified that a wheel slip is a "non-complying condition." (Tr. pp. 195-199)

Prior to July 9, 2016, Respondent had disciplined Complainant on other occasions. In 2009, Complainant took a leave under the Family Medical Leave Act (FMLA) because his wife was ill. Respondent subsequently terminated Complainant's employment for absenteeism. However, he later returned to work for Respondent. Complainant's wife passed away in 2012 and he enrolled in the Employee Assistance Program (EAP). In 2014, in part due to grief counseling and high blood pressure, Respondent again terminated Complainant for absenteeism. He subsequently returned to work for Respondent in January or February 2016. (Tr. pp. 200-202)

From January to July 2016, Complainant worked consistently and did not have any rule violations, disciplinary charges, absenteeism, or problems with his managers. (Tr. p. 203)

On July 9, 2016, Complainant reported to work for the Y205, which is a yard job.[13] On that day, he worked with conductor Mr. Jermaine Jiles. Complainant had worked with Mr. Jiles frequently before July 9, 2016. During his shift, Complainant receives his work orders from the conductor or the Yardmaster. Complainant does not always receive his work orders in the yard office; his orders are conveyed to him on the radio in most cases. (Tr. pp. 203-205)

During his shift on July 9, 2016, Complainant received an order from the Trainmaster, Mr. Oswald, to assemble a train for U.P. Complainant inspected the engines and identified a safety concern. He testified the main problem was a wheel slip fault. He explained a wheel slip fault means a wheel could spin erratically, or it could indicate something is wrong with the traction motor.[14] A wheel slip does not necessarily mean the wheel is slipping on the rail. A wheel slip alarm is something that can affect the safe movement of an engine. Complainant testified the wheel slip alarm bell was ringing, which alerted him that there was a problem with the wheel slip. The alarm rings constantly until the problem is solved. Complainant believed that he was required to notify the Yardmaster or Trainmaster about the wheel slip alarm. There were no tags on the engines, which Complainant believed was "interesting because if, Mechanical dealt with it, I didn't really have to inspect it."[15] Mechanical "tags" an engine if there is a problem. (Tr. pp. 205-208)

Complainant did not know about any problems with these engines before encountering the wheel slip alarm. No one told Complainant there was a problem with these engines before he began inspecting them. Complainant testified that he told the second shift Yardmaster about the wheel slip alarm. He also told Mr. Oswald about the wheel slip fault. In an attempt to solve this problem, Complainant restarted engines, but he was unable to identify the problem. He also

[13] A yard job is, in contrast to a road job, an assignment which involves switching cars and building trains within a particular railyard. (JX-50)
[14] A traction motor is the transmission system used for propulsion of diesel-electric locomotive engines. (JX-50)
[15] Mechanical is a reference to Respondent's Mechanical Department, which is responsible for diagnosing or fixing car or engine locomotive engine defects. (JX-50)

recalled that he visually observed the engine to determine if something was obstructing the axle. Complainant believed U.P. would not accept these engines because they were unsafe and it was unknown what was causing the alarm to sound. Because there was no clear visual problem, Complainant believed the problem could be internal in the traction motor. Complainant later reported this problem by radio to the Mechanical Department on channel 3171; however, Mr. Oswald intervened. Mr. Oswald told Complainant that the Mechanical Department was aware of this problem and U.P. would take the engines. Although Mr. Oswald was very busy at this time, Complainant testified that Mr. Oswald seemed "agitated" because Complainant had called the Mechanical Department. Later that evening, Complainant's crew handed off the engines to U.P. and Complainant tagged the wheel slips. (Tr. pp. 209-213)

When Complainant returned to the yard office, he went inside and spoke with Mr. Simonson, the Yardmaster on duty. This was sometime between midnight and 1:00 a.m. Central time. Complainant asked Mr. Simonson if there were any other movements that needed to be completed. In response, Mr. Simonson said the crew needed to bring some engines at Read Road to the yard. Complainant asked Mr. Simonson if the crew could complete this move immediately. Complainant believed this would be his last move so he "wanted to go ahead and take care of it." Mr. Simonson told Complainant the yard was too congested at that time and instructed him to take a lunch break. At that point, Complainant had been working for nine hours without taking a lunch break. Approximately one hour later, Mr. Simonson sent Complainant to Read Road. He did not instruct Complainant to complete any additional moves. Complainant and the crew brought the train's engines at Read Road back to the yard for service. Usually, if there are additional moves that need to be completed, the Yardmaster will call and update the crew on the radio. However, this did not occur on the evening of July 9, 2016 after the crew was instructed to move the Read Road train. (Tr. pp. 213-215)

After Complainant completed the Read Road train move, he had been at work for approximately 11 hours and ten minutes; 50 minutes remained until his shift would be required to end. Complainant tied down the engine, shook Mr. Jiles's hand, and walked to his truck. Mr. Jiles returned to the office to go to his locker. Complainant does not usually use a locker at work. At this time, Complainant believed Mr. Jiles had the responsibility to "tie up the ticket."[16] (Tr. pp. 215-216) Complainant testified that he specifically asked Mr. Simonson, the Yardmaster, what additional movements would need to be completed that evening. Complainant explained he was already working overtime before taking a lunch break. Complainant had already worked eight hours that evening, and eight hours is considered a shift. (Tr. p. 218) Mr. Simonson never verbally told complainant that the Read Road move was the last move. (Tr. p. 232) Complainant "assumed" the Read Road move was his last move of the shift. (Tr. p. 234)

Complainant testified that Respondent has access to his cell phone number and he has spoken with employees and managers on his cell phone over the years. On the evening of July 9, 2016 and morning of July 10, 2016, he did not receive a phone call from Respondent. (Tr. p. 216)

When Complainant came to work the next evening, he learned that Mr. Oswald was going to report him for leaving the property without permission. Complainant asked him if there was

[16] Tie-up ticket refers to the Conductor officially ending the shift on the yard office computer, tantamount to "clocking out." (JX-50)

anything they needed to talk about. In response, Mr. Oswald said "no" and that he was "straight." Complainant interpreted this comment to mean that Mr. Oswald had decided to write him up. Mr. Laney was not present during this conversation. However, Complainant later told Mr. Laney that he believed that he had completed all required moves that evening. Complainant testified that if Respondent had called him and instructed him to return to work, he would have come back to work; Complainant believed he was done working for the evening. (Tr. pp. 216-218)

Complainant testified that in over 20 years of working for Respondent, he has never heard of anyone being charged for leaving the property without permission. (Tr. p. 219)

Complainant later learned he would be pulled from service. Complainant did not know if his removal from service had anything to do with his conversation with Mr. Oswald and his reporting of the wheel slip. However, Complainant believed that Mr. Oswald was "aggravated." (Tr. pp. 219-220)

Complainant stated a wheel slip fault is a common event. He estimated this occurs every couple of weeks. If Complainant is not able to correct a wheel slip, then he reports the problem to Respondent. However, most of the time, Complainant is able to correct a wheel slip problem. Usually, rebooting the computer will correct the wheel slip alarm. When Complainant contacted Mr. Oswald about the wheel slip, Mr. Oswald told him that Mechanical was aware of the problem. Complainant thought this was "strange" because he had been instructed to inspect the engines and put them together. If Mechanical had inspected the engine, Complainant believed the engines would have been tagged if the wheel slip had not been repaired. (Tr. pp. 228-231)

During Respondent's internal investigation, Complainant never suggested the charge he was facing was retaliation for reporting the wheel slip fault on July 9, 2016. Complainant stated he told the union about the wheel slip, but the issue was not raised during Respondent's internal investigation. (Tr. pp. 235-236)

Complainant has reported safety issues to Mr. Oswald in the past. Prior to July 9, 2016, Complainant had no concerns with how Mr. Oswald responded to his reports of safety issues. Complainant testified that Mr. Oswald is, overall, concerned with making sure the railyard operates safely and is not someone who disregards safety issues. Respondent requires Complainant to report safety issues. (Tr. pp. 239-240)

Complainant testified that either the Yardmaster or Trainmaster verbally give him instructions at work. (Tr. pp. 240-241)

Neither Mr. Laney nor Mr. Simonson ever said anything that suggested to Complainant that they were upset or concerned about reporting the wheel slip. (Tr. p. 243)

Complainant testified that his shifts end differently, depending on which Yardmaster is on duty. After working eight hours, an employee can be required to stay at work for up to a total of 12 hours. After working 12 hours, an employee cannot perform any additional work that day. Complainant stated Mr. Simonson was "unorganized" and "inconsistent" in the way he assigned

jobs. Complainant explained there are no Yardmasters that require employees to obtain express permission before leaving work. (Tr. pp. 244-248)

Complainant stated he never had any issues or personality conflicts with Mr. Oswald. However, Complainant believed that Mr. Oswald "gets rattled easily if things are not going exactly as planned" and can "overreact" at times. Neither Mr. Oswald nor Mr. Simonson ever yelled at Complainant or conveyed to Complainant that they disliked him. (Tr. pp. 251-252)

2) Mr. Jermaine Jiles.

Mr. Jiles has been employed by Respondent for five and a half years and currently works as a utility foreman. In this position, he switches out rail cars, builds trains, and helps engineers assemble engines. He explained that an engineer's job is to take commands from conductors or foremen regarding the movement of trains. In his experience, locomotive engineers are required to inspect engines, and these inspections are important for safety. (Tr. p. 37)

Mr. Jiles worked the Y205 job with Complainant on July 9, 2016. He explained the Y205 is a transfer job to the yard, in which trains are transferred from the Gentilly Yard to the I-10 Yard. He explained this job regularly begins at 15:59 local time. Respondent operates on Eastern Time, although Complainant was working in New Orleans, which is in the Central Standard Time zone. (Tr. pp. 37-38, 63)

Mr. Jiles explained the Y205 job is usually a 12 hour shift. Before July 9, 2016, Mr. Jiles testified that he had worked with Complainant on other occasions. Mr. Jiles receives his orders from the Yardmasters. He explained a Trainmaster is like a "head coach," who makes sure the Yardmasters correctly complete train movements during a shift. (Tr. pp. 38-39)

On the evening of July 9, 2016, Mr. Oswald was working as the Trainmaster. Mr. Jiles recalled assembling a train for Respondent that evening with Complainant. Mr. Jiles testified that Complainant inspected nine engines that evening. It takes approximately 15 to 20 minutes to inspect each engine. During the inspection process, Mr. Jiles and Complainant noticed that another crew had disconnected a M.U. Cable,[17] which caused "the wheel slip to show on the computer. We put it back in place. That didn't fix the problem." Mr. Jiles described the wheel slip alarm as a loud, ringing bell. Mr. Jiles stated they were able to stop the alarm from sounding when they removed the cable, but this did not repair the problem "because they all have to be in place to read each other." (Tr. pp. 39-42)

Mr. Jiles testified that a wheel slip qualifies as a "non-complying condition." In his experience, he believed engineers are required to report non-complying conditions. Mr. Jiles recalled that he and Complainant reported the wheel slip to Mr. Oswald, the Trainmaster, on the radio. Wheel slips also involve the Mechanical Department. Mr. Jiles testified that Mr. Oswald was "a little agitated" when he was informed there was a problem with Respondent's outbound engine. During this time, the traffic in the yard was very busy. In his experience, a train cannot leave the yard before a problem like this is repaired because other crews will not accept the train.

[17] The M.U. Cable is an electrical cable between locomotives that allows the lead locomotive engine to control the operation of the connected locomotive engines. (JX-50)

This is problematic because the train ties up the track. The crew is required to obtain another set of engines before the train can leave the yard. Mr. Jiles was unsure if the wheel slip problem was repaired because he and Complainant received another assignment. (Tr. pp. 42-45)

Mr. Jiles was present when Complainant communicated to U.P. that there was a problem with the wheel slip. Mr. Jiles estimated that he attempted to resolve the wheel slip issue for approximately an hour and half that evening. After that, the crew returned to the office. Mr. Jiles recalled Complainant asked Mr. Simonson if the crew could make its last move of the day. In response, Mr. Simonson told the crew to take a lunch break. Mr. Jiles did not know how many moves would have to be completed before the end of his shift after the lunch break. After the lunch break, Mr. Simonson instructed the crew to deliver a train from Read Road to the Gentilly Yard, which was approximately two miles away. After Mr. Simonson gave this instruction, he did not tell the crew about any additional moves that they would have to complete that evening. He explained the Read Road move was a transfer job, meaning the crew would relieve another crew on board the train. The crew moved the train to the Gentilly Yard as instructed. Mr. Jiles testified he did not know if this would be the crew's last move of the evening. After this move was completed, Complainant radioed and asked the crew on the south end of the yard if the yard was open. Complainant was informed there were no trains obstructing him or anyone else from leaving the facility. After that, Mr. Jiles and Complainant shook hands and Mr. Jiles stated "I'll see you next time." (Tr. pp. 45-50)

Mr. Jiles testified that Respondent's employees receive "job briefings." He explained the purpose of job briefings is to inform employees about the status of the yard and the work they will be required to perform during their shift. Yardmasters also call Mr. Jiles on the radio to give additional moves. On July 9, 2016, Mr. Jiles did not recall a Yardmaster updating his crew about a new move after the Read Road move. (Tr. pp. 50-51)

Mr. Jiles explained that some Yardmasters in Gentilly inform employees when they are making their last move of a shift, and others do not. He described this inconsistency as a "grey area." On July 9, 2016, Mr. Jiles testified it was unclear as to when he would be permitted to leave work; he did not hear the entire conversation between Mr. Simonson and Complainant. The Read Road move concluded at approximately 2:00 a.m. (Tr. p. 65) After the Read Road move, Mr. Jiles returned to the office and was helping crews with their yearly exams and testing. Then, Mr. Simonson stated that he had another move for the crew. In response, Mr. Jiles stated that Complainant "was gone." Mr. Jiles also told the Trainmaster, Mr. Lowell, that Complainant left the property. To his knowledge, Mr. Jiles did not know if anybody discussed calling Complainant back to the property. Approximately ten minutes had elapsed since the time he shook Complainant's hand and learned there would be an additional move. (Tr. pp. 51-53) After shaking his hand, Mr. Jiles did not believe there would be any additional moves for his crew that evening. However, an average shift is approximately twelve hours, from 4:00 p.m. to 4:00 a.m. (Tr. pp. 66-67)

Three days later, Mr. Jiles learned that Complainant was being charged for leaving the property without permission. Mr. Jiles was surprised that Complainant was being charged with this offense. In the past, Mr. Jiles has seen other employees, through confusion, leave work before all moves were completed without permission; he had not seen other employees charged

with this offense. He explained that each Yardmaster operates differently; sometimes a Yardmaster will call an employee and instruct him to return to work, but others do not. Mr. Jiles believed that Complainant was a "good engineer." (Tr. pp. 53-55, 68)

Mr. Jiles stated that during a shift in the railyard, employee assignments are regularly changed. When Mr. Jiles completes a move, he normally returns to the yard office. On July 9, 2016, Mr. Jiles stated he did not have direct permission from either Mr. Simonson, Mr. Lowell, or anyone with authority to leave work or relieve him of duty. After the Read Road move, Mr. Jiles did not "tie up" his ticket, meaning his work was closed out for the evening. At the time of this incident, until the ticket is tied up after a shift, he and Complainant would continue receiving pay. (Tr. pp. 56-59) Mr. Jiles begins receiving overtime pay after eight hours of work on a shift. (Tr. pp. 68-69)

Mr. Jiles testified that safety is an important issue for Respondent and Respondent encourages employees to report safety concerns. He is required report safety concerns. Mr. Jiles has worked with Mr. Oswald regularly for over five years and he believes that Mr. Oswald cares about safety on the railroad. He is very responsive to safety concerns when raised. He has never seen Mr. Oswald prioritize production or train movements over safety. Mr. Jiles believed that Mr. Laney is also concerned with the safe operation of the railroad. (Tr. pp. 59-61)

3) Mr. Lowell Oswald.

Mr. Oswald has worked for Respondent for over ten years and currently works as a Trainmaster. He is not an engineer or conductor, and does not perform the same type of work as Mr. Jiles. However, he is conductor-certified. He explained that his main work responsibility is to ensure a "safe and fluid operation." He also supervises the locomotive engineers and makes sure they follow the rules. Respondent and federal regulations require locomotive engineers to inspect the engines. A locomotive engineer must thoroughly and properly inspect locomotive engines. He testified inspections are important to protect employees from injury, prevent blocking the yard, and minimize interference from movements to the public. Locomotive inspections are essential to a safe railroad operation. (Tr. pp. 71-75)

Mr. Oswald testified that Respondent requires its locomotive engineers to report "non-complying conditions." He testified a wheel slip alarm qualifies as a non-complying condition. A wheel slip means there is no traction between the locomotive's wheel and the rail; the wheel is still on the rail as it should be, but it is not grabbing any traction. In some cases, a wheel slip could result in a flat spot on the wheel, which could cause the wheel to turn erratically on the locomotive engine. In other cases, wheel slips are not a major issue because the wheel continues to turn; if an engine is not under power, then the wheel cannot slip. However, the wheel slip alarm may still sound in either situation. (Tr. pp. 75-78)

Mr. Oswald recalled Complainant reported a wheel slip on a U.P. engine while working the Y205 on July 9, 2016. However, he conceded that he stated, during his deposition, he did not have any recollection about Complainant's report on July 9, 2016. His memory was refreshed

after listening to a recording of the radio communication between Complainant and himself at the hearing.[18] (Tr. p. 79)

Mr. Oswald did not know if the engines that Complainant inspected on July 9, 2016 had a defect tag on them before he inspected them; he did not see anything because he did not physically inspect the engines himself. If issues with the wheel slip were known before July 9, 2016, then it would be customary practice for the engine to be tagged. On the day before Complainant inspected the engine at issue, Mechanical inspected it and reported to Mr. Oswald that there was "faulty indication" and it had been corrected. He did not know if the wheel slip that Complainant discussed with him on July 9, 2016 was ever cleared out by Mechanical after he reported it. Mr. Oswald told Complainant that they did not need that engine for power and other engines would be added to that consist.[19] He explained it was not a "big deal" that the engine had an alert on, because it would not be powered on and they could rely on other engines under power to pull that consist. The wheel should have been able to roll freely and not cause any issues. (Tr. pp. 79-83)

Complainant reported for the Y205 job at 15:59 Central Standard Time. Mr. Oswald explained that at 3:59 a.m., Complainant is "timed out" and, thus, is unable to perform additional work for Respondent. After eight hours on duty, Complainant earns overtime pay. Mr. Oswald did not know why Complainant left work that evening with approximately one hour and ten minutes remaining in his 12 hour shift. He was not present and did not hear the conversation between Complainant and the Yardmaster about work that needed to be completed before leaving the property. On July 9, 2016, when the Yardmaster was giving the Y205 another move, they could not locate Complainant. He looked for Complainant in the offices, bathrooms, locker rooms, and locomotive facility. He went to the parking lot and observed that Complainant's truck was gone. Mr. Oswald stated the Yardmaster had access to his telephone number in the computer system. He explained that "crew callers" in Jacksonville, Florida call employees off the "extra board." (Tr. pp. 83-85) He did not consider calling Complainant back to work on the evening of July 9, 2016. He did not know that he had the discretion to call Complainant back to work; he had never done this before. He did not call Complainant because he did not "have time to go around chasing somebody that's not there or even call them back and, possibly, wait for them if he's coming back if I can get in touch with him." He further testified his "job is to continue the forward operations of that yard with the resources that I have available." (Tr. pp. 86-87)

Mr. Oswald is familiar with Respondent's IDPAP disciplinary policy. This policy was designed to provide employees an opportunity to improve and succeed through an open and just process. The policy requires managers to provide fair and consistent treatment to all employees and use alternatives to formal discipline when appropriate. (Tr. p. 85) He explained IDPAP categorizes offenses as minor, serious, and major. Respondent considers employee discipline on a three-year rolling period depending on the classification of the offense. Mr. Oswald does not have authority to determine the classification of an offense. Mr. Oswald testified he later learned that Complainant was charged with a major offense, which was leaving the property without permission. However, under IDPAP, major offenses are those that question an employee's morality and those that could cause bodily harm or physical damage to equipment. He agreed

[18] This recording is included in the record as JX-2.
[19] A consist is a group of connected locomotives which may be used to pull or shove cars. (JX-50)

that Complainant leaving the property early did not implicate a major operating incident or anything that would cause injury or equipment damage. Mr. Oswald did not know if the Yardmaster that evening had instructed Complainant that there were other moves that needed to be completed before he was able to leave work. (Tr. pp. 88-92)

Later in his shift on July 9, 2016, when he "had time," Mr. Oswald sent an email to Mr. David Laney, the Terminal Manager of New Orleans and his direct supervisor, and told him that Complainant had left work early.[20] Mr. Oswald testified he sent this email to "seek guidance," and not necessarily initiate a disciplinary charge. In response, Mr. Laney told Mr. Oswald that he would let him know how to proceed. Mr. Laney eventually told Mr. Oswald that Complainant would be disciplined and charged with an offense. (Tr. pp. 93-94, 128) Mr. Oswald later placed a telephone call to Mr. Laney. During this phone call, he told Mr. Laney that Complainant was not on the property and was needed to perform a specific move to keep the yard fluid. Mr. Oswald did not tell Mr. Laney that Complainant had reported a wheel slip issue, nor did Mr. Oswald tell Mr. Laney about any other safety concerns that Complainant raised that evening. (Tr. pp. 111-112)

In his deposition, Mr. Oswald stated that in his role, if an employee breaks a rule, then he is required to charge them with an offense. Mr. Laney learns of employee rule violations from Mr. Oswald. When Mr. Oswald assesses discipline against an employee, it is entered into Respondent's computer system. Mr. Oswald does not know where this information goes after he enters it into the computer system; however, eventually an employee receives a charge letter notifying him that he has been charged with a rule violation. After the charge letter is issued, there may or may not be an investigation, depending on the employee's past disciplinary record and type of charge. In some cases, an employee may sign a waiver admitting that he knows he violated a rule. Mr. Oswald stated there are many factors that affect what happens after a disciplinary charge, but he is unfamiliar with the exact process. (Tr. pp. 95-97)

Mr. Oswald testified that he charged Complainant with a rule violation.[21] The charge stated that Complainant left Respondent's property while working the Y205 without permission from the Trainmaster or Yardmaster on duty. Specifically, Complainant was charged with a violation of Operating Rule 104.7(a). The violation was classified "minor." However, Mr. Oswald did not determine and did not know why this was classified as a "minor" violation. He also did not change the offense classification from minor to "major." Complainant is the only employee who Mr. Oswald has ever charged with violating this specific rule. (Tr. pp. 98-99)

Mr. Oswald becomes aware of all mechanical issues that affect the movement or progression of a train. On a 12-hour shift, this happens usually a minimum of five times, but can happen 25 or 30 times. He testified a wheel slip can be a common mechanical issue. He estimated this occurs approximately two or three times per week. If a wheel slip is under power, meaning that the engine is running and supplying power to the wheel, it can eventually develop into a safety concern. If an engine is not under power, then there is no safety concern because other locomotives power the wheels. Wheel slips are only a concern when under power. A wheel slip

[20] This email is located in the record as JX-8.
[21] The document Mr. Oswald created to charge Complainant with a rule violation is included in the record as JX-22.

itself does not cause a safety problem; the tread buildup caused as a result of a wheel slip is the safety concern. (Tr. pp. 101-103, 123-124)

During the hearing, Mr. Oswald listened to portions of an audio recording that are included in the record as JX-2. In describing the recording, Mr. Oswald stated that Complainant, as the engineer, was contacting the second shift Yardmaster to ask if Mr. Oswald was available to clarify what he had told Mr. Jiles. In response, Mr. Oswald gave Complainant some information about the same engine that a machinist inspected the night before Complainant's July 9, 2016 shift. Mr. Oswald explained that, in the recording, he told Complainant they did not need that specific engine for pulling power because other locomotives were located on the track. The engines at issue would not be used for power; they would travel like a regular boxcar on a train returning to the company that owned the engine. Mr. Oswald further explained this was a U.P. engine and he would not dedicate further resources to repair it. He told Complainant they did not need it for power, but it would be tagged when transferred to U.P. Mr. Oswald told Complainant that this engine would be returned to U.P. as part of the consist and U.P. would make necessary repairs. Mr. Oswald was not concerned that U.P. would reject the engine as part of the consist. Mr. Oswald testified there was no safety concern because the engine was not needed for power and would not be powered on. After having this conversation, Mr. Oswald did not recall further discussing the wheel slip issue again with Complainant. (Tr. pp. 104-109)

Later that evening, Mr. Simonson informed Mr. Oswald that Complainant was no longer on the premises. First, he asked Mr. Jiles if he knew where Complainant was, which he did not. Mr. Oswald then looked in the locomotive servicing area and parking lot; he did not see Complainant's red truck. (Tr. pp. 109-110)

After Mr. Oswald determined that Complainant had left the facility, he asked the Yardmaster to provide a written statement. He explained that Mr. Mark McGee was the Division Manager; however, he did not tell Mr. McGee that he and Complainant had discussed the wheel slip fault. Mr. Oswald did not discuss with Mr. McGee any safety concerns that Complainant had reported. In addition, Mr. Oswald never told Mr. Keough that he and Complainant had discussed a wheel slip fault or any other safety concerns. (Tr. pp. 113-114) Mr. Oswald later clarified that the Yardmaster voluntarily wrote this statement and handed it to him; he did not specifically request for the Yardmaster to make a written statement. (Tr. p. 117)

Mr. Oswald testified that, as the manager on duty who observed Complainant's rule infraction, his only role in the disciplinary process was to input the violation in Respondent's computer system. He had no other involvement in the decision to discipline Complainant. He does not know of anyone else who was dismissed for violating this rule because he is not involved "with every charge that every employee gets." (Tr. pp. 114-115)

Mr. Oswald stated that Respondent's policy prohibits retaliation against employees; he is required to comply with this policy. This includes a prohibition against retaliating against employees who report unsafe working conditions. He stated Respondent has an "open door policy" to report safety concerns. Mr. Oswald testified that his decision to notify his superiors about Complainant's conduct on July 10, 2016 was not motivated in any way by Complainant's report of a wheel slip fault on July 9, 2016. (Tr. pp. 115-117)

Mr. Oswald stated the email he sent to Mr. Laney was an informal notification of a violation. When he observes a violation, he either calls or emails his supervisor and waits for a response providing him guidance on how to proceed in formally reporting the violation. In his ten years of work for Respondent, he has never made an informal notification of an employee leaving work early to his supervisor, with the exception of Complainant. (Tr. p. 128)

During his deposition, Mr. Oswald stated he did not know the types of problems a wheel slip could present for a locomotive. (Tr. pp. 131-132)

4) Mr. Stan Capers.

Mr. Capers has been employed by Respondent for the past 19 years. He began working as a conductor, but has worked as an engineer for the past 14 or 15 years. He primarily works in the Gentilly Yard on yard jobs and personally knows Complainant. Throughout his employment, Respondent has charged him with several rule violations, including absenteeism.[22] Respondent terminated his employment on one prior occasion. However, the union was able to secure his return to employment approximately one year after his dismissal. (Tr. pp. 137-140)

In June 2016, Mr. Capers testified Respondent charged him for leaving company property without the permission of a supervisor. He received a charge letter, which was signed by Mr. William Keough. He testified he informed his supervisor that he was sick and needed to leave work. In response, his supervisor told him to "stand by," but he left work anyway because he was sick. He stated "and that was always the policy. If you're off sick, you just notify a supervisor, and they should be able to mark you off." However, his supervisor reported that he left work without permission. At this time, Mr. Capers was under the impression he did not need verbal permission to leave work after reporting his sickness. Mr. Capers testified that his supervisor, Mr. Mark Bias, told him something like "if you're going to be late, you might as well not be here." After being charged, Respondent offered Mr. Capers the option to sign a waiver and formal reprimand, rather than have Respondent initiate and complete a formal investigation. Mr. Capers decided to sign the formal reprimand and execute the waiver, although he disagreed with the disciplinary charge. Specifically, Respondent charged him with failing "to mark off sufficiently in advance to allow the vacancy to be filled" and "to receive permission from a supervisor to leave work for designated off-duty time." He explained that signing a waiver means he admitted guilt, which prevented a formal investigation and potential employment termination. (Tr. pp. 140-146)

Mr. Capers testified that Respondent requires him to report safety concerns and he complies with this requirement. He has reported mechanical issues, including a wheel slip fault. (Tr. pp. 145-146)

Mr. Capers has known Complainant throughout his entire career. He has not socialized with him independently outside of work. He and Complainant have never discussed this claim. (Tr. pp. 146-147)

[22] Mr. Capers's "Employee History" documents are included in the record as JX-26.

5) Mr. William Keough.

Mr. Keough is currently employed by Respondent as the Division Manager of the Baltimore Division. In 2016, he was the Assistant Division Manager in Atlanta and his territory included 2,300 route miles in eight states, including Louisiana and the Gentilly Yard. In this position, he oversees the employees who report to him and imposes appropriate discipline on employees after an investigation. Typically, he receives initial information about suspected rule violations from front-line managers, including Trainmasters. Information about possible rule violations is entered into Respondent's computer system, which is then routed to the Field Administration Office in Jacksonville, Florida. He explained Trainmasters enter details of a possible rule violation, but are not involved in the disciplinary process. The Division Manager ultimately determines the discipline imposed on an employee. (Tr. pp. 147-150)

Mr. Keough testified that Mr. Mark McGee made the decision to terminate Complainant's employment. Mr. Keough issued the charge letter to Complainant for failing to receive permission from a designated supervisor to leave the property. He explained that the charge letter is generated automatically from the Field Administration Office with his electronic signature. Mr. Keough does not normally review charge letters before they are issued; rather, the local supervisor usually reviews them. Mr. Keough did not know if he reviewed Complainant's charge letter. Mr. Keough was familiar with Rule 104.7(a), which requires an employee to secure permission from a designated supervisor before leaving the property. Mr. Keough always construes this rule violation as a "major offense." He explained this rule is important to maintain a safe and efficient rail yard. (Tr. pp. 150-151)

Mr. Keough stated that Respondent assesses discipline on a three-year rolling period depending on the type of rule violation. After three years, a specific offense is removed from an employee's "Employee History" documents for disciplinary considerations, but the offense remains denoted in red-colored font on the documents. There are three categories of rule violations. First, a "minor" offense is something that could be handled with coaching and counseling. Second, a "serious" charge is handled on a progressive basis on a three-year rolling period. Third, a "major" charge means an employee is subject to dismissal for a single incident. or suspension for 30 days. Mr. Keough was not aware of any Respondent employee, other than Complainant, that has been terminated for violating Rule 104.7(a) on a first offense. He was not familiar with any incidents where an employee abandoned his job. (Tr. pp. 151-153)

Before Mr. Keough charged Complainant with leaving the property without permission, he did not look at his "Employee History" documents. Mr. Keough testified he based the charge on this single incident. (Tr. pp. 154)

Mr. Keough conceded he also charged Mr. Capers with leaving the property without permission of a designated supervisor one month before issuing the same charge against Complainant. However, he stated the circumstances surrounding Mr. Capers's charge were "markedly different" than Complainant's charge. He explained that he offered Mr. Capers a waiver and formal reprimand due to a miscommunication between Mr. Capers and the Trainmaster about his past absenteeism. A formal reprimand is classified as progressive discipline and would be considered on an employee's rolling period. (Tr. pp. 155-158)

Prior to the formal administrative hearing, Mr. Keough admitted that he spoke with Mr. Miguel Estrada, the Terminal Manager in New Orleans at the time of Mr. Capers's rule violation, about the factual details surrounding Mr. Capers's charge. Mr. Keough conceded that he did not specifically recall all of the details concerning Mr. Capers's charge, so he reached out to Mr. Estrada to refresh his memory. (Tr. pp. 158-159)

Mr. Keough explained the IDPAP does not specifically cite Rule 104.7 as a "major offense." Rather, it is considered insubordination. However, the IDPAP does not classify insubordination as a "major offense." (Tr. pp. 161-162)

No employees or equipment were injured or damaged as a result of Complainant leaving the property early or without permission. Mr. Keough believed that Mr. Oswald had the discretion to call Complainant and instruct him to return to work after realizing that he left the property. However, this potentially could have taken too much time to accomplish while trying to operate a fluid yard. Mr. Keough expected Mr. Oswald to contact Mr. Laney about Complainant's major rule violation. Complainant was not charged with any dishonesty or theft-related charges. Mr. Keough did not know why Mr. Oswald's summary notification sent to the Field Administration Office stated the incident type related to dishonesty or theft and was classified as a minor violation.[23] Mr. Keough believed this was a "conduct" violation. He later clarified the "Violation Category" of this document always lists a charge as "minor" for an unknown reason. However, under the "Document Selected" subsection, the offense was classified as major. (Tr. pp. 163-168)

Respondent does not define or distinguish insubordination into a willful or inadvertent category. (Tr. p. 169)

Mr. Keough testified that he reviewed the transcript of Complainant's investigation. Mr. Keough stated he believed that the Yardmaster never gave Complainant permission to leave work and Complainant did not check with the Yardmaster to see if there was another move that needed to be completed. (Tr. pp. 169-170)

Mr. Keough explained the Field Administration Office reviews the nature and details of the assessments that are entered into the computer system by supervisors. Then, it makes a determination of how offense should be classified for disciplinary purposes. After the Field Administration Office completes its work, it generates a charge letter which is sent to the employee notifying them of the charge. In some cases, a waiver may be offered depending on the type of charged offense. Division Managers are not involved in this process; the Field Administration Office decides if a charge letter will be issued. Respondent uses internal formal investigations during the disciplinary process. When an investigation is completed, the Assistant Division Manager determines the appropriate discipline. The Field Administration Office then sends the employee a discipline letter, under the electronic signature of the Division Manager. (Tr. pp. 171-174)

[23] The summary notification of Complainant's rule violation from July 10, 2016 is included in the record as JX-22.

Mr. Keough did not recall if he personally played a role in assessing discipline against Complainant. Mr. Keough stated he "might have" had a conversation with Mr. McGee about Complainant's discipline, but he could not specifically recall any details. (Tr. pp. 175-176)

Mr. Keough testified that when addressing Complainant's situation, he was unaware that Complainant reported a wheel slip fault to Mr. Oswald on January 9, 2016. He stated his "first knowledge of that came when, when this hearing was scheduled and started to get the details." Mr. Keough stated none of the action taken against Complainant was related to him raising or reporting safety issues to Respondent. Mr. Keough stated his decisions were based solely off the transcript of the investigation and that issue was not raised. (Tr. p. 180)

Mr. Keough testified the IDPAP does not define insubordination or dishonesty. The Field Administration Office can define anything for the purposes of generating charges. However, the Division Manager makes the final determination on imposing specific disciplinary action. (Tr. pp. 182-183) Mr. David Laney was the Division Manager and Hearing Officer assigned to Complainant's case. (Tr. pp. 189) Mr. Laney was not involved in the incident. (Tr. p. 190) The Hearing Officer makes a recommendation as to whether an employee is guilty or innocent of a charged offense; the Hearing Officer does not make specific disciplinary action recommendations. (Tr. p. 191)

Mr. Keough could not recall a separate incident occurring during the past three years in which an employee was charged with insubordination. (Tr. pp. 184)

Mr. Keough explained the IDPAP did not require Complainant to be terminated for this offense; however, this specific charge makes an employee subject to removal. (Tr. p. 187)

6) Mr. David Laney.

Mr. Laney works for Respondent as the New Orleans Terminal Manager. He began working in this position nine days before July 9, 2016. His direct supervisor is Mr. Mark McGee, the Division Manager of Atlanta.[24] As of July 9, 2016, Mr. Keough worked as the Assistant Division Manager. (Tr. pp. 267-268)

Mr. Laney relies on Trainmasters to learn when employees commit rule violations. Depending on the type of rule violation, Trainmasters commonly provide informal counseling to an offending employee for minor violations. In all cases, the Trainmasters contact Mr. Laney, and then they decide whether the employee will be charged with a rule violation. Mr. Laney explained the Field Administration Office classifies violations as minor, serious, or major. (Tr. pp. 269-271) Mr. Laney has no discretion in how the Field Administration Office classifies an offense. (Tr. p. 271)

Mr. Laney testified he is familiar with Operating Rule 104.7(a), which requires an employee to have proper authority from a designated supervisor before leaving the property. (Tr. p. 271)

[24] As of the date of the formal administrative hearing, Mr. McGee no longer worked for Respondent. (Tr. p. 293)

Mr. Oswald reported to Mr. Laney that Complainant left the property without permission. At this time, Mr. Laney had not met, and did not know, Complainant so he pulled his employee history report. Mr. Laney testified he made the decision to assess discipline against Complainant. Mr. Laney directed Mr. Oswald to initiate the disciplinary process by entering the details into the computer system to route to the Field Administration Office. After consulting with Mr. McGee about Complainant's conduct, Mr. Laney believed the Field Administration Office would likely classify this as a "major" offense because this was a "pretty big deal" and "something that might result in dismissal." Mr. McGee instructed Mr. Laney to place Complainant on administrative leave pending Respondent's formal investigation. Mr. Laney told Complainant that he had been placed on administrative leave when Complainant reported to work the following day. In response, Complainant told Mr. Laney that he believed overtime should be "optional." Mr. Laney testified that Mr. McGee ultimately made the decision to terminate Complainant's employment. (Tr. pp. 272-274, 293-294) Mr. Laney testified he was not aware that Complainant reported a wheel slip until his deposition in this case given in March 2017. (Tr. pp. 294-295)

During Respondent's internal formal investigation of Complainant's actions from July 9, 2016, Mr. Laney served as the Hearing Officer. Although Mr. Laney was involved in Complainant's incident at issue, it was not uncommon for him to act as the Hearing Officer. (Tr. p. 297) During this process, Respondent and Complainant, with union representation, questioned various witnesses about the incident. Mr. Laney's role was to serve as a "fair" and "impartial" Hearing Officer. After Respondent's internal formal hearing concludes, the Hearing Officer makes a recommendation as to whether an offense is proven or unproven; then, the Division Manager issues the final determination. The Hearing Officer does not make disciplinary recommendations. During the formal investigation process, Mr. Laney did not recall Complainant reporting a wheel slip fault on an engine; thus, it was not considered during this investigation. If Complainant had brought up the wheel slip fault issue during Respondent's formal investigation, Mr. Laney testified Mr. Oswald would have been further questioned on this subject. Although Mr. Laney knew, after speaking with Mr. McGee, that Complainant committed a major offense, such knowledge did not affect his impartiality or fairness in serving as the Hearing Officer. (Tr. pp. 274-280) Mr. Laney testified he was never aware that Complainant reported safety concerns at any point during his involvement with Complainant. (Tr. p. 295, 298) After Respondent's internal formal investigation and hearing, Mr. Laney concluded that Complainant was guilty of the charged offense. (Tr. p. 298)

Mr. Laney testified that he learned, through Mr. Jiles's testimony at the formal administrative hearing, that "we needed to be more standardized about, at least about the communication between the Trainmaster on duty and Yardmaster on duty in terms of whether they agreed if we were finished with a crew or not and how to communicate that with a crew." The first time Mr. Laney learned about this issue was during Respondent's formal investigation. In response, Mr. Laney instructed the Trainmasters "to make sure they were on the same page as the Yardmasters before a crew is allowed to leave" and "one of them would communicate with the crew that they were finished for the night." Mr. Laney stated that, after implementing this "policy," there has not been any confusion. However, this policy had always been in writing and this change was to "make sure [the managers were] communicating effectively." (Tr. pp. 280-283)

Despite Mr. Laney's concession there had been some confusion in the past between Trainmasters and Yardmasters in relieving crews from duty, he believed it was fair to terminate Complainant's employment for leaving the property without permission. Mr. Laney testified he was unaware of any other employee leaving work without being properly relieved of duty in his ten years of experience with various employers. However, he conceded he later learned that Mr. Keough had charged Mr. Capers with the same offense as Complainant approximately one month before this incident; however, Mr. Laney did not have any direct knowledge of the details surrounding Mr. Capers's charge, but believed Mr. Capers had reported he was sick. (Tr. pp. 283-285)

Mr. Laney testified that Complainant was not charged with dishonesty, theft, or insubordination; he was charged with violating Operating Rule 104.7(a). Mr. Laney determined that Complainant was "guilty" of the charged offense following Respondent's internal formal investigation. Mr. Laney stated that the Trainmaster had the discretion to call Complainant back to work, but also had the obligation to keep the yard moving and operational. (Tr. pp. 285-289)

Mr. Laney believed that Complainant's actions resulted in the delay of the crew performing another move. However, Mr. Laney did not recall that this resulted in any train being late to depart. (Tr. pp. 290-291)

As Terminal Manager, four management-level employees directly report to Mr. Laney. Approximately 60 employees work in the Gentilly Yard. Yard employees work eight hours and then begin receiving overtime pay. After 12 hours, their shifts are required to end by law. (Tr. pp. 299-301)

Mr. Laney testified Respondent has a policy that prohibits retaliation against employees for reporting safety issues and concerns. Mr. Laney was not aware that Complainant had reported safety concerns until after he was dismissed. The first time Mr. Laney learned that Complainant reported a wheel slip, which he believed was not "really a safety issue," was at his deposition. He explained a wheel slip is not a safety concern if the engine is not under power. (Tr. pp. 301-302)

Mr. Laney has conducted 30 or 40 hearings as a Respondent Hearing Officer. Mr. Laney has only concluded that an employee was not guilty on one occasion; generally, an employee is not charged unless Respondent is certain that an employee is guilty of an offense. When an employee is proven guilty, in Mr. Laney's experience, the Division Manager has always imposed some type of discipline on the employee. (Tr. pp. 302-305)

Since Complainant's termination, Respondent's policy requires both the engineer and conductor to "tie a ticket" at the end of a shift. However, this policy change was already in development prior to July 9, 2016. (Tr. pp. 314-315) This change does not affect the way the engineer obtains permission to leave work. (Tr. p. 319)

6. <u>Credibility and Relevant Findings of Fact.</u>

a. Credibility Analysis. The finder of fact is entitled to determine the credibility of

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

1) Complainant.

The undersigned found Complainant generally credible. His testimony was persuasive at times and unconvincing at other times. He occasionally provided inconsistent or unspecific testimony on both directly relevant and non-relevant facts. Complainant credibility testified that he was required to inspect engines and report safety or hazardous conditions to his supervisor. Complainant further credibility testified that he believed the wheel slip could indicate a safety concern.

However, although not directly relevant to any contested issue of law or fact, the factual circumstances surrounding Respondent's internal investigation and hearing prior to referral of this claim to OSHA or OALJ cast doubt on Complainant's allegation that his claimed protected activity was a contributing factor in Respondent's decision to terminate his employment. Complainant testified that, after the charge letter was issued and Respondent initiated its internal investigation, Complainant never suggested to Respondent during the course of its internal investigation that his charged offense was either direct or indirect retaliation for reporting the wheel slip to Mr. Oswald. In light of the seriousness of the charged offense and that Complainant was facing dismissal, Complainant's suggestion that he informed his union representative about his concerns, but he or the union representative never conveyed such a serious concern to Respondent is unpersuasive.

2) Mr. Jermaine Jiles.

The undersigned found Mr. Jiles largely credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. Mr. Jiles worked with Complainant on the evening of July 9, 2016 and witnessed the majority of events that are at issue in this case. Mr. Jiles confirmed Complainant's testimony that he reported the wheel slip alarm to Mr. Oswald. Mr. Jiles further corroborated Complainant's testimony that wheel slips are non-complying conditions, which must be reported to an employee's supervisor. Such testimony bolsters Complainant's argument that he engaged in protected activity because he had a reasonable belief that the wheel slip presented a safety issue.

3) Mr. Lowell Oswald.

The undersigned found Mr. Oswald particularly credible and persuasive. He provided specific, detailed testimony about his interaction with Complainant and Respondent's

management team regarding personnel decisions after he reported Complainant left work without being properly relieved of duty. Mr. Oswald credibility testified that he did not tell Mr. Keough or Mr. Laney that Complainant reported the wheel slip or other safety concerns on July 9, 2016. There were no apparent inconsistencies in his testimony and his testimony was corroborated by testimony of other witnesses and documentary evidence. His demeanor during testimony was straightforward and forthright, and he provided unequivocal responses. He displayed no animus towards Complainant and appeared to have no interest in the outcome of this claim.

4) Mr. Stan Capers.

The undersigned found Mr. Capers largely credible. His testimony was straightforward and forthright. There were no apparent inconsistencies in his testimony. In June 2016, approximately one month before Respondent charged Complainant for leaving work without permission, Respondent charged Mr. Capers with the same offense. Mr. Capers offered detailed and specific testimony about his conversation with his supervisor prior to leaving work in June 2016. There there is no reason to discredit, and Complainant does not dispute, Mr. Capers's testimony that he verbally told his supervisor that he was ill and needed to leave work early during his shift in June 2016. His testimony was corroborated by Mr. Keough.

5) Mr. William Keough.

The undersigned found Mr. Keough largely credible. His testimony was straightforward and forthright. He displayed no animus towards Complainant and appeared to have no interest in the outcome of this claim. He could not recall if he personally played a role in disciplining Complainant in this case, but may have had some discussions with Mr. McGee about Complainant's conduct. Importantly, Mr. Keough testified that he was unaware that Complainant reported a wheel slip to Mr. Oswald on July 9, 2016. His first knowledge of Complainant's report came when "this hearing was scheduled and he started to get the details." Mr. Oswald corroborated Mr. Keouogh's testimony and confirmed he never told Mr. Keough about Complainant raising concerns about the wheel slip. Complainant cited no evidence and makes no argument that Mr. Keough had any knowledge of Complainant's protected activity prior to Respondent's decision to terminate his employment. Although it is unclear what role, if any, Mr. Keough played in disciplining Complainant, the undersigned finds Mr. Keough did not have knowledge of Complainant's protected activity prior to Complainant's termination.

6) Mr. David Laney.

The undersigned found Mr. Laney largely credible. His testimony was straightforward and forthright. He displayed no animus towards Complainant and appeared to have no personal interest in the outcome of this claim. Mr. Laney, the Division Manager, testified that Mr. Oswald reported to him that Complainant left work without permission. During Respondent's internal investigation, Mr. Laney was unaware that Complainant reported a wheel slip to Mr. Oswald on July 9, 2016. Mr. Laney concluded that Complainant was guilty of the charged offense following Respondent's internal investigation and hearing. Mr. Laney testified that he first became aware that Complainant reported a wheel slip in March 2017 when giving his deposition. Mr. Oswald's testimony corroborates Mr. Laney's testimony. Complainant cited no evidence and makes no

argument that Mr. Laney had any knowledge of Complainant's protected activity prior to Respondent's decision to terminate his employment. Thus, the undersigned finds that Mr. Laney had no knowledge of Complainant's protected activity prior to Complainant's termination.

7. <u>Application of Law and Analysis.</u>

a. Elements of Claim. Actions brought under the FRSA are governed by the legal burdens of proof set forth in the AIR-21 whistleblower protection provision. 49 U.S.C. § 20109(d)(2)(A)(i). To prevail, the complainant must demonstrate by a preponderance of the evidence that (1) he engaged in activity protected by the FRSA; (2) the respondent took some adverse personnel action against him; and (3) his protected activity was a contributing factor in that adverse personnel action. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 17 (ARB Sept. 30, 2016; reissued Jan. 4. 2017). If the complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. *Henderson v. Wheeling & Lake Erie R.R.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).

b. Protected Activity. The FRSA is intended "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA prohibits a railroad carrier from "discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity." 49 U.S.C. § 20109. This includes "reporting, in good faith, a hazardous safety or security condition." 49 U.S.C. § 20109(b)(1)(A).

Complainant argues he engaged in protected activity under 49 U.S.C. § 20109(b)(1)(A) when he reported the wheel slip alarm to Mr. Oswald. (CB-1, pp. 8-9; CB-2, pp. 2-6) In response, Respondent contends Complainant did not engage in protected activity because he did not report a hazardous safety condition and did not reasonably believe the wheel slip presented a hazardous safety condition. (RB-1, pp. 14-18; RB-2, pp. 2-3)

At the hearing, Complainant testified that, after inspecting the engines and hearing the wheel slip alarm on the evening of July 9, 2016, he reported to the Yardmaster on duty that the wheel slip alarm was sounding. Shortly thereafter, Complainant testified that he called the Trainmaster, Mr. Oswald, on the radio. Complainant's testimony about reporting the wheel slip alarm to Mr. Oswald is corroborated by Mr. Jiles's testimony, who also testified that Complainant reported the wheel slip alarm to Mr. Oswald on the radio. Complainant's testimony is further corroborated by Mr. Oswald himself, who also testified that Complainant reported a wheel slip while at work on July 9, 2016.

In addition to the testimony of Mr. Jiles and Mr. Oswald, Complainant's testimony is further supported by an audio recording between Complainant and Mr. Oswald from the evening of July 9, 2016. As previously mentioned, the parties stipulated, and the undersigned affirms, that on or around 9:55 p.m., Central Standard Time, Complainant and Trainmaster Oswald communicated with each other on the radio. Because the wheel slip alarm was sounding while Complainant was inspecting the engines, and as the radio recording details, Complainant decided to radio Mr.

Oswald to follow-up about a conversation Mr. Oswald previously had with Mr. Jiles specifically about the wheel slip alarm. During this conversation, Complainant did not specifically use the words "wheel slip," "alarm," or "fault." Rather, Complainant initially mentioned the U.P. engine power issue to Mr. Oswald. As indicated in the recording, although Mr. Oswald was already aware of the wheel slip at the time of their conversation, Mr. Oswald's awareness of the wheel slip fault is not fatal to Complainant's assertion that he engaged in protected activity. Although it is not explicit from the recording, the record is clear from Complainant's and Mr. Oswald's testimony, that in context, Complainant intended to report a wheel slip issue when he radioed Mr. Oswald, and Mr. Oswald interpreted Complainant's statements in this manner. Therefore, the undersigned finds that Complainant raised concerns and reported that the wheel slip alarm was sounding to Mr. Oswald on the radio.

Respondent argues that Complainant's "failure to convey an actual safety concern" to Respondent defeats his contention that he engaged in protected activity. (RB-1, p. 15) However, Respondent's argument that reporting a wheel slip alarm does not implicate a hazardous safety or security concern is unpersuasive. Although Complainant did not specifically set forth the potentially hazardous effects of a wheel slip during his conversation with Mr. Oswald, Complainant's report about the wheel slip alarm necessarily implicated a hazardous safety concern.

For example, Complainant testified, and Respondent does not dispute, that Complainant's position as an engineer requires him to perform inspections of locomotive engines. He testified that Respondent requires him to report defects, even if a train is not moving, because it could later cause a safety concern. Complainant testified that a wheel slip is a non-complying condition, which he is required to report. He further testified a wheel slip can cause a train's wheel to spin erratically or indicate there is a problem with the traction motor. Although a wheel slip does not necessarily mean the wheel is slipping on the rail, it may later affect the safe movement of a train. Complainant's testimony is corroborated by Mr. Jiles's testimony, who explained that a wheel slip qualifies as a non-complying condition, which an engineer is required to report to his supervisor. Furthermore, Mr. Oswald also testified that a wheel slip is a non-complying condition, which an engineer is required to report. The fact that Respondent required Complainant to report such an issue, as a part of his employment responsibilities, strongly suggests that wheel slips could certainly cause or later result in serious safety concerns. Mr. Oswald further explained that a wheel slip occurs when there is no traction between the locomotive's wheel and the track. Mr. Oswald further cautioned that a wheel slip can cause a flat spot on a wheel, which could cause a wheel to turn erratically on the locomotive's engine. In other cases, however, such as when an engine is not under power, a wheel slip will not cause a safety concern. Nevertheless, in either situation, the wheel slip alarm may continue to sound. As the record demonstrates, it is well-known between engineers, utility foreman, and trainmasters in the rail industry that a wheel slip implicates, or could potentially implicate, hazardous safety concerns. Although Mr. Laney testified a wheel slip fault is "not really a safety issue" if the engine is not under power, there is no indication that Complainant was aware that this engine would not be under power when he contacted Mr. Oswald. Mr. Laney's testimony certainly indicates that a wheel slip, under engine power, is potentially hazardous. Because Complainant was required to report wheel slips to his supervisor, and the testimony and evidence of record establishes that such an issue can present hazardous or safety conditions, Complainant engaged

in protected activity under the FRSA. *Compare Jackson v. Union Pac. R.R. Co.*, ALJ No. 2012-FRS-017, ARB No. 13-042 (ARB Mar. 20 2015) (affirming the ALJ's finding of protected activity where the employee reported perceived concerns about smoky air to his supervisors and where the employee's supervisor expected an employee to report such concerns), *with Winch v. CSX Transp., Inc.*, ALJ No. 2013-FRS-014, ARB No. 15-020 (ARB July 19, 2016) (holding the employee did not engage in protected activity where the employee believed he was sick and only reported his name, identification number, and his request to be marked off as sick because the information reported was too limited and made no mention of a hazardous or safety condition).

For similar reasons, Complainant had a good faith belief that he was reporting a hazardous safety issue to Mr. Oswald. Respondent unpersuasively argues that Complainant did not believe in good faith that a wheel slip presented a safety concern because "a wheel slip fault is a mechanical issue, and not a safety concern." (RB-1, p. 17) Implicitly, and without merit, Respondent argues that a mechanical issue can never be, or later become, a safety issue. Nevertheless, Complainant's other actions on July 9, 2016 establish he in good faith reported a hazardous safety issue. For example, Complainant testified he called the Mechanical Department to report the wheel slip fault.[25] In addition, after speaking with Mr. Oswald, Complainant placed a defect tag on the engine. This portion of Complainant's testimony is corroborated by Mr. Jiles, who testified he was present when Complainant told the U.P. crew there was a problem with a wheel slip. Similarly, Complainant also testified he told the U.P. crew that the wheel slip alarm was ringing. These actions are consistent with the actions of an employee who has a good faith belief about the existence of a hazardous safety issue.

Consequently, the undersigned concludes that Complainant engaged in protected activity under the FRSA when he contacted Mr. Oswald to discuss his concerns about the wheel slip and wheel slip alarm and Complainant reported such concerns in good faith.

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

The parties stipulated, and the undersigned affirms, that Complainant's dismissal constitutes an adverse action within the meaning of the FRSA. (JX-49) Therefore, the undersigned concludes Respondent took an adverse action by terminating Complainant's employment on September 9, 2016.

d. Protected Activity as a Contributing Factor in Adverse Action. The complainant must "demonstrate" that the protected activity was a contributing factor in the adverse personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 17 (ARB Sept. 30, 2016; reissued Jan. 4. 2017). The term

[25] The undersigned notes that Respondent contests the fact that Complainant contacted the Mechanical Department. (RB-1, p. 16) Although there is no additional corroborating evidence supporting Complainant's testimony that he made this call, there is no reason to discredit this portion of his testimony.

"demonstrate" means "to prove by a preponderance of the evidence." *Id.* at 18. It requires the employee to prove *as a fact* that the protected activity was a contributing factor in the adverse personnel action. *Id.* (emphasis in original). To prove a fact by a preponderance of the evidence means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not. *Id.* at 19. The employee must *persuade* the ALJ that the protected activity played some role in the adverse action. *Id.* (emphasis in original). The factfinder must thus believe it is more likely than not that the protected activity was a factor in the adverse action. *Id.* Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action. *Id.* at 16.

"A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" *Id.* at 56 (citations omitted). The ARB has emphasized how low the standard is for the employee to meet, how "broad and forgiving" it is. *Id.* "Any" factor really means any factor. *Id.* It need not be "significant, motivating, substantial or predominant"—it just needs to be a factor. *Id.* The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices. *Id.*

An employee may meet his burden with circumstantial evidence. *Id.* at 59 citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 11-029, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Jan. 31, 2013); *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); *cf. Bobreski II*, ARB No. 13-001, slip op. at 17 (noting that "[c]ircumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence"). The ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action." *Id.*

The ARB has specifically rejected "any notion of a per se knowledge/timing rule." *Id.* However, "an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action." *Id.* (emphasis in original). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Id.* (emphasis in original).

"Proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone." *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-15, slip op. at 17 (ARB Mar. 29, 2013) "Proof of a contributing factor may be established by evidence demonstrating 'that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.'" *Id.* citing *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006) (requiring ALJ upon remand to determine "whether knowledge held by other company employees should be imputed to the decision-maker); *Kester v. Carolina Power & Light Co.*,

ARB No. 02-007, 2000-ERA-031, slip op. at 9 (ARB Sept. 30, 2003) (imputing to company official responsible for employment decision knowledge of protected activity of employees having substantial input into the personnel action). *See also Bartlik v. T.V.A.*, No. 1988-ERA-015, at n.1 (Sec'y, Apr. 7, 1993) ("[W]here managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming bureaucratic ignorance.").

"Evidence of an employer's inconsistent application of policies can provide circumstantial evidence that protected activity was a contributing factor in an adverse action." *Palmer*, ARB No. 16-035, slip op. at 63 (citations omitted).

1) Decision-Makers' Knowledge of Protected Activity.

As previously determined, the undersigned concluded Complainant engaged in protected activity when he reported the wheel slip alarm to Mr. Oswald, the Trainmaster, at 9:55 p.m., on July 9, 2016. After Complainant reported the wheel slip, he continued working with his crew for several hours and eventually left work without obtaining express permission from his supervisor after completing the Read Road movement. Approximately one hour and ten minutes before Complainant's shift would be required to end, Mr. Oswald noticed that Complainant was no longer on Respondent's property and his truck was not in the parking lot. Shortly thereafter, on July 10, 2016 at 3:54 a.m., Mr. Oswald sent Mr. Laney, the Assistant Division Manager, an email and requested that he call him about Complainant. In this email, Mr. Oswald stated to Mr. Laney that Complainant left work without being properly relieved of duty. Importantly, although Mr. Oswald was directly aware of Complainant's wheel slip report, Mr. Oswald's email made no mention about Complainant's protected activity occurring earlier during his shift that evening. Further, Mr. Oswald credibly testified that he did not inform Mr. Laney that Complainant reported a wheel slip or other safety issue.

Mr. Laney's testimony corroborates Mr. Oswald's testimony that he never told Mr. Laney about Complainant's report about the wheel slip. Significantly, Mr. Laney testified he had no knowledge about Complainant's report of the wheel slip alarm until he gave his deposition in March 2017, which was well after Complainant engaged in protected activity. After receiving the report about Complainant leaving work without permission from Mr. Oswald, Mr. Laney consulted with his supervisor, Mr. McGee, the Division Manager.

Likewise, there is no evidence in the record to suggest that Mr. McGee had any knowledge of Complainant's protected activity. After consulting with Mr. McGee, Mr. Laney testified he instructed Mr. Oswald to initiate the employee disciplinary process by transmitting the details of Complainant's rule violation to the Field Administration Office. Following the conclusion of Respondent's internal investigation and hearing, Mr. Laney determined that Complainant was guilty of the charged offense. Subsequently, Mr. McGee ultimately made the decision to terminate Complainant's employment. Both Mr. Laney and Mr. McGee made this decision without knowledge of Complainant's protected activity.

In addition, Mr. Keough, the Division Manager, testified he could not recall if he personally played a role in assessing discipline on Complainant, but he might have had some discussions

with Mr. McGee about Complainant. His electronic signature was on the charge letter issued to Complainant by the Field Administration Office. Nevertheless, Mr. Keough credibly testified that he had no knowledge about Complainant's wheel slip report until after the formal administrative hearing was scheduled.

The record is clear that Mr. Oswald did not make the decision to initiate or take disciplinary action against Complainant. Rather, Mr. Oswald only contacted Mr. Laney to "seek guidance" and, in turn, Mr. Laney instructed Mr. Oswald to initiate disciplinary proceedings against Complainant by transmitting the details of the charged offense to the Field Administration Office. Thus, Mr. Oswald did not exercise any decision-making authority to impose or initiate discipline against Complainant in this case. Consequently, due to Mr. Oswald's lack of input in any of the disciplinary actions taken against Complainant, there is no reason impute his knowledge of Complainant's protected activity to other Respondent supervisors or executives. The only decision-makers with any type of role in taking disciplinary action against Complainant were Mr. Keough, Mr. Laney, and Mr. McGee, and these individuals did not have knowledge of Complainant's protected activity prior to initiating disciplinary proceedings against Complainant and terminating his employment. Although not determinative to this matter, the relevant decision-makers' lack of knowledge of Complainant's protected activity casts significant doubt on Complainant's assertion that his protected activity was a contributing factor in Respondent's decision to terminate his employment.

2) Temporal Proximity Between Protected Activity and Adverse Action.

It is without doubt, and Respondent concedes, that a close degree of temporal proximity exists between Complainant's protected activity and the initiation of disciplinary proceedings and the ultimate adverse action. (RB-1, p. 27) The undersigned concluded that Complainant engaged in protected activity when he reported the wheel slip to Mr. Oswald at 9:55 p.m. on July 9, 2016. The next day when he reported for work, Complainant was informed that he was being suspended and a charge letter was issued thereafter on July 19, 2016. Respondent subsequently terminated Complainant's employment on September 9, 2016, solely based on his conduct occurring at work during his shift on July 9, 2016 when he engaged in protected activity.

However, based on the factual circumstances presented in this case, the temporal proximity between Complainant's protected activity and the adverse action only minimally assists Complainant's in carrying his burden to establish his protected activity was a contributing factor in his discharge. Although Complainant offered extensive testimony detailing his confusion about the conclusion of his shift on July 9, 2016, it is undisputed that Complainant inaccurately assumed or determined that the Read Road move would be the last move of the shift and he left work without being properly relieved of duty in violation of Respondent's Operating Rule 104.7(a). Based on Complainant's admitted rule violation, Respondent acted reasonably in initiating disciplinary proceedings against Complainant in a timely manner. The close degree of temporal proximity also only minimally assists Complainant in carrying his burden because, as Complainant testified, wheel slips are common events, which occur every couple of weeks. Complainant also testified that he had reported safety concerns to Mr. Oswald prior to July 9, 2016 and had no issues with the way his reports were handled prior to July 9, 2016. The fact that Complainant made numerous similar complaints and reports throughout his employment without

Respondent taking any adverse action undermines his contention that his rule violation, leaving work without permission, was a facade for retaliation.

3) Respondent's Nonretaliatory Reason as Pretext for Retaliation.

Complainant argues that Respondent's nonretaliatory reason, that it terminated Complainant's employment for leaving work without permission, was a pretext for retaliation for four reasons. First, Complainant contends Respondent's reason was pretextual because Complainant was confused about when his shift would conclude because different Yardmasters use different methods to notify crews about the end of shifts. Second, Respondent subjectively branded Complainant's actions as insubordination, which is a "major offense," without any objective criteria. Third, Respondent imposed a formal reprimand on Mr. Capers, a similarly situated employee, for the same rule violation. Fourth, Mr. Oswald had the opportunity, means, and discretion to call Complainant back to work. (CB-1, pp. 23-32)

To begin, Respondent has consistently offered the same reason it terminated Complainant's employment. Respondent contends it dismissed Complainant because he left Respondent's property without permission, before the end of his shift, in violation of Operating Rule 104.7(a). Mr. McGee made the decision to terminate Complainant's employment following Respondent's internal investigation and hearing. During Respondent's internal investigation and at the hearing, Complainant admitted he left Respondent's property with approximately one hour remaining in his maximum 12 hour shift without being told by the Yardmaster or other supervisor that he was free to leave. Although Mr. Jiles, who worked with Complainant on July 9, 2016, stated it was unclear when the crew's shift would conclude, he confirmed that Complainant had not been explicitly released to leave work. As Operating Rule 104.7(a) makes clear, employees must have permission from a supervisor to leave work before the designated off-duty time. Although Complainant testified that his shifts only last eight hours, he conceded that he receives overtime pay after working eight hours on a shift and shifts may last for as long as 12 hours. The fact that Complainant worked for approximately 11 hours, and was thus receiving overtime pay, before leaving work without permission suggests that Complainant was well-aware that his July 9, 2016 shift would last more than eight hours and he should have obtained permission prior to leaving work from a supervisor. These facts establish Respondent acted in good faith when it concluded that Complainant violated Operating Rule 104.7(a).

In addition, Respondent acted in conformity with its IDPAP in assessing discipline against Complainant. Although the IDPAP does not specifically classify Operating Rule 104.7(a) as a major offense or insubordination, Mr. McGee, Mr. Keough, and Mr. Laney each stated in a deposition or testified that leaving work, without the permission of a supervisor, in violation of Operating Rule 104.7(a), is considered insubordination. Insubordination is classified under the IDPAP as a major offense, which can result in termination for one single offense. Mr. Laney testified that the IDPAP does not have a "single category for every different thing." The IDPAP contains some specific illustrative examples of major offenses, such as speeding and theft. However, although Respondent may be better served by making its IDPAP more comprehensive by including additional specific actions that are considered major offenses, Respondent is not obligated to formulate more specific policies.

Nevertheless, the Field Administration Office solely determined that Complainant's offense would be classified as a major charged offense. Mr. McGee, Mr. Keough, and Mr. Laney agreed with the Field Administrations Office in that violating Operating Rule 104.7(a) constituted insubordination. Specifically, Mr. Keough testified that he always construes this offense as major because this rule is important to maintain a safe rail yard. Mr. Laney testified he believed the Field Administration Office would classify this violation as a major offense because leaving without permission was a "pretty big deal" and, other than Mr. Capers, he was not aware of any other employee violating this rule in the past. Although Complainant is not required to prove pretext, because Respondent acted in conformity with its IDPAP, and dismissed Complainant's from employment for violating a major offense, Complainant's argument that Respondent's nonretaliatory reason for his discharge is a pretext for discrimination is unavailing.

Moreover, the circumstances of Mr. Capers's disciplinary proceedings only minimally assist Complainant in establishing his protected activity was a contributing factor in his adverse action. Complainant argues that he was treated in a disparate manner relative to Mr. Capers - if he was not terminated for failure to secure his supervisor's permission before leaving work, then Complainant also should not have been terminated for leaving work without permission from his supervisor. According to Complainant, this disparate treatment is circumstantial evidence of pretext. Although it is true that Complainant and Mr. Capers were treated differently, the two individuals were not similarly situated and, therefore, the treatment was not disparate. First, Complainant and Mr. Capers were supervised by different superiors at the time of their alleged rule violations. Complainant was supervised by Mr. Oswald and Mr. Capers was supervised by Mr. Bias. Second, Complainant and Mr. Capers did not receive their respective discipline from the same upper level manager. Mr. McGee imposed discipline on Complainant and Mr. Keough imposed discipline on Mr. Capers.

Furthermore, and most relevant to this discussion, Complainant's and Mr. Capers's actions were not comparable. Although Mr. Capers did not specifically obtain explicit approval from his supervisor before leaving work, Mr. Capers verbally notified his supervisor that he was ill and needed to leave work. Conversely, Complainant made absolutely no attempt to speak with his supervisor about his departure before deciding to leave work. Notably, Mr. Keough testified that there was a miscommunication between Mr. Capers and his supervisor because Mr. Capers misinterpreted his supervisor's instructions after he verbally informed his supervisor that he was ill. Although Complainant and Mr. Capers were charged with the same rule violation, the factual differences concerning the two rule violations undercuts Complainant's claim of disparate treatment. In addition, the fact that Mr. Capers testified that he, like Complainant, has also reported wheel slips throughout his employment further undercuts Complainant's argument.

4) Animus.

According to Mr. Jiles, on July 9, 2016, the railyard was very busy and congested. According to Complainant, in his experience in working with Mr. Oswald, Mr. Oswald became "rattled easily if things are not exactly as planned" and he "overreacted sometimes." Complainant suggests that Mr. Oswald's work pressure increased when Complainant reported the wheel slip alarm, which tied up a needed track, and caused Mr. Oswald to become "agitated" towards Complainant. As a result, after Complainant reported the wheel slip, he was "on thin ice" with

Mr. Oswald, "which ultimately contributed, even if in such a small way, to his termination." (CB-1, pp. 16-18)

As previously discussed, the audio recording of the conversation between Complainant and Mr. Oswald in which Complainant raised his concerns about the wheel slip is included in the record and was played at the formal administrative hearing. Contrary to Complainant's testimony, in this recording, Mr. Oswald does not make any specific statements that indicate he is "agitated" due to Complainant's concerns about the wheel slip alarm. Nor does Mr. Oswald's tone of voice in the recording suggest that he was "agitated" or aggravated with Complainant at the time of the protected activity. Further, undisputed evidence of record demonstrates that a wheel slip is a relatively common issue in the railyard. Thus, it is highly unlikely that Mr. Oswald would have become aggravated with Complainant based on Complainant's report of such a common event.

Furthermore, there is no evidence to suggest that Mr. Oswald, or any other Respondent employee, directed any animus towards Complainant at other times during his employment. Complainant testified that he and Mr. Oswald never had personality conflicts and Mr. Oswald never made any statements or gestures to indicate that he disliked Complainant. Notably, Complainant testified that, prior to July 9, 2016, he had reported other safety concerns to Mr. Oswald without issue. Complainant agreed that Mr. Oswald was concerned with safety and did not disregard safety reports. Mr. Jiles agreed, and testified that Mr. Oswald is responsive to safety reports and he has never seen him prioritize train movements over safety.

Therefore, contrary to Complainant's contention, Mr. Oswald's lack of "agitation" at the time of Complainant's protected activity and lack of prior animus directed towards Complainant at any other time during his employment when he reported wheel slips and other safety concerns strongly suggests that Complainant's protected activity was not a contributing factor in Respondent's ultimate decision to terminate his employment.

Complainant further argues that Mr. Oswald acted with animus by emailing Mr. Laney about Complainant's absence from work, rather than exercising his discretion to call Complainant and instructing him to return to work. Complainant contends that Mr. Oswald was aware, based on his experience as a trainmaster, that Complainant would be disciplined. (CB-1, p. 22; CB-2, p. 9) Although it is unlikely, the undersigned recognizes that Complainant may have been confused about when his shift would conclude based on his conversation with Mr. Simonson earlier that evening prior to the Read Road move. Although Mr. Oswald may have had the discretion to call Complainant and instruct him to return to work, this does not relive Complainant of his employment responsibility to comply with Operating Rule 104.7(a) and obtain permission from his supervisor before leaving work prior to the end of a shift. Mr. Oswald testified he has never called and instructed an employee who left work without permission to return to work, and there is no evidence to indicate this was Respondent's standard operating practice.

The facts also establish that Mr. Oswald acted reasonably under the circumstances. Mr. Keough testified that he would have expected Mr. Oswald to report Complainant's rule violation to upper management. As a result, Mr. Oswald acted in compliance with his supervisors' directives when he emailed Mr. Laney about Complainant leaving the property without

permission. Regardless of whether Mr. Oswald had the discretion to do so, it would be unreasonable and impractical to require him to call and instruct an employee to return to work after leaving without permission in violation of a clear company rule, especially when there is only approximately one hour remaining in an employee's 12 hour shift. Mr. Oswald's email to Mr. Laney about Complainant's rule violation does not demonstrate animus towards Complainant; rather, it establishes that Mr. Oswald acted in compliance with his employment duty to report employee rule violations to his supervisors and send details of such rule infractions to the Field Administration Office for a charge classification and initiation of possible disciplinary action, over which Mr. Oswald would not have control.

5) Conclusion.

There is no direct evidence that Complainant's protected activity was in any way a contributing factor to his employment termination. Consequently, after a thorough consideration of the totality of the circumstantial evidence of record, including the relevant decision-makers' knowledge of Complainant's protected activity, temporal proximity between the protected activity and adverse action, Respondent's consistent nonretaliatory reason for taking the adverse action, and lack of animus towards Complainant during his protected activity and throughout his employment by his supervisors, the undersigned concludes Complainant did not carry his burden by a preponderance of the evidence to establish his wheel slip report to Mr. Oswald contributed in any way to Respondent's decision to terminate Complainant's employment. The undersigned further concludes that the sole reason for Complainant's discharge was nonretaliatory – namely, Respondent's good faith belief that Complainant violated the rule that requires employees to obtain permission from a supervisor before leaving work.

e. Clear and Convincing Evidence of Same Unfavorable Personnel Action in Absence of Protected Activity. If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11-13 (ARB Apr. 21, 2015). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. *DeFrancesco*, ARB No. 10-114, slip op. at 8 (citations omitted). Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. *Id.* Clear and convincing evidence that an employer would have disciplined the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. *Id.*

Complainant argues that Respondent cannot carry its burden by clear and convincing evidence that it would have taken the same unfavorable personnel action because Complainant discredited Respondent's nonretaliatory reason for Complainant's discharge. Specifically, Complainant contends Respondent did not have a uniform procedure to indicate to engineers when they are free to leave the property, Respondent subjectively characterized Complainant's rule violation as insubordination, Mr. Oswald had the discretion to instruct Complainant to return to work, and Respondent treated a similarly situated employee more favorably than Complainant. (CB-1, pp. 32-33; CB-2, pp. 10-12)

To begin, the record establishes that the facts of this case would not change in the absence of Complainant's protected activity. On the evening of July 9, 2016, it is undisputed Complainant reported the wheel slip to Mr. Oswald and left work without permission from his supervisor. On the next day when Complainant reported for work, he was notified that he would be suspended pending an investigation of violating Operating Rule 104.7(a). Mr. Oswald credibly testified that he was required to report Complainant's rule violation to his supervisor, and he would have done so even if Complainant had not reported the wheel slip issue to him. Following Respondent's internal formal investigation, in which Complainant admitted he did not raise the wheel slip report, Mr. McGee made the ultimate decision to terminate Complainant's employment. Significantly, as the undersigned found, Mr. McGee did not have any knowledge of Complainant's protected conduct when he made the decision to terminate his employment. Therefore, the undersigned concludes it is highly probable that no materials facts would have changed in the absence of Complainant's protected conduct.

It is also significant that Claimant's violation of Operating Rule 104.7(a) was a clear violation of Respondent's established employment policy. The undersigned acknowledges that Respondent's IDPAP does not specifically state that a violation of Operating Rule 104.7(a) constitutes insubordination, nor does it specifically classify it as a "major" offense. Nevertheless, every manager and supervisor credibly testified that they believed that leaving work without permission was insubordination and a violation of a major offense. However, even more importantly, Complainant's supervisors did not make the decision to classify his rule violation as a major offense or insubordination; rather, the Field Administration Office made the decision to classify Complainant's conduct as a major offense, and this decision was made without knowledge of Complainant's protected conduct. As Part III of the IDPAP makes clear, an employee is subject to dismissal when found guilty of only one major offense. Although the IDPAP gave the decision-maker the discretion to terminate Complainant's employment or suspend him for 30 days, it is not the undersigned's role to "question whether the employer's decision . . . was wise or based on sufficient 'cause,' . . . but only whether all of the evidence taken as a whole makes it 'highly probable'" that Respondent would have taken the same action. *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 n.67 (ARB Apr. 25, 2014). Mr. Keough testified that compliance with Operating Rule 104.7 is critical "for maintaining the safety and efficient operation of the yard" and "for obvious reasons . . . we just . . . can't have people coming and going when they want." Respondent's clearly stated personnel policies support its decision to terminate Complainant, and Respondent's response to Complainant's conduct was in compliance with its IDPAP and proportionate with the charged offense.

Moreover, Respondent has offered a consistent nonretaliatory reason for Complainant's termination. In addition, Complainant points to evidence of a similarly situated employee, Mr. Capers, to establish Respondent would not have taken the same adverse action in the absence of protected activity. However, Complainant's argument is belied by the fact that Mr. Capers testified that he, like Complainant, consistently reported safety issues to Respondent, including wheel slips, during his employment and he was not terminated for reporting safety concerns. Further, for the reasons previously explained above in detail, the undersigned found that Mr. Capers was not a similarly situated employee.

Consequently, in the alternative, even if Complainant had established that his protected activity was a contributing factor in the decision to terminate his employment, the undersigned would conclude that Respondent carried its burden to present clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.

8. Ruling. Complainant engaged in protected activity under the FRSA, but he did not carry his burden to establish by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to terminate his employment.

Furthermore, in the alternative, Respondent carried its burden to establish by clear and convincing evidence it would have taken the same adverse action against Complainant in the absence of his protected activity.

This claim is DENIED and DISMISSED.

SO ORDERED this 2nd day of May, 2018, in Covington, Louisiana.

TRACY A. DALY
ADMINISTRATIVE LAW JUDGE

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

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

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

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

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

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

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

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

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