



Issue Date: 19 November 2018

CASE NO. 2017-FRS-00053

IN THE MATTER OF

JONATHAN KABETZKE
Complainant

v.

BNSF RAILROAD
Respondent

DECISION AND ORDER

Procedural History

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

On 15 Nov 16, Complainant filed his initial complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent retaliated against him by firing him for reporting an on the job injury. OSHA issued its decision on 12 Apr 17, dismissing the complaint. After Complainant filed a timely objection, the case was referred to the Office of Administrative Law Judges and assigned to me. On 25 Apr 18, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

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

Witness Testimony of:

Complainant
Robert Kelley

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

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

Derrick Cargill
Christopher Lovato

Exhibits:⁴
Joint Exhibits (JX) 1-37⁵

STIPULATIONS⁶

Respondent proffered stipulations as part of its prehearing statement. I reviewed the stipulations with the parties during the hearing and hereby accept and incorporate by reference those stipulations.

FACTUAL BACKGROUND

On 22 Dec 14, Complainant waived an investigation and was assessed a level S violation for failing to report to work. He was placed on a 36 month review period. On 4 Jul 16, Complainant called to report that he was sick and would not be able to cover his afternoon shift that day. On 4 Aug 16, Respondent conducted an investigation into his absence from work on 4 Jul 16. On 15 Aug 16, Complainant reported a work injury to his shoulder. On 18 Aug 16, Respondent terminated Complainant for having two level S attendance violations within a 36 month period.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant maintains that his termination was in response to his reported injury and not his absence from work on 4 Jul 16. Respondent answers that he was not sick on 4 Jul 16 and his termination was for misconduct that was unrelated to his work injury.

LAW

Prima Facie Case

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a work injury.⁷ It incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).⁸ To prevail under the Act, a complainant must prove: (1) that he or she engaged in protected activity; (2) that the employee suffered an adverse action; and (3) that the protected

⁴ Counsel were cautioned that since a number of exhibits appeared to be *en globo* collections of records, Counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. Tr. 12.

⁵ Includes what was previously referred to as Complainant's Exhibits (CX) 1 (Spohn deposition at JX 35) and 2 (Tax records at JX 34). Also includes as JX 37 that part of Respondent's prehearing statement that stated stipulations.

⁶ JX 37;Tr. 14-18.

⁷ 49 U.S.C. § 20109(b)(4).

⁸ 49 U.S.C. § 42121 (2011).

activity was a contributing factor in the unfavorable employment action.⁹ To avoid liability the employer must prove by clear and convincing evidence its affirmative defense that it would have taken the same action absent the employee's protected activity.¹⁰ An aggrieved employee must file his initial complaint with the Department of Labor (OSHA) for investigation and initial decision.¹¹ Upon objection to that decision by either party, the case will be considered *de novo* by the Office of Administrative Law Judges (OALJ).¹²

Contributing Factor

In establishing that a protected activity was a contributing factor to a subsequent adverse action, it is not necessary to show that the employer had animus against the complainant, held any retaliatory motive, was motivated by the activity, or even gave any significance to the activity. The central question is whether the activity played any part in the adverse action. In certain circumstances, a chain of events may be all that is necessary to satisfy the contributing requirement.¹³

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

Respondent's Burden

Even if a complainant is able to establish a factual link of causation between the protected activity and adverse action, an employer may still avoid liability by presenting clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity.¹⁷ That evidentiary standard is more rigorous than the preponderance of the

⁹ At times the *prima facie* case has been interpreted to include *four* elements: (1) the complainant engaged in protected activity; (2) *the employer knew that the complainant engaged in the protected activity*; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Powers v. Union Pacific Railroad Co.*, 2010-FRS-30, (ARB Apr. 21, 2015)(*en banc*), *reissued*, emphasis added.

¹⁰ *D'Hooge v. BNSF Railways*, 2014-FRS-2 (ARB Apr. 25, 2017).

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

¹² 29 C.F.R. § 1986.106.

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

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

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

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

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

evidence standard and denotes a conclusive demonstration that the thing to be proved is highly probable or reasonably certain.¹⁸

EVIDENCE

*Complainant testified at hearing in pertinent part that:*¹⁹

His first job was sacking groceries for United Supermarkets. He worked his way up in that company and then went to Atmos Energy and worked as a customer service representative for almost seven years. After Atmos, he worked for the Texas Department of Transportation for almost six years.

He then hired on with Respondent as a machinist apprentice. As a machinist apprentice, he would help clean the restrooms and cabs, make sure the horns, lights, and everything else was working properly. They made sure the engine had fuel, the brakes were good, and that the locomotive was rail worthy. After an apprenticeship of two or three months, he became a journeyman machinist.

In December 2014, they were swapping shifts. He was on nights and on one occasion overslept and was late to work. He was given an option to have an investigation or waive it. His union representative said the best thing was just to waive the investigation. He was placed on a 36 month review period for violating Rule 28.6 and 28.14, conduct and absence. He's not aware of any other problems on his work record between that time and 4 Jul 16, which fell on a Monday.

He has joint custody of his 9-year-old son and gets every other weekend. When he works, his parents take care of his son. He had his son for the weekend before the Fourth of July and the Fourth itself and was hoping to spend it with him, but was scheduled to work. He signed up on a sheet the union had for employees who would like to take off on the Fourth. The union had a similar sheet for employees who wanted to work on the Fourth. If the number of employees who want to work is less than the number of employees that don't want to work the most senior employees have precedent to take the day off. He was fairly junior because of his hire date and was scheduled to work on the Fourth. He also asked a few people in passing if they were working on the Fourth and if not, would they mind taking his shift.

He does not recall asking Chris Lovato to help him get off for the Fourth. He did not ever have a conversation with his supervisor, Robert Kelly, saying he was taking off the Fourth no matter what. He did not ask his union representative for help in getting off on the Fourth.

On 4 Jul 16, when he woke up that morning, he had been vomiting all night and suffering from diarrhea earlier in the morning. He called the doctor to see if they were open and they were. His son was with him, but he did not call his parents or his son's mother to

¹⁸ *DeFrancesco*, slip op. at 8.

¹⁹ Tr. 27-83.

come get him. He took his son with him while he went to see Tina Spohn, a nurse practitioner he had seen in April and June and later saw again in August for a shoulder problem.

Spohn examined him, asked him what was going on, and looked in his ears and throat. He paid cash for the visit, even though he does have insurance that he used for his other visits. He has never seen any medical records from that visit and does not have a receipt. After he saw her, he called Respondent. He believes he spoke to Ulysses Munoz, who was a foreman.

He was familiar with Respondent's standards for attendance and employee performance accountability. Respondent's policy was that sick employees who would be unable to safely work should call in to report their illness and say they would not be able to work their shift. He called in because he did not think it would be safe for him to go to work.

On 5 Jul 16, he returned to work. His union rep told him he would need a note from his doctor. At his deposition he testified that he told the foreman he had forgotten the note at home. He called the clinic and told them he needed a note from the day before. He testified at his deposition that it was his practice to get a note whenever he went to the clinic. At that time, his girlfriend's mother-in-law worked at the clinic. At his investigation he was asked if he had any friends, relatives, or other close relations at the clinic, and he said he did not. At the time, he had only met his girlfriend's mother once or twice. At his deposition, he testified that he did not know anyone or have any friendship with anyone at the clinic.

He went to the clinic, picked up the note. It may have been his girlfriend's mother that actually handed him the note. JX-13 is the note he got from the clinic. He does not know who signed the note. It was already signed when he got it from the clinic. He did not write it. He did not call up his girlfriend's mother and ask her to write it for him.

Even though he was off that day, he went in on 6 Jul 16 to give his note to Respondent. When he gave the note to Robert Kelly, Kelly called him a "fucking liar." He turned around, walked out, and called the 800 number for workplace complaints. He gave his name and reported that he had been discriminated against for reporting an illness, but to his knowledge nothing was ever done.

Sometime around 22 Jul 16, he received a notice of investigation, but continued to work his normal schedule. It may have been after he received the notice of investigation that he called the 800 number.

His investigation was held on 4 Aug 16. He had a union representative and the opportunity to call witnesses. He was allowed to submit exhibits and did submit the note from the clinic. At the investigation hearing, he testified that he was sick that day and did not feel safe to come in to work. He also provided his doctor's excuse note for that day. He continued to work until 15 Aug 16 and heard nothing about the investigation. He

heard from shop talk that Respondent generally waits to the end of the 30 day period to make a decision on an investigation.

While working on 15 Aug 16, around 9 or 9:30 PM, he flipped a switch and heard and felt his shoulder pop. He went in and told the foreman on duty what had happened. He does not recall which foreman was on duty. He was taken to the emergency room where x-rays were done and he was told to follow-up with his doctor the next day. He filled out a personal injury report and turned it into Respondent. It was emailed to Larry Perez and Roy Jackson.

The next day, 16 Aug 16, he went to his doctor and was sent for an MRI. He was pulled off work because of his medical status. On 17 Aug 16, Mr. Perez, the general foreman, called him to tell him he was no longer allowed to be on the premises and was released from his duties. He has not returned to work for Respondent since. He thinks he was fired because he reported the shoulder injury. He is familiar with the employee's policies about reporting injuries and prohibiting discrimination for reporting injuries.

At the time he was fired, he was making \$30.17 an hour, working a standard 40 hour week with some overtime. JX-29 is his pay records and they are accurate. In 2015, he grossed about \$68,500 from Respondent.

He has continued to treat with doctors, but did not start looking for other employment until they released him to return to work sometime during November 2016. He interviewed with the Texas Department of Transportation in late November and started working for them on 5 Dec 16. His job with Texas Department of Transportation is salaried and he makes about \$38-\$39,000 a year. It is the same job he had before. JX-34 is his tax records showing his wages from Texas Department of Transportation during 2017.

Robert Kelley testified at hearing in pertinent part that:²⁰

He has worked for Respondent for almost 6 years. In July and August 2016, he was Complainant's supervisor. He had nothing against Complainant and they would talk a lot about his family and building a garage. Complainant was a hard worker and did everything asked of him without complaint. Complainant worked for him for about a year and a half.

He in turn worked for Chris Lovato as his assistant general foreman and Larry Perez as his general foreman. Roy Jackson was further up the supervisory chain. Safety is Respondent's number one consideration. Whether or not an employee is safe at work is a call for that employee's medical provider. He would not want employees coming to work throwing up and having diarrhea.

Generally, holiday work scheduling is left up to the chairman of the union in accordance with the collective bargaining agreement. If employees have not already requested

²⁰ Tr. 86-109.

vacation time for a holiday and are scheduled to work, they can try to find a replacement. That replacement is approved by the union local chairman.

On or about 30 Jun 16, the schedule for the Fourth of July was posted. Complainant came into his office and said he could not work that day because he was going to have his son, who he had not seen in a long time. He told Complainant to get with his union representative to see if they could work something out, but if they couldn't, Complainant was going to have to work that day. Complainant responded that if he could not get the day off, he would just call in sick. He told Complainant that was not a good idea and could lead to an investigation. He also told Complainant that he would have to report the threat to call in sick to his supervisors. He did tell Chris Lovato about it. He did not put anything in writing, because he didn't think Complainant would actually do it.

He did not work on 4 Jul 16, but got an email from the on duty supervisor, Munoz, informing him that Complainant called in sick and they would pay an employee overtime to come in and replace Complainant.²¹ They were able to fill the gap by splitting the shift between two employees.

Respondent does not require a doctor's note and he did not ask Complainant to provide one. Nonetheless, on 6 Jul 16, Complainant gave him one.²² He saw the note had no specifics and, given their earlier conversation, became very disappointed and frustrated, and called Complainant a "fucking liar." He was subsequently disciplined for doing that. He took the note and gave it to Chris Lovato. He called the doctor's office just to see if they were really open on 4 Jul 16 and they said they were open for a little bit.

A few days later, he wrote a statement about what had happened and gave it to Chris Lovato.²³ He may have also sent it to Larry Perez, who had told him the case was going to investigation.

He did not recommend an investigation or make any recommendations about discipline. He is not sure exactly who does decide if something goes to investigation. Once they decided to have an investigation, he was named as a witness. He believed Complainant broke a number of rules by failing to show up for work without good cause and lying about it. He doesn't know that there is a set number of absences it takes to create a problem.

Derek Cargill testified at hearing in pertinent part that:²⁴

He started working for Respondent around April 2011. He is currently the Director of Labor Relations, as he was during the summer of 2016. In that capacity he oversees the

²¹ JX 8.

²² JX 13.

²³ JX 7.

²⁴ Tr. 109-138.

application and administration of the Policy for Employee Performance Accountability, or PEPA, which applies to discipline policy for all scheduled employees.²⁵

The policy includes stand-alone violations that justified dismissal for a single event. If such a violation does not lead to a dismissal, it carries a review period, during which a subsequent violation could result in dismissal. One such violation would be unauthorized absences. Two violations within the review would subject an employee to dismissal.

Respondent has a PEPA team of three who oversee discipline administration. Before an employee can be dismissed, the Director of Employee Performance has to review the investigation transcript and make a determination as to the appropriate level of discipline. That would involve the PEPA team. The process is designed to ensure consistent application of discipline across the company and an employee in Amarillo is treated the same as an employee in California. The collective bargaining agreement requires an investigation. After the investigation, the transcript and exhibits are sent to the PEPA team to review, along with the employee's record. JX-1 is Complainant's record.

The time it takes for the team to make a recommendation varies depending on how many cases are pending. It can be the same day that it is received or could be 2 or 3 days later. According to the collective bargaining agreement, the decision must be made no later than 30 days after the investigation.²⁶

Roy Jackson's emails and attachments about Complainant's investigation were delivered to the team's dedicated email address. Jackson initially sent the request for their review on 12 Aug 16. Jackson was the supervisor in the supervisory chain, but made no recommendation. Frank Zeller conducted the investigation and recommended discipline. Those two, along with him, constituted the decision-making body.

After he reviewed the transcript of the investigation, he determined that the charges were prudent and substantial evidence existed to prove the violation in the charging notice. He also saw no procedural flaws in the investigation. He looked at Complainant's record and noted a previous absentee violation within the review.

On 16 Aug 16 at 4:51 PM, Jackson sent another email asking for a decision to be made that day. That was not unusual, because the time for decision under the collective bargaining agreement was running out.

He determined that dismissal was appropriate and Jackson agreed. At the time he was not aware that Complainant had suffered an injury and does not believe the employee record he reviewed had an entry related to that personal injury. It would not have mattered anyway, since that would not have entered into the decision-making process. The fact that it was a second violation in a relatively short time of employment was also a factor. He also had significant questions about Complainant's credibility. He believes that Complainant wanted the day off and when he could not get the day off, just called in sick.

²⁵ JX 22.

²⁶ JX 26.

Respondent does not have a policy that rewards managers monetary incentives to discourage personal injuries from being reported or discipline employees who do report an injury.

Christopher Lovato testified at hearing in pertinent part.²⁷

He works as an assistant general foreman for Respondent. He was one of Complainant's supervisors. Complainant was a great worker.

Sometime before 4 July 16, he had a conversation with Complainant. Complainant explained that he had his son for the Fourth of July holiday and was going to need to have that day off. Complainant asked if there was any way he could help him. He told Complainant he wished that he could help him, but the best he could do was to suggest that Complainant get with the local union chairman to see if they could find another machinist to cover his shift. Complainant asked if there was not something else he could do and he explained to Complainant that it was up to the union.

He later had a conversation with Robert Kelly during which Kelly mentioned Complainant trying to get off for July Fourth. He told Kelly they had had the same conversation a few days ago, with the same result. Kelly added that Complainant said that if he couldn't get the day off, he would just call in sick.

Joe Jackson testified at deposition in pertinent part.²⁸

In July and August 2016 he was Respondent's Superintendent of Field Operations for Zone Four. He was located in Kansas City, but his supervision extended to Amarillo. His supervisors in the Amarillo yard included Larry Perez, Chris Lovato, Jean Stockwell, Ulysses Munoz, Robert Kelley, Ricky Long Wien, Ralph King, and Lonnie McGinnis. Derrick Cargill was not a supervisor, but was in Labor Relations. Complainant fell within his jurisdiction, but he did not know Complainant and would not have recognized him.

Safety is Respondent's primary concern. He would agree that an employee who has diarrhea and vomiting would be unsafe at work. He would advise that employee not to come to work, but to stay home.

Respondent operates with reduced manning on holidays, but some employees have to work. Respondent sets its requirements and relies on the union to fill those requirements. In the event there are not enough employees who want to work on the holiday, the union assigns the most junior members.

He is familiar with Respondent's discipline policies. Level S violations are considered serious. Unauthorized absence is a level S violation. Level S violations can warrant termination. Normally the first level S violation results in a 30 day record suspension and

²⁷ Tr. 138-142.

²⁸ JX 33.

a review period of 36 months. The review may be shortened under certain circumstances. A second serious violation within the review period may result in dismissal.

He was ultimately responsible for employee discipline and determining whether an investigation into an allegation of a violation was required. He did not conduct the investigations. Although he generally accepted the recommendation of the investigating officer, he was not required to do so. He generally reviewed the investigation transcript and exhibits. He then sent serious rule infractions with his recommendations to PEPA for review. PEPA reviews potential dismissals. He does not know everyone who is on the PEPA team, although Derrick Cargill is on it.

Complainant was hired on 2 Dec 13. On 6 Dec 14, Complainant was assessed discipline for a level S violation and placed on a 36 month review period.

He came to be aware of Complainant's case when he received a phone call from one of his supervisors, either Chris Lovato or Larry Perez, saying that an employee had said he did not want to work on 4 Jul 16 and was going to call in sick if he couldn't get the day off. He told the supervisor to let it play out and see what happens. When that date came, Complainant did call in sick, which prompted him to appoint an investigating officer.

He appointed an investigating officer, Frank Zeller. He did not make any recommendations or suggestions to Zeller. The investigation was delayed by mutual agreement, but finally held on 4 Aug 16. He did not attend the investigation, but Complainant and his union representative did. They were allowed to call witnesses, present evidence, and make an argument.

On 12 Aug 16, he received the transcript from Zeller and reviewed the high points, paying particular attention to the testimony. He learned that Complainant provided a nurse practitioner note for that day. However, the note said nothing about his symptoms or complaints or why he might be unsafe to work. It simply said that the illness began on 4 Jul 16. Later that night, he forwarded the transcript to PEPA by email, but didn't make any recommendations. The only thing he discussed with Derrick Cargill about the case was about timing on the transcript.

Since it was a second level S violation within a review period, it involved a potential dismissal and PEPA was required to review it and make recommendations. On 15 Aug 16, Zeller sent him the final transcript with the recommendation for discipline based on the testimony provided. The collective bargaining agreement sets different timelines for disciplinary decisions, based on the craft involved. Some crafts have a 30 day deadline and some crafts have a 20 day deadline. Complainant's craft had a 30 day deadline. His practice is to get a decision as soon as possible to avoid missing any deadline.

He was supposed to be notified of any injury at any location. On the evening of 15 Aug 16, he was notified that Complainant had suffered a work-related injury. He received a phone call from his general foreman, Larry Perez. Gerald Stockwell sent an

email to Perez at 9:25 PM on 16 Aug 16 stating that Complainant was throwing the 406 switch, felt a pop in his shoulder, and was experiencing pain.

The next morning at 7:24 AM, he sent an email to PEPA asking if they could make a decision on Complainant's case that day. He attached the transcript and exhibits. At 4:51 PM that afternoon, he received an email from Derrick Cargill indicating that Cargill supported dismissal.

Complainant's injury had nothing to do with his termination. Complainant was terminated because he had two level S violations, which, according to PEPA, subjected him to dismissal. Respondent does not discipline employees for being injured. Complainant was disciplined because when he was told he had to work on 4 Jul 16, he announced that he would call in sick to avoid doing so and then followed through with his threat.

Tina Spohn-Ledford testified at deposition and her records indicate in pertinent part:²⁹

She is a nurse practitioner and from October 2015 until January 2017 had an urgent care practice in Amarillo. Vicki Ellington was her office manager and performed all of their billing. The bills they submitted were derived from the charts that she completed for each patient encounter. Sometimes she would chart a patient visit immediately and sometimes it was done later. Either way, she had to do the charting at some point. She did not pay that much attention to billing, which is why she went out of business. Patients had the option of paying a \$50 cash fee for a visit if they did not want to use insurance. However, even the cash payment would be reflected in their billing records.

There would be times where she would not really be open for business but have an unscheduled patient happen to stop by or call her. In other words, she might not do a chart entry every time she talked to a patient. If she saw the patient in person, did a full exam, and took vital signs, she would do a note. She would not do a note for a triage visit or telephone call.

She first saw Complainant on 12 Apr 16. He presented with an upper respiratory infection. His intake form indicated he heard about her practice from Jennifer Fore, who is Vicki Ellington's daughter. She also had worked with Fore at one point and they were acquaintances. Complainant is now married to Fore.

She saw Complainant again on 29 Jun 16. He reported having injured his left shoulder while building a fence on 26 Jun 16. He indicated he had been to the emergency room for treatment on that day. She prescribed pain medication for him and likely gave him a note to miss work. Following the appointment and insurance approval, she ultimately ordered a left shoulder MRI for him on 5 Jul 16.

She does not recall whether or not her clinic was open on 4 Jul 16. If she was not open on 4 Jul 16, but happened to be in the clinic, and Complainant happened to stop by, it's

²⁹ JX 30, 35.

possible she could have seen him without charting the visit. She does not recall if she happened to see Complainant that day. Her office has no records indicating that Complainant came to the office and was treated. It's highly likely that she did not see him. Her records show only the three visits from April, June, and August 2016.

She has not seen JX-13 until today. She didn't sign it and she didn't give it to him. They used preprinted form with blanks to fill in the patient name and dates. Her staff would keep the forms and signed them for her. Sometimes, patients would call and she would instruct the staff to give a note to the patient when the patient came into the office. She does not recall anyone ever asking permission to provide a work note for Complainant.

Aetna Insurance paid her office \$59.17 for treating Complainant at 10:30 AM on 16 Aug 16. Complainant had a \$20 co-pay for that visit. Complainant presented complaining of right shoulder pain that resulted when he lifted a pallet at work. Complainant said he had gone to the emergency room for testing and they had sent him to primary care and to get an MRI. Even though she does not do Worker's Compensation, she did order an MRI for Complainant. She told Complainant to continue his medication, rest, and apply ice. She gave him a note to excuse him from work.

Amarillo Bone and Joint Clinic records indicate in pertinent part:³⁰

Complainant was seen on 31 Aug 16 for an injury he reported suffering on 15 Aug 16 while at work. He was diagnosed with and treated for a right shoulder sprain. Following an MRI, the diagnosis was modified to a right shoulder separation.

Vicki Ellington testified at deposition in pertinent part:³¹

She worked for nurse practitioner Tina Spohn from 2015 to 2017. Her daughter knew Spohn and suggested to Spohn that she would be a great office manager. She was the office manager and in charge of making appointments and billing. The billing records were generated by treatment notes. Without treatment notes, no charges could be assessed. If no treatment notes were recorded, there would be no record of the treatment or bill.

Billing records show that Spohn saw Complainant on 12 Apr 16, 29 Jun 16, and 16 Aug 16. At that time, her daughter was dating Complainant. They are now married.

If she's not mistaken, they were in the clinic for a few hours on 4 Jul 16. The clinic was not scheduled to be opened. The clinic phone number was automatically forwarded to Spohn's cell phone. Spohn received a call from Complainant in the morning of 4 Jul 16 and then contacted her to say that they needed to see a patient. She did not like Spohn going in by herself to meet patients. They went to the clinic, where they saw Complainant. She does not recall what was wrong with Complainant. She did not see

³⁰ JX 31.

³¹ JX 36.

anyone with him, but did not look out in his car. She cannot recall how long he was there, but Spohn did not chart the visit, because there would have been a bill if she had.

Normally, patients with insurance pay a co-pay before they are treated. She thinks Complainant had insurance with a co-pay of \$25. She did not necessarily collect co-pays at the time of the visit if the patient had a deductible. Complainant paid \$25 co-pays on his other visits and should have paid a \$25 co-pay on his July visit.

She is the one that typed up the clinic's missing work notes and made copies. She kept it in her drawer. Complainant asked for one so she filled out one and gave it to him before he left.³² Spohn told her that Claimant could have that day off but was cleared to go back to work the next day. He was the only patient treated that day. After a bit, they closed the clinic and went home.

Frank Zeller stated in pertinent part:³³

He was appointed to conduct the investigation involving Complainant's absence on 4 Jul 16. He conducted the hearing on 4 Aug 16. He recorded the proceedings and accepted exhibits. After the hearing was concluded, he forwarded the tape-recording to be transcribed.

After he received the first draft transcript on 12 Aug 16, he reviewed it and identified key parts of witness testimony. On 12 Aug 16 at 2:30 PM, he sent an email to Roy Jackson and included what he considered to be the key parts of testimony, as well as attaching the entire hearing transcript and all exhibits.

When he received the final transcript on 15 Aug 16, he forwarded it at 9:50 AM and recommended that discipline be assessed.

On 18 Aug 16, a letter went out under his signature informing Complainant that he was being dismissed for failing to report to work on 4 Jul 16. Even though he prepared and signed the dismissal letter, he was not the final decision maker, but only recommended that decision to Roy Jackson.

Respondent's records state in pertinent part that:³⁴

Complainant was hired by Respondent on 2 Dec 13. Respondent's employees may not be absent from duty without proper authority. Failing to report for duty is a level S violation. Insubordination and dishonesty are also level S violations. Respondent's policies forbid retaliating against individuals for properly exercising their rights, including reporting injuries. Respondent's disciplinary policies state that a first serious violation results in a 30 day record suspension and a 36 month review period. Second serious violations within the review subject the employee to possible dismissal. Certain violations subject the

³² JX 13.

³³ JX 14.

employee to possible immediate dismissals. They include dishonesty related to any employment issue.

On 22 Dec 14, Complainant waived an investigation and conceded he had failed to report to duty on 6 Dec 14. He was assessed a level S violation and was placed on a 36 month review period.

On or about 28 Jun 16, Complainant came to Robert Kelly with concerns about having to work on 4 Jul 16, because he would have his son for that day. When Complainant said he would just call in sick to get out of work, Kelly told Complainant he could be investigated for doing that, even if he had a doctor's note.

Claimant was scheduled to work on 4 Jul 16 from 3:00 PM to 11:00 PM. On 4 Jul 16 at 9:21 AM, Complainant called in sick. Complainant did not work on 4 Jul 16.

On 22 Jul 16, Complainant was notified that an investigation was being scheduled for 28 Jul 16 to determine whether he had been absent without leave on 4 Jul 16. The investigation was continued by mutual agreement to 4 Aug 16.

On 12 Aug 16, the investigating officer forwarded the draft transcript and testimony he identified as relevant, along with the exhibits to Roy Jackson.

On 15 Aug 16, at 9:10 PM, Complainant sustained a right shoulder injury at work. At 9:25 PM, an initial report of the injury was sent by email from Gerald Stockwell to Larry Perez and Roy Jackson. He was treated at Northwest Hospital at 10:33 PM. The hard copy report of the injury was filed on 16 Aug 16.

On 16 Aug 16, at 7:24 AM, Roy Jackson emailed PEPA asking if a decision could be made on Complainant's case. At 4:51 PM, Derek Cargill emailed Roy Jackson stating that he supported dismissing Complainant.

On 18 Aug 16, Complainant was fired for a second level S violation, being absent without leave on 4 Jul 16.

DISCUSSION

Protected Activity

There is no real factual dispute that Complainant reported that he had suffered a work-related injury on the evening of 15 Aug 16. Although the parties may dispute the significance of the injury and what treatment is required in the long-term, the record clearly establishes that Complainant engaged in a protected activity under the Act at that time.

Although that was the only protected activity specifically alleged, Complainant elicited evidence concerning whether it would have been safe for him to report to work on 4 Jul 16. These

³⁴ JX 1-3, 4 (as cited, see n.4), 5- 12, 15-19, 20 (as cited, see n.4), 21-24, 25-26 (as cited, see n.4), 27, 30.

inquiries may have been intended solely to establish that the 4 Jul 16 absence was a pretext, rather than a good faith basis for his termination. Nonetheless, if, by reporting for work when he was incapacitated, Respondent would have been in violation of any law or regulation related to railroad safety or created a hazardous situation by his presence, his refusal to report could have constituted a protected activity under the act.³⁵

The clear weight of the record shows that Complainant had custody of his son for the Fourth of July holiday. Unfortunately, he was scheduled to work. He tried to get off of the work schedule and asked at least two people to help him. When he was told they could not and he would have to go to work nonetheless, Complainant responded that he would just call in sick.

On the morning of 4 Jul 16, Complainant did call in sick. He further alleges that he called his primary care provider to tell her he was sick, she met him at her clinic, and gave him a medical excuse for the day. He offers in support the testimony of the clinic office manager, who was the mother of his girlfriend at the time and is now his mother-in-law.

Her testimony is not very persuasive, given that she could not recall what was wrong with her daughter's boyfriend when he called in and specifically asked the clinic to be opened for him. She was not particularly credible when it came to explaining the absence of any records of a visit that day, particularly given that Complainant testified he paid cash for the visit. She attempted to explain the absence of any record of a visit by noting that the provider was inconsistent in charting patient encounters.

The provider did concede that at times she would fail to chart patient encounters. However, her description of those instances indicated that they occurred when someone called in for telephone consult or happened to be walking by and stopped in with a question. That would be inconsistent with a patient calling in and the doctor specifically going in to open the clinic for him and him only. More importantly and most persuasively, the provider specifically testified that it was highly likely that she never saw him on that date.

In short, the clear weight of the evidence establishes that it is more likely than not that when Complainant was unable to find a way off of the work schedule for the holiday, he simply carried through with his threat and called in sick. The evidence fails to establish that he was ill and therefore would have broken any safety rules or created a hazardous situation by reporting to work. Consequently, even if he had alleged his actions on 4 Jul 16 to be protected activity, he would have failed to prove he engaged in any protected activity on that date.

Contributing Factor

Complainant therefore, must establish that his report of his injury on 15 Aug 16 contributed to his termination. All of the individuals who were involved in the disciplinary decision testified clearly and credibly that the only reason for Complainant's termination was his failure to report to work on 4 Jul 16, while he was still on a review for a previous attendance violation. Robert Kelley's obscenity when Complainant handed him the medical excuse is clear and persuasive evidence that he did not believe Complainant.

³⁵ See 49 U.S.C. § 20109(a)(2); 49 U.S.C. § 20109(b)(2)(B).

Complainant argues that the timing of the termination shortly after his injury is circumstantial evidence that it played a role in the decision to terminate him. While temporal nexus might provide some circumstantial evidence, any such value was minimized by the fact that the decision to charge and investigate the absence was made long before the injury report, as was the investigator's recommendation to terminate Complainant.

Complainant further submits that Respondent used the 4 Jul 16 absence as a pretextual excuse to terminate him, when the actual precipitating factor was the report of his injury on 15 Aug 16. The suggestion that the 4 Jul 16 absence was no more than an excuse used by Respondent ignores the facts of the case, which are that long before he complained of an injury, Complainant threatened to call in sick if he couldn't get time off for the holiday and was told if he did so, he would be subject to investigation.

Indeed, even if Respondent was incorrect or even unfair in concluding that Complainant had lied in order to get out of work and firing him because of it, Complainant would need to show that Respondent was more than simply wrong or even biased against him, but acting at least in part because of his report of injury. In any event, the evidence in this case shows that Respondent was not wrong and more likely than not correctly concluded that, consistent with his threat to do so, Complainant had lied to get the day off.

Consequently, I find that Complainant has failed to establish that it is more likely than not that his protected activity contributed in any way to Respondent's decision to terminate him. Moreover, even if for some reason Respondent was prompted to issue its decision because it was reminded of his pending case when he submitted his injury report, the record shows by clear and convincing evidence that Respondent would have taken the same action and terminated Complainant even in the absence of his report of a shoulder injury.

ORDER

The complaint is dismissed.

ORDERED, this 19th day of November, 2018 in Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of

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

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

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

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to

the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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