

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 May 2018

CASE NO.: 2017-FRS-36

IN THE MATTER OF:

DANIEL LEIVA

Complainant

v.

UNION PACIFIC RAILROAD COMPANY

Respondent

APPEARANCES:

JERRY EASLEY, ESQ.

For the Complainant

FRED WILSON, ESQ.

For the Respondent

BEFORE: LEE J. ROMERO JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (herein the FRSA or Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

I. PROCEDURAL BACKGROUND

Daniel Leiva (Complainant) filed his first complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (Department) on September 19, 2012, alleging he engaged in protected activity when he reported an incident involving Mr. Frater, and that he suffered an adverse action when he was suspended without pay and forced to sign a waiver of his right to a formal investigation to avoid termination. On December 2, 2013, Administrative Law Judge (ALJ) Kennington found Complainant engaged in protected activity when he reported the incident with Mr. Frater, and that he suffered an adverse personnel action, and Complainant's protected activity was a contributing factor to the adverse action. Additionally, ALJ Kennington found Respondent did not show by clear and convincing evidence it would have taken the same adverse action in the absence of Complainant's protected activity. As a result, ALJ Kennington ordered, inter alia, Respondent to **"expunge from Complainant's personnel record all disciplinary references relating to Complainant's suspension and waiver."** Leiva v. Union Pac. R.R. Co., ALJ No. 2013-FRS-00019, slip op. at 13 (ALJ Dec. 2, 2013).

Subsequently, on May 29, 2015, the Administrative Review Board (the ARB) affirmed ALJ Kennington's findings, holding Complainant's complaint was supported by substantial evidence, and remanded the case for a determination as to whether punitive damages were appropriate, and if so, the amount in which to award. Leiva v. Union Pac. R.R. Co., ARB Nos. 14-016, 14-017, ALJ No. 2013-FRS-00019, slip op. at 8 (ARB May 29, 2015). Eventually, the matter was settled between the parties and approved by ALJ Kennington on July 14, 2015. Under the terms of the settlement, **Respondent agreed to expunge from Complainant's record the discipline referring to the resulting waiver and level 3 assessment for workplace violence.**¹

¹ Specifically, the July 2015 settlement agreement between Complainant and Respondent stated the following with respect to the July 27, 2012 discipline matter:

Human Resources Records and Inquiries Concerning Complainant. Respondent will expunge Respondent's HR System Report of references to discipline assessed on July 27, 2012. Complainant's HR System Report will not reference his exercise of rights under 49 U.S.C. § 20109 related to discipline assessed on July 27, 2012. Respondent will ensure that the facts and circumstances related to this discipline and/or his exercise of rights under 49 U.S.C. § 20109 **are not used against him in any future disciplinary,**

Complainant filed his second complaint (Complaint) with OSHA on February 15, 2017, alleging that on or about October 27, 2014, August 29, 2016, and December 7, 2016, Union Pacific Railroad Company (Respondent) violated Section 20109 of the FRSA by terminating him, advising the public law board that he engaged in workplace violence in 2012, and allowing the public law board to rely upon Respondent's allegation that he engaged in workplace violence in 2012 when it denied his claim.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the allegations. The "Secretary's Findings" were issued on February 21, 2017. OSHA determined that Complainant's Complaint was not filed within 180 days of the alleged adverse action. (ALJX-2; JX-5).

On February 27, 2017, Complainant filed his objections to the "Secretary's Findings" and requested a formal hearing before the Office of Administrative Law Judges (OALJ). (ALJX-3).

A de novo hearing was held in Houston, Texas, on November 20, 2017. Joint exhibits, JX-1 through JX-15, were offered and admitted into evidence. Complainant offered 20 exhibits; all of which were admitted into evidence with the exception of exhibit 17. Respondent proffered exhibits A through E; all were admitted into evidence, except F and G. Additionally, eight administrative law judge exhibits were admitted into evidence. This decision is based upon a full consideration of the entire record.²

Post-hearing briefs were received from Complainant and Respondent on March 5, 2018, and March 6, 2018, respectively. Based on the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

employment, or promotional opportunities with Respondent, and that Respondent's Human Resources Department will give no negative references relating to the facts and circumstances of this matter to any prospective future employer.

(JX-3, p. 2) (emphasis added).

² References to the transcript and exhibits are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; Administrative Law Judge Exhibits: ALJX-____; and Joint Exhibits: JX-____.

II. UNDISPUTED FACTS

At the commencement of the hearing, the parties stipulated, and I find:

1. At all times material, Respondent was a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102.
2. Complainant engaged in protected activity as set forth in ALJ Kennington's Decision and Order issued on December 2, 2013.
3. The formal investigation held on October 15, 2014, by Respondent does not cite or reference the facts or circumstances forming the basis of Complainant's claim in Leiva v. Union Pacific R.R. Co., ALJ No. 2013-FRS-00019 (ALJ Dec. 2, 2013).
4. The termination letter dated October 24, 2014, issued by Respondent does not cite or reference the facts or circumstances forming the basis of Complainant's claim in Leiva v. Union Pacific R.R. Co., ALJ No. 2013-FRS-00019 (ALJ Dec. 2, 2013).
5. Respondent's Answers to Request for Admission, CX-6, p. 9, makes reference to "Exhibit 1." Exhibit 1 is the public law board ruling dated December 7, 2016, which is included in the record at JX-9.

III. SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Daniel Leiva testified at the formal hearing on November 20, 2017. He testified that he began working for Respondent on March 15, 2004. While employed by them, he was a brakeman, switchman, conductor, and engineer. He was promoted to engineer in 2011, and last worked for Respondent on September 24, 2014, when Respondent determined he violated a rule and terminated him. (Tr. 115).

He stated JX-8, pp. 47-48, was his waiver/acceptance of discipline relating to the 2012 incident when he reported his conductor. (Tr. 116). He signed it because he was threatened with termination, and Respondent charged him with workplace violence and placed the waiver in his personnel file. Consequently, Complainant filed a whistleblower claim against Respondent regarding the incident. (Tr. 117).

He further testified that he was terminated (after the formal investigation) on October 24, 2014. Following this, it was his understanding that his case would be reviewed by an arbitrator. Id. He stated he wanted the union to appeal his termination so he could return to work. According to Complainant, the role of a public law board is to review the facts of the case and make an independent determination. (Tr. 118).

Complainant stated he eventually learned the 2012 workplace violence incident was brought up in connection with his appeal when he received the public law board's decision, presumably January 2017. He stated he had not seen JX-8 prior to the filing of his current whistleblower action. (Tr. 119).

He further testified that he does have an understanding of protected activity under the whistleblower law. Id. For example, reporting an unsafe condition is a protected activity. He opined that he would "certainly" be dissuaded from reporting protected activity if he understood his protected activity could be used against him before a public law board. (Tr. 120).

He indicated that following his termination he did search for employment, and CX-19 identified the jobs to which he applied. Id. He stated in 2017 he worked at a Domino's Pizza, and that he was currently employed at a Toyota dealership in San Antonio. While employed by Domino's Pizza, he was making approximately \$300.00 per week. (Tr. 121). At the Toyota dealership, he makes \$500.00 per week. He further stated he worked for Domino's Pizza up until August 2017. He believed he began working for the Toyota dealership July 30, 2017. (Tr. 122).

Complainant testified that CX-18, p. 1, was his 2014 W-2 from Respondent. (Tr. 121-122). During 2014, he earned \$61,103.12, which covered less than a year of work. He indicated that once Respondent removed him, no more funds were issued. He also stated that prior to September 24, 2014, he had

missed time from work, approximately three months in 2014, and Respondent did not pay him during this time. (Tr. 123).

He further testified that he has travelled due to his case, such as travelling for the hearing, filing the claim, and for his deposition. He stated to travel one way is approximately 250 miles. In addition, he had to secure a hotel room the day before the hearing, which cost approximately \$75.00. (Tr. 124). He also missed work in order to travel to Houston. Complainant estimated he missed five days total from work, which equaled \$300.00 or \$400.00. (Tr. 124-125).

On cross-examination, he testified that the basis of his whistleblower claim was the waiver from 2012. He stated it was his understanding that if he did not sign the waiver he was going to be terminated until Labor Relations reviewed his case. (Tr. 125). He acknowledged that if he had not signed the waiver, there would have been a hearing and formal investigation in accordance with the rights of his collective bargaining agreement. He stated it was unclear how long this process would have taken, and that Respondent asked if he wanted to sign the waiver to return to work. He explained that he along with the conductor, Jason Jenkins, and the union representative from both sides met, and it was at that formal meeting where facts were presented and the offer to sign was proposed. He stated it was a possibility that if he never signed, his case would have gone through a formal investigation. (Tr. 126). He testified that he was told, "You can be terminated." (Tr. 127).

According to JX-8, p. 49, Complainant acknowledged it was a waiver from an event after April 2014, which he signed as shown on page 51 of the same exhibit. Id. He indicated he signed the waiver because he wanted to "get the whole thing over with because at the time, [he] was going through a very ugly divorce and [he] wanted to - - - there was much more and I didn't want to do it so I signed." (Tr. 127-128). Complainant admitted that on April 14, 2014, he went through a red signal. When he signed this particular waiver, it allowed him to go back to work, but the violation placed him at a higher level of discipline. He believed a Level 4C. (Tr. 129).

He further testified that on September 19, 2014, he failed to bring his train to a stop when he received an exit signal. Due to this violation, there was a hearing on October 15, 2014, where there was no mention of the workplace violence incident. He could not recall if the incident was admitted into the record. He stated his ultimate dismissal was a result of the

exit message violation on September 19, 2014, and the April 2014 red signal violation. Id.

He explained that he did not work for three months because Respondent had terminated him as a result of the April 2014 incident for running the red light. He was essentially pulled from service pending either an investigation or the signing of a waiver with the ability to return to work. (Tr. 130).

Complainant acknowledged that JX-8, pp. 10-11, outlined his discipline history, and that all the disciplinary actions were correct, except the incident that was supposed to be expunged from his record. (Tr. 131).

Billy Gearen

Billy Gearen testified that he has been employed by Respondent approximately fifteen years, and has worked in the role of a switchman; bright man conductor; supervisor of Locomotive Engineers, "MOP;" and a locomotive engineer, which is his present position. He averred he switched from a supervisor to a locomotive engineer because the supervisor position was time-intensive, and the locomotive engineer position permits him some family time. (Tr. 18).

Mr. Gearen averred that in September 2014 he recalled Complainant was involved in an incident concerning a detector, and that he failed to get an exit signal. Specifically, he testified that at that time, he was the assisting manager on the efficiency test regarding a detector, and Mr. Mewis was the testing manager to determine if Complainant had followed certain protocol because Complainant's train qualified for the criteria they were seeking. Mr. Gearen indicated "there's certain criteria you have to follow each month." (Tr. 19).

He also testified that he recognized JX-6, p. 152, which was the formal charge letter for Complainant's investigation. He averred his signature was located at the bottom of the document. (Tr. 20).

He stated he did not know Complainant was charged with a workplace violence violation in 2012, and that the formal charge letter did not refer to the aforementioned incident. Id. At the time of the September 2014 incident, Mr. Gearen stated he was unaware of Complainant's 2012 workplace violence incident. He stated the only recollection he had regarding Complainant and workplace violence was a general reference in his work history.

Mr. Gearen could not recall what the reference was, but he believed it might have been a reference as to the location of the incident. Other than that work history document, Mr. Gearen did not know any more about the incident. He also denied knowing about the waiver Complainant received in relation to the 2012 incident, unless it was mentioned in the work history document. (Tr. 21).

Mr. Gearen further denied seeing JX-8, pp. 47-48, evidencing Complainant's whistleblower complaint against Respondent regarding the 2012 workplace violence charge. He stated during his time working for Respondent, he never received formal whistleblower training; however, he was aware of the "Whistleblower Act." (Tr. 22). He also indicated that he was aware that it was unlawful to take adverse action against an employee who engaged in protected activity, such as reporting a violation of railroad laws or unsafe conditions or injuries or filing a whistleblower complaint. Mr. Gearen further stated that the alleged 2012 workplace violence incident did not contribute to his decision to test Complainant in September 2014. In fact, he averred that the 2012 incident did not contribute to his decision to charge Complainant with a rule violation in September 2014. (Tr. 23). He also stated the 2012 whistleblower complaint did not contribute to his decision to test Complainant, and that it did not contribute to his decision to charge him. In addition, he averred that subsequent to charging Complainant with the rule violation, he testified against him at Respondent's formal investigation hearing on October 15, 2014. He indicated the 2012 incident and the whistleblower complaint did not affect his testimony at that formal investigation. (Tr. 24).

Mr. Gearen also stated he is a union member at the railroad. Id. He testified that he has been a union member with "UTU," "BLE," and "BLET." He believed he was the vice treasurer for BLET 19, perhaps, secretary/treasurer. He indicated that while employed by Respondent, he has "had coaching events on [their] FTX [Field Training Exercise] policy," and that he has never been "formally charged with an incident of discipline." He further averred that at the time, he only had general knowledge of the disciplinary process; the process "changes from time to time." He stated, "he used to be up on it a lot more than [he] [is] now." (Tr. 25). He further stated, "[g]enerally speaking . . . I know there are options." For instance, if an individual is charged and held responsible for violating a rule, he could challenge the discipline during the investigative process. He testified that "we have the right

to go through an investigation and determine the facts of the case on whether [the] [person] . . . performed the alleged violation or . . . [not]. You do have that due process." He indicated the formal investigation process happens at the railroad, and a manager is the official that charges the employee with a rule violation. Another manager will be the hearing officer and would preside over the formal investigation. (Tr. 26). He stated another manager would be responsible for determining whether the employee should be disciplined, and if so, the extent of the discipline. He averred he understands the process from the charging manager to the hearing; however, beyond that he believes an individual reviews the case, generally the superintendent or "DRO." Mr. Gearen was, however, aware that once an employee went through the process, he could pursue arbitration. (Tr. 27).

He also averred arbitration was "absolutely" important because—

It lends [him] the opportunity to have it looked at from a neutral standpoint, someone that has no involvement in the case . . . [a person that] wouldn't have an invested interest in it, but would be able to look at that as a neutral opinion and render a decision on an unbiased opinion in any way, shape or form.

Id.

Subsequently, Complainant's counsel posed the following hypothetical situation to Mr. Gearen:

Say for instance, you had a co-worker who was physically and verbally threatening you with violence, okay. And you reported that up to management and management responded by charging you with workplace violence for reporting it. If you were to find out that later one [sic] for some unrelated discipline, when your case went up to arbitration, the railroad could bring up the fact that they alleged you engaged in workplace violence for reporting your co-worker, is that something that might make you think twice about reporting that co-worker if you were to know that?"

In response, he stated, "[i]f I have an instance with a co-worker and I engage, I still have a due process of an investigation to go through. I might --- it would be situational." He further testified that he did not think it would be proper if he did not do something, and the employer used the incident against him. He stated, "[y]es, I would have a problem with that." (Tr. 29).

Next, Counsel posed another hypothetical. He stated what if Mr. Gearen participated in multiple due process proceedings and it was confirmed he did not engage in workplace violence. And years later, he is involved in another unrelated matter and the employer brings forward the "supposed" workplace incident during arbitration. Counsel then averred, "[t]hat's something that would make you think twice about potentially reporting something like that, right?" Mr. Gearen responded, "[y]eah." He further stated it would make him contemplate the process and how the non-founded workplace incident was brought up. (Tr. 29-30).

On cross-examination, Mr. Gearen testified JX-6, p. 152, also RX-C, p. 1, was the charge letter regarding Complainant (and the conductor) that he signed. (Tr. 30-31). He further stated the charge letter was based on a FTX, which mimics events an employee may encounter during a normal day, and the tester is to monitor the employee's response(s) during those events. The test performed in 2014 was a "structured test." Managers have to perform so many of these a month. The lead tester on that occasion was Mr. Mewis. Complainant's train was selected because it qualified for the criteria the managers needed for training. (Tr. 31). According to Mr. Gearen, managers were required to perform a specific number of FTX events and a certain type of FTX events. No criteria existed for a certain number of failures on FTX events. He further stated when conducting a test, managers are concerned with testing employees, not looking to hold them responsible for something they did not do. (Tr. 32).

He stated the test on September 19, 2014, required a key train, which is a train transporting hazardous material. Mr. Mewis and Mr. Gearen located Complainant's key train, which was transporting hydrous ammonia. (Tr. 33). Mr. Gearen described the test as follows: "item 13 in our special instructions defines the actions required when train defective detector has a failure of some sort or it doesn't broadcast or it does broadcast a defect." An employee is required to take several

different actions depending on the type of train. The test required that managers disable the voice broadcast of the detector. As a result, a person would have to "stand in the detector with a hand held radio and . . . receive a message." He stated someone was in the box, and as Complainant's train entered the detector, it broadcast an instant message. The message consists of the mileage post and the detector number. (Tr. 34). Once the train enters the detector, the voice feature of the detector is disabled; thus, the voice message does not transmit to the train. The message to be received was considered an "exit message," which was required. (Tr. 35). If the message is not received, the train must be brought to a stop because it suggests something may be wrong with the train. (Tr. 35-36).

In Complainant's case, Mr. Gearen testified that Complainant did not stop the train. The train continued for seven miles to a signal indication, which supposedly brought the train to a stop. He stated that by going seven miles past the detector, this was a rule violation. He further indicated he charged the conductor as well as the engineer. (Tr. 36). Mr. Gearen stated that where it showed "Engineer Only," in the second paragraph of JX-6, p. 152, this referred to charges made against Complainant. (Tr. 36-37). He testified Complainant received a proposed Level 5 offense, which is not the norm based on Complainant's infraction. In fact, Mr. Gearen testified that the offense is a Level 4. Complainant received a proposed Level 5 offense because it was his second "Level 440" or "4C offense" in a non-specified retention table. The prior violation was in April 2014 when Complainant failed to stop for a red signal. He indicated Complainant's prior discipline event did not result in his dismissal but that it placed him at a heightened level of discipline as a result of the FTX event. (Tr. 37). Consequently, Complainant was charged with a level of discipline that could result in termination. Mr. Gearen averred that Complainant's 2012 workplace violence incident did not lead to the Level 5 charge or was a factor in the decision to charge Complainant at Level 5. Due to Respondent's upgrade policy, Complainant was charged at Level 5 because of the violations in April 2014 and September 19, 2014. (Tr. 38).

He further stated he read Complainant's work history and the 2012 incident was referenced. Id. When Mr. Gearen charged Complainant, he was unaware of the former whistleblower complaint. He became aware of it when he conversed with Respondent's counsel. (Tr. 39).

Mr. Gearen could not recall whether Complainant was under his supervision during 2014. Nevertheless, if an employee is "working within the limits of [his] supervised territory," the employee would presumably be considered his employee. However, if the employee is not assigned to him, he stated he is "not going to have a conversation with him or perform a task." He further averred he had performed other tests and field training exercise(s) involving Complainant prior to September 19, 2014; yet, he could not recall the specific dates or the actions taken. Id.

He testified that prior to September 2014 he had not charged Complainant with discipline. He stated there was a test that was set up for Complainant, but it was never performed for several reasons. (Tr. 40-41). He indicated the purpose of a FTX is not to take unfair advantage of employees. The manager is not seeking to fail someone, and he is not judged based on whether he gets someone to fail a test. (Tr. 41). The supervisor's responsibility is to know the engineers' behaviors. When tests are performed, it is to provide supervisors with information as to what is going on in the field. (Tr. 42).

Mr. Gearen reiterated he was present during Complainant's formal investigation on October 15, 2014, and that he testified during the investigation. He indicated the 2012 workplace violence incident was not mentioned during the proceeding. He stated based on his knowledge, the record of investigation did not reference the incident. Id.

On re-direct examination, he testified that CX-10 was Respondent's discipline policy in 2014. On page 5 of that exhibit, he acknowledged there was a "Retention Period Table." (Tr. 43). During 2014, Respondent had "progressive discipline," which essentially means if an employee commits a rule violation and shortly thereafter commits another rule violation, the second rule violation might be escalated as a result of the first for a limited period of time. He stated the retention period table explains the length of time the first rule violation can count against the level of the subsequent rule violation. (Tr. 44). According to the table, twenty-four months is the longest period of time any prior discipline can affect the level for a subsequent discipline. However, in regard to a Level 3 where an employee takes a waiver, it can only be used against the employee for twelve months in relation to the upgrade policy. He again testified that at the time of Complainant's 2014 charge, the 2012 workplace violence incident

was listed within Respondent's work history documents. (Tr. 45).

Jamal Chappell

Jamal Chappell testified during the formal hearing. He stated he is currently employed by Respondent, and that he has worked for Respondent for twenty-one and three-quarter years. (Tr. 47). During his time with Respondent, he has been a train dispatcher, corridor manager, yard operations manager, manager of terminal operations, senior manager of terminal operations, director of train management, director of terminal operations, director of transportation services, superintendent of the Marine Service Unit, and superintendent of the handling dispatch center. He stated he has never worked out of the Houston Service Unit for Respondent. (Tr. 48). When he was the superintendent in Lavonia, Louisiana, he had various duties, such as managing transportation, safety, budget, and public relations for the Lavonia Service Unit. (Tr. 48-49).

He further testified that he was the decision-maker with respect to Complainant's termination in October 2014. He acknowledged that JX-7 contained Complainant's termination letter issued October 24, 2014, which he signed. (Tr. 49). He indicated he did not know Complainant was charged with workplace violence in 2012, and that he had taken a waiver on that charge. Mr. Chappell stated that if Complainant was a Houston Service Unit employee and the incident occurred on the Livonia Service Unit, the hearing would have been under his jurisdiction. He also indicated he could not recall whether Complainant was a Livonia Service Unit employee or Houston Service Unit employee. He later acknowledged the September 2014 incident occurred on the Beaumont Subdivision, which is part of the Livonia Service Unit. (Tr. 50).

After reviewing JX-8, pp. 47-48, Respondent's submission to the public law board, Mr. Chappell stated he had never seen the document. He further stated he never knew Complainant filed a whistleblower complaint in 2012 against Respondent regarding allegations he engaged in workplace violence. Mr. Chappell indicated while in management, he did receive whistleblower training; thus, he is aware that it is illegal to take adverse actions against an employee who engaged in protected activity, such as reporting violations of railroad laws or unsafe conditions. He also knew it was illegal to take adverse action against an employee because he or she filed a whistleblower complaint. (Tr. 51). To Mr. Chappell's knowledge, he was

unaware of a finding made by OSHA, an ALJ, or court that Respondent violated a whistleblower law based on any conduct that he had been involved. (Tr. 51-52). He further stated neither the 2012 workplace violence allegation nor the whistleblower complaint contributed to his decision to terminate Complainant in October 2014. (Tr. 52).

On cross-examination, Mr. Chappell reviewed JX-7, which is the Notice of Discipline Assessed that included his signature. (Tr. 52-53). In rendering his determination, Mr. Chappell stated he relied upon the hearing transcript. In accordance with JX-6, which contained the hearing transcript, he testified that the 2012 workplace violence incident was not referenced. He also stated there was no reference to the whistleblower claim (FRSA claim). Mr. Chappell averred that he was not aware of the workplace violence incident when he made his determination. (Tr. 53). He asserted, "[h]onestly, I can't say that I know of it at all. I mean, I know of it because of this trial, but at the time, it was not part of what I did and when I got there, I was director of Transportation so my focus was the transportation product." (Tr. 53-54). Mr. Chappell stated he "did not deal with discipline at all." He indicated that when he became superintendent in 2014, he believes Complainant's case was one of the first he had read; thus, he made his determination based on the merit of the transcript. He did not have any background information on Complainant. Mr. Chappell testified that he may have had contact with Complainant while travelling across the service unit, but he does not know him and has not had contact with him. (Tr. 54). He also explained that although Complainant was a Houston Service Unit employee, Complainant comes under his jurisdiction when he goes from Houston to Livonia. (Tr. 54-55).

On re-direct examination, he acknowledged that JX-8, p. 10, contained what appeared to be disciplinary actions against Complainant. (Tr. 55). He stated based on his review of the document, he recalls Complainant was already at a certain level of discipline when he made his determination. He further stated he "read the case," and "based on the merits of the transcript," he found Complainant at a Level 5. (Tr. 55-56). At the time, Complainant was already at a Level 4C, and he was not concerned with his background. According to Mr. Chappell, Complainant's level of discipline at that time had no impact on "anything [he] was doing or was going to do." He indicated that he reviewed the case and determined if Complainant violated a rule(s) as charged. Mr. Chappell stated Complainant was in violation, and

that the level of discipline, more specifically, a Level 5 was correct based on the upgrade policy. (Tr. 56).

In accordance with CX-10, p. 5, Mr. Chappell testified that the retention policy states the longest period a violation can be retained is twenty-four months. (Tr. 56-57). He averred he believed that any violation prior to September 19, 2012, should not have counted against Complainant; he asserted Labor Relations should be questioned concerning this particular issue. Mr. Chappell also testified that he did not know why Complainant was at a Level 4C, meaning what events or disciplines contributed to the level. (Tr. 57). He stated that since Complainant was at a Level 4C, the Level 5 charge was the result of the Level 4C discipline. He indicated he read the investigation transcript and made his determination based on it. According to Mr. Chappell, his job requires that he decide whether or not the employee violated the rule in question, not researching how the employee reached their current level of progressive discipline. He further stated he believed Labor Relations performs the analysis to determine if a violation will result in suspension or termination. (Tr. 58).

Jennifer Powell

Jennifer Powell also testified at the formal hearing. She testified that Respondent currently employs her, and that she has worked for the company for thirteen years. She was currently the senior manager of Labor Relations, a position she has held since July 2017. (Tr. 59). Prior to this position, she was the assistant director of Labor Relations for approximately four years. Before this, she was the Labor Relations manager. She indicated she started as an officer. In addition, she stated she had no experience in Labor Relations. Ms. Powell worked for a marketing company prior to working for the railroad. (Tr. 60). She also testified that she does not have any legal training. However, she does have labor relations training and is required to take other courses, in addition to, attending conferences concerning the railroad industry. Ms. Powell further testified that she was hired on with Respondent as an agreement employee, more specifically, a crew collar, in 2004, and then she worked in the Timekeeping department for approximately four years. Following this, she was promoted into Labor Relations as a non-agreement employee, Labor Relations officer. She also stated she received labor relations training through the National Labor Relations Carrier (NLRC). She indicated the National Organization of Railroads provides training to Class 1 railroads. (Tr. 61).

She also testified that she has been involved in disciplinary matters concerning agreement employees, meaning employees who are union members that have collective bargaining agreements with the railroad. She averred she has approximately eight years of experience concerning disciplinary matters. (Tr. 62).

She indicated different unions have different collective bargaining agreements with Respondent. She testified she has primarily handled "BLET" and "UTU," now Smart Transportation Union, agreements. She averred that she generally becomes involved in disciplinary matters after the superintendent renders a decision. Id. Then the union representative or the general chairman for the union submits an appeal to Labor Relations due to collective bargaining rights. Subsequently, Labor Relations reviews the transcript and all of the "on-property of record," and then it provides its positions. (Tr. 63).

She explained that Respondent has a discipline program maintained by the Southern Region Office. This office holds the employee discipline record, and Labor Relations reviews the record to determine if the employee was progressed according to policy. (Tr. 63-64). Ms. Powell stated she has received approximately 500 discipline appeals during her eight years. If Labor Relations and the union cannot reach a consensus, the discipline can be challenged at arbitration. She stated the same number of disciplinary matters received eventually go through arbitration. (Tr. 64).

Ms. Powell testified that she would have become involved in Complainant's case after the appeal came from the general chairman and the union. After that, she had a certain number of days to respond to the appeal requesting dismissal. She acknowledged JX-8, p. 31, was correspondence between the general chairman and herself regarding Complainant's termination. The correspondence confirmed Complainant's discipline was going before a public law board. (Tr. 65). She did not believe any correspondence between November 11, 2014, and January 30, 2015, mentioned the 2012 workplace violence incident. (Tr. 66).

She also averred Complainant is a member of Smart Transportation Division, and that the union has a collective bargaining agreement with Respondent. This agreement governs the relationship between employees and the employer. Disputes

concerning discipline under this agreement are referred to as "minor disputes" in labor relations. Id.

Ms. Powell further testified that she is familiar with the Railway Labor Act (RLA). (Tr. 66-67). She stated the RLA provides for arbitration of "minor disputes" under a collective bargaining agreement, and it outlines different arbitration methods called "special levels of adjustment." Complainant's agreement provides for arbitration of "minor disputes." (Tr. 67).

One particular method of arbitration is public law boards, which is composed of three members, one of which is a neutral member agreed upon by the union and railroad. Id. With regard to the other two members, one member is selected by the union and the other by Respondent. A public law board requires a majority vote in order to reach a decision. She stated a public law board considers whether Respondent's actions were consistent with the discipline policy in effect, and whether Respondent properly applied the policy. Ms. Powell testified that it has been her experience where a public law board has returned employees to their place of service, even if in opposition with Respondent's written policy. (Tr. 68). In short, she stated a public law board is not obligated to follow Respondent's discipline policy, and a public law board is not mandated to follow an earlier decision rendered by another public law board in a different case. (Tr. 69).

In determining a case, a public law board has several options, for instance, it can uphold the discipline assessed by the employer; reverse the decision and put the employee back to work with full benefits and pay; or it can take a blended approach. Id. If a public law board sustains the employee's claim, the minimal remedy could be reinstatement; however, it depends on the language in the award. She indicated she has witnessed a public law board remove discipline but refuse to put an employee back to work, for instance, if the employee was going on medical leave or about to retire or simply not returning to work for another reason(s). Ms. Powell could not recall if Complainant had any extenuating circumstances that precluded him from returning to work. She stated Complainant's appeal to the board was based on his October 2014 termination. (Tr. 70).

Ms. Powell further testified that arbitration is an adversarial process similar to an OALJ formal hearing because each side is putting forth its best evidence and arguments to

persuade the decision-maker. In Complainant's case, she put forth the best evidence and best arguments before the public law board to sustain the discipline (i.e. termination). She understood that her advocacy could affect Complainant's employment. She stated in preparation for the arbitration proceeding she prepared a document entitled "Carrier's Submission." (Tr. 71). She acknowledged that JX-8 was the "Carrier's Submission" document, which contained attachments, and was submitted to the public law board on August 29, 2016, in addition to an affidavit. (Tr. 72-73).³ Within her submission, Ms. Powell included Complainant's discipline history; fourteen out of fifteen of the incidents mentioned pre-dated Complainant's termination in October 2014. (Tr. 73). She admitted that under the upgrade policy the longest period of time a rule violation can be used to progress discipline against an employee is twenty-four months. Thus, after twenty-four months, the rule violation(s) is removed from the employee's record so it cannot be used in determining the level of discipline in the future. She agreed that any discipline prior to September 19, 2012, was irrelevant under Respondent's upgrade policy, yet she acknowledged that she included the discipline in the submission submitted to the public law board. (Tr. 74). She further agreed that twelve out of the fifteen disciplinary actions (progressive discipline) identified were irrelevant. (Tr. 74-75). She included them because she knew the public law board is not bound to follow Respondent's policy. Ms. Powell stated, "based on [her] experience, an arbitrator will typically ask for what an employee's record looks like so [she] always include[s] it in [her] dismissal cases." She indicated she included the incidents because she believed it would provide a "clear view" of Complainant's record. She also stated if she did not believe the information would be helpful, she probably would not have included it. (Tr. 75). One of the incidents referenced was the incident on July 27, 2012, which resulted in a Level 5 for Rule 1.6, workplace violence violation. (Tr. 75-76).

She acknowledged that JX-8, p. 40, was a printout from Respondent's computer system regarding the incident on July 27, 2012, which was included in her submission to the public law board, in addition to, a signed waiver for the incident on pages 47 and 48 of the same exhibit. She stated she included this documentation because it was in Complainant's record. (Tr. 76). Ms. Powell further stated that knowing what she knows now she would not have included this information because it should have

³ After reviewing RX-D, Ms. Powell did recollect the date the documents were submitted to the public law board. (Tr. 73).

been expunged from Complainant's record. (Tr. 76-77). When the submission was made to the board, the information had not been expunged. If the information regarding the 2012 incident had not been included in Complainant's record, she would not have included it in her submission to the board because she would not have seen it. (Tr. 77).

She indicated she discovered Complainant had filed a whistleblower claim in 2012 when she spoke with "Fred." Id. She believed she may have spoken with "Fred" in 2017. She was not aware that an ALJ ruled in Complainant's favor on December 2, 2013. She was made aware that the ARB upheld the lower court's decision when she was called to testify in the case. She also indicated she was not aware that Respondent had agreed to expunge the 2012 incident from Complainant's record and abstain from using it against him in future employment decisions. (Tr. 78).

She further indicated she had not seen JX-3, p. 2, with the heading "Records and Inquiries Concerning Complainant." Based on her review of this document, she agreed that Respondent failed to adhere to the written instructions. Moreover, she stated she was not sure when she began preparing her submission, which she submitted to the public law board. She assumed she may have begun preparing the documentation the month before it was submitted. She stated she typically starts preparing for a board a month in advance. Ms. Powell agreed that if the 2012 discipline had never been assessed against Complainant she would not have cited it in her materials submitted to the public law board, and she would not have cited it if Respondent had removed the discipline from Complainant's record. (Tr. 79). She indicated the first reference of the 2012 incident in relation to the October 2014 discipline was her submission to the public law board. She was unaware of any other documents referencing the incident pre-dating her submission. She testified that a public law board's consideration is limited to a review of the evidence and arguments presented during the formal investigation. Ms. Powell admitted the fourteen disciplinary actions included in her submission did not appear in the formal investigation record. She explained that in dismissal cases part of the process requires including an employee's discipline history and years of service. (Tr. 80).

Ms. Powell also stated she cited case decisions in her submission to the public law board, and that none of them referenced Ms. Lynette Ross as a neutral member. She acknowledged JX-9 was the Complainant's public law board

decision, which she read. She stated she believed the public law board did not get anything wrong in its decision. (Tr. 81).

She further stated Respondent does not take Labor Relations lightly. Id. She agreed that employee disciplinary matters are serious, that employees' livelihoods are at stake, and that a public law board decision can result in an employee remaining employed or being unemployed. Ms. Powell asserted she does not regard arbitration as a trivial matter, and she also stated the unions do not take arbitration of discipline lightly. She agreed that arbitration of discipline is a substantial right afforded the employee, and that employees do not treat arbitration of discipline lightly. (Tr. 82).

Moreover, she stated she has received whistleblower training while employed by Respondent. Id. She averred that based on her training, she understands that it is unlawful to take adverse action against employees who engage in protected activity. She also understands that it is unlawful to take adverse action against employees that file whistleblower complaints. Ms. Powell thought it was a possibility that a reasonable employee may be dissuaded from engaging in protected activity if he believed the protected activity could be used against him at arbitration. She further indicated that once she learned about the issue surrounding the reference of the 2012 workplace violence incident in Complainant's file, she did not take any steps to resolve the matter. She was unaware if anyone took steps to resolve the issue. (Tr. 83). She also stated she did not know if the 2012 workplace violence incident was still in Complainant's record. (Tr. 84).

On cross-examination, Ms. Powell testified that she drafted approximately 500 submissions regarding appeals because few are withdrawn or resolved in advance. She stated when drafting a submission she relies upon the transcript, the employee's record, the employee's years of service, and supporting awards to bolster her argument. Additionally, Labor Relations considers whether the rule(s) was applied appropriately and consistently with the policy in effect. Id. At the time of Complainant's matter, there were two policies in effect. She explained that there was the upgrade policy concerning the different levels of discipline and the diversion program called the "Safety Intervention Program." The employee had the option of selecting either the upgrade program or the intervention program. (Tr. 85). The intervention program called violations triggering events, and after the third, the employee would be subject to dismissal. (Tr. 86).

Ms. Powell explained that a dismissal submission would be based on attendance or rule violation. Regardless of the type, the employee's work history is included. When she included Complainant's work history in her submission, she was attempting to establish the years of service, the number of discipline events over his career, which could suggest problems complying with rules or that the employee complies with rules. Additionally, the submission in dismissal cases is to establish whether an employee has a history of violating rules regardless of whether it is during their retention. (Tr. 87).

She acknowledged that she was involved in Complainant's appeal regarding his termination. She also acknowledged that she was involved in the Complainant's April 2014 rule violation. She did not believe she was involved in the 2012 workplace violence incident. Ms. Powell averred that her August 29, 2016 submission relied upon the record from the investigative hearing that occurred October 15, 2014. (Tr. 90). She believed it was most likely that she spoke with General Chairman Simpson when drafting her submission; however, she could not specifically recall discussing Complainant's case. She also did not recollect speaking with Mr. Simpson about the workplace violence incident. She did not believe Mr. Simpson ever mentioned Complainant's whistleblower lawsuit or the settlement agreement. She further indicated she did not discuss her submission with the Law department. On rare occasions she does consult with the Law department, for instance, when she is aware of an ongoing case in their department. She also stated she was unaware of Complainant's prior whistleblower lawsuit against Respondent. (Tr. 91). She stated it was possible that she spoke with her boss about Complainant's case because the key train issue was and still is an important case. (Tr. 92).

She explained the rule violation concerning the key train was also a "decertificable event," and that it could have been appealed under the Locomotive Engineer Review Board, which is distinct from its discipline appeal process. This board considers license revocation. She noted carriers had lost cases in relation to the key train issue because they have had some difficulty applying the rule. Some arbitrators have overturned the decision and others upheld it. Complainant's case was of greater importance because the decision could have gone either way. Id. She agreed that Respondent and Labor Relations had an interest in defining the rule better. (Tr. 93).

Ms. Powell testified that her submission to the public law board was broken up into three parts: (1) the merits of the case (2) the dismissal or level of discipline, and (3) the procedural areas the organization may have appealed. The majority of it addressed the rule violation and proof that Complainant violated the rule. Id.

She also stated her boss, Mr. Alan Lead, never mentioned Complainant's 2012 workplace violence incident, the whistleblower complaint, or the settlement agreement. She testified that she relied upon the computer system printout of Complainant's work history when drafting her submission. (Tr. 94).

She averred it was not her responsibility to expunge Complainant's 2012 workplace violence incident, and that she did not know whose responsibility it was. Id. She explained that if Labor Relations receives an unfavorable award directing an expungement, it is forwarded to the Southern Region Office. The office is advised to remove the incident from the employee's record. The record is changed according to the order. (Tr. 95).

She acknowledged that Ms. Ross's decision, JX-9, p. 7, denied Complainant's claim and, as a result, the dismissal was upheld. She indicated it was not her responsibility to contact the region and change Complainant's record, but Labor Relations was responsible for communicating the fact that the case was upheld. The region then places a notation in the record. Id.

She explained that Complainant was at a Level 4C on October 24, 2014, because she believed he was dismissed in May 2014 and later returned to work by leniency reinstatement at Level 4, with the retention period starting over. At that time, the record should have reflected a Level 4. The October 2014 incident equated to a Level 4; thus, according to policy, he was progressed out, meaning dismissal. Ms. Powell could not recall the facts surrounding the May 2014 violation, but she stated employees are sometimes offered reinstatement if the region vice president or superintendent, typically both, agree to it. She indicated the reinstatement has a retention attached. The employee has a choice to accept or not. (Tr. 96). If accepted, their record is updated, and if not accepted and an investigation has been done finding employee at fault, the discipline remains. (Tr. 96-97). If an investigation has not been conducted, then one will be. Ms. Powell stated Complainant returned to work at Level 4C based on the leniency accepted in

May 2014. She was unsure if he waived a hearing or if he had one. She further stated Complainant's probation would have ended twelve months from when he signed the waiver. (Tr. 97). In this case, he signed the waiver July 27, 2012, thus, the probation would have ended July 2013. She indicated the 2012 incident had no impact on his Level 5 discipline. (Tr. 98).

Ms. Powell also testified that she does not think the public law board's decision would have been different if the submission did not reference the 2012 incident, because Complainant had an extensive history of rule violations and a leniency that directly related to the progressive discipline of dismissal. She stated her argument would not have changed if the 2012 incident was removed from her submission; it would have had one fewer leniencies listed. (Tr. 99).

She indicated no one reviewed the submission prior to sending it to the public law board; submissions are reviewed by the Law department if specifically requested. (Tr. 100).

She further stated she had not met Complainant prior to receiving his appeal. She was unaware of any settlement agreements between Respondent and Complainant, of any safety reports, or of an OSHA complaint. Her submission was a part of the Labor Relations process and nothing personal. Id.

On re-cross examination, she stated RX-E, the timeline of events, did not include a notation about Complainant's favorable decision from the Department in December 2013 or the favorable decision from the ARB in May 2015. She agreed that even if the 2012 incident was removed from Complainant's work history, the other fourteen violations were substantial enough to support sustaining the termination. (Tr. 101). She stated the public law board's decision mentioned the two leniency reinstatements, and that Complainant entered the "Safety Intervention Program." (Tr. 102). She also averred the arbitrator noted the safety intervention triggering event, Rule 6.7. Ms. Powell also recognized the decision addressed Rule 1.6, conduct workplace violence; Rule 9.5, and Rule 6.7, remote control zone. (Tr. 103). She stated the public law board's decision "mentions the totality of his record" Although specific rules were highlighted, she believed the public law board considered the entire record. (Tr. 104). The paragraph, which speaks to the totality of the circumstances, according to Ms. Powell, was the conclusion of the decision. (Tr. 104-105). She stated there was a possibility the public law board could have reinstated an employee under these circumstances, and that a review of appeals

before the public law board is among the narrowest in the law. (Tr. 105).

She mentioned that at the Locomotive Engineer Review Board level, Respondent had been losing cases regarding the key train issue, more specifically, the decertification issue. The cases were fairly new in arbitration. Id. She further indicated that Respondent had lost cases before this board under "FRA." She explained that locomotive engineers had to be certified by their employer and pursuant to Part 242 of 49 C.F.R. If an engineer violates certain certification regulations, then the employer is obligated to decertify the employee. She stated the employer has the ability to combine the decertification proceeding with the collective bargaining agreement. As a result, there would be only one transcript. When charging the employee, it must be made known that decertification is possible. (Tr. 106). Based on her review of "Exhibit 6," p. 152, Complainant was not decertified. (Tr. 107).

Ms. Powell averred that if the public law board reinstates an employee back to work, it takes thirty days from the award to return the employee to work; however, it usually happens much sooner. Id. If Complainant would have received an award of reinstatement on December 7, 2016, he would have been back to work or in the process of returning on January 7, 2017. (Tr. 107-108).

On examination by the undersigned, Ms. Powell stated as of October 14, 2014, she believes the 2012 incident was part of Complainant's work history. The settlement was July 2015, which is when the 2012 incident should have been expunged. She further indicated she did not intend to retaliate against Complainant. She agreed the last employment decision against him was on October 24, 2014. Ms. Powell was uncertain as to why Mr. Gearen did not include decertification as part of his charge letter; however, she supposed it could have been because the speeding was below the "FRA." (Tr. 108).

Upon questioning by the undersigned, Ms. Powell testified that the Law department was responsible for determining the process for expunging Complainant's 2012 workplace violence incident. She also stated she was uncertain of the process, but she assumed someone would have directed either the region that maintains the record or Human Resources. (Tr. 109). Moreover, she testified that when she saw the litany of disciplinary actions in Complainant's record, she just read what was there, and she pulled the waivers. The information did not contain any

language with respect to a Decision and Order from an ALJ or administrative ruling or settlement agreement. (Tr. 110).

Stephen Simpson

Stephen Simpson also testified at the formal hearing, and stated he was currently employed by Respondent but was on leave of absence as a conductor. He stated he was a full-time employee with Smart Transportation Division, which is a labor organization. (Tr. 133).

He further testified that he began his railroad career working at the Missouri Pacific Railroad in September 1970 and, eventually, he quit in 1976 and began working on the Alaska Railroad. Then, he later worked at the "Lower 48" on the Cotton Belt Railroad and Southern Pacific Railroad in 1978. In 1987, he accepted a buyout and returned to school. He returned to the railroad industry in 1995, working for Southern Pacific Railroad. He believed Respondent merged or took over Southern Pacific Railroad in 1996 and, as a result, his employer was Respondent. Id.

Mr. Simpson indicated he was a member of a labor organization before working for the railroad industry, which was between his junior and senior year of high school. Id. When he worked construction, he was also a labor organization member. He stated he once was a member of the Brotherhood of Railway and Airline Clerks, which is non-existent now; the Brotherhood of Locomotive Engineers, which changed to Brotherhood of Locomotive Engineers and Trainman; and the United Transportation Union, which merged with Smart Transportation Division and is now Sheet Metal Air Rail Transit Transportation Division. (Tr. 134).

During his time as a labor organization member, he has held leadership positions. He currently is the general chairman, and he is over the general committee called Former Texas and Pacific. He represents approximately 1,600 employees with the majority being Respondent's employees. Id. He also stated he has "three short line railroads in Missouri, Arkansas, and Texas and all of these are elected positions." He stated he deals with "the discipline end" concerning his union members. He has participated in approximately 1,000 formal investigations as a union official. He also stated he has done arbitrations for nine and a half years, and he does more than 100 annually, so in short, he has done more than 1,000 arbitration hearings. (Tr. 135).

He testified that Complainant is a member of his union, and that he represented him at the formal investigation on October 15, 2014. Id. He stated after Complainant was terminated, the union was notified of the discipline agreement. The union appealed the decision to Labor Relations, and Labor Relations had the opportunity to cross-appeal. (Tr. 135-136).

Mr. Simpson acknowledged that within JX-8 was correspondence between the union and Labor Relations regarding Complainant's case. The correspondence discussed having Complainant reinstated. (Tr. 136).

He averred that if Labor Relations and the union cannot resolve the issue, then the matter is transferred to a public law board for arbitration. (Tr. 136-137). However, prior to the arbitration hearing before a public law board, the parties file submissions to the arbitrator. (Tr. 137).

He stated the first page of JX-8 was Respondent's submission. He further stated Complainant's 2012 workplace violence incident had not been addressed in connection with his termination prior to Respondent's submission or prior to receipt. Id. He acknowledged that JX-9 was the public law board's decision. Mr. Simpson indicated he learned of Complainant's whistleblower complaint regarding the 2012 incident after the fact. Once the public law board's decision was received, he and Complainant spoke, and Complainant told him about the incident. (Tr. 138).

He further testified that for purposes of arbitration, an individual is considered an employee up until the arbitrator rules. He explained that although the railroad may terminate an employee, the employee's record is maintained and the union handles everything until the matter is arbitrated. (Tr. 139).

Mr. Simpson indicated the public law board can make one of three rulings, which are as follows: (1) sustain the award and bring the employee back on with full pay and seniority rights; (2) sustain in part, meaning bring employee back on probation or bring back without pay; or (3) deny the claim. If the employee is charged with violating a rule, then a public law board would consider whether the employee violated the rule. In some instances, he stated the union may argue the merits of the case, and the issue of whether the employee was right or wrong may not be at issue. Id.

He indicated the Notice of Investigation states the hearing is to determine the facts as to what occurred on the date in question. A public law board determines what "should have happened" in a case. If a public law board finds the employee violated the rule, it considers the length of service, whether the discipline is appropriate based on the offense, and an employee's work history. It may also consider whether there were extenuating circumstances. (Tr. 140).

In Complainant's case, Mr. Simpson believes the public law board would have reinstated him if the 2012 workplace violence incident would not have been up for consideration. He believed Complainant had ten years of service, and that Complainant had an extenuating circumstance with regard to the FTX. He stated one manager opined it was standard, and the other said the opposite, "so it was a clerical error." He further stated he believes the union could have argued the case and, perhaps, won the case. He indicated arbitrators look at a Rule 1.6 violation with disdain. (Tr. 141). He further stated it is challenging to get the public law board to overrule the following three rules: Rule 1.5 for drugs and alcohol, Rule 2.21 for cell phones, and Rule 1.6, which includes, but is not limited to, workplace violence and insubordination. With regard to Complainant, the public law board's decision mentioned one Rule 1.6 violation. He stated "the other two listed . . . happened to be G-CORE rules." The decision neither mentioned a drug and alcohol violation nor a cell phone violation. (Tr. 142).

Mr. Simpson also stated public law board decisions do not have to be unanimous; only two out of three votes are required. Id. He stated if the neutral on the panel would have agreed to reinstate Complainant, then the union board member would have agreed to the same. He indicated the union does not treat labor relations issues lightly; he stated "people's lives and livelihoods hinge upon these [matters]." He also stated arbitration affects his membership because people lose wives, vehicles, and homes awaiting an arbitration decision; people go from employment to unemployment. (Tr. 143).

He testified that 75 percent of his work at the union is related to disciplinary matters. He stated his members believe the right to arbitrate is important. Id. He also indicated he was aware the whistleblower law states it is unlawful to take adverse action against an employee due to protected activity. Mr. Simpson believed an employee would be dissuaded from engaging in protected activity if he felt his protected activity could be used against him during arbitration. (Tr. 144).

He averred it takes twenty-four months for a case to go from the discipline phase to a public law board. He indicated that within the last five years, it has not been possible to get a case to arbitration within one hundred and eighty days. Id.

On cross-examination, Mr. Simpson stated an employee has the right to a formal investigation after discipline, which is a part of the collective bargaining agreement. (Tr. 144-145). He stated Complainant's collective bargaining agreement is with "BLET." In regard to Complainant's right to an investigation, Mr. Simpson averred he is entitled to union representation, the right to call witnesses, to cross examine witnesses, and to offer evidence. Complainant's investigation focused on his alleged rule violation. He stated at the time of the investigation Complainant was at a Level 4C due to an event in April 2014 when he ran a red signal. (Tr. 145).

He further stated that because of Complainant's Level 4C offense, he could have been terminated and, in fact, due to the discipline policy, an employee can be terminated for less. (Tr. 146-147). He indicated, "[t]hey make a policy. It's not a collective bargaining agreement." Furthermore, Mr. Simpson did not believe there was any mention of the 2012 workplace violence incident at the investigation. In addition, he did not think the Labor Relations department or Ms. Powell had any animosity against Complainant. He also did not believe animosity factored into Ms. Powell's submission when she included the 2012 workplace violence incident. He believed if the Labor Relations department had animosity against someone, it would have been against him, not Complainant. He opined the evidence presented at the formal investigation did not support Complainant's termination offense. (Tr. 147). He agreed, with respect to key trains, it is important to abide by the rules. He stated that in September 2014 Complainant did not receive a "readout from the detector," and that the train was carrying hydrous ammonia, which could create a danger. (Tr. 148).

On re-direct examination, Mr. Simpson testified that decertification was not referenced in JX-8, p. 152. He indicated that under the Federal Railroad Administration, Respondent would have had an obligation to report Complainant regarding a violation of a decertification regulation if it had any information of such. (Tr. 149). He testified that Complainant's incident in September 2014 was not a decertifiable event. (Tr. 150).

He also testified that Respondent elects whether to charge an employee with a rule violation. He averred one of Respondent's managers presides over the formal investigation hearing and acts as judge, jury, and prosecution. The presiding official rules on objections during testimony and the admissibility of evidence. He also stated there are no written rules of evidence that apply to formal investigations per se, and the charged employee is not allowed to be represented by an attorney at the formal investigation. Id. The presiding official over the hearing decides the extent of discipline. (Tr. 151).

On re-cross examination, Mr. Simpson stated the process of charging an employee and any interactions is based on a standard operating practice, but the time frame for charging an employee and the time frame for the hearing are outlined in the collective bargaining agreement. The collective bargaining agreement also addresses who qualifies as a hearing officer. Id. There is an agreement that the record from the formal investigation is subject to review. Following an appeal to Labor Relations, the record is subject to review by an arbitrator. (Tr. 152).

Upon subsequent questioning by Complainant's counsel, Mr. Simpson testified that since the formal investigation is controlled by Respondent, the right to arbitration is crucial because the arbitrator is neutral. Id.

When questioned by the undersigned, Mr. Simpson stated a person is considered an employee up until arbitration because he remains in the system and is updated by both parties regarding the matter. Once at arbitration, the arbitrator decides whether to bring the employee back or not. The collective bargaining agreement does not discuss whether the person is an employee or not while going through the process. (Tr. 153). Mr. Simpson also stated he was not aware whether Respondent's policy states the employee remains on payroll. (Tr. 154).

He further stated he represented Complainant before the public law board along with the alternate vice president of the Smart Transportation Division. He also stated he reviewed Respondent's submission prior to the public law board. Id. However, when reviewing the submission, he paid less attention to the workplace violence incident along with the other prior incidents. (Tr. 155).

Other Evidence

Complainant's Deposition

Mr. Leiva was deposed on June 27, 2017. He deposed that he was born on February 19, 1968, in Honduras. (RX-A, p. 4). He currently lives in San Antonio, Texas, and was employed by Domino's Pizza beginning September 2016. In October 2016, he was a delivery person for Jason's Deli, which ended in November. (RX-A, p. 5). He deposed his employment ended with Respondent on October 24, 2014. Complainant also deposed that in October 2014 he worked at a railroad called Timber Rock, which was a small railroad out of Silsbee, Texas. He stated he was hired as an engineer but was used as a brakeman. (RX-A, p. 6). He believed he worked for this railroad for two months. (RX-A, pp. 6-7). He quit because the railroad did not utilize him as an engineer. After this job, he began working for Domino's Pizza. (RX-A, pp. 8-9).

Complainant indicated he has applied for several jobs following his termination; however, he stated no one wants to give him a chance. Id. He stated he has applied for several jobs, for instance, Amtrak, BNSF, KCS, short line railroads in San Antonio, a railroad company affiliated with the Army, "FRA," and other government jobs. He stated he has retained a copy of his applications. (RX-A, p. 9).

Moreover, Complainant deposed that in 2012 he was charged with a disciplinary violation regarding workplace violence. (RX-A, pp. 9-10). In response, Complainant signed a waiver; however, after doing so, he felt it was not the appropriate action to have taken. Thus, he filed a whistleblower claim, and then there was a later settlement that required the disciplinary violation be expunged from his record. (RX-A, p. 10). Complainant stated he believed the settlement followed his termination with Respondent. (RX-A, p. 12).

He further averred that in May 2014 he was charged with a violation for failing to stop in which he received a ninety day suspension and later returned to work on July 14, 2014. Id. He deposed that in September 2014, he was involved in an incident where he failed to receive an exit message from a detector on the Beaumont Subdivision Milepost 444.6. (RX-A, p. 13). He deposed that he complied with the rules per the "G code," and

that Respondent alleged he stopped the train but not immediately. As a result of the violation, he went through a hearing in October 2014. (RX-A, p. 14). Following the hearing, Respondent found he did not stop the train immediately, and it dismissed the rules compliance. Nevertheless, Respondent found him to be in violation of a safety rule. Consequently, Complainant appealed the decision to the public law board through the assistance of the union. (RX-A, p. 15). He stated an appeal is done automatically if an award is not received or reinstatement is not granted. (RX-A, pp. 15-16).

He averred he was notified by Scott Chelette, a union representative, that an appeal was in progress. Complainant stated he was with "UTU," which is now referred to as "SMART." (RX-A, p. 17). When issues arose, he would call Scott. He believed Scott made him aware of the appeal shortly after receiving the termination letter from Respondent. He stated he never saw any paperwork filed on his behalf in relation to the appeal. (RX-A, p. 18).

In addition, Complainant deposed that his Complaint is a result of his protected activity in 2012, which was settled in 2015 whereby Respondent was not supposed to use certain information against him with regard to future promotions or termination or send to any potential employers. (RX-A, p. 20). However, Respondent alleged he was involved in workplace violence and communicated that to the "Labor Board." In short, Complainant stated Respondent told the "Labor Board" not to give him his job back because he is a violent person. (RX-A, p. 21).

He also acknowledged that the 2012 workplace violence incident was not referenced during his formal investigation hearing. (RX-A, p. 22). Nevertheless, Complainant stated, "they didn't want to see my side of why I stopped the train a few miles after it was supposed to." He felt his termination was a form of retaliation as a result of the workplace violence incident. (RX-A, p. 23). He stated, "he felt that they felt threatened, I guess, because they had a cop outside the office watching me," which he had never experienced in his twelve years. (RX-A, pp. 23-24). He believed this was also a form of intimidation. (RX-A, p. 25).

When posed with the question, "So who is it that you feel has retaliated against you at Union Pacific?," Complainant stated Jason Jenkins, Jimmy Carter, and Jeremy Lorange, who were witnesses at his OALJ hearing in 2013. Id. Then he stated the two managers that were involved in his firing, Mr. Gearen and

Mr. Mewis. (RX-A, pp. 25-26). He indicated Ms. Hogg was their immediate supervisor, and her boss was Mr. Chappell. Complainant asserted, "these people were all involved in my firing and they all retaliated." He further deposed the act of retaliation also consisted of his call to the EEO in Omaha to report Mr. Gearen, who he alleged was harassing him and making allegations. He stated the first lawsuit in 2012 was the first act of retaliation. (RX-A, p. 27). When Mr. Gearen alleged he did not set ten pounds of air on a train was another instance of retaliation, according to Complainant. (RX-A, pp. 27-28). He stated Mr. Gearen told him he was going to send him to training as a result of this incident, but he never did. Instead, he decided to place the incident in the system. He averred Mr. Gearen never told him he did this in retaliation. (RX-A, p. 28). He also stated that in 2012 when a train derailed, he was the only individual written up, although there were others on the train. (RX-A, pp. 28-29). He also averred he was the only employee disciplined for entering a remote control zone without asking for permission, which was a violation listed in the "Labor Board's" decision. He stated the other employee involved was transferred. (RX-A, p. 29).

Moreover, Complainant deposed Mr. Frater had knowledge of his protected activity in 2012. (RX-A, pp. 29-30). At that time, Complainant's manager was Ivan Corona, who he talked to first about the incident. Jeremy Lorange was the "MOP" for the section of track/subdivision in 2012. Tom Lischer was the superintendent for the Houston Service Unit in 2012, and Jimmy Carter was a manager during that time. (RX-A, p. 31). All of these individuals had knowledge of his protected activity. He indicated Mr. Gearen, Mr. Mewis, and Mr. Chappell could have been told about the 2012 incident by other managers in the same service unit, and that these people would have told Mr. Lischer. However, he indicated he did not know what these managers were told. (RX-A, p. 32). He also stated Mr. Gearen was his "MOP" in regard to the 2014 disciplinary action that led to the termination. (RX-A, p. 33). M.K. Guidry was the hearing officer of the investigation, and R.D. Dumas was a union representative along with C.W. Redden. (RX-A, pp. 33-34). Mr. Mewis was a witness at the 2014 investigative hearing, R.A. Martinez was the conductor during the September 2014 incident, and Jamal Chappell was the superintendent for the Livonia Service Unit. (RX-A, p. 34). Mr. Chappell signed off on Complainant's termination. (RX-A, p. 35). Complainant stated the current retaliation is Respondent mentioning the 2012 incident to the public law board. (RX-A, p. 33).

He indicated he learned his termination would be appealed after October 24, 2014, but before October 2015. (RX-A, pp. 35-37). If he did not want to appeal, he could have informed the union, which was acting on his behalf (as a representative) in the appeal. He stated he would call Mr. Chelette from time to time, perhaps, every two months or so to receive a status update. When six months passed, Mr. Chelette told Complainant how backlogged the "Board" was. (RX-A, p. 37). He indicated he was the one that always initiated the call. (RX-A, p. 38). He discovered the appeal was still before the "Board" because he called the union's national office and spoke with a high-level official. (RX-A, p. 41). He averred a secretary at the union's national office accessed his file when he called. (RX-A, p. 42).

He further stated he might have received the decision from the public law board on December 20, 2016, but he really could not recall. (RX-A, pp. 38-39.) The union mailed him a copy of the decision, which was received after he returned from Honduras. (RX-A, p. 39). He indicated he never received a copy of the pleadings filed by either Respondent or the union. All Complainant was aware of was the fact that the appeal was filed. (RX-A, p. 40). He later indicated he never requested from either the union or Respondent any information submitted by either party. (RX-A, p. 43).

Complainant also deposed that in his Complaint he has alleged damages, such as loss of earnings since his termination in 2014. Id. He stated at the time of his termination, he was earning approximately \$9,000 per month (gross). He also alleges he suffered emotional distress because of the decision and, thus, sought treatment because he has been depressed. He stated Dr. Moriantes referred him to a psychiatrist. (RX-A, p. 44). However, he is not currently seeing a mental health professional because the VA has to approve it. (RX-A, pp. 45-46). He stated Dr. Moriantes has prescribed medication to treat depression/anxiety, which he takes. (RX-A, p. 46). He began taking this medication following his termination because he lost everything in his life, such as his family, car, and house. He is also in debt. He explained that his divorce was finalized June 1, 2014; however, they separated January 2014. Lastly, he acknowledged that he continued to work for Respondent from 2012 up until his termination in October 2014. (RX-A, pp. 47-48).

Notice of Investigation

On September 24, 2014, a Notice of Investigation was issued to Complainant. He was charged with failing to receive an exit message from a detector at Milepost 444.6 and, subsequently, failed to control the speed of the key train since he did not immediately stop and continued to travel five additional miles. The proposed discipline for the offense was a Level 5. The notice explained the offense was a Level 4, but since Complainant committed another violation at Level 4/4D/4C within the time frame specified in the retention table, the discipline increased to a Level 5. At that time, Complainant was withheld from service pending the results from the formal investigation. (JX-6, p. 152; RX-C, p. 1).

Notification of Discipline Assessed

On October 24, 2014, Respondent issued a notification, stating that after consideration of the evidence received during the formal investigation hearing on October 15, 2014, Complainant's charges were sustained. As a result, under the upgrade progressive discipline table, his previous Level 4 violation along with the current Level 4 violation equated to a Level 5 violation. Consequently, Complainant was dismissed from service. (JX-7).

Carrier's Submission to Public Law Board

Within Respondent's submission to the public law board, it addressed the violation that triggered Complainant's termination and the formal investigation process. (JX-8, p. 4). Respondent stressed to the public law board that it provided substantial evidence of Complainant's culpability, and that the discipline assessed was warranted. (JX-8, pp. 5-8). Additionally, Respondent stated the discipline was also reasonable and consistent with its policy. In arguing this point, Respondent highlighted Complainant's disciplinary history. In fact, Respondent stated, "[Complainant] is no stranger to the discipline policy. [Complainant] committed multiple infractions throughout his career." The following are a list of his discipline events:

- 1/25/2005 - Formal Coaching
- 1/27/2005 - Waived hearing at Level 3 for Rule 7.6
- 5/17/2005 - Waived hearing Level 3 for Rule 81.4.2
- 4/10/2006 - First Offense Attendance

- 6/15/2007 - Level 4 for Rules 2.6, 5.3.7
- 10/21/2008 - Level 3 for Rule 81.5.4
- 5/26/2010 - Waived Level 3 for Rule 7.1
- 7/27/2012 - Level 5 Rule 1.6 Workplace Violence
Returned by leniency agreement on July 27, 2012
- 10/18/2012 - Entered the SIP program for Rule 6.7
- 12/20/2013 - Formal Conference
- 4/8/2013 - Formal Coaching
- 5/3/2013 - First Offense Attendance
- 9/25/2013 - PIT for Rule 6.5
- 5/12/2014 - Level 5 for Rule 9.5 Returned by leniency agreement on May 14, 2014
- 10/24/2014 - Current Dismissal

(JX-8, pp. 10-11). Furthermore, Respondent indicated Complainant's discipline was determined based on its discipline policy, which is "progressive in nature." Respondent urged the public law board to uphold the discipline. Respondent wrote, "[a]s can be seen by the above-cited Awards, [Respondent] was within its right to assess a Level (permanent dismissal) and such discipline was both reasonable and consistent with company policy." (JX-8, p. 12). It also indicated there were no procedural errors that would warrant voiding the discipline. (JX-8, pp. 12-13).

Also attached was Carrier's Exhibit C, which was Claimant's discipline record. (JX-8, p. 4).

Public Law Board No. 6932 Decision

On December 7, 2016, Public Law Board No. 6932 issued its decision in regard to Complainant's appeal of termination. The Board indicated Complainant requested reinstatement to service and pay for lost wages. The basis of the appeal was Complainant's continued operation of the train after failing to receive an exit message. Under the Findings and Opinions section, the Board stated its decision was based on the "whole record and all the evidence." (JX-9, p. 1). The Board outlined the procedural history of the case and the facts surrounding the incident on September 18, 2014. (JX-9, pp. 1-6). In the last paragraph of the decision, the Board addressed "the quantum of discipline imposed." The Board understood that in accordance with the upgrade discipline policy in effect at the time, the proposed sanction for a Rule 6.31 violation was Level 4 discipline. Additionally, the Board highlighted certain

violations found within Respondent's submission to the Board. In particular, the Board addressed a Rule 1.6, Conduct; Workplace Violence violation, which was a Level 5 dismissal that was modified to a leniency reinstatement on July 27, 2012; and a second leniency reinstatement on May 14, 2014, following his dismissal for a Level 4C violation for a Rule 9.5 violation, Where Stop Must be Made. The Board also noted Complainant entered the "Safety Intervention Process" on October 18, 2012; thus, he was permitted to receive additional training in lieu of discipline for a Rule 6.7 violation, Remote Control Zone. Based on the totality of the record, the Board held there was no reason to disturb the discipline, which was "neither arbitrary nor excessive under the circumstances" because the Board found Respondent's action was warranted. The Board denied Complainant's claim. (JX-9, p. 7).

Complainant's 2014 Wage and Tax Statement

For the 2014 fiscal year, Complainant earned \$61,103.12 in wages, tips, and other compensation. He had \$8,982.04 in federal taxes withheld. (CX-18).

Union Pacific Railroad Policy and Procedures for Ensuring Rules Compliance

Under Numbered item 8, it states:

Current [d]iscipline [s]tatus corresponds to the most recent level of discipline assessed, begins with the date of the incident prompting the disciplinary action, and remains the status for the retention period specified below. If there is no further disciplinary action within the retention period specified, the status reverts to Level 0 for future reference.

(CX-10, p. 4).

RETENTION PERIOD TABLE (MONTHS)		
Level	Waiver	Hearing
2	9	12
3	12	18
4	18	24
4C	18	24
4D	18	24

Note 1: Employees who are assessed Level 4 by virtue of a single incident will have their status reduced to Level 3 after a 6-month period from the date of the incident if there is no further disciplinary action during that period. However, if an employee commits two Level 4/4C/4D infractions under this policy, within the months specified in the retention table for a Level 4/4C/4D, the discipline will be assessed at Level 5. Incident briefing with manager must accompany reduced retention period for 4C or 4D waiver.

(CX-10, p. 5).

IV. ISSUES

1. Did Complainant suffer any adverse, unfavorable action?
2. Was Complainant's alleged protected activity a contributing factor in the alleged adverse, unfavorable personnel action?
3. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?
4. Damages, to include reinstatement, back pay, compensatory damages, other relief, and punitive damages.
5. Attorney's fees and interest.

V. CONTENTIONS OF THE PARTIES

Complainant contends, and Respondent has not disputed, that he engaged in protected activity. He asserts he suffered two separate unfavorable personnel actions:

- (1) Respondent's false allegation (statement) to the public law board regarding Complainant's 2012 workplace violence incident, and
- (2) Respondent's continued maintenance of the alleged 2012 workplace violence discipline in Complainant's personnel file

through June 23, 2017.⁴ Complainant argues his Complaint was timely filed within 180 days of the adverse action(s) under several theories.⁵ First, Complainant argues that **"each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice."** National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (emphasis added). Furthermore, **"[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.** The charge, therefore, must be filed within the [allowed] time period after the discrete discriminatory act occurred." Id. at 113. Here, Complainant asserts the Complaint was filed within 180 days of Respondent's submission to the public law board on August 29, 2016. Additionally, Complainant argues the Complaint was timely filed under the continuing violation theory because the 2012 incident remained in Complainant's personnel file until June 23, 2017. Lastly, Complainant argues the Complaint was timely filed under equitable tolling because "extraordinary circumstances and affirmative misrepresentations" prevented him from pursuing his rights.

Complainant also contends he is an employee covered by the FRSA as stated in 29 C.F.R. § 1982.10(d) because it addresses individuals that formerly worked for a railroad carrier. Furthermore, Complainant argues he is also an employee for the purpose of the FRSA because whistleblower statutes apply to former employees when the adverse action arises out of the employment relationship. Next, Complainant contends he was an employee within the meaning of the RLA, as a matter of law, when the false statement was made to the public law board because the United States Supreme Court and the Fifth Circuit have ruled former employees remain "employees" under the RLA and remain in this status subject to the mandatory arbitration provision. Lastly, Complainant argues he is covered under the FRSA because the United States Supreme Court and Fifth Circuit have held

⁴ In Complainant's brief, he alleged the following adverse actions: (1) his termination on October 27, 2014; (2) the communication of the 2012 workplace violence incident to the public law board; and (3) the reliance by the public law board on Respondent's allegation that Complainant engaged in workplace violence in 2012 when denying his claim. ALJX-1. Here, I find that since Complainant did not file an amended Complaint with the undersigned, I shall consider the allegations addressed in the Complaint rather than the brief.

⁵ In Complainant's Complaint, he argued his Complaint was timely filed because it was filed within 180 days of the alleged adverse actions and/or because it was filed within 180 days of Complainant discovering his 2012 protected activity was a contributing factor in the adverse actions alleged. Id.

anti-retaliation provisions cover former employees, such as Complainant.

Additionally, Complainant argues the protected activity and adverse actions are inextricably intertwined or that the chain of events contributed to the adverse action; thus, causation is established. Nevertheless, Complainant acknowledges an employer's knowledge can be a factor considered in the causation analysis.

He further contends Respondent failed to plead the "same action" defense; thus, it is waived. Even if considered, Complainant argues Respondent could not produce clear and convincing evidence that the adverse actions would have occurred regardless of the protected activity.

With regard to damages, Complainant seeks back pay in the amount of \$123,266. Complainant contends he was without pay for 422 calendar days up until January 7, 2017. In addition, Complainant seeks an order directing Respondent to reinstate him to his prior position with Respondent. He also seeks an order directing Respondent expunge from its personnel and labor relations record any negative references concerning the matter that forms the basis of the Complaint. Complainant further seeks punitive damages in the amount of \$250,000 to deter Respondent from "flagrantly violating and ignoring DOL's future orders." He also seeks compensatory damages due to emotional distress in the amount of \$100,000, which he suffered as a result of the financial strain of his termination. Lastly, he seeks post-judgment interest, attorney's fees, and litigation expenses.

Respondent, on the other hand, contends Complainant's Complaint is untimely, and that equitable tolling (or equitable estoppel) does not apply. In addition, Respondent argues the submission to the public law board was not a discrete act because the award was **"itself not the product of any cognizable FRSA violation."** Respondent also argues Complainant's termination and the reference to the 2012 incident in the public law board submission were not continuing acts of retaliation. Respondent argues that since the Court agreed that Complainant's termination triggered the 180 day limitations period, the submission to the public law board cannot "reset the clock because that reference itself did not run afoul of the FRSA."

Respondent further contends Complainant failed to prove the 2012 report of workplace violence factored into his dismissal

from service. In support of this contention, Respondent asserts that no one connected with the most recent discipline was cognizant of the 2012 workplace violence incident. In fact, Respondent argues it was ignorant of the fact that the 2012 incident remained in Complainant's personnel file, which it categorized as a "harmless error." In addition, Respondent avers that temporal proximity cannot be established because years separated the 2012 incident and Complainant's termination. Respondent also contends the public law board's decision to uphold Complainant's termination was substantiated by Complainant's safety violations and lengthy discipline history. Lastly, Respondent argues that Complainant's rule violations in 2014 constitute independent, intervening events that break any causal link between the 2012 incident and his termination. Alternatively, Respondent argues it has proven by clear and convincing evidence that it would have discharged Complainant even in the absence of his protected activity.⁶

VI. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA § 20109(a)(1), which provides:⁷

(a) In General-A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee

⁶ In Respondent's Answer, it contended its affirmative defenses were (1) that Complainant did not file his complaint within 180 days of the alleged violation, and (2) Complainant failed to state a claim upon which relief can be granted because Respondent did not take any adverse employment action against Complainant due, in whole or in part, to any protected activity by Complainant as defined by the FRSA. ALJX-1. Here, similar to Complainant, since Respondent did not file an amended Answer, I shall consider the affirmative defenses addressed in the Complaint versus its brief.

⁷ In Complainant's brief, he alleges Respondent violated FRSA § 20109(a)(1) and (4) and (b)(1)(A). Here, I shall only consider the provision stated in the Complaint.

reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

49 U.S.C. § 20109(a)(1)(C)(2008).

VII. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). See 49 U.S.C. § 20109(d)(2)(A)(i).

Initially, to maintain a 49 U.S.C. § 20109 claim, the complainant must demonstrate the respondent is subject to the Act and that the complainant is a covered employee under the Act. See § 20109(d)(2)(A)(i). In view of the undisputed facts noted above, it is found that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainant was a covered employee of Respondent under the FRSA as discussed herein below. No evidence to the contrary was introduced at the hearing.

Pursuant to 49 U.S.C. §§ 20109(a)(4), the ARB set forth a "two-step burden-of-proof framework" that must be applied to actions not only arising under AIR-21, but also the FRSA and related whistleblower provisions with the same burden-of-proof framework. Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15-16 (ARB Sept. 30, 2016) (en banc); 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). The first step requires that an FRSA complainant demonstrate: **(1) he or she engaged in a protected activity, as statutorily defined; (2) he or she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable**

personnel action.⁸ See Palmer, supra, slip op. at 16, n. 74; see also 49 U.S.C. § 42121(b)(2)(B)(iii); Johnson v. BNSF Ry. Co., ARB No. 14-083, ALJ No. 2013-FRS-059, slip op. at 3 (ARB June 1, 2016) (acknowledging these three essential elements); Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 5 (ARB Nov. 24, 2015) (recognizing that the complainant has the burden of proving these elements); Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013) (to prevail, an FRSA complainant must establish these three elements by a preponderance of the evidence); Luder v. Cont'l Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." Palmer, supra, slip op. at 17; see Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Indus., Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence, however the evidence need not be "overwhelming" to satisfy the requirements set forth in 49 U.S.C. § 42121(b)(2)(B)(iii).⁹ Indeed, circumstantial evidence

⁸ In Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited a fourth element, the **employer's knowledge of the protected activity**. Id. slip op. at 3. The ARB acknowledged that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis; they are not always determinative factors. Id. (citing Staub v. Proctor, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation)); see Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

⁹ Notably, the Palmer court instructed ALJs not to use the phrase or concept of "**prima facie**" when analyzing the complainant's burden under step one of the AIR-21 test because § 42121(b)(2)(B)(iii) does not apply this term, and therefore, the term "demonstrate" in clause (iii), which means "proves," is not equivalent to establishing a "**prima facie**" case. Palmer, supra, slip op. at 20, n. 87.

is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). Moreover, when the fact-finder considers whether the complainant has proven a fact by a preponderance of the evidence "necessarily means to consider all the relevant, admissible evidence and . . . determine whether the party with the burden has proven that the fact is more likely than not." Palmer, supra, slip op. at 17-18.

Step-two of the test shifts the burden of proof to Respondent when Complainant establishes that Respondent violated the FRSA. Palmer, supra, slip op. at 22. As a result, Respondent may avoid liability only if it can prove by **clear and convincing evidence** that it would have taken the same unfavorable personnel action **in the absence of Complainant's protected behavior**.¹⁰ See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii), (iv); Menefee v. Tandem Transp. Corp., ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing Brune, ARB No. 04-037, slip op. at 13). The ARB noted the "clear and convincing" standard is rigorous and denotes a conclusive demonstration that "**the thing to be proved is highly probable or reasonably certain.**" Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB April 25, 2014) (emphasis added).

It is worth emphasizing that the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a complainant to satisfy than the McDonnell Douglas standard, and is thus more challenging for a respondent to overcome. Cf. Palmer, supra, slip op. at 26, n. 113 (holding that the McDonnell Douglas burden shifting process does not apply to the AIR-21 two-step test); see generally, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Among the reasons for this complainant-friendly standard is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that

¹⁰ In Palmer, the ARB characterized step two as the "same-action defense" rather than the "clear and convincing" defense, noting that the ARB, courts, and administrative law judges have commonly referred to step one as the "contributing factor" step, and step two as the "clear and convincing" step. In doing so, the ARB explained "the phrase 'same action defense' makes clear that step two asks a different factual question from step one--namely, would the employer have taken the same adverse action?--and is not simply the same question [as step one] with the heavier 'clear and convincing' burden imposed upon employer." Palmer, supra, slip op. at 22.

harassment of employees who reported injuries is a common railroad management practice. One of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. Although many railroad companies have since changed this system, a culture of retaliation for reporting injuries unfortunately still lingers in some instances. Araujo, supra.

In view of the undisputed facts noted above, it is found that Respondent is a person within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. However, whether Complainant is covered under the FRSA is a matter of contention.

Under 49 U.S.C. § 20109(d)(1), it provides:

An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provision of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor.

Under 29 C.F.R. § 1982.101(d), OSHA for the purposes of The National Transit Systems Security Act and The Federal Railroad Safety Act defines "employee" as "an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a public transportation agency or a railroad carrier, or a contractor or subcontractor of a public transportation agency or railroad carrier."

Here, it is uncontested that Complainant was terminated from service on October 24, 2014. Therefore, I find and conclude as of October 24, 2014, Complainant was a former employee of Respondent's as defined under § 1982.101(d) for the purposes of his 2017 FRS Complaint.

In furtherance of this holding, the undersigned also looked to precedent concerning AIR-21 and precedent governing Title VII since these are sources of interpretive authority in construing the FRSA; each will be discussed in turn.

Under 49 U.S.C. § 20109(d)(2)(A), it states, “[a]ny action under [this provision] shall be governed under the rules and procedures set forth in section 42121(B) . . . ,” meaning the rules and procedures of AIR-21 are incorporated into FRSA’s enforcement provision. As a consequence, the undersigned has considered how courts have determined whether a “former employee” under AIR-21 has standing to bring a cause of action before the court.

In Peck v. Safe Air Int’l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 13 (ARB Jan. 30, 2004), the ARB highlights the fact that OSHA under 29 C.F.R. § 1979.101 defines “employee” as “an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.” Based on this definition, the ARB concluded coverage under AIR-21 might extend to former employees contingent upon the factual circumstances of the alleged violation, such as blacklisting.

With regard to employment anti-retaliation provisions under Title VII, the majority of courts have held a former employee may be covered under an anti-retaliation provision “when the retaliatory act[] in reprisal . . . arises out of or is related to the employment relationship.”¹¹ See Charlton v. Paramus Bd. of Educ., 25 F.35 194, 198-200 (3rd Cir. 1994); Rutherford v. Am. Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977); Delcore v. Ne. Util., 1990-ERA-37 (Sec’y Mar. 24, 1995). Specifically, in cases concerning Title VII, the court has held “a strict and narrow interpretation of the word ‘employee’ to exclude former employees would undercut the obvious remedial purposes of Title VII.” Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988). Thus, courts have held that an individual may be considered an “employee” under an anti-retaliation provision when the person is currently a former employee that is subjected to post-employment blacklisting by their former employer. See, e.g., Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding former employer denied former employee of a “rare and prestigious” professional laurel in retaliation for filing

¹¹ In Burlington Northern & Santa Fe Railway Co., the United States Supreme Court broadened the scope of Title VII’s anti-retaliation provision to include acts that “extend beyond workplace-related or employment-related retaliatory acts and harm.” 126 S. Ct. 2405, 2414 (2006).

discrimination claim); Rutherford, 565 F.2d at 1164-65 (finding former employer hindered former employee's job search).

In this case, I find AIR-21 and the FRSA define "employee" essentially the same and, as a consequence, I find and conclude former employees, such as Complainant, can be covered under FRSA similarly to AIR-21. I also find Complainant is the type of individual (i.e., a former employee) that is meant to be covered under the FRSA, an anti-retaliation provision, because the act of submitting his personnel file to the public law board was related to his employment. Here, the public law board was to determine whether Complainant would be reinstated as an employee or whether his termination would be upheld.

Therefore, in consideration of 29 C.F.R. § 1982.101(d), AIR-21, and employment anti-retaliation provisions under Title VII, I find and conclude Complainant is an "employee" under the FRSA.

A. Statute of Limitations/Timeliness

An employee who alleges retaliation in violation of the FRSA must commence an action "by filing a complaint with the Secretary of Labor" within 180 days after the date on which the alleged violation occurred. 49 U.S.C. § 20109(d)(2)(A)(ii); Baker v. Union Pac. R.R. Co., ALJ No. 2016-FRS-079, slip op. at 4 (Dec. 23, 2016); see Jenkins, supra, slip op. at 6. The complaint must be filed with OSHA, can be filed orally or in writing, and if in writing and mailed, is effective as of the date postmarked. 29 C.F.R. § 1982.103.

The statute of limitations period in whistleblower cases, such as those claims falling under the FRSA, begins on the date that the employee is given final and unequivocal notice of the respondent's adverse employment decision. Udofot v. NASA/Goddard Space Ctr., ARB No. 10-027, ALJ No. 2009-CAA-007, slip op. at 4 (ARB Dec. 20, 2011). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change; "unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. Rollins v. Am. Airlines, Inc., ARB No. 04-140, Case No. 2004-AIR-009, slip op. at 2-3 (ARB Apr. 3, 2007). In other words, the limitations period begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights." Ross v. Fla. Power & Light Co., ARB No. 98-044, ALJ

No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999) (emphasis added); Phillips v. Leggett & Platt, Inc., 658 F.3d 452, 456 (5th Cir. 2011) (stating termination "is based upon an objective standard, focusing upon when the employee knew, or reasonably should have known, that the adverse employment decision had been made."); Turin v. Amtrust Financial Servs., Inc., ARB No. 11-062, ALJ No. 2010-SOX-018, slip op. at 6-7 (Mar. 29, 2013). The United States Supreme Court has held that the proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act became painful. Chardon v. Fernandez, 454 U.S. 6, 9, 102 S. Ct. 28 (1981); Del. State Coll. v. Ricks, 449 U.S. 250, 258, 101 S. Ct. 498 (1980); see, e.g., Snyder v. Wyeth Pharm., ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (Apr. 30, 2009); Udofot, supra, slip op. at 4.

In addition, the subsequent entertaining of a grievance by respondent does not suggest that the earlier decision was in any respect tentative, even if respondent expresses willingness to change its prior decision if the grievance is found to be meritorious. Ricks, supra at 261; see generally, Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 236-240 (1976). Rather, "[t]he grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Ricks, supra at 261 (emphasis added). Accordingly, during the pendency of a grievance or some form of collateral review of an employment decision, the statute of limitations is not tolled.¹² Id.; see Grimes v. BNSF Ry. Co., 746 F.3d 184 (5th Cir. 2014); see also Reed v. Norfolk S. Ry. Co., 740 F.3d 420, 425 (7th Cir. 2014); Kruse v. Norfolk S. Ry. Co., ARB Nos. 12-081, 12-106, ALJ No. 2011-FRS-022, slip op. at 5 (ARB Jan. 28, 2014); Snyder, supra, slip op. at 10.

In the undersigned's "Order Denying Motions for Summary Decisions," I found as follows:

¹² Notably, the applicability of FRSA's election of remedies provision to an arbitration brought pursuant to the employee's collective bargaining agreement under the RLA was decided by the Board in the consolidated cases of Koger v. Norfolk Southern Railway Company and Mercier v. Union Pacific Railroad, ARB Nos. 09-101, 09-121, 2011 WL 4889278 (ARB Sept. 29, 2011). The Board concluded that FRSA's election of remedies provision permits a whistleblower claim to proceed notwithstanding the employee's pursuit of a grievance or arbitration under a collective bargaining agreement. Id., slip op. at 8. Likewise, other United States Circuit Courts of Appeals have reached the same conclusion. See Norfolk S. Ry. Co. v. Perez, 778 F.3d 507 (6th Cir. 2015); Grimes v. BNSF Ry. Co., 746 F.3d 184 (5th Cir. 2014); Reed v. Norfolk S. Ry. Co., 740 F.3d 420 (7th Cir. 2014).

Based on the foregoing undisputed facts and the applicable law concerning the statute of limitations, the 180-day statutory period commenced on October 24, 2014, and tolled on or about April 22, 2015. Moreover, as a matter of law, the union's appeal (on Claimant's behalf) to the PLB to review Respondent's decision to terminate Complainant's employment did not toll the 180-day statutory period. Ricks, supra at 261; see Grimes, supra. Thus, Complainant's February 15, 2017 complaint is well beyond the permissible period for a timely FRSA complaint.

Moreover, the United States Supreme Court has held "each discrete discriminatory act starts a new clock for filing charges alleging that act." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (June 10, 2002). Discrete acts include but are not limited to termination, failure to promote, denial of transfer, or refusal to hire. The Court further concluded, "each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" The discrete act, whether discriminatory or retaliatory, occurs the day in which it happened. Morgan, 536 U.S. at 110. As a result, a party must file a charge within the statutory limitations period of the act or lose its ability to recover. Id.

The Court has also held that the continuing violation theory (or doctrine) does not apply to discrete acts. Morgan, 536 U.S. at 113-15. If time barred, discrete acts are not actionable, even when they are related to acts alleged in timely filed charges. Morgan, 536 U.S. at 113. Actions which take place within the timely filing period are actionable, whereas prior discrete discriminatory acts are untimely filed and no longer actionable. Morgan, 536 U.S. at 114-15. The continuing violation doctrine "forestalls the commencement of the limitations period for as long as the continuing violation is ongoing." Woods v. Boeing-South Carolina, ARB No. 13-035, ALJ No. 2011-AIR-00009, slip op. at n. 3 (ARB Mar. 20, 2014) (citing Garn v. Benchmark Techs, No. 1988-ERA-021, slip op. at 7 (Sec'y Sept. 25, 1990)). Thus, the statute of limitations does not commence until the continuing violation has ceased. Sweatt v. Union Pac. R.R. Co., No. 14-CV-7891, 2016 WL 128036, at *3 (N.D. Ill. Jan. 12, 2016), aff'd, 678 F. App'x 423 (7th Cir. 2017).

In this present matter, Complainant alleges two additional adverse employment actions in his Complaint: (1) Respondent's advising the public law board in its submission that Complainant engaged in workplace violence in 2012, and (2) the public law board's reliance upon Respondent's allegation that Complainant engaged in workplace violence in 2012 when denying his claim.

Here, beginning with the first allegation of an adverse action, I find Complainant timely filed his Complaint. In this instance, Complainant's disciplinary history, which included the 2012 workplace violence incident along with fourteen other disciplinary incidents, was submitted to the public law board on August 29, 2016, and was one of three incidents mentioned in the public law board's decision issued on December 7, 2016. Because the incident remained in Complainant's personnel file, it was a continuing violation from 2012 when it was originally placed in his file. When the adverse action was committed in 2012, Complainant received "final" and "unequivocal" notice of it. Furthermore, Complainant filed his OSHA complaint on February 15, 2017; therefore, the statute of limitations period was forestalled while the violation persisted. The statute of limitations period did not begin to run until June 23, 2017, when the incident was expunged from Complainant's file. However, since Complainant filed his Complaint before the statute of limitations began to run, I find and conclude the Complaint was timely filed.

With regard to the second allegation of an adverse action, I find Complainant assails the public law board for relying upon the 2012 workplace violence incident. However, this present matter is not against the public law board, an independent body that is not before the undersigned as a party and how it chose to render its decision, but rather against Respondent.¹³

¹³ Under 45 U.S.C. § 153, (m) and (q), the findings of the arbitral panel (i.e., the public law board, adjustment board) are "conclusive of the parties" and the award is "final and binding" on the parties in the dispute governed by the Railway Labor Act. Consequently, I find that at the time Complainant received the public law board's decision, it was a "final" and "unequivocal" notice of Respondent's submission to the public law board and his termination. See generally Elgin J. & E. Ry. V. Burley, 325 U.S. 711, 723 (1945) (holding the interpretation of current labor/management contracts is considered a minor dispute under the Railway Labor Act. The minor dispute is subject to negotiation, and if an agreement cannot be reached, then **binding** arbitration occurs. 325 U.S. at 724-27.). I find that if Complainant had an issue with the public law board's reliance upon information that it should not have had, then the appropriate remedy was to return to arbitration. See Bhd. of Locomotive Engineers v. St. Louis Sw. Ry. Co., 757 F.2d 656, 661-62 (5th Cir. 1985) (holding that if the union believed employer had engaged in misconduct to compromise or destroy the grievance-

Therefore, I find and conclude Respondent is not the proper party against which to allege this adverse action and, as a result, I shall not consider this adverse action alleged by Complainant.

Moreover, as outlined in the post-hearing briefs of the parties, the issue to be decided is whether Complainant's reporting of the workplace violence incident in 2012 was a contributing factor in Respondent's decision to advise the public law board of the 2012 workplace violence discipline, which it relied upon in denying Complainant's appeal.

B. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Ind. Metal Prod. v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an ALJ is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir.

arbitration process, the appropriate remedy was to return to arbitration, and if the collective bargaining agreement had been violated, the arbitrators would determine the appropriate remedy).

1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found the testimony of the witnesses at the hearing to be credible. Specifically, I found Complainant's testimony to be consistent and credible, both at the hearing and during the investigation. I also found Complainant's demeanor while testifying before me to be persuasive and sincere.

With regard to Mr. Gearen, Mr. Chappell, Mr. Simpson, and Ms. Powell, I found their testimony to be sincere, unbiased, and credible. I found their demeanor while testifying before me to be persuasive.

C. Protected Activity

By its terms, FRSA defines protected activities as including acts done "to provide information regarding any conduct which the employee **reasonably believes** constitutes a violation of any Federal law, rule or regulation relating to railroad safety . . . to a person with supervisory authority over the employee" or "to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee." 49 U.S.C. § 20109(a)(1) and (4) (emphasis added).

As previously noted, it is uncontested by the parties that Complainant engaged in protected activity as set forth in ALJ Kennington's Decision and Order issued on December 2, 2013.

D. Alleged Unfavorable Personnel Action

By its terms, 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 Respondent of a work-related illness, or denying,

delaying or interfering with Complainant's request for medical treatment or care. See generally 49 U.S.C. § 20109.

In determining whether the alleged conduct is an unfavorable personnel action, the United States Supreme Court's Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006), decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the Department, including AIR-21, incorporated into the FRSA. Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ No. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, 548 U.S. at 57.

In this case, I find the alleged unfavorable personnel action is the same action noted in ALJ Kennington's Decision and Order issued December 2, 2013 (i.e., the inclusion of the 2012 workplace violence incident in Complainant's file). Here, the 2012 incident remained in Complainant's file from 2012 until 2017 and was shared with the public law board upon which it specifically relied, in part, to deny Complainant's appeal. Respondent argues that "a lingering effect of an unlawful act is not itself an unlawful act" Dasgupta v. Univ. of Wis. Bd. of Regents, 121 F.3d 1138, 1140 (7th Cir. 1997). However, the submission to the public law board, which included the 2012 incident, was not merely a lingering effect; it was the same unlawful act from 2012. Consequently, I find and conclude Complainant has proven by a preponderance of the evidence that Respondent retaliated against him for engaging in protected activity because the adverse action, maintaining a reference in his personnel file of discipline, which should have been expunged, continued until 2017.

E. Contributing Factor

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. 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." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer, supra, slip op. at 53;

Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015). Essentially, the question is not whether the respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor which, alone or in connection with other factors, tends to affect in **any** way the decision to take an adverse action. Nevertheless, if the respondent claims the protected activity played **no role** whatsoever in the adverse action, the evidence of the respondent's non-retaliatory reasons for termination **must be considered alongside** the complainant's evidence in making such a determination. Palmer, supra, slip op. at 29, 55. On the other hand, the fact-finder need not compare the respondent's non-retaliatory reasons with the complainant's protected activity to determine which is more important in the adverse action. Id. at 55.

In the event the fact-finder determines that the respondent has a true non-retaliatory reason for terminating the complainant, this still does not preclude protected activity as a contributing factor in the termination of employment. Palmer, supra, slip op. at 54, n. 224 (citing Bobreski v. J. Givoo Consultants, Inc. [Brobeski II], ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)). On this basis, the argument that respondent had a "legitimate business reason" to take the adverse action "is **by itself insufficient** to defeat an employee's [the complainant's] claim under the contributing-factor analysis . . . since unlawful retaliatory reasons [can] co-exist with lawful reasons."¹⁴ Palmer, supra slip op. at 58 (quoting Brobeski II, supra, slip op. at 17 (internal quotations omitted) (emphasis added); contra Henderson v. Wheeling Lake Erie Ry., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 11 (ARB Oct. 26, 2012) (citing Zinn v. Am. Commercial Lines Inc., ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012)) (holding that the "legitimate business reason" burden of proof analysis does not apply to FRSA whistleblower cases).

The ARB recently observed in Rudolph v. National Railroad Passenger Corporation (AMTRAK), supra at 16, that "proof of causation or 'contributing factor' is not a demanding standard." To establish that the protected activity was a "contributing

¹⁴ The ARB noted in Palmer, that the administrative law judge specifically stated "the argument that [Illinois Central] had a 'legitimate business reason' to take the adverse action is inapplicable to FRSA whistleblower cases." The Board explained it would be "**clear error**" for the fact-finder to conclude that Illinois Central's "legitimate business reason" is **irrelevant** to the contributing-factor analysis. Id., slip op. at 58.

factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. Indeed, the contributing factor need not be "significant, motivating, substantial or predominant," rather it need only play "**some**" role. Araujo, supra at 158; Palmer, supra, slip op. at 53, n. 218. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tends to affect in **any way** the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). Furthermore, the complainant is not required to demonstrate the respondent's retaliatory motivation or animus to prove the protected activity contributed to respondent's adverse personnel action. See Halliburton, supra at 263 (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016) (noting that intent and credibility are crucial issues in employment discrimination cases); see, e.g., DeFrancesco, supra, slip op. at 6-7; Speegle, supra, slip op. at 10; Palmer, supra, slip op. at 55, n. 227. Whether considering direct or circumstantial evidence, an ALJ **must make a factual determination and must be persuaded that it is more likely than not** that the complainant's protected activity played some role in the adverse action. Palmer, supra, slip op. at 55-56.

Courts have held that although the respondent's knowledge of the protected activity is not conclusive evidence that the complainant's protected activity was the catalyst for respondent's adverse personnel action, it is certainly a causal factor that must be considered. See Hamilton, supra, slip op. at 3. Generally, it is not enough for the complainant to show that the respondent, as an entity, was aware of his protected activity. Rather, the complainant must establish that the "decision-makers" who subjected him to the alleged adverse

actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck supra; see Johnson v. BNSF Ry. Co., ALJ. No. 2013-FRS-00059, slip op. at 11, n. 8 (ALJ July 11, 2014) (noting that the final decision-maker's 'knowledge' and 'animus' are only factors to consider in the causation analyses).

Where the complainant's supervisor had knowledge of his protected activity and had substantial input into the decision to fire the complainant, even though the vice president who actually fired the complainant did not know about the protected activity, such knowledge could be imputed to the respondent. Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

As discussed previously, the protected activity and adverse action discussed in this present matter is the same protected activity and adverse action taken in 2012, which was ruled on by ALJ Kennington. As a result, causation was already proven years prior. However, Respondent now argues that it did not have knowledge that the workplace violence incident remained in Complainant's personnel file.

In the present matter, Mr. Gearen indicated he was unaware that Complainant filed a whistleblower complaint in 2012. Mr. Chappell also testified that he was not cognizant of the fact that Complainant filed a whistleblower complaint in response to Respondent's action. He also was unaware of a finding made by OSHA, an ALJ, or court that Respondent violated a whistleblower law in relation to any conduct in which he may have been involved. Ms. Powell testified that she was unaware that Respondent agreed to expunge the 2012 incident from Complainant's personnel file and use it against him in future employment decisions. She indicated she became aware of the 2012 whistleblower complaint in 2017.

Here, I find, regardless of Respondent's ignorance, after the fact, the 2012 workplace violence incident remained in Complainant's personnel file. More importantly, Respondent's ignorance does not negate the fact that when the 2012 discipline was initially placed in Complainant's personnel file it was done as a direct result of Complainant's protected activity. Clearly, in 2012 the decision-makers responsible for the adverse action were knowledgeable of Complainant's protected activity, which led them to place the incident (and waiver) in his file.

Therefore, I find and conclude Complainant has established causation by a preponderance of the evidence.

The Legitimacy Reasons for Respondent's Actions

The ARB has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. Eastern Air Central, Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions." Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993).

Respondent contends that it would have terminated Complainant regardless of the 2012 workplace violence incident, and that the maintenance of the 2012 incident was a **harmless** error. However, I vehemently do not find the disregard of an Order by this Court and the ARB to expunge a false allegation from an employee's record to be merely a harmless error. Furthermore, I also find and conclude Respondent has provided no legitimate reason(s) for maintaining this incident in Complainant's personnel file, simply because there is none.

In sum, because the facts of this case stem from the 2012 workplace violence incident, and was ruled on by this Court and affirmed by the ARB, I find Complainant has established, **prima facie**, that his protected activity in 2012 was a contributing factor to the adverse action in which Respondent submitted his discipline history to the public law board, which included the 2012 incident that Respondent failed to expunge.

F. Same Action Defense

As denoted by Palmer, the second step of the two-part test requires Respondent to establish that it would have **taken the same action** absent the Complainant's protected activity. Id., supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to demonstrate that the protected activity was a contributing factor in the adverse personnel action. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of 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. (stating that step-two asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka, supra, slip op. at 5.

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable**." Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (emphasis added); see Speegle, supra, slip op. at 11. Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

Because "same action" was not specifically cited in Respondent's Answer as an affirmative defense, I find Respondent waived this defense. Respondent had ample opportunity to submit an amended Answer. Assuming, **arguendo**, I find Respondent failed to prove by clear and convincing evidence that it would have taken the same action (i.e., transferring the discipline history to the public law board, to include the 2012 incident) because there was no reason under any circumstance for the 2012 incident to be a part of Respondent's submission. It was required to be expunged, but Respondent failed to obey the Court and ARB's Order.

VIII. REMEDIES

A successful complainant under the FRSA is entitled to all relief necessary to make the employee whole including

reinstatement with back pay, compensatory damages and punitive damages. Specifically, the FRSA provides that:

(e) Remedies.-

(1) In general.-An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.-Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.-Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 20109(e)(1)-(3).

In this case, Complainant contends he is entitled to reinstatement, back pay, compensatory damages for emotional distress, expungement of his record, punitive damages, and attorney's fees and costs.

A. Reinstatement and Back Pay

With regard to reinstatement, Complainant has been terminated, thus reinstatement is a necessary remedy here. I find and conclude Complainant is entitled to immediate reinstatement with the same seniority status that he would have had, but for the discrimination.

Regarding back pay, Complainant credibly testified that his earnings ceased on September 24, 2014. As a result, he is entitled to back pay from September 24, 2014, to the date of his

reinstatement; however, the amount shall be reduced by his earnings received following his termination.

In accordance with Complainant's W-2, he earned \$61,103.12 in wages, tips, and other compensation during 2014. During 2014, he missed three months of work, and Respondent did not compensate him during this time. Consequently, his earnings per day in 2014 was \$347.18 ($\$61,103.12 \div 176 \text{ days} = \347.176). Complainant testified that he earned \$300.00 per week working for Domino's from September 2016 until August 2017. He also testified that he earned approximately \$500.00 per week from Toyota starting approximately July 30, 2017, and that he is currently working for the company. However, Complainant also deposed that he worked for a railroad in October 2014, and that he was a delivery person for Jason's Deli from October 2016 to November 2016. However, no wage information was provided for these periods of employment. Thus, Complainant's earnings made through interim employment should be appropriately offset from the total back pay award, which shall include post-judgment interest to be paid. 49 U.S.C. § 20109(e)(2)(B).

B. Compensatory Damages

In the Complaint, Complainant contends he is entitled to compensatory damages due to emotional distress in the amount of \$100,000 because of the financial strain of being terminated.

As stated above, the FRSA provides for compensatory damages for any special damages as a result of the discrimination. See 49 U.S.C. § 20109(e)(2)(C). Compensatory damages include damages for emotional distress. Baratti v. Metro-North R.R. Commuter R.R. Co., 939 F.Supp. 2d 143, 152 (D. Conn. 2013). Additionally, a complainant must prove compensatory damages by a preponderance of the evidence. Ferguson, supra, ARB No. 10-075, slip op. at 7. A complainant's credible testimony alone is sufficient to establish emotional distress. Id.; see also Simon v. Sancken Trucking Co., ARB Nos. 06-039, 06-088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938 (5th Cir. 1996).

During Complainant's deposition, he testified that he suffers from emotional distress because of his termination, and that he sought treatment because of his depression. He averred that Dr. Moriantes prescribed him with medication for depression/anxiety, and that he was referred to a psychiatrist.

However, he indicated the VA had not approved the referral and, as a result, he was not currently receiving treatment from a mental health professional. Complainant also deposed that he does take the medication prescribed, which started following his termination. He also stated that following his termination he lost everything in his life, to include his family, car, and house. He further mentioned he was in debt. Complainant also deposed that as of January 2014 he separated from his wife, and then subsequently received a divorce as of June 2014.

Here, Complainant began taking medications for depression and anxiety following the public law board's decision, upholding his termination. However, I find the merits of his termination are not at issue in this case; the issue is Respondent's submission, which included the 2012 workplace violence incident.

Furthermore, Complainant admitted that prior to his termination in September 2014 he went through a separation and then finally a divorce. He also indicated he began taking medication following his termination because he lost everything, such as his family, car, and house. Based on the foregoing, I find Complainant's emotional distress is due, in part, to his personal issues.

Additionally, Complainant has not provided any evidence of medical or psychological treatment due to Respondent's adverse action.

Upon my consideration of the aforementioned, I find and conclude Complainant failed to prove by a preponderance of the evidence that Respondent's adverse action caused his emotional distress. In short, Complainant continuously cites to his termination, which is not an adverse action in which Respondent has been held responsible for. More importantly, Complainant never states Respondent's submission to the public law board of the 2012 workplace violence incident caused his emotional distress. Therefore, I find and conclude Complainant is not entitled to compensatory damages due to emotional distress.¹⁵

C. Punitive Damages

The FRSA allows for an award of punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e)(3).

¹⁵ As stated previously in this Decision, although the public law board relied upon, in part, the 2012 workplace violence incident in upholding the termination, this decision was independent of Respondent.

The United States Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" Smith v. Wade, 461 U.S. 30, 51 (1983); see also Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) (\$75,000 awarded in punitive damages based on a finding that the Respondent's fleet manager had intentionally violated a federal safety statute when he pressured Complainant to drive through hazardous conditions). The purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Punitive damages may be assessed in whistleblower cases to "punish wanton or reckless conduct and to deter such conduct in the future." BMW v. Gore, 517 U.S. 559, 568 (1996); Anderson v. Amtrak, Case No. 2009-FRS-3 (ALJ Aug. 26, 2010) (citing Johnson v. Old Dominion Security, Case No. 1986-CAA-3/4/5 (Sec'y May 29, 1991)). In determining whether punitive damages are appropriate, factors to assess include: (1) the degree of the respondent's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. See Anderson at 26 (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001)). Additionally, the ARB requires that an ALJ also consider whether a respondent's behavior reflects corporate policy. Ferguson, ARB No. 10-075, slip op. at 8.

With regard to the first factor, Respondent contends that Complainant's personnel file was submitted to the public law board as a result of Complainant appealing his termination. I find this explanation to be truthful; however, I also find Respondent's failure to disregard not only ALJ Kennington's order, but also the ARB's affirmance of ALJ's Kennington's Order to be **reprehensible**. Here, Respondent allowed the 2012 workplace violence incident to remain in Complainant's personnel file from July 2012 until June 23, 2017. As a result of Respondent's indifference, the 2012 workplace violence incident was reviewed by the public law board during Complainant's arbitration proceeding regarding his termination; therefore, Respondent is "culpable" for the chain of events that followed its illegal behavior.

As to the second factor, and as previously discussed above, Respondent's action (i.e., submitting Complainant's workplace discipline history, to include the 2012 incident) tainted the public law board's decision. Ms. Powell testified that disciplinary matters are serious, and that employees' livelihoods are at stake. She further averred a public law board's decision can result in an employee remaining employed or being unemployed. In addition, Mr. Simpson testified that arbitration affects his union members' lives, because individuals lose wives, vehicles, and homes awaiting decisions from the public law board. He also commented that a public law board decision can result in an individual losing his job. In this case, since the public law board relied, in part, upon the 2012 workplace violence incident, Complainant's termination was upheld.

Lastly, with respect to the third factor, I have conducted a review of other sanctions imposed in other cases for comparable misconduct. Based upon the review conducted, more extensive punitive damages have been awarded in cases where the ALJ found egregious and systematic deterrents against the protected activity in question, or when there is no practice in place to ensure the rights of whistleblowers. See, e.g., Anderson, supra, slip op. 26-27 (ALJ Aug. 26, 2010) (awarding \$100,000 in punitive damages because employer did not have any procedures in effect to assure compliance with legal requirements in cases of anti-retaliation and/or labor/management laws); Cain v. BNSF Ry. Co., ALJ No. 2012-FRS-00019 at slip op. 17-19 (ALJ Oct. 9, 2012) (awarding \$250,000 in punitive damages because employer conspired against employee by preventing him from pursuing his medical claim and assigned him to the "worst place in the yard," which was a wanton and willful action equivalent to an intentional tort); Pan Am Ry., Inc. v. U.S. Dep't of Labor, 855 F.3d 29, 38-39 (1st Cir. 2017) (upholding an ALJ's award of \$250,000 in punitive damages where the ALJ found employer (1) "exaggerated the seriousness of the supposedly 'major' discrepancy, both in the second Notice of Hearing and [VP] Schultz's testimony before the ALJ, and Schultz's dissembling gave reason to be concerned about Pam Am's culture," (2) the charge against the employee was made by the corporate legal department and a Vice President, (3) employer chose not to utilize OSHA's fact-finding process to address the discrepancy, and it opted to threaten the employee with dishonest charges, and (4) the corporate culture was more concerned with retaliation than safety.)

In the present matter, I find Respondent has clearly demonstrated reckless or callous disregard for Complainant's rights under FRSA. As stated by Ms. Powell, she testified that the Law department was responsible for expunging Complainant's 2012 workplace violence incident. However, she later stated she was uncertain of the process; she assumed an individual was to direct either the region that maintains the personnel records or HR about the order to expunge. In Ms. Powell's earlier testimony, however, she testified that she did not know whose responsibility it was to expunge the records. Consequently, I find based on Ms. Powell's vacillating testimony, that the process for expunging records is unclear within the organization. Clearly, there is no internal control system to ensure expungements occur as ordered.

Furthermore, as stated above, Respondent had a nonchalant attitude about its failure to remove the incident from Complainant's personnel file. Again, in Respondent's brief, it called its error "harmless." Here, Complainant did not have the wherewithal to know the incident remained in his folder, and was subsequently blindsided by the public law board's decision, which it did not merely mention in passing, but relied upon in reaching its decision. Respondent was fully aware that the 2012 workplace violence incident should have never been used in any employment matters, yet it was. This reliance by the public law board, in part, caused Complainant to remain unemployed by Respondent. Furthermore, the 2012 workplace violence incident remained in Complainant's personnel file for approximately **five** years, and even after receiving notice in February 2017 from Complainant (via his Complaint) that it remained in his file, Respondent exhibited a lackadaisical attitude once again and allowed the incident to remain in Complainant's file until June 23, 2017. Ms. Powell even testified that once she learned that the 2012 incident should not have been in Complainant's file she took no action to resolve the matter. She also indicated she was unaware if anyone had taken action to resolve the issue. As a result, I find punitive damages are appropriate to deter this conduct in the future, and I assess punitive damages in the amount of \$100,000.

D. Other Relief

Complainant seeks the expungement from his personnel and labor relations file of any reference concerning the 2012 workplace violence incident. However, I find this issue is moot because Complainant states in his brief the expungement of the 2012 incident from his personnel file occurred on June 23, 2017.

E. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported and verified application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent unlawfully discriminated against Mr. Leiva because of his activity and, accordingly, Mr. Leiva's Complaint is hereby **GRANTED**.

IT IS HEREBY ORDERED that:

1. Respondent shall immediately reinstate Complainant to his former job with full seniority and benefits.
2. Respondent shall make Complainant whole and pay Complainant back pay at the rate of \$347.18 per day from September 25, 2014, to present and continuing until reinstated to his former job with full seniority and benefits, which shall be offset by earnings received during the interim in alternative employment, plus interest from the date such wages were lost until the date of payment at the rate prescribed in 28 U.S.C. § 1961.
3. Respondent shall pay to Complainant travel expenses and hotel expenses incurred in the prosecution of this matter.
4. Respondent shall pay to Complainant punitive damages in the amount of \$100,000.

5. Respondent shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 25th day of May, 2018, at Covington, Louisiana.

LEE J. ROMERO JR.
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, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

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

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

from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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

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