



Issue Date: 01 August 2018

Case No.: 2017-FRS-00099

In the Matter of:

LAURIE MONTGOMERY,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY
DECISION, CANCELLING HEARING, AND DISMISSING CLAIM**

This proceeding arises under the employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008) (“FRSA” or “Act”). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations (“C.F.R.”). The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for engaging in certain protected activities.

PROCEDURAL HISTORY

On April 15, 2016, Laurie Montgomery (the “Complainant”) filed a timely complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that Norfolk Southern Railway Company (the “Respondent”) violated the FRSA by terminating her employment in retaliation for reporting an injury on January 9, 2016. OSHA issued a decision on August 21, 2017, explaining that more than sixty days had lapsed since the Complainant filed her complaint. Moreover, OSHA stated that the Complainant had requested that it terminate its investigation and issued a determination. Based on the information it had gathered, OSHA determined that it was unable to conclude that there was reasonable cause to believe that the Respondent violated the FRSA. Therefore, OSHA dismissed the Complainant’s complaint. On September 5, 2017, the Complainant filed objections to OSHA’s findings and requested a hearing.

Pursuant to a Notice of Hearing dated December 21, 2017, this matter was scheduled for hearing on June 21, 2018, in Cleveland, Ohio. Thereafter, an Amended Notice of Hearing, dated March 12, 2018, continued the hearing until August 30, 2018. On June 5, 2018, the Respondent filed a Motion for Summary Decision (“Mot. for S.D.”).¹ The Complainant requested an extension of time to respond. The request was granted pursuant to orders dated June 19, 2018, and June 26, 2018. Thereafter, on July 3, 2018, the Complainant filed a Memorandum in Opposition to Respondent’s Motion for Summary Decision (“Complainant’s Response”).² On July 17, 2018, the Respondent filed a Reply Memorandum in Support of its Motion for Summary Decision.

APPLICABLE STANDARDS

The standard for summary decision under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges is similar to the standard that governs summary judgment in federal courts under Fed. R. Civ. P. 56. *Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004, slip op. at 4 (Feb. 28, 2006). An administrative law judge “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary decision as a matter of law.” 29 C.F.R. § 18.72(a) (2015). A material fact is one whose existence affects the outcome of the case. *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The regulations provide that a party may accomplish this by citing to the materials in the record, “including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials,” to show that 1) they do not establish the absence or presence of a genuine dispute, or 2) that an adverse party cannot produce admissible evidence to support the fact. 29 C.F.R. § 18.72(c)(i)-(ii) (2015).

Once the moving party meets its burden, the burden shifts to the non-moving party to set forth facts showing there is a genuine issue for hearing. *Anderson*, 477 U.S. at 250. In deciding on the motion, the administrative law judge must view the evidence in the light most favorable to the non-moving party. *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, slip op. at 2 (Aug. 23, 2003).

¹ The following Respondent’s Exhibits (“RX”) were attached to the Motion for Summary Decision: (1) Exhibit A, consisting of the Complainant’s Deposition (“Dep.”); (2) Exhibit B, consisting of Deposition Exhibits (“DX”) 1-33; (3) Exhibit C, consisting of the Declaration of Gary Shepard and corresponding exhibits A-F; (4) Exhibit D, consisting of the Public Law Board’s ruling; and (5) Exhibit E, consisting of career service records.

² The following Complainant’s Exhibits (“CX”) were attached to the Complainant’s Response: (1) the Complainant’s deposition; (2) the transcript from the hearing on January 19, 2016, relating to the Respondent’s investigation into the collision on January 9, 2016; (3) the Respondent’s termination letter addressed to the Complainant; and (4) an unsigned Affidavit of Danielle Spence. On July 16, 2018, the Complainant filed a signed Affidavit of Danielle Spence.

STATE OF THE RECORD

The Respondent is a Class I railroad with approximately 19,500 route miles of track in twenty-two states and the District of Columbia. (Mot. for S.D. at 2.) The Respondent hired the Complainant on September 17, 2007, as a conductor on the Lake Division. (Complainant's Deposition ("Dep.") at 15.)

Complainant's Violation History

During her tenure, the Complainant committed a series of rule violations, all of which she testified to at her deposition. The record reveals that the first incident involving the Complainant occurred on March 28, 2008, when the Complainant committed a "1st Minor Offense" after she "failed to protect a shove move³ and ran through the switch⁴ at the east end of WY-09 when it was not properly lined." (Dep. at 40-41; DX 8.) At her deposition, the Complainant testified that she remembered the event and agreed that she understood how important it was to properly protect a shove and make sure she did not run through the switch. (Dep. at 41-42.)

The second incident occurred on December 18, 2009, when the Complainant "improperly lined [a] switch causing [a] rule violation derailment." (Dep. at 42; DX 9.) She testified that she remembered the incident and engaged in a counseling session after it occurred. (Dep. at 42-43.) The incident resulted in a "1st Minor" violation. (DX 9.)

The third incident occurred less than one month later, on January 3, 2010, and involved shoving cars. (Dep. at 43; DX 10.) Once again, the Complainant received counseling regarding her performance. (DX 10.) She testified that she remembered the incident. (Dep. at 43.)

The following month, on February 17, 2010, the Complainant failed "to properly acknowledge and properly call" her "signal indication."⁵ (DX 11.) Following a formal investigation on March 17, 2010, the Respondent assessed a fifteen-day deferred "START Serious" violation. (*Id.*) The Complainant testified that she remembered the incident and agreed that the Respondent's formal investigation involved a hearing. (Dep. at 44-45.)

Six months later, on October 6, 2010, the Complainant accepted responsibility for a "1st Minor Offense" after she "failed to ensure" that her "route was properly lined which resulted in a run through Lead Switch." (DX 12.) She testified that she recalled the incident and agreed that because she "told on" herself, the Respondent assessed a "START Minor" violation for the incident. (Dep. at 45-56.)

The sixth incident occurred on October 19, 2010, when the Complainant ran through "an improperly lined switch causing a Rule Violation Derailment." (DX 13.) This was the second of three derailments she was involved in while employed by the Respondent, the first of which

³ "Shoving is the process of pushing rail cars from the rear." (Mot. for S.D. at 3 n. 2.)

⁴ "A switch is a device consisting of two moveable rails, necessary connections, and operating parts designed to turn a locomotive or car from the track on which it is running to another track." (Mot. for S.D. at 4 n. 3.)

⁵ "Calling a signal indication is the conductor's obligation to orally state whether a train is authorized to pass, and at what speed, an upcoming portion of track based on the lights on the signal." (Mot. for S.D. at 5 n. 4.)

occurred on December 18, 2009. (DX 9, 13.) She testified that she recalled the incident, she accepted responsibility for it, and she was assessed a fifteen-day suspension. (*Id.*; Dep. at 46-47.) At her deposition, she agreed that the incident triggered the previous deferred fifteen-day suspension, which the Respondent assessed because of the incident that occurred on February 17, 2010. (Dep. at 47; DX 11, 13.) She further agreed that a deferred suspension meant that she would not have to serve the suspension unless she committed another violation within a specific timeframe. (Dep. at 47.)

The next incident involving the Complainant occurred on April 17, 2011. (DX 14.) Following a formal investigation held on May 4, 2011, the Respondent concluded that the Complainant failed “to properly protect a road crossing during a shove type move.” (*Id.*) As a result, the Respondent terminated the Complainant. (Dep. at 48; DX 14.) At her deposition, she testified that she remembered the incident. (Dep. at 48.)

Following her termination, the Respondent rehired the Complainant on a leniency reinstatement basis in November 2011. (Dep. at 49; DX 15-16.) By letter dated November 3, 2011, which referenced a conversation between the Assistant Superintendent and the Complainant on November 2, 2011, the Respondent notified the Complainant of its decision to allow her to return to work on a leniency basis after it had dismissed her for failure to properly protect a road crossing during a shove movement. (DX 15.) The letter also referenced the Complainant’s career service record. (*Id.*) It explained that the Respondent had disciplined the Complainant seven times since she had become a conductor, and noted that four of the incidents involved running through switches and two resulted in derailments. (*Id.*) The letter concluded with the following statement: “At the conclusion of our conversation, you stated that you have responsibility for prevention of accidents and injuries and your own personal safety and you gave me a commitment to focus on all the things we discussed to work injury[-] and accident[-]free.” (*Id.*) The Complainant testified that she did not recall having this conversation with the Assistant Superintendent, but she did recall reading the re-hire letter dated November 3, 2011. (Dep. at 51; DX 15.)

Two years later, on November 11, 2013, the Complainant was involved in an eighth incident. (DX 17.) The Respondent scheduled a formal investigation to determine whether she failed “to ensure dock boards were removed from equipment prior to coupling, resulting in damage.” (*Id.*) The Complainant testified that she remembered the incident and described it. (Dep. at 55-56.) Moreover, she agreed that she accepted responsibility for the incident, which resulted in a “START Serious” ten-day deferred suspension. (Dep. at 57; DX 17 at 2.) She further testified that she was aware that “START Serious” violations stayed on her record for two years. (Dep. at 57-58.) When asked if she knew what would happen if she was disciplined again, she explained that she would get another “START Serious” violation. (Dep. at 58.) She added that she would “go to formal investigation” if she got a third “START Serious” violation. (*Id.*) When asked whether the union made her aware that a third “START Serious” violation within a certain timeframe could result in termination, she replied, “Correct.” (*Id.*)

The Complainant testified that on November 28, 2013, she was involved in another incident. (Dep. at 58; DX 18.) The Respondent held a formal investigation on January 10, 2014, after which it found the Complainant responsible for failing to “have proper GR-14 protection

prior to fouling equipment in the vicinity of [the] Bellevue Yard.” (DX 18.) She testified that “GR-14” protection was “three-step” protection. (Dep. at 59.) The incident resulted in a second “START Serious” violation, which led to a ten-day actual suspension and also activated a ten-day deferred suspension. (DX 18; Dep. at 59.)

Collision on January 9, 2016

The tenth incident involving the Complainant is the subject of this case. On January 9, 2016, the Complainant was performing her duties as a conductor and remote control operator on the LB27 in the Bellevue Yard. (Dep. at 68; DX 19.) While moving the LB27 in a westward direction, the crew of the LB23 was moving its locomotive in an eastward direction, and the two locomotives ultimately collided. (Dep. at 68-96; DX 24, 28.)

The Complainant testified that before doing any movements on January 9, 2016, she and the switchman,⁶ Bart Goss, had a briefing in which they discussed how they were going to perform their tasks. (Dep. at 71-72.) She stated that they also talked about the overcast day, but she agreed that the weather was clear and she could see. (Dep. at 72-73.) She explained that the last thing she said to Mr. Goss was, “I’ll see you when we get nine and six tied up unless anything changes.” (Dep. at 78.) Moreover, she added that “[a]fter the verbal communication inside the engine,” she and Mr. Goss “had no more communication with each other at that point in time because after that [she] “tied nine” and “never went back up in the engine.” (Dep. at 74.)

The Complainant explained that Mr. Goss was located at the front end of the northwest end of the locomotive, on the same side as her. (Dep. at 75.) She agreed that she was standing at the northeast side of the locomotive and getting ready to move west. (Dep. at 74.) When asked to clarify whether she and Mr. Goss were still able to have verbal, face-to-face communication once they were no longer in close proximity to each other, she replied that they “could have had verbal” communication “or even hand” communication with each other because she could see the back of his head in her line of sight. (Dep. at 75.) She testified that a vest attached her remote control box to her, her radio was attached to her hip, and her microphone was attached to her left shoulder. (Dep. at 76-77.) She stated that she and Mr. Goss “had no radio communication” with each other, but she testified that her radio was on. (Dep. at 74, 77.)

The Complainant testified that she “brought the locomotive into” track nine and then “tied the track.” (Dep. at 63.) She testified that approximately fifteen minutes passed from the time she operated the switches until she started moving westward. (Dep. at 63-64.) The Complainant stated that the LB23 was moving east into the classification tracks while the LB27 was moving west onto the low-side lead. (Dep. at 67.) She testified that she could not see the LB23 locomotive or anybody on the ground operating any switches. (Dep. at 81.) She testified that she was coming out of track number nine and the LB23 was on the low side lead. (Dep. at 82.) When asked how she determined that her switches were properly lined, she stated that she lined them herself and, as far as she knew, “nothing had changed.” (Dep. at 82.) She added that

⁶ “A switchman is an employee responsible for assisting the conductor. Switching is the process of moving rail cars to assemble or disassemble a train.” (Mot. for S.D. at 8 n. 6.)

Mr. Goss “never told” her that “anything had changed,” and stated that it was Mr. Goss’s job to re-verify that the switches were lined perfectly (*Id.*) When questioned whether she asked him if they were lined appropriately, she replied, “No. I shouldn’t have to.” (*Id.*) The Complainant testified that the collision occurred at the eleven switch. (Dep. at 83.) She agreed that the still photographs taken from a video of the collision showed that there was “a little movement” of her engine at the time of the collision. (Dep. at 84-85; DX 24.)

The Complainant testified that she reported an injury in conjunction with the collision on January 9, 2016. She testified that when the trains collided, she fell to the ground and was taken away in an ambulance. (Dep. at 95.) She added that the injury she reported in connection with the collision was the first injury she had ever reported while working for the Respondent. (Dep. at 65.)

Respondent’s Disciplinary Action

Following a formal investigation on January 19, 2016, the Respondent concluded that the Complainant “failed to comply with restricted speed and failed to properly protect a shove movement resulting in a collision and damage to equipment in the vicinity of Bellevue, Ohio... on January 9, 2016 while performing service as Crew Member on Train LB27.” (DX 29.) The termination letter from the Respondent addressed to the Complainant stated the following:

The transcript of the investigation and the exhibits therein clearly revealed inattention to duty and endangering the safety of yourself and fellow employees when you failed to comply with restricted speed and failed to properly protect a shove movement resulting in a collision and damage to equipment... on January 9, 2016 while performing service as Crew Members on Train LB 27.

(*Id.*) Moreover, the letter stated that the Complainant was in violation of 49 C.F.R. § 240.11(e)(2). (*Id.*) Because of her “responsibility in connection with the” incident on January 9, 2016, the Respondent “dismissed” the Complainant “from all service with the Norfolk Southern Railway.” (*Id.*)

Four crewmembers were involved in the collision, including the Complainant, Danielle Spence, Barton Goss, and Kory Wolcott, and all four were disciplined. (Mot. for S.D. at 1; RX 3 at Ex. D.) The Respondent terminated the Complainant and gave thirty-day suspensions to the other three crewmembers. (Dep. at 112; CX 4; RX 3 at Ex. D.) Two crewmembers, Danielle Spence and the Complainant, reported injuries in conjunction with the collision. (*Id.*)

ARGUMENTS OF THE PARTIES

The Respondent contends that it is entitled to summary decision for several reasons. Primarily, it argues that the Complainant has not presented any evidence establishing that her injury report was a contributing factor in its decision to terminate her. In this regard, the Respondent points to the fact that four crewmembers were involved in the collision on January 9, 2016, and it disciplined all four of them. Three crewmembers were suspended for thirty days

given their clear disciplinary records, whereas the Complainant, according to the Respondent, was terminated due to her poor performance record. Although acknowledging that the Complainant filed an injury report following the incident, the Respondent contends that the injury report had no influence on its conduct or discipline; rather, the Respondent asserts that that it would have investigated the collision and disciplined the Complainant for a major-rule violation regardless of her injury report. Finally, even if the injury report is found to have played some role in its conduct, the Respondent argues that it has presented clear and convincing evidence showing that it would have terminated the Complainant absent her injury report.

Conversely, the Complainant argues that the Respondent terminated her for reporting the injury she sustained in connection with a locomotive collision on January 9, 2016. In her view, she “did absolutely nothing wrong to cause the collision,” and, therefore, the Respondent’s decision to terminate her “must have been” as a result of her protected activity. In support of this conclusion, she argues that the only other crewmember who reported an injury in connection with the collision, Danielle Spence, was also disciplined “for doing nothing wrong other than showing up for work and being on the same crew with a careless employee.”

DISCUSSION AND FINDINGS

The FRSA contains a whistleblower protection provision that prohibits railroad carriers from, among other things, discharging an employee if the discharge is “due, in whole or in part, to” the employee “notify[ing]... the railroad carrier... of a work-related personal injury or work-related illness.” 49 USCS § 20109; 29 C.F.R. § 1982.102. The regulatory burdens of proof are the same burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”). 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv) (2014); *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, 2016 DOL Ad. Rev. Bd. LEXIS at 69 n. 166 (ARB Sept. 30, 2016) (*en banc*).

The regulations implementing the Act provide that a “determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109. 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.” *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, 2016 DOL Ad. Rev. Bd. LEXIS 60, 92-93 (ARB Sept. 30, 2016) (*en banc*). *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). It need not be “significant, motivating, substantial[,] or predominant,” it merely needs to be a factor. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). If the complainant satisfies her burden, then the burden shifts to the Respondent to demonstrate “by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.” 29 C.F.R. § 1982.109(b); *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 98-99.

I. WHETHER THE COMPLAINANT ENGAGED IN PROTECTED ACTIVITY

The Respondent does not dispute that the Complainant filed a personal injury report regarding the injury she sustained in the collision on January 9, 2016. Therefore, I find that the

record, as it presently exists, does not create reason to dispute that the Complainant engaged in protected activity under the Act.

II. WHETHER THE RESPONDENT TOOK ADVERSE ACTION AGAINST THE COMPLAINANT

Following an investigation into the collision on January 9, 2016, the Respondent terminated the Complainant. Therefore, the record does not provide any basis to dispute that the Complainant suffered an adverse job action.

III. WHETHER THE COMPLAINANT'S PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THE RESPONDENT'S DECISION TO TERMINATE HER

Although the Complainant engaged in protected activity and the Respondent took an adverse personnel action against her, the evidence must also create a triable issue as to whether the Complainant's protected activity contributed to her termination. As the Board in *Palmer* explained, in a case of retaliatory dismissal under the Act, the administrative law judge must first answer the following question: "did the employee's protected activity play a role, any role, in the adverse action?" *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 91. On that question, the Board specified that the Complainant has the burden of proof, by a preponderance of the evidence, to show "based on a review of all the relevant, admissible evidence, that it is more likely than not that" the Complainant's "protected activity was a contributing factor in the employer's adverse action." *Id.* This is a very low standard for the Complainant to meet; the factor need not be significant, motivating, substantial, or predominant, it just needs to be *a* factor. *Id.* at 92-93.

The Complainant, moreover, may meet her burden with direct or circumstantial evidence. Direct evidence is evidence that conclusively links the protected activity and the adverse action. *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5 (ARB Jan. 30, 2008). Alternatively, the Complainant may provide circumstantial evidence by proving by a preponderance of the evidence that retaliation was the true reason for her termination. For example, the Complainant may show that the respondent's proffered reason for termination was not the true reason, but instead "pretext." *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). If the Complainant proves pretext, it may be inferred that her protected activity contributed to the termination. (*Id.*)

Under the first approach, the Complainant must produce evidence that directly links his protected activities and termination. The ARB has described direct evidence as "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely on inference." *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011). Having reviewed the record, I cannot find any evidence of this nature. Nor, it should be pointed out, does the Complainant assert any evidence of this nature.

The Complainant challenges the Respondent's stated reason for terminating her, suggesting it was pretextual. In the Complainant's view, she was subject to discipline even though she did nothing wrong. The person at fault, she argues, was Mr. Goss. She asserts that Mr. Goss was the only employee on her locomotive, the LB27, who could see what was occurring to the west of their locomotive. Moreover, the Complainant alleges that the yardmaster

on duty should have advised her that he was sending another locomotive, the LB23, into their work area. Finally, the Complainant alleges that it was Mr. Goss's obligation, not hers, to order a new job briefing once there was a change in work conditions.

The Respondent, however, has submitted overwhelming evidence that it followed its own rules, and that those rules held the Complainant responsible for the collision. Following a formal investigation on January 19, 2016, the Respondent concluded that the Complainant "failed to comply with restricted speed and failed to properly protect a shove movement resulting in a collision and damage to equipment in the vicinity of Bellevue, Ohio... on January 9, 2016 while performing service as Crew Member on Train LB27." (DX 29.) Because of her "responsibility in connection with the" incident on January 9, 2016, the Respondent "dismissed" the Complainant "from all service with the Norfolk Southern Railway." (*Id.*)

In applying its own rules, the Respondent relied on operating rule 94(a), which states that "[t]he Conductor, Engineer and pilot are jointly responsible for the safety of the train and engine and for observance of the rules." (DX 3 at NS_0680.) In other words, the conductor, engineer, and pilot share joint responsibility for any rules violation. At the time of the collision, it is not disputed, the Complainant was acting as the conductor and remote-control operator.

Moreover, operating rule 850(f), regarding remote control movements, provides that:

All Remote Control movements are considered shoving movements, except with the RCO is riding the lead locomotive in direction of movement in position to visually observe conditions ahead.

When initiating a Remote Control shoving movement:

1. The RCO must visually determine the direction of movement, or a crewmember must visually determine the direction of movement and confirm with the RCO.
2. If confirmation of direction of movement is not received, the movement must be immediately stopped.

(DX 4.) Furthermore, operating rule 215, governing shove movements, provides, *inter alia*, "When shoving equipment at any location, a crewmember, or other qualified employee must take action to prevent damage, protect against conflicting movements, and avoid fouling other tracks." (DX 3 at NS_0722.) Finally, the Respondent's operating rules define a restricted speed as "[a] speed that will permit stopping within half the range of vision, short of train, engine, obstruction, railroad car, men or equipment fouling track, any signal requiring a stop, or any derail or switch lined improperly and looking out for a broken rail, but not exceeding" either "20 MPH" or "15 MPH when diverting through any turnout or crossover government by Conrail Signal Indications." (DX 5.)

The validity of the Respondent's operating rules is not the subject of this dispute. Moreover, at her deposition, the Complainant testified that she was familiar with operating rule

94. (Dep. at 30.) When asked whether “the conductor, the engineer, and the pilot” were “jointly responsible for the safety of the train and the engine and observation of the rules,” she replied, “Yes.” (*Id.*) Further, the Complainant testified that she understood that shoving movements were the responsibility of the crew and she agreed that she was part of the crew. (Dep. at 30-31.) When questioned whether she was familiar with operating rule 215, she replied, “Yes,” and agreed that “engineer” in the rule 215 meant “remote control operator.” (Dep. at 31-32.)

At the investigative hearing before her termination, when asked whether she was in a position to see the conditions ahead from her locomotive, the Complainant replied, “Not fully, no.” (DX 28 at NS_0041.) When asked whether she was able to stop short of the other locomotive before colliding with it, she replied, “I stopped. I put my remote in stop position.” (*Id.*) She testified that as soon as Mr. Goss told her to stop, she “threw the speed indicator to stop.” (*Id.*) However, she stated that she did not hear Mr. Goss over the radio. (DX 28 at NS_0042.) At her deposition, the Complainant agreed that her locomotive was moving at the time of the collision. (Dep. at 84-85; DX 24.)

In sum, even though the Complainant argues that Mr. Goss was entirely responsible for the collision, there is no dispute of fact that the Respondent’s operating rules dictate differently, and hold both the Complainant and Mr. Goss jointly responsible for the safety of their locomotive and for rules compliance, including shoving movements. (DX 3 at 2.) Under the rules, it is unquestionable that, as the conductor and remote control operator, the Complainant had a duty to follow all speed restrictions and to protect the shove movement. (DX 4; DX 5.) Moreover, the operating rules provide that the remote control operator or a crewmember must visually determine the direction of movement and stop movement immediately if confirmation of direction is not received. Because she admitted that her locomotive was still moving at the time it collided with the LB23, and she was jointly responsible for abiding by the operating rules, the record does simply not support the Complainant’s assertion that she should not have been subject to discipline.

As further circumstantial evidence of pretext, the Complainant also emphasizes that the Respondent disciplined another crewmember who also reported an injury after the collision on January 9, 2016. Once again, though, her argument is unsupported by the record, which does not disclose any disparate treatment to support an inference of pretext. The Respondent disciplined all four individuals involved in the collision, not just the two who reported injuries. (Mot. for S.D. at 1, 23.) Ms. Spence, who was injured, Mr. Goss, who was not injured, and Mr. Wolcott, who was not injured, all received thirty-day suspensions. (*Id.* at 23; RX 3 at Ex. D.) Thus, the Respondent disciplined Ms. Spence in exactly the same way it disciplined the two crewmembers who did *not* report injuries. (*Id.*)

It is true that the Complainant received a more severe punishment than the other crewmembers, but even here, the record provides ample explanation to dispel any inference of disparate treatment or pretext. The Complainant had nine prior rule violations. The Respondent had terminated her and then re-hired her in 2011, on a leniency reinstatement basis, and she was aware that a third serious violation within a certain timeframe could result in termination. (Dep. at 49, 58; Dep. Ex. 15-16.) She testified that she recalled all nine prior violations, including her prior termination in 2011. Thus, the undisputed facts reveal that the Complainant’s prior history

of rule violations gave the Respondent a reason for imposing more severe punishment on her than it did on the other three crewmembers involved in the collision. The Complainant's protected activity does not shield her from progressive discipline for rule violations.

Proof of animus towards protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers, supra*, slip op. at 27. “[R]idicule, openly hostile actions or threatening statements,” may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996.) The Complainant has not put forth any circumstantial evidence of this nature.

Temporal proximity may also support an inference of causality. The use of temporal proximity as circumstantial evidence to establish retaliatory intent was well established prior to the Board's decision in *Palmer, supra*. Even though well established, temporal proximity was never considered dispositive of the issue. Before *Palmer*, the Board held that although an inference of causation based on temporal proximity could be decisive, it was not dispositive, as the complainant was still required to prove each element of a *prima facie* claim by a preponderance of the evidence. *Spelson v. United Express Systems*, ARB No. 09-063, ALJ No. 2008-STA-39 (ARB Feb, 23, 2011). Further, the Board had held that an inference of causation may be negated by intervening events. *Johnson v. Rocket City Drywall*, ARB No. 05-131; ALJ No. 2005-STA-24 (ARB Jan. 31, 2007). For example, where a complainant violated the respondent's safety rules on the day of his termination, the Board held that the intervening safety-rule violation had negated the inference of causation raised by temporal proximity. *Id*

In *Palmer*, the Board revisited the issue of temporal proximity as part of its general reworking of the AIR 21 analysis, which is to say, jettisoning the concept of a *prima facie* case. The language is worth quoting at length.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, generally, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a *per se* knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee

prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Palmer, 2016 DOL Ad. Rev. Bd. LEXIS at 96-97.

Here, there is an element of temporal proximity. However, based upon a review of all the relevant evidence presented by the parties on summary decision, I am not persuaded, for reasons already discussed, that the temporal proximity is sufficient to support an inference of retaliation.

In sum, in response to the Respondent's motion for summary decision, the Complainant has not presented any direct or compelling circumstantial evidence. Instead, the Complainant's argument opposing summary decision is simply that her injury report is the only plausible explanation for the Respondent's decision to terminate her. The record, however, refutes that argument.

IV. WHETHER THE RESPONDENT HAS PROVEN THAT EVEN IF THE COMPLAINANT HAD NOT ENGAGED IN PROTECTED ACTIVITY, IT WOULD HAVE TAKEN THE SAME ADVERSE ACTION AGAINST HER

Even assuming, *arguendo*, that the Complainant had demonstrated by a preponderance of the evidence that her injury report contributed to the Respondent's decision to terminate her, the Respondent could still succeed on its motion if it present clear and convincing evidence that it would have terminated her regardless. As the Board has explained, "[t]he second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?" *Palmer*, 2016 DOL Ad. Rev. Bd. LEXIS at 91-92.

The Respondent has presented essentially undisputed evidence demonstrating that even absent the Complainant's injury report, it would have investigated the collision that occurred on January 9, 2016. As Gary Shepard, Division Superintendent for the Lake Division, explained via written declaration, the collision caused approximately \$12,000 in damage to the Respondent's equipment. (RX 3 at 3.) Moreover, he stated that the regulations at 49 C.F.R. § 225.29(c) required the Respondent to report accidents or incidents such as collisions that result in damages of higher than \$10,500 during calendar year 2016. (DX 3 at 3-4.) At the investigative hearing, Steve Newcomb, the Assistant Terminal Superintendent in Bellevue, Ohio, testified that he investigated the incident and all of the moves that led up to the collision. (DX 28 at NS_0026.) He explained that the LB23 and the LB27 collided, causing significant damage to both locomotives. (DX 28 at NS_0025.) Thus, even if the Complainant did not report an injury following the collision, the Respondent would have discovered and investigated the collision due to the amount of monetary damage it caused. Moreover, there is no absolutely evidence that the Respondent's investigation into the collision was pretext designed to unearth a basis for disciplining the Complainant for her injury report.

Furthermore, the Respondent provided evidence, again essentially undisputed, documenting why it terminated the Complainant even though it only gave thirty-day suspensions to the three other crewmembers who it determined were at fault for the collision. The career service records for Mr. Wolcott and Ms. Spence show no prior discipline. (DX 3 at Ex. B.) Mr. Goss's career service records show that the Respondent had disciplined him only once, in 2010. (*Id.*) In contrast, the Complainant had committed nine prior violations and the Respondent had terminated her in 2011, after she failed to protect a road crossing during a shove move. (DX 14.) The evidence supports the Respondent's argument that because of their either clear or near-clear service records, the Respondent did not terminate Mr. Wolcott, Mr. Goss, or Ms. Spence. (DX 3 at Ex. D.) Rather, it gave them thirty-day actual suspensions. (*Id.*) It is undisputed that the Complainant's performance history was far worse than that of the other three crewmembers who were involved in the collision, which reasonably explains why the Respondent terminated her as opposed to suspending her for thirty-days. I find that the evidence convincingly shows that the Respondent terminated the Complainant because of her poor performance history, not because she filed an injury report.

In further support of its position, the Respondent explained that it requires employees to file injury reports in an effort to maintain the safety of its employees and the public. (RX 3 at 3-4.) The Respondent submitted evidence of forty-six employees who reported injuries within a two-year period, from 2014 to 2016, who received no discipline related to the incidents underlying their injuries. (RX 3 at Ex. E.) This evidence further supports the Respondent's position that the Complainant's injury report had nothing to do with its decision to terminate her.

Moreover, to illustrate that it routinely disciplines other employees in the same manner that it disciplined the Complainant, the Respondent offered evidence demonstrating that it has repeatedly terminated Lake Division employees with poor work histories who committed major rules violations. Specifically, the career service records submitted by the Respondent document that between January 1, 2014, and February 16, 2017, the Respondent terminated eight Lake Division employees for committing a major rules violation when they already had three or more prior incidents on their disciplinary records. (RX 5 at Ex. E.) None of these employees reported an injury during their tenure with the Respondent. (*Id.*) These career service records show that the Respondent consistently imposed equivalent discipline against employees who committed major rules violations like the Complainant, but who were not injured because of the violations. This evidence further supports the Respondent's allegation that it would have terminated the Complainant due to her involvement in the collision on January 9, 2016, coupled with her performance record, even if she had not reported an injury.

In sum, the Respondent has presented evidence, the facts of which are essentially undisputed, that it would have terminated the Complainant regardless of whether she engaged in protected activity. The evidence documenting the Complainant's disciplinary history, the authenticity of which no party has questioned, shows that the Complainant had committed a series of violations before the collision on January 9, 2016. The evidence further shows that the Respondent had a legitimate, factual basis to conclude that Complainant did not follow operating rules on the day of the collision and that she and Mr. Goss were jointly responsible for the safety of the locomotive and for observing the rules. Furthermore, the Respondent's evidence clearly demonstrates why it disciplined the Complainant more harshly than it disciplined the other three

crewmembers involved in the collision. Further still, the Respondent has proven that it routinely disciplines employees with poor work histories who commit major rules violations in the same manner that it disciplined the Complainant.

Against this bulwark of evidence, the Complainant has only interposed the argument that she did nothing wrong and therefore should not have been subject to discipline. The undisputed facts of record, however, belie her assertion. Thus, even viewing the evidence in the light most favorable to the Complainant, she has not shown the presence of a genuine fact, or why, on the undisputed facts, the Respondent is not entitled to judgment as a matter of law.

CONCLUSION

In sum, the Complainant has not demonstrated any disputed material facts for hearing. The evidence establishes that the Complainant engaged in protected activity and suffered an adverse employment action. However, the Complainant has not presented any direct or circumstantial evidence sufficient to oppose the Respondent's evidence that her protected activity was not a factor in its decision to terminate her employment. Further, even assuming *arguendo* that the Complainant had demonstrated that her protected activity played a role, the Respondent has established through clear and convincing evidence that it nonetheless would have investigated the collision and terminated her, based on her work history, regardless of her protected activity. Accordingly, based on the materials presented, even viewing them in a light most favorable to the Complainant, I find that there is no issue of material fact for hearing and the Respondent is entitled to summary decision in its favor.

ORDER

The Respondent's Motion for Summary Decision is **GRANTED**. Laurie Montgomery's claim is hereby **DISMISSED**. The hearing scheduled on August 30, 2018, in Cleveland, Ohio, is **CANCELLED**.

JOHN P. SELLERS, III
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

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

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

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

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

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

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

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

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

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

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