



Issue Date: 05 June 2019

CASE NO.: 2017-FRS-00021

In the Matter of:

MICHAEL ROBINSON,
Complainant,

v.

SOUTHWESTERN RAILROAD,
Respondent.

Appearances: Michael Robinson
Self-Represented Complainant

Robert F. Gentile, Esq.
For Respondent

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This matter arises under the employee protection provisions of the Federal Railroad Safety Act, U.S. Code, Title 49, §20109, as amended (FRSA), and its implementing regulations at 29 C.F.R. Part 1982. Complainant Michael Robinson alleges that he was suspended from service because he engaged in activity that is protected under the FRSA. Respondent Southwestern Railroad (SWRR) argues that Mr. Robinson was suspended because he was the aggressor in an altercation with another employee. On December 19, 2017, I partially granted SWRR's motion for summary decision, finding that there was no dispute of material fact that Mr. Robinson was terminated for failing to comply with the conditions for his reinstatement, and not for having engaged in protected activity. Thus, the sole remaining issue to be determined at the hearing was whether his suspension was unlawful under FRSA.

On June 5, 2018, I presided over a formal hearing in this matter in Carlsbad, New Mexico. At the hearing, three witnesses testified¹ and Complainant's Exhibits 1 and 2² and

¹ A summary of the testimony of the witnesses is attached hereto as Attachment A.

² Complainant's exhibits are both denominated "Complainant's Request for Appeal." Complainant's Exhibit (CX) 1 is date stamped January 10, 2017, and CX 2 is date stamped May 4, 2017. These exhibits comprise the documents identified by Complainant at the hearing as his hearing exhibits (see Transcript of Hearing, pp. 5-6).

Employer's Exhibits 1-8 were admitted. The parties filed timely post-hearing briefs, and the record is closed. For the reasons set forth below, I find that SWRR did not violate FRSA when it suspended Mr. Robinson, and deny the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Facts

Background

Mr. Robinson was employed by Respondent twice. His first term of employment began in January of 2013, and he was terminated sometime in 2014. He filed a complaint under the FRSA after his termination. Respondent thereafter hired a new vice president of operations, Bruce Carswell, who cleaned house in the management ranks. Mr. Carswell also reviewed the circumstances of Complainant's termination, and decided that the best course of action was to restore Mr. Robinson to employment and give him back pay. Mr. Robinson returned to work on August 3, 2015 as a conductor and conductor trainer. His practice in both capacities was to enforce strictly the rules and regulations of the railroad industry and of SWRR. One reason for doing so was that, in April of 2015, a SWRR train was involved in a collision with another train; the post-accident investigation showed that the crew, consisting of temporary SWRR employees, violated a number of rules, including the rule against drug use. At least one, and perhaps all, of the crew tested positive for drugs after the collision. Mr. Robinson believed that it was his obligation to train all employees under his supervision on the railroad rules and regulations and to enforce those rules and regulations on trains on which he was the designated conductor.

SWRR Discipline Policy

SWRR has a "Development and Accountability Policy"³ addressing discipline of its employees for various rules violations. As relevant here, the policy provides that a first offense will result in a letter of reprimand; a second offense within one year will result in a seven-day suspension that may be deferred at the general manager's discretion; a third offense within a two-year period will result in a suspension of 14 days plus any time previously deferred; and a fourth offense within a two-year period will result in dismissal.

Discipline of Mr. Robinson Before Suspension

On January 17, 2016, SWRR's general manager, Marc Syring, issued a letter of reprimand dated January 15 to Mr. Robinson for failing to follow GCOR rule 6.28, running through a switch in the Rangeland facility.⁴ On May 13, 2016, Mr. Syring issued a second letter of reprimand to Mr. Robinson for failure to follow the placard requirements of the U.S. Hazardous Material Instructions, and for violation of General Order #24 (failure to use proper verbiage for a shoving movement).⁵ Mr. Robinson was warned in both letters that future rule violations "could lead to further discipline including termination."

³ Employer's Exhibit (EX) 1.

⁴ EX 2.

⁵ EX 3.

Mr. Robinson believes that neither letter of reprimand was warranted. In his version of events, the January 15 letter was based on Mr. Syring's wish to mollify the people at Rangeland; the train, according to him, was actually under the command of a Rangeland conductor and it was Mr. Robinson who saw that the switch was not properly aligned and ordered an emergency stop. The May 13 letter, according to Mr. Robinson, grew out of a dispute between him and Mr. Parker; his train was properly placarded for hazardous material, but Mr. Parker apparently boarded the train without permission and in an unsafe manner, removed a placard, and waited to see whether the crew would notice the missing placard. When Mr. Robinson became aware of what Mr. Parker had done, he confronted Mr. Parker about boarding the train without following proper procedures.

Events Leading to Suspension

During 2016, Mr. Robinson was assigned to qualify Michael Zillifro as a conductor with SWRR. On July 4, 2016, Mr. Robinson sent an email to his supervisor, Jeff Parker, describing a disagreement he had with Mr. Zillifro.⁶ Specifically, he told Mr. Parker that Mr. Zillifro had reported for a qualification check ride at 12:15 p.m. on that day, along with engineer Marcus Brookhart. Mr. Robinson was attempting to conduct a crew job/safety meeting, but in his opinion, Mr. Zillifro was more focused on a dispute between Mr. Brookhart and Mr. Parker. Additionally, Mr. Robinson made a number of other allegations regarding comments and actions by Mr. Zillifro, including:

- A "casual conversation" between Mr. Robinson and Mr. Zillifro turned controversial, when Mr. Zillifro said that his job was to move trains expediently and rapidly; Mr. Robinson objected to that characterization, and told Mr. Zillifro that he had to consider safety and rules compliance. Mr. Zillifro disagreed with Mr. Robinson on that matter and on the importance of the conductor in ensuring safety and welfare of the crew. According to Mr. Robinson's email, Mr. Zillifro said that his allegiance was to the train, and not to the welfare or safety of the crew. Mr. Robinson characterized that as a coward's response, and Mr. Zillifro replied, "Robinson, don't you call me a coward, or you will suffer severe consequences."
- Mr. Zillifro disagreed with the requirements of General Order Number 12 and GCOR Rule 2.4 "Ending Transmissions," requiring certain reporting requirements. According to Mr. Robinson, Mr. Zillifro thought the requirement was unnecessary and mocked it.
- Mr. Zillifro disagreed with the understanding and application of General Order Number 14, and stated that he would apply his understanding when he was a conductor;
- Mr. Zillifro took exception to General Order Number 23, requiring reporting to the dispatcher that all main line switches were locked in the normal position, and when Mr. Robinson tried to correct the violation, Mr. Zillifro became hostile;
- Mr. Zillifro stated that his personal policy was "if someone throws me under the bus, I will return the favor," and Mr. Zillifro was then reminded of the SWRR policy related to workplace violence;

⁶ CX 2.

- Mr. Zillifro took exception to SWRR Time Table “A” with regard to trains operating on a specific radio channel, and refused the instructions of the conductor to use the correct channel after the engineer had directed him to switch to an incorrect channel;
- Mr. Zillifro took exception to switch point inspection inside the BNSF yard, and vehemently declared that his interpretation was correct while Mr. Robinson’s was intrusive;
- Mr. Zillifro took exception to GCOR Rule 5.0, requiring proper use of a lantern when working around equipment at night, and disobeyed instructions to use a lantern while setting hand brakes and performing a train securement test.

Mr. Robinson asked Mr. Parker that he be relieved of responsibility for qualifying Mr. Zillifro as a conductor.

On August 18, 2016, Mr. Robinson was assigned duties as conductor, and Mr. Zillifro was assigned duties as an engineer, on a SWRR train bound for Artesia and then Carlsbad, New Mexico. A trainee engineer, Justin Winston, was also on board. During the run to Artesia, Mr. Zillifro and Mr. Whitson used their personal cell phones in the cab, and were smoking in the cab. Mr. Robinson directed Mr. Zillifro to stop doing so, and to instruct Mr. Whitson to stop doing so. As the train approached Artesia, Mr. Robinson felt ill from the effects of the smoke, and instructed the crew to take a safety break so he could obtain some medication. He also wanted to contact the dispatcher to obtain a track warrant from Artesia to Carlsbad. Mr. Robinson went to the toilet in the locomotive and was sick, and when he returned to the cab he saw that the engineers had failed to follow his instruction to stop, and in fact had exceeded their track warrant to Artesia by less than a train length. He issued an emergency command to stop and stay stopped, and demanded an explanation from Mr. Zillifro and Mr. Winston, but they became belligerent and found the situation amusing. Mr. Robinson then obtained a track warrant to Carlsbad from the dispatcher.

When the train arrived at the Rangeland facility, it was transferred to other employees and the switches at the Loving industrial spur were placed in the correct position. The SWRR crew then took a cab to the Carlsbad depot, where Mr. Robinson tried to hold a safety meeting. Mr. Zillifro refused to participate in the safety meeting, and said that he was going to show off duty before the crew reported that the switches were restored to proper position as required by SWRR rules. Mr. Zillifro marked off duty at 9:30 p.m.; Mr. Robinson reported proper switch position at 9:34 p.m.; and Mr. Robinson and Mr. Whitson showed off duty at 9:45 p.m.

After the crew reported off duty, they went to SWRR-provided lodgings in Carlsbad. Mr. Robinson berated Mr. Zillifro for his attitude and for his rules violations, including smoking in the cab, which had made Mr. Robinson sick. He approached Mr. Zillifro, stood near him, and lunged at him, and cursed at him for violating the rules for the Loving industrial spur. Mr. Zillifro told Mr. Robinson to get out of his face, and Mr. Robinson continued to curse and yell at Mr. Zillifro.

Mr. Zillifro reported the incident to Matt Astle, then the manager of rules and training at SWRR. He characterized Mr. Robinson as being agitated and hostile, getting in his face and yelling at him while standing toe to toe. Mr. Astle interviewed Mr. Zillifro, Mr. Whitson, and

Mr. Robinson separately.⁷ Mr. Zillifro said that Mr. Robinson was aggressive; that he was yelling and screaming in Mr. Zillifro's face and standing very close to him. He told Mr. Astle that Mr. Robinson made lunging gestures at him, and that he considered it a hostile work environment. Mr. Whitson confirmed Mr. Zillifro's account, and described Mr. Robinson as aggressive, out of control, and "in Mr. Zillifro's face." Mr. Robinson admitted to Mr. Astle that he had made a mistake and was a little too heated in his approach to Mr. Zillifro. He told Mr. Astle that he would try to be more professional in the future. Mr. Astle emailed Mr. Syring a summary of his discussions with the three individuals involved in the incident, and told Mr. Syring that "all of this began with a disagreement over what time should be recorded on the Hours of Duty Record."

After meeting with Mr. Astle, Mr. Robinson was under the impression that no further action would be taken. On the morning of August 20, 2016, he emailed Mr. Bryant and asked to be taken off board for 24 hours while he recovered from lung inflammation, which he attributed to Mr. Zillifro's and Mr. Whitson's smoking in the cab of the locomotive. At that time, he was taking over the counter medications.

On August 20, Mr. Robinson and Mr. Burkhart, together with another engineer trainee, Mr. Wiggins, deadheaded to Carlsbad to pick up a run on August 21 from Carlsbad to Clovis.⁸ On the following morning, while the crew was waiting for the company taxi to take them to their train, a contractor joined them and had a conversation. Mr. Robinson learned from the contractor that drinking and unauthorized visitors were allowed in the company-provided lodging at Carlsbad on August 20. The contractor employee told them that Mr. Syring had excepted contractors from the no-drinking and no-visitor policy at the lodging. When Mr. Robinson reported for duty at the Carlsbad depot, he asked Patty Walker, Mr. Syring's secretary, whether what the contractor had told him was true. Ms. Walker replied that contractors were not excepted from the policy, and she would advise Mr. Syring of the matter.

On August 23, 2016, Mr. Robinson reported off duty at 6:45 p.m., and learned that he had been suspended from duty without explanation or prior notification.

Suspension

After Mr. Astle interviewed Mr. Robinson, Mr. Zillifro, and Mr. Whitson about the events of August 18-19, he emailed a report of his findings to Mr. Syring.⁹ Mr. Syring, Mr. Carswell, and company attorneys consulted on Mr. Robinson's behavior, and ultimately agreed that the appropriate action would be a one-week suspension with a requirement for 10 hours of anger management from a licensed program. On August 23, 2016, Mr. Syring signed the letter to

⁷ Written statements of Mr. Zillifro and Mr. Whitson were admitted as EX 4 and EX 5.

⁸ Mr. Robinson's hearing testimony regarding the events of August 20-24 are very different from the way he reported them in his 2016 OSHA complaint (CX 2). I credit the version in the OSHA complaint over the hearing testimony, because the report to OSHA was made less than a week after the fact, while his hearing testimony was almost two years later. In addition, it was clear from Mr. Robinson's testimony at the hearing that he blamed Mr. Zillifro for his suspension and termination, and I conclude that he changed his version of events to underscore Mr. Zillifro's blame.

⁹ EX 6.

Mr. Robinson informing him of the decision.¹⁰ He provided Mr. Robinson with the letter by email on the same day. Mr. Robinson went to the doctor on August 24 to be checked for his reaction to the smoking, and was diagnosed with acute bronchitis and taken off work until August 26. The doctor told Mr. Robinson that he should attend the anger management course to prevent termination from employment, although the doctor indicated that he saw no mental issues. Mr. Robinson investigated the availability of anger management training in Clovis, and learned that there was a class available for one hour per week. He also spoke with Ms. Walker about the availability of insurance, and understood after speaking with her that his insurance coverage would end at the end of August because he would still be under suspension.¹¹ He determined that he could not afford to stay in New Mexico for the length of time required to take anger management while receiving no income and paying for the course out of his own pocket, so on September 15, 2016, he went to his home in Michigan. He had not received anger management before he left, and did not receive it in Michigan. He was treated for his lung ailment by Community Health in Michigan.

By letter dated September 22, 2016, Mr. Syring offered to assist Mr. Robinson in finding an anger management program in New Mexico at little or no cost to Mr. Robinson.¹² He also advised Mr. Robinson that if he still decided to go to Michigan, he would have to stay in contact with Mr. Bryant. He extended the date for Mr. Robinson to complete an anger management program to October 14, with a target date to return to work of October 17. Mr. Syring gave Mr. Robinson the opportunity to let him know whether the time frame worked, but absent that, he was expected to return to work on October 17; and if he did not, he would be terminated. Mr. Syring instructed Mr. Robinson to check in with Mr. Bryant every Monday until he returned. Mr. Robinson did not do so, and in fact had no contact with anyone at SWRR after he left New Mexico. By a second letter dated September 22, 2016, Mr. Syring again instructed Mr. Robinson to complete his anger management program by October 14 and return to work by October 17.¹³ Mr. Robinson did not do so, and by letter dated October 19, 2016, Mr. Syring informed him that his employment with SWRR was terminated as of that date.¹⁴

FRSA Complaint

Mr. Robinson made a complaint under FRSA to OSHA on August 24, 2016, alleging that he had been suspended for engaging in protected activity. During the course of the OSHA investigation, Mr. Robinson was terminated. Mr. Cedar considered the termination as part of his investigation, and concluded that neither the suspension nor the termination violated FRSA.

Discussion

To prevail in a whistleblower case brought under the FRSA, a complainant has the initial burden to show by a preponderance of the evidence (1) that he engaged in protected activity,

¹⁰ EX 7.

¹¹ This understanding was incorrect. As Mr. Carswell explained, insurance benefits ended when an employee was terminated, but not on suspension.

¹² EX 8, p. 1.

¹³ EX 8, p. 2.

¹⁴ EX 9.

(2) that he suffered an adverse employment action, and (3) that his engaging in protected activity contributed to the adverse employment. If a complainant successfully meets that burden, the employer can escape liability by demonstrating by clear and convincing evidence that it would have taken the adverse employment action even in the absence of protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Stallard v. Norfolk Southern Railway Co.*, ARB No. 16-028, ALJ No. 2014-FRS-149 (ARB Sept. 29, 2017); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012).

Mr. Robinson Engaged in Protected Activity

Under the FRSA, employers are prohibited from discriminating against employees who, as relevant to this case: (1) provides information to a supervisor or an agency regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, (2) reports in good faith a hazardous safety or security condition, or (3) requests medical or first aid treatment, or follows orders or a treatment plan of a treating physician.

Here, the evidence shows that Mr. Robinson made a number of complaints about Mr. Zillifro's conduct. Some of those complaints clearly involved a reasonable belief that Mr. Zillifro's conduct constituted violations of Federal law, rule, or regulation. Some, however, did not, as they were mere verbal disagreements about certain rules and policies of the railroad, and others were manifestations of the poor personal relationship between Mr. Robinson and Mr. Zillifro. I find that the following complaints did constitute protected activity:

- Reporting Mr. Zillifro for refusing to use a lantern while setting hand brakes at night;
- Reporting Mr. Zillifro and Mr. Whitson for using cell phones in the cab, which violates 49 C.F.R. § 220.305;
- Requesting time off on August 20, 2016 to recover from exposure to smoke in the cab of the locomotive; and
- Filing a complaint of discrimination with OSHA on August 24, 2016.

I specifically find that Mr. Robinson did not, at any time before testifying at the hearing, report that the smoke he encountered in the cab of the locomotive was from the use of illegal drugs, or indeed drugs of any kind. He did not report illegal drug use to anyone at SWRR. In addition, he has not shown that smoking in the cab was in violation of any Federal law, regulation, or policy related to railroad safety. Thus, he did not engage in protected activity when he reported Mr. Zillifro and Mr. Whitson for smoking in the cab. The remainder of the incidents reported in the July 4 email to Mr. Parker likewise do not constitute protected activity, as there is no evidence that they violated or were otherwise contrary to any Federal law, regulation, or policy related to railroad safety.¹⁵

¹⁵ If Mr. Robinson had reported Mr. Zillifro for acting on any of his policy disagreements with Mr. Robinson or with SWRR rules, this determination might be different. But he only reported Mr. Zillifro's verbal disagreement with them.

Furthermore, I find that the information provided to Mr. Astle in the meeting of August 19, 2016, that the altercation arose from a disagreement about hours of duty rules, was not protected activity. Hours of duty are strictly regulated under 49 U.S.C. § 21101 *et seq.* and 49 C.F.R. Part 228. However, Mr. Robinson's mentioning the disagreement to Mr. Astle is not a report of a violation, but was background information about the cause of the altercation between him and Mr. Zillifro.

Mr. Robinson Suffered Adverse Employment Action

There is no dispute, and Employer does not contest, that Mr. Robinson was suspended from employment. Consequently, he suffered an adverse employment action.

Mr. Robinson's Protected Activity Did Not Contribute to the Adverse Employment Action

On August 18, 2016, Mr. Robinson was the aggressor in a verbal confrontation with Mr. Zillifro. He was unhappy with Mr. Zillifro's conduct on the run that day, and in his words "berated" Mr. Zillifro for failing to follow proper operating procedures. He approached Mr. Zillifro, stood within inches of him, and yelled at him. After learning of Mr. Robinson's behavior, Mr. Syring discussed the matter with Mr. Carswell and company attorneys. Based on Mr. Robinson's behavior, his admission of becoming "heated," and their conclusion that he was the aggressor, they decided to suspend Mr. Robinson for five days, with his return conditioned on completion of 10 hours of anger management from a licensed program.

Mr. Robinson's reporting Mr. Zillifro for failing to use a lantern while setting hand brakes in the dark did not contribute to the decision to suspend him. The report was made to Mr. Parker, and there is no evidence that Mr. Parker was involved in the suspension decision, nor is there evidence that Mr. Parker informed any of the decision makers that Mr. Robinson had made that allegation.

Mr. Robinson's complaint that Mr. Zillifro and Mr. Whitson used their cell phones in the cab played no part in the decision to suspend him. Mr. Carswell testified credibly that SWRR takes all reports of safety concerns seriously, and investigates all of them to determine whether any corrective action should be taken. It is a common occurrence, and one that the railroad encourages, for employees to report their concerns about other employees' safety violations. Furthermore, although I credit Mr. Robinson's assertion (in his OSHA complaint) that he told Mr. Astle during his inquiry into the events of August 18 that Mr. Zillifro and Mr. Whitson had used their cell phones in the cab, there is no evidence that Mr. Astle passed that information along to the decision makers, or that Mr. Astle was involved in the decision to suspend Mr. Robinson. Likewise, nothing in the record suggests that Mr. Robinson reported cell phone use to the decision makers during the period between August 19 (when Mr. Astle reported his findings to Mr. Syring) and August 23 (when the letter of suspension was signed).

Mr. Robinson's request for time off to recover from his throat and lung inflammation played no part in the decision to suspend him. His request was made to Mr. Bryant, and there is no evidence that Mr. Bryant informed anyone involved in the suspension decision that Mr. Robinson had made the request. And there is no evidence that Mr. Bryant himself was involved

in the suspension decision. Likewise, Mr. Robinson's doctor's request that Mr. Robinson be off work on August 24 and 25, even if considered a treatment plan, played no part in the suspension decision; he had already been suspended before he saw the doctor.

Mr. Robinson's filing an OSHA complaint on August 24, 2016 did not contribute to his suspension. It could not have: Mr. Syring signed the letter of suspension one day earlier, and sent it to Mr. Robinson the day he signed it. It was that letter that prompted the OSHA complaint.

ORDER

For the foregoing reasons, IT IS ORDERED that the complaint filed by Michael Robinson under the FRSA be, and the same hereby is, DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief 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).

Attachment A - Summary of Evidence

Complainant's Testimony (Tr. 22-99)

Mr. Robinson started working in the railroad industry in 1974, and has been a conductor, an engineer, a train dispatcher, an agent, a general manager, and a conductor qualifier and trainer. He worked for seven other railroads before finishing out his career with SWRR. He started working for SWRR in January of 2013, when they approached him to become a conductor. He was a conductor trainer for the entire time that he worked for SWRR, and also acted as conductor on certain trips.

Complainant was terminated by SWRR in 2014 after reporting multiple crew failures and violations, including damage to BNSF equipment by temporary engineers who were not qualified to run engines. He filed a complaint with OSHA, and was reinstated in 2015. He worked for SWRR until August of 2016. When he returned to work in 2015, he encountered a hostile work environment, because "they were not happy to have me back." In his first meeting with Mr. Syring after his return, Mr. Syring basically told him to watch his step. After that, he did his best to relearn the operating principles and rules of SWRR. Mr. Astle told Complainant that he was glad Complainant was training the conductors, and appreciated his hardcore approach, because many people were violating the rules and taking shortcuts. They were violating radio procedures, switching operations, and dispatcher reporting rules, which ultimately resulted in a head-on collision in Chisum. SWRR did not have a proper training program for the temporaries or the conductors.

The Chisum collision occurred on April 26, 2015. It happened when the track for a southbound train, crewed by a temporary engineer and a SWRR conductor, was not lined for the main. The crew of the other train was a temporary crew. All the crew members failed their post-accident drug testing. That was the kind of problem that Complainant was dealing with: the core association of the temporary crews with Mr. Syring, and the idea that it was okay to smoke in the cab, take drugs, and drink. When he complained about it, he was told to shut up. He didn't shut up, and when he reported it to Mr. Syring, he was subject to retaliation. He started reporting the issues to Mr. Syring the first week he was there, including the condition of the crews and the laxity of the training. Although Mr. Astle had asked him to be hardcore, in order to comply with a letter from the FRA, Mr. Syring asked him to back off because if he kept pressuring the crews to do the operations as Mr. Astle demanded, they would quit. That would lead to a further crew shortage, and Mr. Syring would have to explain to senior management why he was out of turnaround crews and couldn't get his trains across the road. Mr. Robinson made these reports 3-4 times a month, to the trainmaster, to Mr. Syring, and to Mr. Astle, as well as other management people.

Mr. Robinson discussed his reports to management with Mr. Cedar, an OSHA investigator, and thereafter sent the reports to Mr. Syring or spoke verbally with Mr. Syring, Mr. Astle, Mr. Carswell, and a few other people. He made his reports during the 2013-2014 employment period, but mostly within the 2015-2016 period. Mr. Syring's response was to say that he knew about the issues, and that Complainant shouldn't worry about it. Mr. Parker told

him several times that if he didn't shut up he would lose his job. Even after those conversations, Complainant continued to make reports 3-4 times per month.

Respondent's Exhibit 2 is a letter of reprimand dated January 15, 2016, that was issued to Mr. Robinson for failure to follow GCOR Rule 6.28, subsequently running through a switch within the Rangeland facility. The event giving rise to the letter involved an extremely heavy, under-powered sand train. Mr. Robinson was the conductor and, as the train pulled up to the Rangeland facility, they were approached by Rangeland employees. One was a conductor who informed Mr. Robinson that as he was not qualified on the route, the Rangeland conductor would take command of the train. When the head of the train pulled onto the Rangeland property, the conductor boarded and took command, and instructed the engineer to proceed, as the switches were properly lined. The train rounded a blind curve, and the Rangeland conductor continued to advise the engineer that the switches were lined properly. As they came out of the curve, Mr. Robinson observed that the switches were not lined properly, and ordered an emergency stop. The engineer put the train in a controlled emergency, but due to the weight of the train and the under-power, the train ran through the switch. The crew reported the incident to Mr. Syring, who said that he had gotten "quite an earful" from the Rangeland facility, and that if he didn't take some kind of disciplinary action then Rangeland may not allow SWRR crews on their property. Mr. Bryant (the engineer) and Mr. Robinson explained that Complainant was not in charge of the train – the Rangeland conductor was – but Mr. Syring wrote him up. Both Complainant and Mr. Bryant got a letter. In Mr. Robinson's opinion, the letter of reprimand was undeserved. Complainant believes that it was issued in retaliation for his reports of rule violations at SWRR, because Mr. Syring was well aware of his complaints involving crews operating in the Rangeland facility. He had reported that Rangeland was not giving SWRR crews proper information to access their property. Mr. Syring's response was basically not to worry about it, and to shut up.

The letter of reprimand dated May 13, 2016 was for failure to follow United States Hazardous Materials Instructions for Rail, Section 4, Item 2, Placard Requirements, and General Order No. 24, Failure to Use Proper Verbiage for a Shoving Movement. Mr. Robinson and a trainee were making a pickup on the east end of Artesia. He and the trainee walked the pickup and found all placards in place around the loaded hazmat cars. They proceeded to pull the eight-car train out, using proper verbiage, and tied it to the main train on the main, and proceeded to perform the air test. During the course of the movement, Trainmaster Jeff Parker approached them and told them that he had pulled a placard off the east end of the car. Complainant asked Mr. Parker if he was out of his mind; he did not ask permission to occupy the cars or the train in the track, which is required under the rules. He also told Mr. Parker that removing the placard was a violation. Mr. Parker told Mr. Robinson that Mr. Syring wanted Mr. Parker to push the proficiency reports, and Mr. Robinson replied that he could do so, but to do it in a legal manner; and in the meantime, to stay off his train. That didn't go over too well, and Mr. Parker wrote him up. When he contested it with Mr. Syring, Mr. Syring just gave him a blank look. In Mr. Robinson's opinion, the letter of reprimand was unwarranted, given that it was a violation of federal law.

During the period between the two incidents leading to letters of reprimand, Mr. Robinson was continuing to report what he believed to be rules violations by SWRR employees.

He made the reports to Mr. Syring and other senior management, including one person who was a prior Conrail employee who said he would forward them to Mr. Syring and Mr. Carswell.

With respect to the events of August 2016, Mr. Robinson had, on July 4, 2016, sent an email to Mr. Parker advising Mr. Parker that he no longer wanted to be involved in qualifying Michael Zillifro. He listed a number of violations by Mr. Zillifro, and noted that engineer Burkhart had not taken exception to any of them. He did not get a response to that email. He did have a follow-up conversation with Mr. Parker about Mr. Zillifro's issues with authority and his anger; he had bullied Mr. Robinson's engineer and tried unsuccessfully to bully Mr. Robinson. Complainant told Mr. Parker that Mr. Zillifro was a detriment to the railroad, and Mr. Parker replied that that was Mr. Syring's call, not his. Between July 4 and August 18, he conducted no further training of Mr. Zillifro. He had disqualified Mr. Zillifro, but Mr. Syring and Mr. Astle had promoted Mr. Zillifro to engineer anyway.

Between July 4 and August 18, Mr. Robinson had several runs with Mr. Zillifro. Mr. Zillifro was assigned as engineer on those runs. On August 18, he showed Mr. Astle and Mr. Syring the violations that he had reported about Mr. Zillifro, including smoking in the cab and use of personal electronic devices. The FRA investigated Mr. Zillifro's use of his cell phone. By using his cell phone, Mr. Zillifro had lost control of the operation of the train, even though he was training a student. Mr. Robinson does not know how Mr. Zillifro got qualified, and his anger issues and bullying made it really difficult. Mr. Robinson complained to Mr. Syring about Mr. Zillifro's use of a phone, failing to follow proper procedures, and his bullying and anger. Smoking in the cab is prohibited by BNSF rule, and the equipment SWRR uses is with BNSF. It is also state law in New Mexico that smoking in the cab is prohibited. When Mr. Robinson conducted safety briefings before a run, he would inform Mr. Zillifro that there was no smoking in the cab, and Mr. Zillifro replied that Mr. Syring had given him permission to do so.

Mr. Robinson also reported Mr. Zillifro for drug use. He contacted Mr. Syring twice; Mr. Syring said he would look into it. At the time of the August 18 incident, Mr. Zillifro and the trainee were smoking something that affected them, and made Mr. Robinson sick. He told the crew that he was going to stop the train so he could get relief because he was sick. As they approached Artesia, he was violently sick and went to the toilet of the locomotive because he was vomiting. After he returned to the cab, he saw that the train had exceeded the warrant, meaning that the train had exceeded the limits of its authorized run. He immediately stopped the train, and Mr. Zillifro and the trainee were sitting there laughing. He asked them if they realized what had happened in Chisum, because they had almost done the same thing. Mr. Robinson put the train in emergency and contacted the dispatcher and asked him for a warrant from Artesia to Carlsbad. He got one, and the train proceeded. Between Artesia and Carlsbad, Mr. Zillifro told Mr. Robinson that if he reported the drug use, Mr. Robinson would be thrown under the bus. Mr. Robinson told Mr. Zillifro not to threaten him, that he was the conductor, and that if Mr. Zillifro didn't like it, he could stop the train and get another engineer. Mr. Zillifro and the trainee did not speak after that, until they arrived in Carlsbad, when Mr. Zillifro began making little rude remarks. As they were proceeding through Carlsbad, Mr. Zillifro and Mr. Whitson, the trainee, were commenting that Mr. Robinson better not say anything to Mr. Syring or to Mr. Carswell or to anyone else about what happened at Artesia, or he would be looking for another job. Mr. Robinson again told them not to threaten him.

When the run was over and the train tied down, Mr. Zillifro said he was going to mark himself off-duty. Mr. Robinson told him that he couldn't do so, because they had to report to the dispatcher that the switches were lined and locked in the normal position, and they had to be on-duty to make the report. Mr. Zillifro improperly reported his time. The crew rode relatively quietly to Rangeland, but when they arrived there, Mr. Zillifro began his bullying again, saying that it was his way or the highway.

The run from Carlsbad to Rangeland took 12 hours and 45 minutes. When they arrived, they parked the train and got the switches lined, and then were picked up by the cab driver. The cab driver took them to the depot at Carlsbad. Mr. Zillifro came in and threw his paperwork at Mr. Robinson, saying that he was showing off-duty at that time. Mr. Robinson looked at Mr. Whitson, who said he would share his off-duty with Mr. Robinson's, saying that he knew what Mr. Robinson was talking about. Mr. Robinson took his comment to mean that Mr. Whitson acknowledged reporting off-duty with the switches lined and locked for normal movement, and derail restored. As they were getting into the cab, Mr. Zillifro started berating Mr. Whitson, calling him a "big pussy" for doing what Mr. Robinson wanted him to do. He told Mr. Whitson that if Mr. Whitson wanted to continue training with Mr. Zillifro, he would have to do what Mr. Zillifro said, because he was Mr. Whitson's trainer. Mr. Robinson was just a conductor. Mr. Robinson suggested that Mr. Zillifro take a break and relax.

When the crew got over to the apartments, Mr. Zillifro again began berating Mr. Robinson, on the public sidewalk, about the incident at Rangeland. Mr. Robinson explained to Mr. Zillifro that he was in violation, and was forcing Mr. Robinson to approach Mr. Astle about it. Mr. Zillifro got angry and started yelling at Mr. Robinson, who yelled back and said that Mr. Zillifro committed a catastrophic rules violation. He told Mr. Zillifro that he was tired of Mr. Zillifro's bullying and anger problems, and he was not going to bully Mr. Robinson. Mr. Zillifro threw down his bag on the porch of the apartment and went to the next set of apartments along with Mr. Whitson. Mr. Zillifro's partner and some of the other temporaries were there having a beer party, with liquor and women, directly in violation of Mr. Syring's orders.

The next morning, Mr. Robinson and Mr. Zillifro were called in by Mr. Astle to talk about what had happened, and Mr. Astle suggested that they drop the issue, shake hands, and try to get the railroad going. Mr. Robinson agreed to try to take care of it, and then begrudgingly wrote up a statement, still feeling the effects of what had been smoked in the cab. Mr. Astle said he would have a discussion with Mr. Zillifro, and as far as Mr. Astle was concerned, it was over.

On August 20, however, Mr. Robinson had another run with Mr. Zillifro, who again was drinking and had unauthorized persons in the cabin. Mr. Robinson reported it to Mr. Syring's secretary, who reported it to Mr. Syring, and Mr. Syring pulled Mr. Robinson out of service. On August 20, the crew had deadheaded from Clovis to Carlsbad to catch a train on August 21. On the evening of August 20, at the apartments, there was drinking and unauthorized persons in the apartment. Mr. Robinson was allowed to take the train back up to Clovis from Carlsbad, and Mr. Zillifro started smoking and using his phone. Mr. Robinson told him to stop, and if he didn't, Mr. Robinson would get off the train. Mr. Zillifro said that he had nothing to worry about, and that Mr. Syring was going to have a conversation with Mr. Robinson. When Mr. Robinson arrived at

Clovis and signed off duty, he found out he was not on the call list. He asked Bill Bryant, who was then the trainmaster, who said that Mr. Syring needed to talk to him about the drinking at the apartments. Mr. Syring did not talk to Mr. Robinson for three days, and suspended him at that time and told him he needed to go to anger management. Mr. Robinson was given a letter of suspension on August 23, to begin on August 24. The suspension was for five days “concurrent,” although Mr. Robinson did not know what “concurrent” referred to because he had no other action pending.

The letter, and an email, told Mr. Robinson that he had to attend anger management before he could come back to work. He investigated, and spoke to a woman in Carlsbad who told him that she could meet with him one day per week, so it would take six to eight weeks to complete it. As Mr. Robinson was suspended, he was not being paid, and his health insurance would end at the end of August. He could not afford to pay it out of pocket, as he was earning no income. There was no way he could go two months in Clovis with no income or insurance, and nobody offering to pay for anger management. He understood that he could only get it done in Michigan, where he stayed with a friend and was able to use Community Medical for treatment for the effects of the exposure in the cab of the locomotive. Mr. Robinson left New Mexico on September 15, and had not received anger management when he left. He could not obtain it, and was following instructions from Mr. Cedar that he didn’t need to have it.

Mr. Syring sent Mr. Robinson a couple of letters on September 22. Mr. Syring told Mr. Robinson that the time for him to complete anger management had been extended through October 14, and Mr. Robinson was expected to return to work on October 17. Mr. Robinson spoke with Mr. Syring after September 22, and Mr. Syring told him that he had spoken with Mr. Cedar. Mr. Syring also told Mr. Robinson that either he got anger management, or he would not have a job. Mr. Robinson told Mr. Syring that he was cut off from his medical insurance when he was suspended, and he could not afford to live there during for the duration of anger management in New Mexico because they would only meet with him one hour per week. Mr. Syring told Mr. Robinson that he would have to figure it out. Before leaving New Mexico, Mr. Robinson had seen Dr. Donald in Clovis, who told him that he saw no sociological, psychological, or psychiatric problems. Dr. Donald did see an inflammatory situation in Mr. Robinson’s esophagus and bronchially, from an unknown substance, occurring in the cab of a locomotive when people were smoking. In Dr. Donald’s opinion, Mr. Robinson did not need anger management.

Mr. Syring also instructed Complainant to stay in touch with Bill Bryant while he was in Michigan. Mr. Cedar told Mr. Robinson that he did not have to do so, because Mr. Cedar was going to talk to someone. Based on his conversation with Mr. Cedar, Complainant did not keep in touch with Mr. Bryant.

The last communication Mr. Robinson had with anyone at the railroad was when he received a letter dated October 19, informing him that he had been terminated.

During the 2015-2016 period, after returning to work with SWRR, Mr. Robinson was earning \$20.00 per hour. Many times he did not work 40 hours a week, so it was a financial hardship. He asked Mr. Syring for pay equal to that of the trainees, which was a guaranteed

\$1,500.00 per week, but Mr. Syring declined. There were times that he worked more than 40 hours in a week, and he estimates that over that period of time he averaged pay of about \$1,000.00 per week.

Mr. Robinson has written three documents with respect to this case: the initial complaint, an amended complaint about two weeks later, and an appeal to the administrative court. Those documents include allegations that people were smoking in the cab, making him sick, but he does not know whether he specifically alleged drug use. He did not document the use of drugs in the cab other than to say that the substance being smoked made him sick.

Complainant recalls receiving the January 15, 2016 letter of reprimand with regard to allegedly running the switch at Rangeland. Before testifying at the hearing, Mr. Robinson did not allege that the letter was a basis of retaliation. He made an OSHA complaint in August of 2016. He did say then that the January 15, 2016 letter was retaliatory.

Mr. Robinson did not file a complaint with OSHA with respect to the May 13, 2016 letter of reprimand, related to the placarding incident. He handled it internally the best he could. Mr. Syring told him that he did not approve of what Mr. Parker had done, and would handle it; but Complainant received the letter. On the day of the incident, Mr. Robinson's train had tied up to other cars, which they then pulled out and tied to the main train. They proceeded to do an air test, when Mr. Parker told him to stop the movement for a safety meeting. Mr. Parker told the crew that while they were moving the loaded tank car out of the siding, he had ordered the placard taken off that train and waited to see whether the crew noticed it during the air test. They had not yet found it, because they had not got to that part of the train yet. Mr. Robinson reprimanded Mr. Parker for boarding a moving train without asking for three-step protection, and for committing a federal offense by removing a placard off a loaded tank car. At his deposition, Complainant testified that Mr. Parker had told him that he had boarded the train and removed the placard while the train was moving. He testified that it was dark, and Mr. Parker could have been killed. Complainant takes no responsibility for the removal of the placard; he did not leave the station with the placard off, but Mr. Parker removed the placard while the train was moving.

Complainant documented events that he thought were pertinent in emails. There is no email before the events of August 18 documenting that he had told Respondent about catastrophic violations, drug use in the cabins, drug use in the locomotives, or the like. He had verbal conversations with Respondent about those matters. After receiving his second letter of reprimand in less than five months, he did not file any OSHA complaints alleging retaliation. The formal complaint he made was in August, but he made verbal complaints before that. He sent an email alleging a hostile work environment to Mr. Cedar in the first few months after his return to SWRR, but he does not have a copy of it. If he had issues with something, he would call and talk to a supervisor, upper management, or Mr. Cedar.

The incident in this case occurred on August 18. Complainant would not call what Mr. Astle did an investigation; if he had been told there was an investigation, he would not have made a statement because he has the right to representation or to remain silent. He did not engage in conduct that made him believe he needed representation, but there were retaliatory actions from a general manager who showed favoritism to a temporary employee. Mr. Robinson

does not like or dislike Mr. Zillifro; Mr. Zillifro made more money than he did, and Mr. Robinson was a qualified conductor, while Mr. Zillifro was not. Mr. Robinson believed he was more skilled as a conductor than Mr. Zillifro. It didn't bother Mr. Robinson that he made less money than Mr. Zillifro, even though he believed he was a better and more skilled employee.

Mr. Robinson met with Mr. Astle on August 19. On August 20, nearly 24 hours later, he emailed Mr. Bryant and asked Mr. Bryant to take him off board to recover. Complainant had seen a doctor and had an inflammation, and he needed to take the time off. He also told Mr. Cedar of his condition. The doctor had advised him to take three days off for his throat inflammation. There is nothing in his email to Mr. Bryant about people using drugs in the cab, but he told Mr. Bryant verbally. Using drugs in the cab is a rules violation, and a serious one if it can be proven. Complainant does not have access to testing materials, and has not received training from SWRR, but he can report what he saw and what his instincts – which Mr. Astle said were pretty good – tell him. He told Mr. Bryant verbally, not in an email, that they were smoking some kind of substance out of a container that he did not recognize.

The altercation between Mr. Robinson and Mr. Zillifro only lasted a minute or two, and there was no physical contact and no threat to life, limb, or employment. It started with Mr. Zillifro, and it ended when he left the sidewalk, but his personal equipment on the porch of the rooming house, and went over to drink with co-workers from the temporary employment company. Mr. Robinson admitted that he got too heated with Mr. Zillifro during the altercation. Conductors should be ground level and control juvenile actions like Mr. Zillifro's, but he is human, and Mr. Zillifro was repeatedly noncompliant with the rules and almost got them into a head-on collision with another train. It's the conductor's job to reprimand the engineer for that conduct. He did, and Mr. Zillifro didn't like it.

Mr. Robinson reported Mr. Zillifro's conduct to both the FRA and OSHA. The FRA is still investigating the allegations. Complainant has attempted to contact a witness, but they have legal fears and would not testify.

Patty Walker is the name of the person Mr. Robinson referred to as the secretary. He told her about the drinking on property, and Ms. Walker said she would inform Mr. Syring. It was after that that Mr. Syring told Mr. Robinson to attend anger management.

When Mr. Robinson returned to work for SWRR for the second time, there was a new general manager, a new vice president of operations, and a new rules and safety compliance manager. There was another new person, Mr. Miller, who introduced himself to Mr. Robinson as a safety consultant, and Mr. Robinson told him about some of the violations including drinking and drug use in the cab. He did not document the conversations with Mr. Miller because he understood that Mr. Miller was maintaining confidentiality, and if they wanted documentation, they would ask for it. Mr. Miller never asked for any documentation.

After the crew conflict, Mr. Robinson understood that there would be no write-up. Mr. Astle told him that the situation had been resolved and there was no need for further action, and Mr. Astle emailed the same to Mr. Syring. Exhibit 6, the email, does not say that the situation

had been resolved and there was no need for further action; that was a verbal statement by Mr. Astle.

Mr. Robinson told Mr. Astle that Mr. Zillifro had been the aggressor in the altercation. He also told Michelle Naija, the cab driver, and she said that she understood.

Mr. Robinson had a verbal conversation with Mr. Bryant after he sent an email, telling him that he had seen a doctor and the doctor had recommended taking three days off. The doctor also told him that he had no psychological impairment that would require him to get anger management. Mr. Robinson felt better after that and, on the second trip reported the use of alcohol in the cabins to the secretary. He returned from that trip and saw that he had been taken off-board by Mr. Syring.

The secretary, Patty, told Mr. Robinson that if he was suspended or terminated, his insurance would end at the end of the month. He understood that because he was suspended in August, his health insurance would terminate at the end of August. He checked with a provider of anger management services, who told him that if his insurance ended, he would have to pay out of pocket, and it was pretty expensive. She also said that she didn't think insurance would cover it anyway. Mr. Robinson took Patty's word for it, and didn't call the insurance company to confirm what she said. He decided, with the advice of the OSHA inspector, that it was unnecessary; his doctor thought so as well. His doctor gave him a return-to-work slip indicating there was no impediment. He sent a copy of that to the company, which refused to abide by what the doctor said. The OSHA investigator told Mr. Robinson that if the employee guidelines did not require him to attend anger management, he didn't have to attend. Mr. Robinson told the investigator that he didn't think the manual required it, and the investigator said he didn't see any reason that Mr. Robinson had to go. The investigator also said that the company was supposed to be talking to him about it.

Mr. Robinson used the words "too heated" when he described his demeanor in the altercation with Mr. Zillifro. It went from priestly, debonair, quiet, peaceful and demure to scolding a child. He was scolding a very immature, uneducated, undisciplined, rules-violating "piece of human being" that he was not in compliance with the rules, and that he would report it again if he continued in his aggression. It was not making Mr. Robinson upset that Mr. Zillifro was making more money than he was.

Any appeals of the two letters of reprimand and the letter of suspension were verbal. Mr. Robinson did not document them. He made them to the OSHA investigator and to SWRR senior management.

During Mr. Robinson's second employment with SWRR, Mr. Syring introduced himself as general manager, Mr. Parker indicated that he was the Clovis train manager, and Matt explained that he was the new safety supervisor. SWRR had numerous safety stand-downs in which the new management and the FRA discussed safety issues and procedures. Jack Stolarczyk told the employees that if they saw something, they were to report it, and if management isn't listening, report it to OSHA or FRA. Complainant does not recall Mr. Stolarczyk specifically telling employees to follow up in writing to support the file.

The SWRR employee manual from 2011 permits the reporting of harassment by employees, vendors, customers toward any person, in either verbal or written form.

After receiving the letter of reprimand in January of 2016 and before receiving the letter in May of 2016, Complainant did not file a complaint with OSHA about the first one. After the second letter and before the suspension in August, Complainant did not file a complaint with OSHA about the second letter of reprimand. Both times, he called Mr. Cedar and asked for his input about what had happened.

Testimony of Matthew R. Astle (Tr. 101-129)

Mr. Astle has been the general manager of SWRR since January of 2017. Before becoming general manager, he was SWRR's manager of rules and training. He was hired into that position in October of 2014. The duties and obligations of the manager of rules and training are to train people and to ensure that personnel are performing their duties per the rules and regulations. Before becoming SWRR's manager of rules and training, he was an instructor at the Northwest Railroad Institute in Vancouver, where he taught various railroad rules classes.

Mr. Astle became involved in the August 18, 2016 incident when he was approached by Mr. Zillifro, who told him that there were some things that needed to be looked at. Mr. Astle told Mr. Syring of the conversation, and Mr. Syring instructed him to look into it and take statements from the three employees who were witnesses. He then stated his findings in an email to Mr. Syring, along with the three statements. In taking the statements, Mr. Astle called each of the employees into his office, one at a time, and asked them what happened. He then asked each of them if they would fill out a statement, and they did. When he spoke with Mr. Robinson, Mr. Robinson told him that he had made a mistake, and the situation became heated. Mr. Astle took that to mean that Mr. Robinson was admitting that he had made the situation heated and possibly out of control. After speaking with all three witnesses, Mr. Astle believed that Mr. Robinson was the aggressor. Mr. Robinson did not tell Mr. Astle that he was ill or sick when he gave his statement. Mr. Astle's observations were that when Mr. Robinson gave his statement, he was calm and collected, and communicated normally; Mr. Astle did not witness any ill effects or judgment issues. Mr. Robinson did not appear ill.

Mr. Astle does not recall Mr. Robinson ever bringing safety issues to his attention. He does not recall Mr. Robinson ever expressing concern about any safety issue. If he had expressed concern about people using drugs in the cab or the locomotive, Mr. Astle would have reported it immediately to his supervisor. He would have taken those types of allegations very seriously, and would have been required to begin an investigation.

After taking the witness statements, Mr. Astle sent an email to Mr. Syring, giving him the sequence of events. The email includes a statement that "Robinson was out of control and in Zillifro's face." Mr. Astle believed that conclusion after his investigation. During his interview with Mr. Robinson, Mr. Robinson did not make any allegations about people drinking or using drugs on the SWRR property. If he had, Mr. Astle would have documented it in his email to his supervisor. SWRR takes those types of allegations very seriously.

Mr. Astle did not work for SWRR during when Mr. Robinson was first terminated from employment. He had no involvement in that decision. With respect to the August 18, 2016 incident, Mr. Astle had no role other than gathering information. After he wrote his email, Mr. Robinson did not come to him and tell him that he was not feeling well when he made his statement, and had additional allegations to make. If that had happened, Mr. Astle would have made a separate report. If he had alleged, even after the fact, that drugs and alcohols were being used, Mr. Astle would have taken it very seriously.

Mr. Astle began railroading in 2003 as a conductor, and worked as a conductor or an engineer until 2012 or 2013, when he went to work for the Northwest Railroad Institute. He then came to SWRR in October of 2014. He started out with the Portland and Western Railroad, which is a short line railroad. He has no Class 1 railroad experience.

Mr. Astle is aware of a compliance agreement between SWRR and the FRA, which required SWRR to continue to operate by federal regulations and rules. SWRR was required to report to the FRA monthly about any regulations that came into play. Mr. Astle was not in charge of the compliance agreement at the time; Art Miller was. Mr. Astle occasionally read the reports that were sent to the FRA. He recalls that SWRR reported various rules violations under the compliance agreement, including hours of service violations and a couple of certification violations, especially at the beginning of the compliance agreement.

Mr. Astle does not recall seeing the email that Mr. Robinson sent to Mr. Parker listing eight or nine violations of GCOR compliance rules on the part of Mr. Zillifro. He does not remember whether SWRR qualified Mr. Zillifro to be a conductor. At the time, either he or Mr. Miller would have signed the cards that qualified people to be conductors or engineers. Mr. Astle does not remember when Mr. Zillifro was qualified as an engineer, but does remember that he was qualified.

Mr. Astle remembers the conversation with Mr. Zillifro, but doesn't remember whether it occurred the night of August 18 or the morning of August 19. When he initially contacted Mr. Astle, Mr. Zillifro didn't tell him what it was about; it was in another conversation that Mr. Zillifro told him that there was a dispute over the hours of duty record and about clearing the Loving industrial spur. He did not tell Mr. Astle that he had exceeded his track warrant, and neither did anyone else. If Mr. Astle had learned that Mr. Zillifro had exceeded his warrant, and that Mr. Robinson had asked him to stop the train so that he could seek medical attention, Mr. Astle would have notified his supervisor, Mr. Syring, and sought counsel from him.

Mr. Astle has read parts of the NTSB investigative report into the Chisum collision. His understanding was that drugs were partially involved. One or possibly two of the four crew members failed the drug testing. The local crew was made up of temporary employees, who underwent a drug test.

Mr. Astle has not had conversations with Mr. Robinson about his qualification or training of conductors on SWRR. If Mr. Robinson were to qualify someone as a conductor, he would report that to Mr. Bryant, Mr. Miller, Mr. Astle, or Mr. Syring, depending on who was involved

in the operations. Mr. Astle was aware that Mr. Robinson was a conductor trainer, and had no problem with that designation at the time. Mr. Robinson's performance in the rules classes was satisfactory, and Mr. Astle does not remember whether there were any issues that Mr. Robinson needed to re-study. He does not recall taking exception to any of the tests that Mr. Robinson took at the safety classes.

Mr. Astle does not remember when Mr. Zillifro was certified or re-certified, and has no knowledge of Mr. Zillifro's being decertified as an engineer.

Typically, the general manager is the person who makes the determination that a conductor working for SWRR can be promoted to engineer. Mr. Astle does not know whether Mr. Syring ever recommended Mr. Robinson for promotion to engineer.

Under the compliance agreement, the FRA showed up periodically to perform surprise inspections. The hours of service issues were found during those audits. There were no violations of the agreement where SWRR said they would do something, and they failed to do it. The hours of service violations were discovered in the audits, but were not violations of the agreement.

Mr. Astle did not get any allegations from Mr. Robinson or anyone else that anybody exceeded their track warrants. That is a serious allegation that he would have taken seriously, and he would have begun an investigation.

Testimony of Bruce Carswell (Tr. 130-147)

Mr. Carswell is a senior vice president of SWRR. He originally went to work for SWRR as vice president of operations. As vice president of operations, his duties were to manage all aspects of SWRR, along with other short line railroads that are owned by his boss. Essentially, he supervised and managed the management teams on the railroad in all aspects of operations, including safety, mechanical, operations, maintenance, and commercial. When he was hired, the owner was unhappy with the performance of the railroad from operations, safety, and commercial standpoints, and Mr. Carswell had a general mandate to figure out what was needed and make necessary changes. After assessing SWRR for a short period of time, Mr. Carswell determined that the railroad needed a complete overhaul, and he brought in new management in almost all areas, including the general manager and his direct reports. Mr. Robinson's initial period of employment and termination from SWRR occurred before Mr. Carswell's employment with SWRR.

Sometime after he came on board, Mr. Carswell became aware of the OSHA complaint and the hearing, and after consulting with counsel, determined that the appropriate response was to re-employ Mr. Robinson and give him his back pay. He determined that prior management had not acted in keeping with what should have been done, and did everything in his power to rectify that situation.

Mr. Carswell became involved in the August 2016 incident when Mr. Syring, the general manager, contacted him to let him know about the altercation between employees. Given his prior OSHA complaint, and a couple of instances where Mr. Robinson had been combative with

fellow employees, Mr. Carswell decided that the situation needed to be handled appropriately and in context with what the company had done with employees in similar situations. They decided that a five-day suspension would be appropriate, with a requirement for anger management.

Mr. Carswell was aware of the compliance agreement between SWRR and the FRA, and was not aware of any violations of the agreement itself. There were periodic audits that would take place, and the FRA would advise SWRR that there were some issues that needed to be addressed; and they were. SWRR went through a fairly complete revamp. They instituted new training programs, a lot of which were focused and governed by issues and concerns raised by the FRA during the audits.

Other employees had been asked to take anger management with SWRR. Other employees had been suspended for “behavior unbecoming.” That this was Mr. Robinson’s third strike under the railroad’s accountability policy was discussed during the determination of the appropriate action.

An employee’s insurance benefits are not terminated or suspended if the employee is suspended, only on termination. In this case, Mr. Robinson’s insurance benefits were not going to be suspended or terminated at the end of August.

Mr. Carswell would expect to be made aware of allegations of people using drugs or alcohol in the locomotives, and was never made aware of any such allegations. If he had been made aware, he would have asked for an immediate investigation to determine the facts. Mr. Carswell is aware of Mr. Robinson’s allegations of retaliatory conduct, which he said were related to safety, but Mr. Carswell never received any information about Mr. Robinson’s complaints of retaliatory action. He was generally aware of Mr. Robinson’s concerns about the substandard performance of certain individuals, and spoke directly with Mr. Robinson in Carlsbad on one occasion. He took Mr. Robinson’s concerns seriously, and ultimately had conversations with the management team to make sure they were keeping them in mind when assessing and training employees. The comments could help SWRR focus where they should do operational testing to make sure employees weren’t shortcutting the rules. Mr. Robinson wasn’t the only employee making similar comments. There are always folks who think that somebody else could do a job differently or better, and the railroad took all the comments onboard and didn’t prejudge any of them. The approach was that there were valid concerns and they needed to make sure they were not indicative of larger problems.

The decision to suspend and ultimately terminate Mr. Robinson was a consultative effort between Mr. Carswell, legal, and the general manager. Mr. Carswell does not recall other people being involved. The original recommendation to suspend Mr. Robinson came from Mr. Syring. They talked about the alternatives, including termination, and decided that in this particular case the fair thing was a one-week suspension with anger management. Mr. Syring signed the letter informing Mr. Robinson of the decision because he was the senior manager locally. The ultimate decision to terminate Mr. Robinson was the subject of repeated conversations; neither Mr. Syring nor Mr. Carswell had been through a similar situation and they wanted to make sure that the

followed appropriate protocol to give Mr. Robinson every opportunity to complete the instructions and come back to work.

Mr. Carswell started in the railroad industry in 1986, originally in shops constructing and maintaining locomotives and freight cars. He started with the Willamette and Pacific Railroad in 1993 and has had progressive positions through several short line railroads up to the present. He has been a qualified locomotive engineer or conductor on the Willamette and Pacific, and later with the West Texas and Lubbock Railroad. They are Class 3 short line railroads. He has not had any qualifications in a Class 1 railroad.

Mr. Carswell's counterpart in the compliance agreement process is Vince Haggard, the regional administrator for Region 5 of the FRA. Since he has been dealing with this, SWRR's lease with BNSF has been terminated.

Mr. Carswell is only generally aware of Mr. Zillifro's employment. He does not recall receiving any complaints about Mr. Zillifro. In his position, Mr. Carswell has the authority to require employees to undergo anger management. He does so in a situation where it's apparent that an employee has issues. He has found in the past that it has been helpful. He has not attended any seminars or received any degrees specific to anger management, although it has been referred to in several presentations on dealing with problematic employees. Problematic employees does not mean that an employee has mental health issues; mental health is typically a totally separate situation that requires a different approach. Anger management is essentially trying to make sure that people can deal with partners, co-workers, et al. without exhibiting behaviors that would make the other person feel they are in a hostile environment. His approach was rather than just to use suspension, which typically doesn't solve the problem, to figure out an alternative approach that might improve the situation in the future. There were no records involved in the determination that Mr. Robinson needed to submit to anger management. There is a chief medical officer in relation to the Drug and Alcohol Program. The determination from Mr. Robinson's doctor that he could return to work related to the bronchial inflammation, and that did not relate to the determination as an outcome for the employee altercation. He did not forward the recommendation, which may have included a statement that Mr. Robinson does not have a mental impairment, to the company's chief medical officer and didn't believe it needed to be.

Insurance is not cut off on suspension, but it is on termination. An employee may approach Patty Walker for basic information, but more detailed questions would be referred to the corporate office or to Mr. Carswell.

In day to day operations, with 50-60 employees, there are inevitably people who will raise concerns. The railroad sought that out as part of the revamp of the safety process, essentially to get peer feedback on employee performance. As a result, they did end up with comments about concerns with specific employees. Mr. Carswell had no prejudice against any employee who came forward with serious concerns. He does not recall that he was aware of Mr. Robinson's allegations about Mr. Zillifro prior to August 19-20, and has no specific knowledge about Mr. Zillifro's certification or de-certification.

There is no requirement that an employee advise management of safety concerns in writing; it can be done verbally or in writing.

Absent any safety or health concerns raised by Mr. Robinson, SWRR would have suspended him as a result of the altercation.

At the time, Mr. Carswell had an office in Carlsbad, but split his time between there and other operations in Kansas, Arizona, western New Mexico, and Oregon.