



Issue Date: 31 August 2020

CASE NO.: 2018-FRS-00112

In the Matter of:

JUSTIN BROWN,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

DECISION AND ORDER DENYING COMPLAINT

This proceeding arises under 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. 110-53 (Aug. 3, 2007) (“Act” or “FRSA”). Justin Brown (the “Complainant”) alleges that Norfolk Southern Railway Company (the “Respondent” or “Employer”) violated the Act by unlawfully terminating him for reporting a work-related injury.

PROCEDURAL HISTORY

This case originated with a complaint filed on June 23, 2017, by Complainant. Specifically, the Complainant alleged that he was terminated in retaliation for reporting a workplace injury that occurred on February 18, 2017. (ALJX 1.) According to the complaint, the Complainant sustained an injury to his hand after he “realized the crew [he] had relieved had left the front locomotive nose door opened and that it was banging on the locomotive.” When the Complainant went to close the door, he alleged, “the door came back hard slamming against his outreached hand and jammed his finger.” (*Id.*) The Complainant further alleged that he had been subjected to disparate treatment because the Respondent, as grounds for his termination, cited to “false or conflicting statements,” while tolerating those of a fellow crew member, Engineer Marvin Hill, who claimed that the Complainant had admitted injuring himself by striking the door in anger.

On March 27, 2018, the Regional Secretary of the Occupational Health and Safety Administration (“OSHA”) issued the Secretary’s Findings. (*Id.*) The Secretary found that the

Respondent had terminated the Complainant “for conduct unbecoming an employee” by failing to promptly and properly report his “alleged on-duty injury” and by providing the Respondent with “false statements concerning his injury.” (*Id.*) According to the Secretary’s Findings, evidence gathered during an investigation into the matter “revealed Complainant’s protected activity did not contribute to his termination and that Respondent terminated his employment for “a legitimate business reason.” Accordingly, OSHA dismissed the Complaint.

On July 13, 2018,¹ the Complainant objected to the Secretary’s Findings and requested a formal hearing. (ALJX 2.)

On February 1, 2019, the undersigned issued a Notice of Hearing.

On July 22, 2019, the Respondent filed a motion for summary judgment. (ALJX 3.) According to the Respondent, even leaving aside the version of events of a co-worker, Engineer Hill, that the Complainant’s injury was self-inflicted by an angry punch to the locomotive wall, it was indisputable that the Complainant had given conflicting statements to Trainmaster Jeremy Louis as to how the accident occurred. (*Id.*) Regardless of the veracity of either version, the Respondent asserted, there was no factual dispute that the Complainant had 1) given false and conflicting statements, thereby failing to demonstrate good faith in reporting the injury; and 2) failed to promptly and properly report his injury after receiving medical attention. Therefore, the Respondent argued, it was entitled to judgment as a matter of law.

On August 19, 2019, the Complainant submitted his response to the Respondent’s motion for summary judgment. (ALJX 4.) The Complainant argued that questions regarding the credibility of both himself and Hill created genuine issues of material fact that could only be resolved in an evidentiary hearing. Moreover, the Complainant framed the issue as one in which the relevant inquiry was not whether the Complainant made prior inconsistent statements regarding his injury, but solely whether he “genuinely believed the injury he was reporting was work related.” (*Id.*) According to the Complainant, that question alone determined whether he had acted in good faith. Because the inquiry involved issues of credibility, the Complainant argued, he was entitled to a hearing on the matter.

On September 12, 2019, the undersigned denied the Respondent’s motion for summary judgment. (ALJX 5.) The undersigned found that the record adduced in support of the motions showed that there were genuine issues of material fact for hearing, including whether the Complainant acted in good faith.

A hearing on this matter was held in Cleveland, Ohio, on October 23, 2019. At the hearing, the following witnesses testified: 1) Justin Brown, the Complainant, 2) Jeremy Louis, Trainmaster at the time of the injury; 3) Nathaniel Gaines, Assistant Superintendent and Hearing Officer in the Respondent’s internal handling of the matter; and 4) Engineer Marvin Hill, the only other crew member on board the train at the time of the injury.

¹ Along with his objections to the Secretary’s Findings, the Complainant provided proof that his attorney had not received the letter from the Department of Labor containing those findings until July 12, 2018. (ALJX 2.) The parties have not made timeliness of the Complainant’s appeal to this Office an issue.

ISSUES

The following issues were contested:

1. Whether the Complainant reported his injury in good faith in order to invoke the employee-protection provisions of the FRSA;
2. If so, whether the Complainant's report of a personal injury was a protected activity under the FRSA;
3. If so, whether the Complainant's protected activity contributed to the Respondent's decision to discharge him;
4. If so, whether the Respondent can show by clear and convincing evidence that it would have discharged the Complainant absent his protected activity; and
5. If the Complainant is entitled to relief under the FRSA, the appropriate measure of relief.

(Tr. 11-12.)

FACTUAL BACKGROUND/TESTIMONY

It is undisputed that the Complainant began working for the Respondent in July 2015. Nor do the parties disagree that on February 18, 2017, a Saturday, the Complainant was working for the Respondent as a conductor. Marvin Hill, the Complainant's co-worker, was working as an engineer. The two men had just relieved the previous crew and were in a locomotive traveling from Cleveland, Ohio, to Bellevue, Ohio, when the Complainant injured his left hand. The facts are sharply in dispute, however, as to how the injury occurred.

According to the Complainant's testimony at the hearing, he was in the cab with Hill when, as the train was pulling out, he heard the sound of an unlatched metal door. (Tr. 41.) He testified that he heard "the opening and clacking of metal" coming from the "front-end nose door." (Tr. 42.) According to the Complainant, he alerted Hill to the sound and then proceeded down steps to the vestibule door, which he opened. He discovered that the nose door was not latched properly. He described how he used his right hand to close the vestibule door, then reached toward the unlatched nose door with his left hand just as the "slack opened up" on the train and he lurched forward. (*Id.*)

According to the Claimant, his left "pinkie" hit against the inside metal, or inner-trim of the engine around the nose door. (Tr. 47.) In the Complainant's words, "the door was coming back... and I did lurch forward into it." (Tr. 72.) He stated that it felt like he had "jammed" his finger but he did not think he had been injured. (Tr. 47.) He testified that he did not consider his jammed pinkie a reportable injury. (Tr. 49.) According to the Complainant, he did not discuss the

incident with Hill when he returned to the cab. (*Id.*) He testified that he did not perceive any reason to discuss the incident with the engineer. (Tr. 105.)

Hill, however, described the incident quite differently. He testified that after approximately four miles into their journey, the Complainant left his presence and, thereafter, he heard a “pop.” (Tr. 229.) According to Hill, immediately prior to that, the Complainant and he were involved in a conversation about the Complainant’s “baby’s mother, Vanessa” with whom he was having some “home issues.” (*Id.*) Hill testified that when the Complainant returned to his presence, he asked him, “Justin, why would you do that?” and the Complainant responded by talking about Vanessa and “having trouble at home.” Hill further testified that the Complainant began icing his hand. He stated that the Complainant “admitted” that he was “just mad” with Vanessa.” (*Id.*) Moreover, he stated that the Complainant admitted to hitting or punching the door.² He testified that when he and the Complainant later got off the train, he advised the Complainant to “go home and say you hurt your hand at home.” (Tr. 230.) He cautioned the Complainant not to say that he got his hand hurt at work because, “being a seasoned railroader,” he knew that if the Complainant injured his hand at work punching something, he was “going to get caught.” (*Id.*) He then explained that if the door had been defective, he would have been required to report it. (Tr. 231.) He stated that “if somebody has a defective anything and somebody gets hurt, you have to turn that in right then and there, right then and there. The injury is supposed to be reported.”³ (*Id.*)

After arriving in Bellevue and completing his shift, the Complainant returned home in the early morning hours of what was now Sunday, February 19, 2017. Given his recent workload, he was required to begin a forty-eight hour period of undisturbed rest. (Tr. 50.) The Complainant testified that he went to sleep for a couple of hours and, when he awoke, he observed “a tad bit of swelling” in his hand, which prompted him to go to the emergency room at around nine o’clock in the evening. (Tr. 51-52.) He stated that in the emergency room, he was advised of a possible fracture and told that it would “be best” to schedule an appointment with an orthopedist. (Tr. 52.) According to the Complainant, he left the emergency room with a wrap on his hand and a prescription for hydrocodone, ten milligrams, and Tylenol. (Tr. 52-53.) He stated that he went to Walgreen’s right away and filled the prescription at around two or three o’clock in the morning on what was then Monday, February 20, 2017. (Tr. 95-96.)

Records from Mercy Health record that the Complainant was seen in the Emergency Room on February 19, 2017. (JX 1.) He was diagnosed with a “closed nondisplaced fracture of

² On cross-examination, when asked whether he had actually seen the Complainant punch part of the locomotive, Hill responded, “Well, I heard it and we talked about it. He told me.” (Tr. 254.) He further testified that the Complainant never told him that there was “anything wrong with the door.” (Tr. 255.) On re-direct examination, he clarified that he had confronted the Complainant about what he had done, after hearing the “pop,” and the Complainant replied that he was having trouble with Vanessa.” (Tr. 264.) According to Hill, the Complainant admitted that that he had smacked the door with his hand. (Tr. 264.) On questioning from the bench, Hill clarified that the Claimant stated that he had hit the door, which Hill interpreted as the same as punched the door. (Tr. 266; *see also* Tr. 269.) According to Hill, when he learned two days later that the Complainant was stating that he jammed his hand on the door, “I knew that didn’t happen.” (Tr. 265.)

³ Asked whether he had his own separate duty to report the injury, Hill responded, “Yes, but I have never seen another person work for the railroad report an injury for another person. I’ve never seen that.” (Tr. 263.) Asked, though, whether failure to report an injury to another was violation of the rules, he replied, “That’s a violation.” (*Id.*)

fifth metacarpal bone of left hand, unspecified portion of metacarpal, initial encounter.” (*Id.* at 2.) He was advised to follow-up with an orthopedic surgeon within two days. (*Id.* at 3.) He was prescribed hydrocodone-acetaminophen, a quantity of five tablets of 325 milligrams, with instructions to take one-to-two tablets by mouth “every 6 hours as needed for Pain.” (*Id.* at 8.) He was also prescribed ibuprofen, 800 milligrams per tablet, to be taken by mouth every eight hours for pain. Finally, he was advised to ask his doctor about taking naproxen, 500 milligrams per tablet, two times daily for twenty doses. (*Id.*)

According to the Complainant, he called and spoke to the Respondent’s crew caller, named Shannon, sometime on February 20, 2017. (Tr. Tr. 53-54; 95-96.) He testified that he was not sure of the time that he called. (Tr. 54.) According to the Complainant, the purpose of the telephone call was to inquire about the procedure for “marking off” due to an injury after his period of mandated rest. (*Id.*) He stated that he informed Shannon about going to the emergency room and told her it was due to a workplace injury. (Tr. 96.) However, he stated that he did not consider this reporting an injury because “I didn’t know exactly what was wrong with my hand.” (Tr. 97.)

The Complainant was able to schedule an appointment with an orthopedist to examine his hand the following morning, Tuesday, on February 21, 2017. He testified that he had his father drive him to the morning appointment because he did not feel it was safe for him to drive due to the medication he was taking. (Tr. 55.) While in the car, however, he did call the crew caller. (Tr. 56.) The trainmaster, Jeremy Louis, joined the call. (*Id.*; JX 19.) The transcript of the phone call reveals that it began with the Complainant stating that on his last assignment, he had “a door come back and kind of jam my finger,” and he had been in the ER to have it “checked out” and was now on his way to a specialist. (JX 19 at 1.) The Complainant told Louis that, when his injury occurred, the “engine door was open cause I was going out cause we were gonna tie on the power.” (JX 19 at 2.) He added, “I was getting on the ground. He was pulling ahead. I was going to be back at the tie of course. The engine came ... the door was open as I was walking out. I wanted to catch the other door so it was closed so we didn’t hear all that noise in there and when I turned around the door was coming back and jammed my finger...” (*Id.*) When Louis said he was “curious why somebody wasn’t notified at the time of incident,” the Complainant responded by questioning whether he was supposed “to call you guys and stop movement” when he smacked a finger. (*Id.* at 3.) Answering his own question, he stated, “No. I kept going because I’m a man and I work hard.” (*Id.*) When Louis retorted that he was not questioning his manhood or work ethic, the Complainant responded that Louis was “questioning his integrity.” (*Id.*) Ultimately, Louis informed the Complainant that the “proper mark off in this case is on-duty injury,” and requested that he keep him “in the loop if there’s anything” he could “help with.” (*Id.*)

At the hearing, the Complainant stated that he was “in pain and disoriented” when he had spoken to Louis. (Tr. 57.) He conceded that he did not inform Louis during the call that he had a broken finger. (Tr. 70.) He also admitted that the version he told Louis turned out to be different from the one he would later tell Louis and others on the February 22, 2017. (Tr. 72.) He acquiesced to the Respondent’s counsel’s identification of the two versions as “Version A and Version B.” (Tr. 72-73.) He attributed the discrepancy between the two versions to the hydrocodone he was taking. (Tr. 73.) He agreed with Respondent’s counsel that Version B was

“very important” to his “pending FELA claim” because it made the previous crew, who he believed failed to fully close the nose door, partially responsible for his injury. (*Id.*) He stated that he was aware that in order to recover under FELA, it was necessary to prove “some degree of fault on the part of somebody other than yourself.” (*Id.*)⁴ Finally, the Complainant agreed that, consistent with Version B, he was blaming the conductor of the previous crew for his injury. (*Id.*)

In response to questions from the undersigned, the Complainant agreed that the difference between the two scenarios was that in Version A, he was injured “getting off the engine to go do a power move.” (Tr. 100.) He made clear that this was not an accurate description of what happened, according to his present version of events. (*Id.*) Asked if the version he gave Louis was still his version of what actually happened, he replied, “No, sir.” (*Id.*) He explained the inconsistency by stating that he was under the influence of hydrocodone when he gave the first statement, Version A. Asked, however, which version he allegedly gave to the orthopedist, the Complainant testified that he gave the orthopedist what he claimed was the correct version, Version B. (Tr. 101.)

Asked what happened between the time he spoke to Louis on way to the orthopedist and when he was seen by the orthopedist, such that he would offer the two men different versions of what happened, the Claimant replied that a couple of hours passed before he actually saw the orthopedist, due to the fact that he first had to have another x-ray taken. (Tr. 91-92.) Asked if his explanation, therefore, was that his mind had cleared over that two-hour period, he replied, “A tad bit, sir, yes.” (Tr. 103.) Asked if he had any other explanation for giving Louis a different version than he gave to the orthopedist only two hours earlier, other than the effect of the medication, the Complainant responded, “No, sir.” (*Id.*) He stated that by Tuesday morning, before he spoke to Louis on the way to the orthopedist, he had taken all five of the hydrocodone-acetaminophen that he had been prescribed, including one tablet that morning. (Tr. 98-99.)

Louis also testified at the hearing. He testified that he recalled the Complainant telling him on the telephone during the morning of February 21 that he jammed his finger during a power move “in which he was exiting the cab of the locomotive.” (Tr. 127.) He testified that during the telephone call, the Complainant did not inform him that he was on narcotic pain medication. (Tr. 128.) Asked whether the Claimant “seemed disoriented or confused,” or was slurring his words, or gave any other indication that he was impaired “to any degree,” Louis replied, “None. None whatsoever.” (*Id.*) Louis also testified that when he met with the Complainant the next morning, on February 22, the Complainant reported that the only medication he was taking was ibuprofen—in other words, that he had not taken the hydrocodone prescribed to him. (Tr. 133.) Louis’s summary of the telephone call contains the same information, stating, “Brown sated that the only medication he has been taking is the Ibuprofen.” (JX 15 at 3.)

⁴ The Federal Employers’ Liability Act (“FELA”) holds railroads liable for employees’ injuries “resulting in whole or in part from [carrier’s] negligence.” 45 U.S.C. § 51. To establish a *prima facie* case, the plaintiff must show, among other things that the railroad company was negligent and the railroad’s negligence played some part in causing the injury for which the plaintiff seeks compensation under FELA. See *Wright v. BNSF Ry. Co.*, 177 F.Supp.3d 1310, 1314 (N.D. Okla. 2016).

When cross-examined on this issue, Louis was asked whether it was possible that the Complainant's statement, that he had taken only ibuprofen, could have meant that he was not on hydrocodone at the time of the in-person meeting on February 22. (Tr. 139-140.) Louis responded, "No, that is not how I interpreted it." (Tr. 140.) He stated that he had asked the Complainant which medications he had been taking, and the Complainant told Louis that he had "taken ibuprofen as his form of medication since the incident." (*Id.*) According to Louis, he interpreted this to mean that the Complainant had only taken ibuprofen, not hydrocodone. (Tr. 141.) Asked by the undersigned how specific was Louis' memory of the conversation with the Complainant regarding the Complainant's prescribed medication, Louis replied, "Very specific. (Tr. 163.) Asked if his memory was "not fuzzy at all about the conversation," Louis replied, "Not during the 22nd – I asked him directly if he were taking any other medications or any medications, and he stated that the only medicine that he had been taking since the incident was ibuprofen." (Tr. 163-164.)

According to the Complainant, the orthopedist he saw on the morning of the February 21, 2017 diagnosed him with a fracture "similar to what's called a boxer's fracture." (Tr. 74.)

The following day, Tuesday February 22, 2017, the Complainant had a person-to-person meeting with Louis and two others, the assistant terminal superintendent, Bill Krzyzak, and the local union chairman, Aaron Frye. (Tr. 129.) Louis testified that Frye was present to insure that proper procedure was followed. (*Id.*) Louis testified that the version of the incident the Complainant gave was Version B, meaning that it was different from the version he had presented during the telephone call the previous morning. (*Id.*) As he put it, the Complainant's explanation of "how the injury occurred had changed." (Tr. 129-130.) In Louis's words, "There were discrepancies." (Tr. 129.) Louis explained that although the location of the incident was the same, "how the injury occurred had changed." (Tr. 120.) According to Louis, although he noted the change mentally, he did not confront the Complainant with the differing versions. (Tr. 162.) Louis testified that he did not seek an explanation from the Complainant. (*Id.*) Rather, he testified, he wanted to reference the recording of the telephone conversation on the February 21, the day before, and compare it with what the Complainant was stating on February 22. (Tr. 162-163.) He stated that even after he reviewed the Complainant's initial statement on the telephone, he did not seek any explanation from the Complainant before writing the "letter of charge." (Tr. 162; JX 11.)

According to Louis, he also had the nose door inspected for defects and interviewed Hill. (Tr. 131.) From Hill, he received information that the Complainant had inflicted his own injury "by punching the interior of the locomotive cab." (*Id.*) Louis testified that he was surprised by this information and had Hill memorialize it in his own handwriting. (Tr. 13; JX 16.) Louis informed his superintendent, Gary Shepard, of his investigative findings in a written report. (JX 15.) Louis clarified his own role as aiding in the investigative process and gathering and collecting data "to help determine the facts." (Tr. 134.) He described himself as the "charging officer." (*Id.*) He acknowledged, however, that the superintendent would have a say in the decision to charge, as well as others up the chain of command. (*Id.*) Although he described himself as the "charging officer," he stated that he did not arrive at any conclusions of his own. (Tr. 168-169.) Rather, he again emphasized his role as information-gatherer. (*Id.*)

In his investigative report (EX 15), Louis noted that the interview the Complainant gave on February 22 “conflict[ed] with his initial reported and show[ed] various discrepancies with one another.” (JX 15.) He stated that the two statements “vividly contradict[ed]” each other, creating “several inconsistencies,” and that the Complainant “should be formally charged for giving false and conflicting statements to company officers during the course of an ongoing investigation.” (*Id.*) On February 27, 2017, Louis issued his “letter of charge,” in which he advised the Complainant to report for a formal investigation into whether he had engaged in conduct unbecoming an employee by 1) making “false and/or conflicting statements concerning an alleged on-duty injury,” and 2) failing to “promptly and properly” report an alleged on-duty injury. (JX 11.)

A hearing on the matter was held on March 2, 2017. (Tr. 134-135.) Louis stated that his role in the hearing was to present the facts. (Tr. 135.) Asked if he had any “retaliatory motivation of any sort whatsoever” toward the Complainant, Louis responded, “No. I certainly hope this is not the case, no.” (Tr. 136.)

Nathaniel Gaines testified that he was an assistant superintendent for the Respondent in March of 2017, and was the hearing officer in the Complainant’s case. (Tr. 175-176.) As such, he testified, he was the sole person to decide who to believe and who not to believe. (Tr. 176.) It was his job to recommend findings to Shepard, the division superintendent. (*Id.*) He recommended that the Complainant be dismissed based on both charges against him. (Tr. 177.) He testified that his conclusion that the Complainant had given false and/or conflicting statements was based on the difference between the version of the incident that led to the Complainant’s injury given to Louis on the telephone on February 21, and the subsequent version the Complainant told during the in-person meeting on February 22. (Tr. 190.) He made clear that there was no other reason for his finding. (Tr. 190-191.) For him, the discrepancies between Version A and Version B, which the Complainant admitted to, were sufficient to substantiate the charge. (Tr. 191.) Although Gaines indicated that he recalled testimony at the hearing regarding the Complainant’s use of pain medication, he stated that he did not take such testimony into consideration. (Tr. 194.)

As for the charge of failing to promptly and properly report an injury, Gaines testified that he believed that the Complainant should have reported his injury “when he went to the emergency room,” which was on the evening of February 19. (Tr. 188.) He acknowledge that this was during the period of the Complainant’s mandatory 48-hour rest period. (*Id.*) However, he explained that, in his view, although the railroad could not contact the employee, nothing precluded the Complainant from reporting a reportable injury during this period. (Tr. 266.) He stated that he expected that if an employee went to the emergency room during his 48-hour rest period to treat a reportable workplace injury, it was reasonable for the company to expect that employee to also notify the railroad. (*Id.*)

Asked if he took into consideration Hill’s account of what happened at the time of the incident, Gaines responded that he did not, and that Hill’s account was not a factor in his final decision. (Tr. 210.) According to Gaines, he would have recommended that the Complainant be terminated based solely on either of the two charges. (Tr. 216.) In other words, he felt that if the

Complainant had been exonerated on one of the two charges, the remaining charge that had been proven would be sufficient to justify discharging the Complainant from service. (*Id.*)

CREDIBILITY ISSUES

As can be seen, this case hinges largely on the Complainant's credibility. The Complainant admits that he gave two versions to the Respondent of how his injury occurred. Version A emerged when he first spoke to Louis on the telephone, as he rode to the orthopedist's office, when he stated that he injured his hand during a power move. Under this scenario the nose door was not defective and the previous crew was not implicated in failing to secure the door. That version was recorded and transcribed.

According to the Complainant, however, Version A was not an accurate statement of how he injured his finger. The injury, he testified at the hearing, did not occur during a power move. Rather, the accident occurred as he sought to inspect the nose door that was making a rattling sound after being left less-than-fully secured by the previous crew. As he admitted under questioning by defense counsel, this new version of what happened, Version B, is helpful in pursuing a FELA claim, as it makes the previous crew at least partially responsible for his injury.

Why, then, did the Complainant first give Louis a false version of what happened? The Complainant's explanation is that he was under the influence of hydrocodone prescribed to him when he had gone into the emergency room the previous Sunday night. The effect of the medication, he maintains, caused him to misremember what happened – to create in his own mind a different series of events that led to his injury. The effect did not last long. According to the Complainant, by the time he got to the orthopedist, his mind had cleared enough for him to give the orthopedist the correct version of events, Version B.

Unfortunately for the Complainant, his explanation as to why he first came up with Version A, and why Version B should supplant it as the truth, is simply not convincing. First, he has not presented any persuasive evidence showing that a short-term dosage of hydrocodone can have the mind-altering effect that the Complainant claims it did. In this regard, it is worth noting that the effect the Complainant is describing goes well beyond grogginess, confusion, disorientation, or even memory loss. Rather, it is the creation of a completely false memory—that he was in the process of performing a power move, rather than checking out the nose door. In effect, the Complainant is arguing that hydrocodone worked on him as a type of *anti-truth* serum. There is no evidence of record, however, to support a finding that hydrocodone, for the short period and at the level he claims to have taken it, could have had such a mental effect.

Secondly, having reviewed evidence of the call with Louis, at the time of which the Complainant claims that the hydrocodone was having such a negative effect on his mental functioning, I perceive nothing in his words or delivery that would support his claim. He sounded lucid. There is no hint that he spoke under the influence of medication. There is no palpable confusion. He was conscious and alert enough to draw offense and bristle when Louis pressed him as to why he did not report the injury at the time that it occurred. His thinking was clear enough to reply to Louis's assertion that Louis was not questioning his manhood or work

ethic by suggesting that Louis was still challenging his integrity. Such a nuanced retort seems to belie any claim that the Complainant's mental acuity had been significantly altered or diminished.

Thirdly, Louis, who I found to be a very credible witness, testified persuasively that when they spoke, the Complainant denied having taken any medication other than ibuprofen after his injury. Although Complainant's counsel suggested that Louis may have misunderstood the Complainant, who meant only that he had not taken anything but ibuprofen at the time of the in-person interview, Louis persuasively refuted the notion. Asked by the undersigned if he had a specific and clear memory of the Complainant saying that he had only taken ibuprofen since the injury, Louis responded with a high degree of certainty that the Complainant had stated exactly that.

Finally, there is compelling evidence that neither Version A nor Version B accurately reflects the cause of the Complainant's injury, in which case the Complainant is still not telling the truth. There is actually a third version of what happened. Hill, the engineer, testified that immediately before the incident, the Complainant, against the rules regarding cellphone usage, was involved in an angry conversation with the mother of his child. According to Hill, the Complainant then left the cab, soon after which Hill heard a popping sound. When the Complainant returned to the cab, Hill testified, he admitted having hurt his hand after punching the interior of the locomotive in anger. Although Hill was certainly not a perfect witness, and contradicted himself on what he actually observed, and what he surmised happened, he did not falter in his testimony as to what the Complainant told him. Significantly, even the Complainant could not provide any reason why Hill would fabricate a story against him. Both men proclaimed to not have anything against the other. Indeed, both men claimed to like each other. That the Complainant would be later diagnosed with a boxer's punch fracture only lends further credence to Hill's version of events. If Hill's version is true, and I have no reason to trust the Complainant's word over his, this would add a further layer of dishonesty to the Complainant's actions. The two versions the Complainant espoused, both Version A and Version B, would both be false. He would have lied under oath.

For all these reasons, I find that the Complainant's explanation, blaming hydrocodone for providing two different versions of how he injured his hand, is simply not convincing. As the trier of fact, I am not convinced that he took the hydrocodone he was prescribed, nor am I convinced that, even if he took the hydrocodone, it would cause him to fabricate a false memory of how the injury occurred. Consequently, I find that he has not presented any persuasive explanation why he first gave Louis, his superior, a different version of events than the one he now espouses. Moreover, I am not convinced that the version he now espouses is truthful in light of Hill's testimony that he admitted punching the wall of the locomotive in anger. Consequently, I reject most of his testimony as to how he injured his hand. I am convinced that he suffered an injury at work. However, I find no more convincing his story, that he injured his hand while attempting to inspect an unsecured nose door, than I do the story he first told, that he injured in his hand during a power move, or Hill's testimony, that he admitted injuring his hand after punching the locomotive wall in anger.

DISCUSSION

The Complainant, in order to have a cognizable claim under the Act, must be employed by a covered employer, which is defined by the FRSA as a railroad carrier engaged in interstate commerce. 49 USCS § 20 109(a). The parties agree that Respondent is a railroad carrier engaged in interstate commerce and that the Complainant was an employee of Respondent. (Tr. 13.) Therefore, I find the parties fall under the jurisdiction of the FRSA.

Next, in order to prevail on his FRSA claim, the Complainant must prove 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). If the Complainant has satisfied its burden, however, the Respondent may avoid liability by demonstrating by clear and convincing evidence that it “would have taken the same adverse action in the absence of any protected behavior.” 29 C.F.R. §1982.109(b).

PROTECTED ACTIVITY

49 U.S.C. § 20109 (a)(4) prohibits railroad carriers from discharging, or otherwise discriminating against an employee, "if such discrimination is due, in whole or in part, to the employee's *lawful, good faith* act done ... to notify, or attempt to notify, the railroad carrier ... of a work-related personal injury...." *Id.* (Emphasis supplied.) As stated by the Court in *Armstrong v. BNSF Railway Co*, 880 F.3d 377, 381:

To make a prima facie showing of unlawful retaliation in this specific context, an employee must show that: (1) he made an injury complaint in *good faith* (i.e., engaged in a protected activity); (2) the rail carrier knew of the complaint; (3) he suffered an adverse employment action; and (4) the complaint was a contributing factor in the adverse action. *See id.* § 20109(d)(2)(A) (incorporating by reference the rules and procedures, including the burdens of proof, applicable to enforcement actions under 49 U.S.C. § 42121(b)); *see also* 29 C.F.R. § 1982.104(e)(2). Once that showing is made, the rail carrier can still escape liability if it can show, by clear and convincing evidence, that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(ii); 29 C.F.R. § 1982.104(e)(4).

It is undisputed that by telephone on February 21, 2017, and in person the following day, February 22, 2017, the Complainant informed Louis that he had suffered a personal injury on February 18, 2017, while at work. Under normal circumstances, his reporting of an injury would be protected activity. However, as noted, the FRSA expressly requires that the employee must have acted in “good faith” in reporting the injury, and it is part of the employee’s burden in order to establish a prima facie case. *Id.* The FRSA was clearly not designed to protect fraudulent or dishonest notification. As stated by the United States Court of Appeals for Sixth Circuit when it affirmed the grant of summary judgement in *Lemon v. Norfolk S. Ry.*, 958 F.3d 417, 418 (6th Cir. 2020), “railroads may fire employees for making false statements.”

In order to find that Complainant's actions in the present matter constitute protected activity, therefore, I must be convinced that when he reported his injury, he did so in good faith. Counsel for the Complainant argues that, when all the evidence is considered, "there is simply no credible basis to conclude that [the Complainant's] report of injury on February 22, 2017 was anything other than a "lawful, good faith act" by Brown. (Comp. P .Hg. Bf. at 41.) According to counsel, the worse that can be said about the Complainant is that he made a "few inconsistent statements" in "a phone statement given on February 21, while under the influence of narcotic medication." (*Id.*)

Obviously, based on my earlier findings regarding the Complainant's credibility, I disagree with the Complainant's argument that I must find him credible. For me to find the Complainant credible would require that I willingly suspend my disbelief and overlook the two different versions of the incident that he admitted to giving Louis, the statement he gave to Louis that he had only taken ibuprofen for his pain, the lack of evidence that even if he took hydrocodone it would cause him to experience a false memory of what he was doing at the time of the injury, his admitted awareness that his revised version of how he injured his hand was helpful to filing a FELA claim, not to mention the testimony of his co-worker, Hill, with apparently no axe to grind against him, that he admitted that his injury was self-inflicted when he struck at the locomotive wall in anger. Such a willing suspension of disbelief would be inconsistent with the burden of proof resting on the Complainant. As the fact-finder, it is not my duty to overlook matters that negatively affect the Complainant's credibility in order to find him credible. Rather, it is my duty to weigh his testimony, along with all the other evidence, with a critical eye to determine if his testimony is, more likely than not, true. I cannot say that here. As I stated, the record shows three different versions of how the Complainant injured his hand, two of which the Complainant created, and I cannot say that the version he now espouses is entitled to any more credence than the others. Hill's version seems more truthful, if for no other reason that I cannot imagine why he would lie. The two men expressed absolutely no animosity toward each other.

Still, none of this should matter, the Complainant argues, because the only test of good faith is whether he honestly believed when he gave notice of his injury that his injury occurred during his employ on February 18, 2017. Comp. P.-Hg. Bf. at 42. As long the Complainant honestly believed that he hurt his hand at work, in other words, that it was a work place injury, he was acting in good faith despite the "admitted discrepancies" in the two accounts of how the injury occurred which he gave Louis.

The Respondent, however, argues the test of good faith is broader and consist of two parts: the Complainant must not only prove that 1) he had a good faith belief that his injury was work related, but 2) that he acted in good faith in making the injury report. Resp. P.-Hg. Bf.at 16, citing *Miller v. CSX Transp., Inc.*, No. 1:13-CV-734, 2015 U.S. Dist. LEXIS 112507, at *21 (S.D. Ohio Aug. 25, 2015), (citing *Murphy v. Norfolk S. Ry. Co.*, No. 1:13-CV-b63, 2015 U.S. Dist. LEXIS 25631, at *17 n. 3 (S.D. Ohio Mar. 3, 2015; see also *Lemon v. Norfolk S. Ry. Co.* No. 3-18-CV-1029, 2-19 U.S. Dist. LEXIS 146607, at *11-15 (N.D. Ohio Aug. 28, 2019).

I agree with the Respondent that the test is two-part and requires more than a sincere belief by the Complainant that he suffered a workplace injury, no matter the doubts as to whether he reported the injury in a forthright and honest manner. As the District Court for Northern Ohio stated in *Lemon, supra*, several courts have disagreed with the single-part test and adopted the two-part test, requiring that the employee make the injury report itself in good faith. *Lemon* at *9-10, citing *Murphy, supra, Bostek v. Norfolk Southern Railway Co., et al.*, 3:16CV02416 (N.D. Ohio), at 3; *Smith v. BNSF Ry. Co.* 2019 WL 3230975, at *4 (D. Colo.); *Armstrong v. BNSF Ry. Co.*, 128 F. Supp. 3d 1079, 1089 (N.D. Ill. 2015); and *Miller v. CSX Transport, Inc.*, 2015 WL 5016507, at *6-7). The purpose of the second part of the test, as stated by the court in *Lemon*, was to “prevent employees who have ‘some ulterior motive in report an injury.’ or who are ‘actually attempting to avoid reporting an injury’ from abusing the FRSA protections.” *Lemon, supra*, at *10, quoting *Murphy, supra*, 2015 WL 914922 at *5, n. 3. As characterized by the court in *Lemon*, the burden is on the plaintiff in an FRSA case to demonstrate that his report was “in good faith, that is, with ‘honesty of purpose, freedom from intention to defraud, and generally speaking, ...faithful[ness] to [his] duty or obligation.’” *Lemon* at *11, citing *Murphy, supra*, 2015 WL 914922 at *5, n.3 (citing BLACK’S LAW DICTIONARY (6th ed. 1990)).⁵

The Respondent argues that the Complainant has failed in his burden to demonstrate that he satisfied this standard of conduct. As stated by the Respondent:

In this case, Brown has filed to that his initial injury report was made with “faithfulness to his duty or obligation.” [Citations omitted.] Brown’s ‘duty or obligation’ is defined within Norfolk Southern’s policies and rules. Rue 912 of Norfolk Southern’s Safety and General Conduct Rules required Brown to report his injury, at the very latest, “promptly” upon obtain[ing] medical attention.” J. Ex. 21 at 15-16 (footnote omitted). Brown therefore had an affirmative duty to report his injury no later than when he went to the emergency room on February 19 (citations to transcript omitted). The General Notice contained in Norfolk Southern’s Operating Rule states that “[t]he service demands the honest...discharge of duty.” J. Ex. 20 at 17 (footnote omitted). The rationale underpinning this requirement is that that “[h]onesty is a necessary ingredient to the maintenance of the employee/employer relationship” (citation to transcript omitted).

(Resp. P.-Hg. Bf. at 17-18.)

⁵ As noted, the grant of summary judgment in *Lemon* was subsequently affirmed by the United States Court of Appeals for the Sixth Circuit in *Lemon v. Norfolk S. Ry.*, 958 F.3d 417 (6th Cir. 2020). The Court in *Lemon* did not discuss at length the district court’s good-faith analysis, but ultimately agreed with the trial court “that *Lemon*’s dissembling left no dispute about whether *Lemon* reported his injury in good faith.” *Id.* at 418. The Court observed that the record supported that the plaintiff was a “teller of tales.” Similar to the present case, the plaintiff in *Lemon* partly blamed pain medication for his inconsistent statements, but the Court noted that pain medication could not explain every inconsistency, including the plaintiff telling co-workers a different story as to how he injured himself. *Id.* at 421.

The Respondent argues that the Complainant did not demonstrate that he met this standard of conduct when he gave two different versions of how he injured his hand to Louis. Furthermore, the Respondent argues, the Complainant was being disingenuous, at best, when he first spoke to Louis on the telephone and described his injury as simply a jammed finger when he had left the emergency room with a diagnosis of a fracture, a splint on his finger, and a prescription for narcotic pain medicine. (Resp. P.-Hg. Bf. at 18.) All this amounts to dishonesty, the Respondent argues, accusing the Complainant of changing “nearly every aspect of how the locomotive door came to impact his hand” and “omit[ting] details about the known extent of his injury.” (*Id.* at 19.) “At worst,” the Respondent asserts, the Complainant “outright lied...to conceal the fact that he had obtained a ‘boxer’s fracture’ by using the door as a sparring partner.” (*Id.*)

To counter these arguments, the Complainant states that once he adopted Version B he has consistently clung to it, testifying to it at the company investigation, his deposition, and at the evidentiary hearing before me. (Comp. P.-Hg. Bf. at 40.) Moreover, the Complainant continues to stress that although he does admit that there are “discrepancies” between what he told Louis on February 21, as opposed to February 22, he consistently has maintained that he injured his hand while in the Respondent’s employ. Therefore, he argues, because he has never varied on this point, his report of injury must be seen as one made in good faith.

Again, I disagree with the Complainant. When I view the evidence together—the Complainant’s inconsistent statements, the possibility, based on Hill’s testimony, that he is still concealing the truth, the evidence that he never took the hydrocodone he professes to be responsible for his giving two different statements, his failure to fully report the nature and extent of his injury when he spoke to Louis on February 21, the fact that his present version of events is more advantageous to perusing a successful FELA claim—I simply cannot conclude that he sustained his burden of proof that he acted in good faith in reporting the injury. As the trier of fact, I do not have a firm belief in his testimony. Indeed, based on Hill’s testimony, there is still a substantial possibility that he has given two entirely false versions of how he injured his hand.

The failure of the Complainant to demonstrate that he acted in good faith in reporting the injury is dispositive. Without a finding that he acted in good faith, his report of injury is not protected under the FRSA. The FRSA does not protect a report of injury that was not made in good faith.

Accordingly, I make the following findings of fact:

1. The Complainant clearly gave—indeed, the Complainant does not dispute that he gave—conflicting statements as to how the injury occurred to Trainmaster Louis one day apart;
2. The Complainant’s explanation for the two conflicting statements—that he was on pain medication—is unconvincing in light of the absence of any persuasive evidence that

hydrocodone, at the level he alleges to have taken it, would have caused such a mental effect; his own contrary statements that the only pain medication he took after the injury was ibuprofen; and the absence of any indicia in his recorded statement on February 21, 2017, of mental impairment;

3. The testimony of Hill, though flawed in the details, nonetheless provides compelling evidence, from a witness with no apparent reason to lie, that neither version of how the injury occurred, given by the Complainant to Louis, are actually true.
4. As a consequence, the Complainant did not sustain his burden of proof that his report of injury was made in good faith, meaning honesty of purpose, freedom from intent to defraud, and consistent with his obligation under the railroad's rules;
5. Therefore the evidence does not support that the Complainant's report of injury was protected activity under the Act, which by its express language requires that a report of a workplace injury, in order to invoke its protections, be made in good faith.

CONCLUSION

The undersigned previously denied the Respondent's motion for summary decision, finding that the record at that time did not demonstrate that the Respondent was entitled to judgment as a matter of law. Issues of material fact remained to be determined. Those factual issues depended largely on the creditability of witnesses, none more so than the Complainant. Although able to withstand a motion for summary judgment, with the burden on the Respondent to show an absence of material fact, at the hearing the Complainant bore the burden of demonstrating that he reported his injury in good faith. Good faith is not an affirmative defense, but an element of the Complainant's case that he must prove. The burden of proof is by a preponderance of the evidence. For all the reasons given, I am not persuaded by the Complainant's account of how he injured his hand, or the explanation he gave for his admittedly inconsistent statements. This being so, I cannot conclude that he has proven by the weight of the evidence that he acted in good faith when he reported the injury. Accordingly, I find that he has not demonstrated that his report of injury constituted protected activity under the Act.

ORDER

Accordingly, having failed to establish the threshold requirement of reporting his injury in good faith, Justin Brown cannot invoke the employee-protection provisions of the FRSA. His claim is **DENIED**.

SO ORDERED.

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).