



Issue Date: 11 May 2020

Case No.: 2018-FRS-00015

In the Matter of

WILLIAM BURT,
Complainant

v.

NATIONAL RAILROAD PASSENGER CORPORATION (“AMTRAK”),
Respondent.

Appearances

For the Complainant: William L. Meyers, Jr., Esq.

For the Respondent: Gina E. Nicotera, Esq.

DECISION AND ORDER AWARDING RELIEF

This case arises under the employee protection provision of the Federal Rail Safety Act of 1982 (“FRSA” or “the Act”), 49 U.S.C. § 20109 (2012), and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1982. Both parties are represented by counsel. A hearing took place on June 24–25, 2019, in Cherry Hill, New Jersey.

I. PROCEDURAL HISTORY

On September 20, 2017, Complainant filed a formal complaint with the Occupational Safety and Health Administration (“OSHA”), U.S. Department of Labor, alleging that Respondent subjected Complainant to retaliation for reporting the denial of overtime. By letter dated November 28, 2017, OSHA issued its notice that it had completed its investigation of the claim, determining that Complainant had not established that he had engaged in any protected activity. On November 30, 2017, Complainant timely objected to the OSHA determination and requested a hearing before the Department of Labor Office of Administrative Law Judges (“OALJ”). The undersigned subsequently received this matter for hearing and decision. On December 15, 2017, the undersigned issued an Initial Notice of Hearing and Pre-Hearing Order, scheduling the hearing for June 18, 2018.

On May 9, 2018, the undersigned issued an Order Granting Respondent’s Second Unopposed Motion for Extension and Rescheduling Hearing, which rescheduled the hearing for August 14, 2018. On July 3, 2018, the undersigned issued an Order Granting Joint Motion for

Extension and to Continue Formal Hearing, which rescheduled the formal hearing for November 13, 2018. On November 8, 2018, the undersigned issued an Order Granting Joint Motion for Extension and to Continue Hearing, rescheduling the hearing for February 14, 2019. On February 7, 2019, the undersigned issued an Order Granting Unopposed Motion for Extension to Continue Hearing and Denying Bifurcation, rescheduling the hearing for June 24, 2019. The hearing took place on June 24 and 25, 2019.

On January 16, 2020, the undersigned issued an Order addressing Complainant's Exhibit 3, ordering Claimant to resubmit CX 3 in a viewable format. Claimant submitted CX 3 in a viewable format on January 21, 2020.

II. ISSUES

A. Stipulations

The parties stipulated to the following at hearing:

- (1) On July 17, 2017, and at all times relevant to this action, Amtrak employed Complainant as an Electrical Technician in Bear, Delaware. (Tr. at 5.)
- (2) Complainant is, and at all relevant times was, a member of the International Brotherhood of Electrical Workers. (*Id.*)
- (3) On July 17, 2017, and at all times relevant to this action, Amtrak employed Respondent Maurice Ward as a Foreman. (*Id.*)
- (4) On July 17, 2017, and at all times relevant to this action, Amtrak employed Kevin Mitchell as a General Foreman. (Tr. at 5–6.)
- (5) On July 17, 2017, and at all times relevant to this action, Amtrak employed Luis Ortiz as an Assistant Superintendent. (Tr. at 6.)
- (6) At the time of the events at issue, Amtrak employed Respondent Charles Messina as an Electrician. (*Id.*)
- (7) Complainant took a medical leave of absence beginning on September 26, 2017. (*Id.*)
- (8) Complainant returned to work on December 11, 2018. (*Id.*)
- (9) Amtrak is a railroad carrier engaged in interstate commerce covered by the FRSA, 49 U.S.C. § 20109(a). (Employer's Brief at 4, Exhibit A.)

B. Issues Remaining for Adjudication

The following issues remain for adjudication under 49 U.S.C. § 20109:

- (1) Did Complainant engage in protected activity?
- (2) Did Respondent engage in any adverse employment actions?
- (3) Did any demonstrated protected activity contribute to any of Respondent's adverse employment actions?
- (4) Assuming Complainant can meet his burden of demonstrating the above elements, would Respondent have disciplined Complainant in the absence of any protected activity?
- (5) Is Complainant entitled to any relief?

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Evidence

In support of his case, Complainant submitted, and the undersigned admitted:

<u>Exhibit Number</u>	<u>Description</u>	<u>Tr. Page Where Admitted</u>
CX 1-A	Complainant's April 2, 2013 Amtrak Hotline Complaint	Tr. at 32.
CX 1-B	Complainant's April 4, 2013 OSHA Complaint	Tr. at 33–34.
CX 3	Video of Incident on July 17, 2017	Tr. at 38.
CX 5	Letter of Instruction—Attending to Duties, July 31, 2017 (to Creedon)	Tr. at 308.
CX 5-A	Letter of Instruction—Attending to Duties, July 31, 2017 (to Creedon)	Tr. at 252.
CX 6	MAP Inspections, January 5, 2017 and January 9, 2017	Tr. at 47.
CX 6-A	MAP Inspections, December 15–16, 2016	Tr. at 252.
CX 6-B	MAP Inspections, February 22–23, 2017	Tr. at 252.
CX 6-D	MAP Inspections, March 29–30, 2017	Tr. at 252.
CX 6-E	MAP Inspections, June 9 and 12, 2017	Tr. at 252.
CX 6-F	MAP Inspections, June 21 and 22, 2017	Tr. at 252.
CX 7	Medical Disqualification letter to Complainant from Amtrak, March 27, 2018	Tr. at 72.
CX 8	Amtrak Roster Sheet (Showing Complainant out on MDQ, March 27, 2018)	Tr. at 72.
CX 10	Economic Loss Chart	Tr. at 76.
CX 14	Typed Statement of Maurice Ward	Tr. at 185.
CX 21	IBEW Pay Rates	Tr. at 76.

<u>Exhibit Number</u>	<u>Description</u>	<u>Tr. Page Where Admitted</u>
CX 22-A	Paystub, 12-18-16	Tr. at 76.
CX 22-B	Paystub, 10-08-17	Tr. at 76.
CX 23	RRB Lien	Tr. at 81.
CX 24	AETNA Lien	Tr. at 81.
CX 25	Prescription Costs	Tr. at 80.
CX 26	Dr. Wilson Charges	Tr. at 80.

In support of its case, Respondent submitted, and the undersigned admitted:

<u>Exhibit Number</u>	<u>Description</u>	<u>Tr. Page Where Admitted</u>
RX C	August 25, 2017 grievance submitted by the International Brotherhood of Electrical Workers on Complainant's behalf.	Tr. at 330–31.
RX D	October 25, 2017 denial of Complainant's grievance claims.	Tr. at 330–31.
RX E	Spreadsheet of estimated labor hours for various jobs at Amtrak.	Tr. at 282.
RX F	July 14, 2017 typed letter from Vernon Patrick to Kevin Mitchell and July 17, 2017 email from Phillip Daly to Kevin Mitchell.	Tr. at 257–58.
RX H	Excerpted pages from the agreement between Amtrak and the International Brotherhood of Electrical Workers.	Tr. at 98.

The parties jointly submitted, and the undersigned admitted:

<u>Exhibit Number</u>	<u>Description</u>	<u>Tr. Page Where Admitted</u>
JX 1	None. ¹	Tr. at 6.
JX 2	Report of the July 18, 2017 Amtrak Hotline Report call placed by Complainant	Tr. at 6.
JX 3	July 18, 2017 time adjustment slip for Complainant.	Tr. at 6.
JX 4	July 28, 2017 written counseling letter from Kevin Mitchell to Complainant.	Tr. at 6.
JX 5	Inbound inspection log from July 12, 2017 and July 13, 2017.	Tr. at 6.
JX 6	Work order from July 26, 2017 and July 27, 2017.	Tr. at 6.
JX 7	September 19, 2017 letter from Complainant's counsel to OSHA.	Tr. at 6.

¹ The undersigned admitted JX 1 at hearing, as the parties asked for the admission of JX 1 through JX 10, but upon inspection of the joint exhibits, there is no JX 1. (Tr. at 6.)

<u>Exhibit Number</u>	<u>Description</u>	<u>Tr. Page Where Admitted</u>
JX 8	Excerpts from Amtrak's employee policy.	Tr. at 6.
JX 9	Letter handwritten by Complainant signed and dated July 18, 2017.	Tr. at 6.
JX 10	Letter handwritten by Robert P. Ellis signed and dated July 18, 2017.	Tr. at 6.
JX 11	Amtrak Standards of Excellence.	Tr. at 6. ²
JX 12	Transcript of Dr. Wilson's Deposition	Tr. at 362.

B. Testimonial Evidence and Witness Credibility Determinations

The undersigned fully considered the entire testimony of every witness who appeared at the hearing. As the finder of fact in this matter, the undersigned is entitled to determine the credibility of witnesses, to weigh evidence, to draw from her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), reh'g denied, 391 U.S. 929 (1968)(an administrative law judge has the authority to address witness credibility and to draw her own inferences and conclusions from the evidence); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

In weighing testimony in this matter, the undersigned considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor when testifying, and opportunity to observe or acquire knowledge about the matter at issue. The ALJ also considered the extent to which other credible evidence supports or contradicts the testimony of each witness. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The undersigned briefly summarizes the testimony of the witnesses who testified in this case and makes the following credibility assessments:

1. Mr. Charles Messina (Tr. at 9–26.)

Mr. Messina testified about his recollection of the July 17, 2017 incident where he was skipped for overtime. Mr. Messina formerly worked as a C-class electrician for Respondent. (Tr. at 10.) He retired on January 18, 2019. (Tr. at 9.) He worked on Track 29 during the time of the incident, when Mr. Ward was responsible for running overtime. (Tr. at 10.) Mr. Messina testified that on July 17, 2017, he was the next individual on the list to work overtime, but Foreman Ward skipped him. (Tr. at 10–11.) After speaking with Foreman Ward, Mr. Messina called his union president, who told him to go to Complainant, the shop steward. (Tr. at 11–12.) Mr. Messina met Complainant at Track 26, and they then went to speak with Mr. Ward. (Tr. at 12.) This eventually led to an incident that day between Complainant and Mr. Ward, which Mr. Messina testified about. (Tr. at 12–13.)

² The undersigned only identified JX 1–10 when initially admitting the joint exhibits, but as the parties agreed to the admission of all joint exhibits, the undersigned hereby admits JX 11 into evidence. (Tr. at 6.)

Mr. Messina's testimony was largely credible. He provided testimony that other witnesses largely corroborated. Mr. Messina had limited discernable bias overall, as he no longer works for Respondent, nor did he display any notable bias towards Complainant. He did, however, display the potential for bias against the individual Respondent, Foreman Ward, as his testimony demonstrated that he and Foreman Ward had a strained working relationship.³

2. Complainant (Tr. at 27–157.)

Complainant began working for Respondent in July of 1983, and by 2017, he had been working for the railroad for thirty-four years. (Tr. at 27.) In 2017, Complainant worked as an Electrical Technician at the Bear Complex repairing Amfleet 1 and Amfleet 2 rolling stock railcars and cab cars. (Tr. at 28.) Complainant's doctor told him in September 2018 that he should not return to the Bear Complex, and Respondent medically disqualified Complainant. (Tr. at 72–73, 105.) He returned to work at the Wilmington Complex, where he currently repairs key stations for the doors on Amfleet cars. (Tr. at 72–73.)

Complainant testified as to the nature of his employment with Respondent, as described above, and his personal experience with how long it usually took to perform inspections of the café cars,⁴ as well as what these inspections usually entailed.⁵ He also testified as to his recollection of the circumstances surrounding the safety complaint and "EEOC⁶ report" he made back in 2013. Complainant explained that in 2013, he went to his superiors concerning a safety concern with battery chargers.⁷ (Tr. at 30.) He testified that, a few days after he made the

³ Mr. Messina testified that he made EEOC complaints against Foreman Ward. (Tr. at 14.) He also answered affirmatively that he had witnessed Foreman Ward acting aggressively towards employees, testifying that Foreman Ward "kind of acts like he's a badass." (Tr. at 16.) When asked if Foreman Ward, in his experience, came across as a foreman who did not like being questioned by his subordinates, he answered, "[a]ll the time." (Tr. at 17–18.)

⁴ Q: "I'd like to discuss your inspection of inbound café cars. You testified that you'd been doing this for seven years. Can you tell Her Honor how long it normally takes to inspect the inbound café cars?" A: "It takes usually between two, sometimes three days to completely test everything on a café car, depending on problems." Q: "And when you say depending on problems, what does that mean?" A: "We could have 480 jumpers hanging from the car that have to be repaired before I can even start. 480 boxes underneath the car might have to be repaired before I can go to power. There's a hundred things that can go wrong." (Tr. at 45.)

⁵ See Tr. at 50–53.

⁶ The "EEOC hotline" is an ethics hotline unique to Amtrak, where employees can call in to report bad behavior by other employees or foremen. (Tr. at 14, 87.)

⁷ Q: "Who were the superiors you went to and what was the safety concern?" A: "Bruce Carlton, Jerry Eddis (ph) and Brian Dallas, and I reported battery chargers that covers were put on while 480 wires were hanging inside the cover not connected." Q: "And why was that a safety concern?" A: "Because if I would have went and powered the car up, someone could have gotten electrocuted. The car could have blown up. The 480 would go to the ground." (Tr. at 30.)

complaint, he had an incident with Foreman Ward⁸ that led to him making an “EEOC report” against Foreman Ward.⁹ (Tr. at 31.) Complainant also testified about making an OSHA safety complaint about the battery charger. (Tr. at 32–33; CX 1-B.)

Complainant also testified to his recollection of the incident with Foreman Ward on July 17, 2017. Complainant recalled that he first got involved in the incident when he received a call from his union president to assist Mr. Messina with an overtime issue. (Tr. at 34.) He met Mr. Messina at 26 Track and walked with him towards Foreman Ward’s office, where he testified that they encountered Foreman Ward around 27 Track. (Tr. at 35.) He testified as to his recollection of the exchange he had with Foreman Ward at 27 Track¹⁰ and how he recalled Foreman Ward cancelling overtime immediately after the exchange.¹¹ (Tr. at 35–37.)

Complainant further testified about the events that occurred on July 18, 2017, the day after his exchange with Foreman Ward. Complainant recalled that he attempted to walk through the guard shed to work that morning, but the guard said to come with him, and an Amtrak policewoman accompanied him. (Tr. at 40.) His recollection was that the guard and the policewoman escorted him “to the conference room in the main admin building and stood by the door and closed the door.” (*Id.*) He testified that both General Foreman Mitchell and Assistant Superintendent Ortiz were in the conference room when he arrived, and testified to his recollection of what happened in the conference room.¹² (Tr. at 41.) He recalled receiving a time adjustment slip for the day for failure to punch out. (Tr. at 44; JX 3.)

⁸ Q: “Did something happen a few days later regarding [Foreman] Ward?” A: “Yes.” Q: “And will you tell Her Honor what that was?” A: “On the 28th of March, [Foreman] Ward went to the other technician that I was working with and said I heard, you guys are fucking up 30 track. He was insinuating that we were causing the sabotage on the cars. So he was harassing me for an earlier safety report that I reported to Mr. Carlton.” (Tr. at 31.)

⁹ See CX 1-A.

¹⁰ Q: “Okay, so what happened? What happened between you and Mr. Messina and [Foreman] Ward?” A: “He went right to [Mr. Messina] and said, I don’t appreciate you bringing this over here with you, and I don’t appreciate you calling your union man in my office.” [...] Q: “And what happened from there?” A: “Then he started telling Mr. Messina that he was only joking, let’s run the list correctly and everyone will be happy. And that’s when he said, that’s it, overtime’s done, and he started to turn and walk away. And I said, well, just remember, if there is overtime, you have to use the board, because we have—the union rule is that we use the overtime list. And at that time, he stepped towards me, got in my face and said, I do whatever the fuck I want here. At that time, he started reaching for his radio. And he took his radio out and called for the guard or someone from management to come to the crosswalk.” Q: “And who walked away from whom?” A: “At the time, I just put my hands up in the air and I turned around and started walking away.” Q: “And did he shout anything after you?” A: “Yes. As I was walking away, he said the next time you call the EEOC, leave your name with it.” (Tr. at 35–36.)

¹¹ Q: “When [Foreman] Ward announced, that’s it, overtime is cancelled, did he do so out in the open shop?” A: “Yes, he yelled it.” Q: “And did he then follow up on that threat and cancel overtime for his men?” A: “He did.” (Tr. at 37.)

¹² Q: “What happened in the conference room?” A: “I walked into the conference room and [Assistant Superintendent Ortiz said this is about the incident with [Foreman Ward] yesterday, and before we let you work, we need to hear your side of the story.” Q: “Then did you tell them what you told us?” A: “I did.” (Tr. at 42–43.)

Complainant addressed his subsequent employment after leaving the Bear facility. When Complainant returned to work, he testified that he returned to work at the Wilmington facility, rather than the Bear facility, and worked at a desk position repairing key stations, which was a different job than the café care inspections he performed at the Bear facility. (Tr. at 73.)

Complainant testified to his medical issues and treatment after leaving the Bear facility. He recalled the physical effect that the stress from the issues at work had caused him.¹³ (Tr. at 69–70.) He sought care for his medical issues from his primary care physician, Dr. Wilson. (Tr. at 70.)

Complainant testified about his asserted damages. (*See* Tr. at 73–82.)

Complainant’s testimony was largely credible. The overall record corroborates and supports his testimony. Complainant was well-informed as to the substance in his testimony, and he was thorough in his recollection. The undersigned acknowledges Complainant’s potential for bias, as this is his claim, but still overall gives great weight to his testimony, as he substantiated his testimony well with documentary evidence.

3. Foreman Maurice Ward (Tr. at 158–207.)

Foreman Ward is a Foreman 2 for Respondent, assigned to 29 Track. (Tr. at 177.) He also worked as a Foreman 2 back in 2013. (Tr. at 178–79.) About fourteen or fifteen electricians report to him. (Tr. at 178.)

Foreman Ward testified as to the nature of his employment with Respondent, as described above. He also provided his recollection of the circumstances surrounding the safety complaint and EEOC report Complainant made back in 2013 and Complainant’s complaint about him to the EEOC. (Tr. at 195–96, 202–03.) Foreman Ward testified as to his meeting with Mr. Lou Woods concerning the nature of the complaint that Complainant had made against him and how he had come to realize that Complainant was the one who made the complaint. (Tr. at 163–164, 195.)

Foreman Ward also testified as to his recollection of the incident with Complainant on July 17, 2017 and the events that occurred on July 18, 2017. Foreman Ward’s view of the situation was that he unintentionally passed Mr. Messina up and he was joking with him when he made the comments prior to Mr. Messina going to get Complainant. (Tr. at 165.) He asserted

¹³ Q: “Physically did it have any effect on you?” A: “Yes.” Q: “And how?” A: “Absolutely. I had diarrhea. I had headaches. I had heart palpitations. I had high blood pressure. I had diarrhea. I was a physical wreck. When I went out sick, I basically stayed in the house all day and put on the TV while my wife went out to work. She was wondering why I went to work every day for 34 years and couldn’t go to work anymore.” (Tr. at 69–70.)

that he cancelled the overtime to minimize confusion. (Tr. at 182, 193.) He met with other managers the afternoon of the incident, not, as he testified, “by design.”¹⁴ (Tr. at 186.)

Foreman Ward’s testimony was only moderately credible. There were instances where he contradicted his own testimony at hearing.¹⁵ There were also instances where the answers he gave appeared deceptive, given the testimony of record as a whole. Additionally, he has a potential for bias, as he both is an individual Respondent and a current employee of Respondent. His testimony further demonstrates a potential bias against Complainant due to their history of a strained relationship as co-workers, including the incidents in 2013 and 2017.

4. General Foreman Kevin Mitchell (Tr. at 213–308.)

General Foreman Mitchell currently works for Amtrak as a Foreman in the electric shop in Wilmington and has worked there since October 2019. (Tr. at 244.) He has eighteen employees who report to him, and Complainant is not currently one of those employees. (Tr. at 245.) In 2017, General Foreman Mitchell was a General Foreman. (*Id.*) Complainant reported to Phillip Daly, who reported to General Foreman Mitchell. (*Id.*) He was in the General Foreman position for “a little over 18 months, almost two years.” (Tr. at 245–46.) Back in March and April 2013, Mr. Mitchell had just started working as Foreman III in the Bear shops. (Tr. at 246.)

General Foreman Mitchell recalled the incident with Complainant and Foreman Ward on July 17, 2017 and the events that occurred on July 18, 2017. He first heard about the incident after his manager’s meeting at the end of the day, because, as he testified, “the foremen clock out in the admin building, and that’s when we found out about it.” (Tr. at 224.) He recalled that either Mr. Ward or Mr. Van Dyke informed everyone who had been in the Monday manager’s meeting¹⁶ about that incident after the meeting had adjourned. (Tr. at 224–25.) General Foreman Mitchell also received statements on the incident but was not the one to ask for them. (Tr. at 227, 247.) He met with Complainant on July 18, 2017 to obtain his statement on the incident. (Tr. at 246–47.)

¹⁴ “I didn’t—that’s not how it took place. They were in the administration building. They had just finished up with their management meeting they have every week. I was on my way through the administration building to clock out. That’s where I clocked out at on a daily basis. So I had to walk past the room they were sitting in, in order to get out to the parking lot to get to my vehicle.” (Tr. at 191.)

¹⁵ For example, Foreman Ward gave answers that contradicted his deposition testimony, only to later concede the point upon further questioning. He initially said that he did not say “EEOC” when telling Complainant to leave his name, but he later admitted that he did mention the EEOC hotline. (Tr. at 159–161.) He also answered negatively when asked if Mike Dudley ever came to his office to talk, but later admitted that he and Mr. Dudley did talk in his office. (Tr. at 171–73.)

¹⁶ General Foreman Mitchell testified that there are two different meetings that occur on Mondays: the morning Foreman’s meeting, for employees who are Foremen and above, and the later manager’s meeting, which is for Foreman III and above. (Tr. at 260–61.) The meeting after which General Foreman Mitchell heard about the incident between Complainant and Foreman Ward was the later manager’s meeting. (*See* Tr. at 261.)

General Foreman also testified about Amtrak's counseling and disciplinary process and how that applied to the letter Complainant received. He described Amtrak's steps for disciplining an employee.¹⁷ (Tr. at 267.) He discussed Complainant's Letter of Counseling specifically and his view that it was "counseling," rather than discipline. (Tr. at 230–31.) He asserted that his reason for giving Complainant the Letter of Counseling was issues with "communication." (Tr. at 238–39.) He sent the Letter of Written Counseling to Complainant after the incident between Complainant and Foreman Ward occurred. (Tr. at 239.)

He further testified to his relationship with Complainant as both a co-worker and a supervisor. General Foreman Mitchell initially started out as Complainant's C Man before he became a Foreman, and eventually a General Foreman, and gained supervisory responsibility over Complainant. (Tr. at 217–221.) He felt that their relationship was initially "very good," but over time, and as he changed positions at Amtrak, it "started to fizzle." (Tr. at 262–64.)

General Foreman Mitchell's testimony was only moderately credible. There were instances where he contradicted his own testimony at hearing. For example, General Foreman Mitchell originally answered negatively when asked if he felt his working relationship with Complainant had gone awry because Complainant was giving him attitude, but he later affirmed that he did testify to this in his deposition. (Tr. at 218–19.) There were also instances where the answers he gave appeared deceptive, given his own prior testimony, the testimony of record as a whole, and logical inferences. For example, General Foreman Mitchell answered negatively when asked if he was angry at all about Complainant giving him attitude and yelling at him in front of his men, testifying that "[e]verybody has bad days," even though he felt that his relationship with Complainant had gone awry. (Tr. at 220.) He also initially downplayed the serious nature of the written counseling letter as "like a coaching aspect" even though he later affirmed that Amtrak expects employees to take such letters seriously, and the Amtrak Standards of Excellence expressly state that failure to abide by the Standards of Excellence will result in appropriate disciplinary action, even including firing. (Tr. at 229–30; JX 11.)

Additionally, he has a potential for bias, as he is a current employee of Respondent. His testimony further demonstrates a potential bias against Complainant due to their long history of a strained relationship as co-workers. General Foreman Mitchell was originally Complainant's C-man¹⁸ when he started working. (Tr. at 217.) He testified that he and Complainant had a "very good relationship" while General Foreman Mitchell was a C-man and a foreman, but he affirmed that he testified in his deposition that in 2016, when he became a General Foreman, the relationship had gone awry. (Tr. at 218–19.)

¹⁷ Q: "And you confirmed that the steps in the discipline policy were counseling and the next step— or written warning, and then the next step would be Notice of Intent; is that accurate?" A: "No. Verbal, written, and notice of intent. And with the verbal and the written, it's also management's discretion to also use that, and you can also say in six months, whenever, the verbals and counseling go away. They can be removed from the personnel file at any time deemed agreed upon." Q: "So there is a—" A: "Notice of—I'm sorry—Notice of Intent cannot. That is physical discipline that stays within the record." (Tr. at 267.)

¹⁸ The C man is the electrician who assisted Complainant, "basically his helper." (See Tr. at 46; 235.)

5. Assistant Superintendent Luis Ortiz (Tr. at 310–360.)

Assistant Superintendent Ortiz is a current “manager mechanical operations”¹⁹ with Respondent in the Bear, Delaware shop. (Tr. at 310.) He has held that position for approximately four years. (*Id.*) He has five employees who report directly to him, who are a general foreman, supervisors of maintenance, as well as an environmental contractor. (*Id.*) He had the same title in July 2017, but he had additional duties that he does not currently have in that he was also responsible for the component shops. (*Id.*) In 2013, Amtrak employed Assistant Superintendent Ortiz, but he was a general foreman at the wheel shop at the Wilmington maintenance facility. (Tr. at 311–12) He estimated that he started working in the Bear shops in late 2015 or late 2016. (Tr. at 312.)

Assistant Superintendent Ortiz testified as to the nature of his employment with Respondent, as described above, along with his recollection of the incident with Complainant and Foreman Ward on July 17, 2017, and subsequently on July 18, 2017. Assistant Superintendent Ortiz averred that he first heard about the July 17, 2017 incident from Mr. VanDyke, either at a production meeting or upstairs in the Foremen’s general area. (Tr. at 313.) He recalled that he also spoke to Foreman Ward in Bruce Carlton’s office that afternoon. (*Id.*) Assistant Superintendent Ortiz also requested statements from other parties.²⁰ (Tr. at 315.) He asked Complainant to meet on July 18, 2017 about the incident and described how the meeting came about, and he released Complainant back to work after he got his side of the story.²¹ (Tr. at 320, 323.)

Assistant Superintendent Ortiz also testified to Amtrak’s counseling and disciplinary process and how that applied to the letter Complainant received, as well as his own role in addressing Complainant’s grievance. Assistant Superintendent Ortiz was involved in the decision to issue the written counseling letter to Complainant. (Tr. at 324.) He was counseling General Foreman Mitchell about employee performance issues. (*Id.*) He explained that the purpose of written counseling was to correct something and testified as to Amtrak’s Progressive Disciplinary Policy.²² (Tr. at 325–26.) Assistant Superintendent Ortiz personally received

¹⁹ This title is “basically synonymous” with Assistant Superintendent. (Tr. at 311.)

²⁰ Assistant Superintendent Ortiz directly recalled requesting statements from Bob Ellis and Mr. VanDyke, but he could not recall if he asked for the statements from David Mailey and Mr. Messina. (Tr. at 315–16.)

²¹ Q: “And how did that meeting come about?” A: “So at this point, [Complainant] had already gone home for the day. So what I had instructed [General Foreman Mitchell]—I believe it was [General Foreman Mitchell]—to do is let the guard know that when he saw [Complainant] in the morning to tell him to go to the admin conference room so that I could talk to him and get his side of the story.” (Tr. at 320.)

²² Assistant Superintendent Ortiz explained Amtrak’s Progressive Disciplinary Policy as follows:

Well, you have progressive counseling—it’s a progressive counseling discipline. So initially you start off with forms of counseling that can be just a verbal conversation. It can be a Letter of Instruction. It could be a verbal counseling, which could [be] documented. And it could be a written counseling, which is obviously documented because it is written. And you don’t have to start at the first one. You can start—you know, depending on severity or seriousness of any issue,

Complainant's union grievance letter.²³ (Tr. at 327.) He discussed the expectations that managers have of their employees at Amtrak, including the expectation for communication with their foremen when there is an issue. (Tr. at 333–34.)

Assistant Superintendent Ortiz's testimony was largely credible. He provided testimony that other witnesses corroborated, and where he had personal experience or expertise, he appeared knowledgeable. He, however, was more limited in his personal knowledge of the relevant events surrounding this matter, so his testimony was limited in scope. He has the potential for general bias as he is currently an employee of Amtrak, but he has less of a potential reason for personal bias against Complainant, as, unlike Foreman Ward and General Foreman Mitchell, he did not have a longstanding work relationship with him,²⁴ nor did he testify to any negative interactions with Complainant.

6. Weighing of Witness Testimony Concerning Facts and Events in Dispute

Where there is conflicting testimony between witnesses on material issues of fact, the undersigned has applied the witness credibility determinations above to weigh the testimony of the witnesses. The undersigned weighs the testimony of the witnesses on the following below: the events of March and April 2013, the events of July 17, 2017, the events of July 18, 2017, the letter of written counseling, and Complainant's medical treatment.

The Events of March and April 2013

Complainant and Foreman Ward both testified as to the events surrounding Complainant's complaints in 2013. The undersigned finds Complainant a more credible witness than Foreman Ward and credits his recollection of these events. The other evidence of record

you can start at different ones along the way, and it doesn't mean you only need to do one each time. You can do one of those iterations multiple times. So this just depends on the situation, but the whole point is to do all of that stuff. We don't want people being in trouble or getting disciplined. We just want to fix any problems that there may be, so that's the point of counseling.

(Tr. at 326.)

²³ Assistant Superintendent Ortiz testified as to the following for how a union grievance letter would come to his attention:

Well, the union will typically write a grievance—some part of their contract, some rule in their contract was violated. I don't remember the specific rule, but it had to do with discipline that in order for someone to be disciplined there's certain steps that have to be followed. So they grieved and said that this—first they called the counseling letter a Letter of Discipline, which it was not, it was a Letter of Counseling. And they asked that it be removed from his file. They asked for the Letter of Discipline to remove from the file. And the response to the grievance was denied because they were grieving a discipline rule when this letter is not discipline. It was counseling. (Tr. at 327–28.)

²⁴ Assistant Superintendent Ortiz did not know any of the parties involved in this matter in 2013, nor any of the history between the parties pre-dating the July 17, 2017 incident, as he only began working at the Bear shops in “late 2015 or late 2016.” (See Tr. at 311–12, 326–27, 334–35.)

substantiates Complainant's recollection of these events while it further diminishes the credibility of Mr. Ward's testimony.

In 2013, Complainant worked on 30 Track. (Tr. at 83.) Complainant, on March 26, 2013, went to Bruce Carlton, Jerry Eddis,²⁵ and Brian Dallas with a safety complaint. (Tr. at 30.) He reported "the battery chargers that covers were put on while 480 wires were hanging inside were not connected." (*Id.*) This was a safety concern because "if I would have went and powered the car up, someone could have gotten electrocuted. The car could have blown up. The 480 would go to the ground." (*Id.*)

Complainant filed an OSHA complaint April 4, 2013, writing that, on March 28, 2013, he "found what looked like a wire hanging from my 480volt pothead on the a-end right side of the car," and he informed the safety department and union official about this during his checks on a car on 30 Track, Spot 4. (CX-1B.) He further wrote that he felt like the "pothead incident" was done in retaliation for reporting the battery charger incident. (*Id.*) Foreman Ward testified that on March 28, 2013 Complainant was working on a car from Ward's line, stating that "[i]t was still a 29 [T]rack car." (Tr. at 202-03.)

On March 28, 2013, Complainant testified that Foreman Ward went to the other technician he was working with, Todd Porter, and said "I heard, you guys are fucking up 30 [T]rack," which Complainant interpreted to be an insinuation that Complainant and Mr. Porter were causing the sabotage on the cars and that Ward was harassing him for an earlier safety report that Complainant had made to Mr. Carlton. (Tr. at 31.) Complainant also answered affirmatively that Foreman Ward interjected himself into the safety matter by going around and telling people that Complainant was responsible for the safety issue. (Tr. at 108.)

Foreman Ward's recollection of the same incident, in contrast, is as follows:

So 30 [T]rack had a car from the 29 [T]rack, and at the end of a car being done, your electrical tech and his CI take over the car and just run through all the tests of the car. There are allotted hours for outbounding, what we call outbounding. At this particular time, the outbound hours were in excess of 300 hours. So I said to Todd Porter, who was Mr. Burt's CI at the time, why are you all holding the car hostage over there? We talk, we joke. And he laughed, he said what do you mean? I said your guys got over 300 hours on this car. I said, we've got to get these cars out for production. That was the end of the conversation. You know, he laughed and he said, we'll get to it, and he, you know, walked off, walked on. And that was it. That was the end of that conversation.

(Tr. at 195-96.) Foreman Ward testified that he made the comment to Mr. Porter because "[t]he car that he was working on was a car from my line at the time." (Tr. at 202.) He said that while it was not his responsibility to make sure the car got out, "[w]e wanted to make sure that our cars were within what they've always been in hours, money, and things like that. So if that car went in excess of hours or so, then it kind of counted against our lot." (Tr. at 202-03.)

²⁵ This is the phonetic spelling the transcript gives for this individual. (Tr. at 30.)

The undersigned finds Foreman Ward's assertion that he made the statement to Mr. Porter as a joke unpersuasive. Foreman Ward made statements earlier in his testimony that his line to Mr. Messina about it being his line and doing what he wanted was a joke, but the testimony from Complainant²⁶ and Mr. Messina,²⁷ as well as his own later testimony,²⁸ casts doubt on this statement. In the light of that prior testimony concerning "joking," Foreman Ward passing his statement to Mr. Porter off as a "joke" appears deceptive. Complainant's action in filing an EEOC complaint against Mr. Ward further casts doubt on this statement being a "joke;" if Foreman Ward and Mr. Porter had been joking, as Foreman Ward testified, it does not logically follow that Complainant would interpret Mr. Porter's recollection of the events as serious enough to file an EEOC complaint against Foreman Ward, especially when there had been no prior incidents between the two men. It is thus reasonable to credit Complainant's statement that Foreman Ward made the comment in a harassing nature.

Additionally, other facts of record support Complainant's testimony that Foreman Ward was insinuating that he and Mr. Porter were sabotaging the cars and harassing him for his earlier safety report to Mr. Carlton. The car with the pothead issue that Complainant was working on during March 28, 2013 was a 29 Track car. (Tr. at 202-03.) Foreman Ward expressed the sentiment that even though he was not responsible for the car while it was on 30 Track, he still believed issues with his cars counted against him. (*Id.*) Foreman Ward also testified that, as of March 28, 2013, Complainant and Mr. Porter had been working on the car in excess of 300 hours. (Tr. at 195.) Following this, it is logical to conclude that Complainant and Mr. Porter were working on the same 29 Track car two days prior, on March 26, 2013, when Complainant reported safety concerns. It further follows that if Complainant reported a safety concern about a car that originated on 29 Track, Foreman Ward would feel personally invested in this safety complaint.²⁹

It is also logical to conclude that Foreman Ward knew about the earlier safety complaint. To insinuate that [Complainant and Mr. Porter] were "sabotaging the cars" and causing the electrical problem, Foreman Ward would have to have known that there was a safety problem with the car. (Tr. at 31, 108.) Complainant testified that the three individuals he told the safety

²⁶ Q: "And what happened [after Mr. Messina got Complainant after [Foreman] Ward and Mr. Messina had their conversation on July 17, 2017]?" A: "Then as we got to approximately 27 [T]rack, [Foreman] Ward started walking very fast towards us in an intimidating manner, with an angry look on [his] face." Q: "Okay. Did he look lighthearted or jovial at that point at all?" A: No, he was upset." (Tr. at 35.)

²⁷ Foreman Ward affirmed, in his deposition, that he and Mr. Messina joke with each other all the time. (Tr. at 168.) However, given the totality of Mr. Messina's testimony about Foreman Ward, they do not appear to have a relationship with one another where they would be joking all the time. *See* Note 3, *supra*.

²⁸ Q: "But when Charles came in that day, he wasn't joking; he was mad, he was upset?" A: "He was upset."

²⁹ Complainant did answer negatively when asked if the "instillation of the battery charger did not have anything to do with [Mr.] Ward," (Tr. at 85) and answered affirmatively when asked if the "pot head" incident had nothing to do with Foreman Ward (Tr. at 86.), but Foreman Ward's own testimony demonstrates that he had an interest in the outcome of these incidents because the car came from his line. (Tr. at 195, 202-03.)

complaint to were Bruce Carlton, Jerry Eddis, and Brian Dallas. The testimony of record, however, demonstrates that Amtrak management routinely meets with the other party when someone makes a complaint, and that Amtrak's management culture does not protect the confidentiality of individuals who make complaints.³⁰ (See Tr. at 198–99.) Foreman Ward himself also described the culture at Amtrak concerning anonymous complaints as follows: "I'm going to put this so I don't—it's the railroad. He'll make a call, he'll in discretion tell one of his buddies, who in discretion tells one of his buddies, and then it gets around the shop." (Tr. at 198.) Given this information concerning the culture of Amtrak surrounding complaints, it is reasonable to infer that Foreman Ward knew about Complainant's safety complaint, either from one of the managers or from it "getting around" the shop.

The undersigned thus fully credits Complainant's testimony concerning the events surrounding the safety complaint of March 26, 2013, and his recollection of Foreman Ward's statement to Mr. Porter on March 28, 2013.

The Events of July 17, 2017

All of the witnesses testified as to the events that occurred on July 17, 2017. Complainant provided the most credible testimony as to the events of this day, and the undersigned accords his testimony the greatest weight. The undersigned also gives weight to Mr. Messina's testimony concerning the events before he went to get Complainant, with the caveat that the undersigned will not fully credit Mr. Messina's testimony with respect to Foreman Ward's actions. Mr. Messina's testimony evinced a potential bias against Foreman Ward, and the undersigned finds that Mr. Messina may have over-exaggerated his testimony about Foreman Ward's reactions due to this bias. The undersigned has found Foreman Ward to have diminished credibility, so she does not credit his recollection of this incident to the extent that it contradicts other testimony of record. General Foreman Mitchell and Assistant Superintendent Ortiz were not personally present for the confrontation between Complainant and Foreman Ward itself, but they both testified to conversations they had with parties after the incident. This lessens the probative value of their testimony on this incident, as they are not providing direct testimony, though the undersigned credits their testimony to the extent a probative account of the event corroborates it.

The Events of July 18, 2017

³⁰ Complainant testified to the following about how he knew Foreman Ward knew about the EEOC complaint he had made against him, even though it was supposed to be confidential: "You need both sides of the story to make a decision...The first thing a manager does is talk to his foreman about something that happens like this." (Tr. at 132–33.) Foreman Ward affirmed that Mr. Woods had sat down with him and told him the nature of the EEOC complaint that Complainant had made against him, and he testified that Mr. Woods confirmed that Complainant had made the call, even though the hotline was supposed to be confidential. (Tr. at 163.) General Foreman Mitchell, in his testimony, did not appear surprised by the prospect of Mr. Woods having leaked the identity of an employee who made a complaint to Foreman Ward, only saying, "I guess not," when asking if the leaking of such information is improper. (Tr. at 222.)

Complainant, Foreman Ward, General Foreman Mitchell, and Assistant Superintendent Ortiz testified about the events that occurred on July 18, 2017. Complainant provided the most credible testimony as to the events of this day, and the undersigned accords his testimony the greatest weight. There are, however, events of this day that are outside of his personal recollection, regarding the administrative side of the meeting that occurred, to which he was not privy. Assistant Superintendent Ortiz has provided the most credible testimony compared to General Foreman Mitchell and Foreman Ward, so the undersigned credits his recollection where Complainant is unable to provide direct testimony. Additionally, the undersigned finds that no party has provided substantial enough testimony to establish who called Amtrak police or the security guard.

The Monday Meetings

Complainant, Foreman Ward, General Foreman Mitchell, and Assistant Superintendent Ortiz testified as to the Letter of Written Counseling that Complainant received, the two inbound café car inspections that resulted in the letter, the appeal of that Letter, and the general Amtrak policies on timeliness of inspections, communication, and employee discipline. Complainant never attended the Monday meetings, and he admitted that his testimony on the substance of these meetings issue came from “rumors.” Assistant Superintendent Ortiz provided the most credible testimony. The undersigned credits Foreman Ward and General Foreman Mitchell’s testimony to the extent that other evidence of record corroborates it, as they only demonstrated moderate credibility. The undersigned thus finds credible the testimony from Assistant Superintendent Ortiz, as corroborated by Foreman Ward and General Foreman Mitchell, that there were two Monday meetings, one for Foremen and above in the morning, and one for Foremen III and above at the end of the day, and that neither meeting was for the purpose of discussing employee discipline.

Complainant’s Medical Treatment

Complainant testified as to his medical treatment after he stopped working at the Bear complex. Complainant is a largely credible witness, and the evidence of record corroborates his treatment expenses. The undersigned therefore credits Complainant’s testimony on this issue, as it is both supported and uncontested.

C. Relevant and Material Findings of Fact

Based on the documentary exhibits and testimonial evidence provided, and the weighing of the testimony above, the undersigned makes the following relevant material findings of fact:

- (1) Amtrak hired Complainant on July 19, 1983, and as of 2017, he had worked for Amtrak for thirty-four years. (Tr. at 27.) Complainant worked as an Electrical Technician in Bear, Delaware, where he inspected inbound and outbound Amtrak café

cars. (Tr. at 27–28.) Amtrak had never disciplined Complainant in the thirty-four years between hiring him in 1983 and the events of July 2017. (Tr. at 30.)

(2) On March 26, 2013, Complainant went to his superiors—Bruce Carlton, Jerry Eddis, and Brian Dallas³¹—to report a safety concern, namely that the battery chargers were put on while 480 wires were hanging, unconnected, inside the cover. (Tr. at 30.) The wires were 480-volt AC wires, which power everything on a railcar. (Tr. at 134.) Complainant was concerned that people were sabotaging the railcars on Track 30 and that someone could get hurt. (Tr. at 107–08.)

(3) On March 28, 2013, two days after Complainant’s report, Maurice Ward, who was foreman of Track 29,³² told technician Todd Porter (with whom Complainant was working) that Porter and Complainant were “fucking up 30 track.” (Tr. at 31, 84.) Complainant believed that Mr. Ward was insinuating that he and Mr. Porter were sabotaging the cars, and that Mr. Ward was spreading rumors that Complainant was behind the problem. (Tr. at 31, 108.)

(4) On April 2, 2013, Complainant reported Foreman Ward to Amtrak’s confidential EEOC hotline because of Ward’s comment that Complainant and Mr. Porter were “fucking up 30 Track.” (CX-1A; Tr. at 31–32.)

(5) On April 4, 2013, Complainant submitted a complaint to OSHA about the March 26, 2013 safety concern, along with reporting that on March 28, 2013, he found a wire hanging from the 480 volt pothead on the a-end right side of the car. (CX-1B.) He expressed concern that this could cause injury or death. (*Id.*) Complainant contacted OSHA because his superiors took no action in response to his safety report of March 26, 2013, and Complainant believed that Foreman Ward was telling people that Complainant caused the safety hazard. (Tr. at 32–33, 108.)

(6) Foreman Ward knew of Complainant’s 2013 EEOC complaint against him, as he learned of the complaint from Bear Superintendent Lou Woods. (Tr. at 162–63.) Foreman Ward was also upset because Complainant had reported him to the EEOC previously, in 2013. (Tr. at 161.)

(7) Mr. Woods and Foreman Ward met about Complainant’s complaint. (*Id.*) Mr. Woods also had a meeting with Complainant concerning the complaint, attended by Frank Gentry, the union president, Shop Steward Sterling Rapacelli,³³ Shop Steward Dave Hahn, and General Foreman Mike Fox. (Tr. at 131.)

(8) In 2013, OSHA came to the shop in response to Complainant’s complaint. (Tr. at 124–25.) OSHA walked the line with Complainant and his union president, so

³¹ Jerry Eddis was a foreman, and Brian Dallas was the Safe-2-Safer facilitator of the plant. (Tr. at 30.)

³² Q: “And is there a specific track you’re assigned to?” A: “29 track.” (Tr. at 178.)

³³ This is the phonetic spelling the hearing transcript gives for this individual’s name. (Tr. at 131.)

Complainant believed that everyone in the plant knew that he called OSHA. (Tr. at 125.) OSHA announced their presence to management so they could enter the building. (Tr. at 145.)

(9) Complainant's Foreman, Phil Daly, reports to General Foreman Kevin Mitchell. (Tr. at 42.) Complainant is within General Foreman Mitchell's supervisory umbrella, and General Foreman Mitchell can initiate discipline against Complainant. (Tr. at 155.) As a Foreman, General Foreman Ward was part of company supervision. (Tr. at 203.) Foreman Ward's direct report is to General Foreman Paul Malascalza. (Tr. at 155.) The supervisory hierarchy is not a strictly straight-line model, and foremen other than an employee's own direct foreman can report an employee to management. (Tr. at 269; *See* RX F-1.)

(10) Every week, the foremen and supervisors hold a meeting that non-managerial employees like Complainant do not attend. (Tr. at 144–45, 179, 188, 222–23.) Outside of these managers' meetings, a foreman having trouble with an employee can access the General Foreman or one of the superintendents at any time. (Tr. at 223.)

(11) On July 17, 2017, Foreman Ward was in charge of overtime for the men working on 29 Track. (Tr. at 10.) That day, electrician Charles Messina was listed as fifth on the overtime list, but Foreman Ward passed over Mr. Messina and granted overtime to the twelfth and thirteenth men on the list. (Tr. at 10–11.) Complainant had been the union shop steward of the Bear facility since 2016. (Tr. at 123.) Both Mr. Messina and local union president George Kepley asked Complainant to help Mr. Messina with the overtime issue. (Tr. at 34.) Complainant approached Foreman Ward with Mr. Messina about Foreman Ward denying Mr. Messina overtime. (Tr. at 34–36.) Complainant and Foreman Ward had an exchange about the overtime. (Tr. at 35–36.) As the exchange concluded, Foreman Ward shouted at Complainant, “[T]he next time you call the EEOC, leave your name with it.” (Tr. at 36, 159–161, 227; JX 10.) Foreman Ward was upset when he yelled this line. (Tr. at 190–91.) John VanDyke, another Foreman, came over to defuse the situation and walked Foreman Ward backwards as Complainant walked away. (Tr. at 187, 336–37; CX 3; JX 10.) After the encounter with Complainant, Foreman Ward immediately announced that he was cancelling overtime for everyone. (Tr. at 13–14.) Complainant believed that Foreman Ward tried to make it look like Complainant caused him to cancel overtime by complaining. (Tr. at 37.)

(12) At approximately 1:52 P.M., after the exchange between Complainant and Foreman Ward, Complainant saw Foreman Ward and security guard Mike Dudley together in Mr. Ward's office. (Tr. at 39, 80.) Foreman Ward and Mr. Dudley are friends. (Tr. at 171.) Foreman Ward spoke with Mr. Dudley about the incident between himself and Complainant. (Tr. at 171–73.)

(13) On July 18, 2017, the day after the incident between Complainant and Foreman Ward, Complainant reported to work at 5:45 A.M. (Tr. at 40.) He was unable to clock in, because an Amtrak guard and an armed, uniformed, Amtrak police officer ordered

him to accompany them to the conference room in the administration building. (Tr. at 40–41.) Complainant felt humiliated and frightened. (Tr. at 41.)

(14) General Foreman Mitchell believed that Mr. Dudley had called the police in. (Tr. at 228–29.) Calling the police required approval from management, “from general foreman on up.” (Tr. at 196, 206.)

(15) Foreman Daly gave Complainant a Time Adjustment Slip for failing to sign out on July 18, 2017. (Tr. at 43–44, 92; JX 3.) General Foreman Mitchell approved this Time Adjustment Slip. (*Id.*)

(16) On July 28, 2017, General Foreman Mitchell presented Complainant with a “Written Counseling—Attending to Duties” Letter. (Tr. at 53–54; JX 4.) The Written Counseling Letter took issue with Complainant’s inspection of café cars on July 12–13, 2017 (JX-5) and on July 26-27, 2017. (JX 6; Tr. at 141.)

(17) Complainant testified that Amtrak’s disciplinary process has three steps: verbal warning, written counseling letter, notice of intent to fire. (Tr. at 122.) Complainant recognized the written counseling letter as a form of discipline. (Tr. at 57.) The Written Counseling Letter referenced Amtrak’s “Standards of Excellence.” (Tr. at 56; JX 4.) Complainant believed the Written Counseling Letter to be “serious” rather than “trivial” discipline because the Amtrak Standards of Excellence state that an employee can be dismissed for violating the Standards of Excellence and Complainant knew this. (Tr. at 56, 59, 94.) While Complainant was worried about dismissal, he was also worried about less drastic steps, including suspension and suspension without pay. (Tr. at 111.)

(18) The Amtrak Standards of Excellence contain the following language:

You should understand that failure to follow the standards of excellence outlined in this booklet—as well as rules specific to your particular job—will result in appropriate corrective or disciplinary action up to and including dismissal.

(JX 11; Tr. at 58.)

(19) General Foreman Mitchell did not verbally counsel Complainant about the issues pertaining to the July 12, 2017 inspection before sending the Written Counseling Letter. (Tr. at 276.) When he sends a Written Counseling Letter, he expects the employee to take it seriously; it is not trivial. (Tr. at 230–31.) Management takes Written Counseling Letters seriously. (Tr. at 338.)

(20) Foreman Ward admitted that all employees are taught that violating the Standards of Excellence can lead to discipline, and he knows of employees suspended for violating the Standards. (Tr. at 176–77.) Foreman Ward admitted that a Written Counseling Letter is the second step in Amtrak’s disciplinary process, the third of which is a Notice of Intent to Impose discipline. (Tr. at 231–32.)

(21) When Complainant received the counseling letter, he took it as part of a plan to fire him. (Tr. at 60, 94.) Complainant interpreted the counseling letter this way because of the following:

(a) Complainant's Foreman Phil Daly had never raised an issue with Complainant regarding spending two days to do rail car inspections. (Tr. at 61–62, 68.)

(b) Foreman Daly had access to the inbound inspection sheets as the work was being done and knew how long each job took. (Tr. at 61–62.)

(c) The inbound inspection sheets themselves detailed many items that would take extra time. (Tr. at 62–64.)

(22) Complainant's union filed a grievance with respect to the Written Counseling Letter, but it did not appeal it after Amtrak rejected the grievance. (Tr. at 96.) By the time Amtrak had rejected the appeal, Complainant had already filed his FRSA complaint with OSHA. (Tr. at 112.)

(23) Complainant decided not to appeal Amtrak's denial of his grievance for the following reasons:

(a) Complainant would have to appeal Amtrak's decision to another Amtrak senior management employee. (Tr. at 345.)

(b) An appeal of that management decision would then go to the management employees in Amtrak Labor Relations in Washington. (Tr. at 346.)

(c) Complainant would have been out of work and not getting paid while these appeals were going on. (Tr. at 114.)

(24) In the years following Complainant's EEOC report, Complainant felt that Foreman Ward was argumentative whenever he spoke with him. (Tr. at 86.) Complainant had to speak with Foreman Ward every few months about union issues such as manpower, discipline, and overtime. (*Id.*)

(25) In the years after Complainant stopped reporting to Foreman Ward, Complainant saw Foreman Ward every day; Foreman Ward worked on 29 Track and Complainant worked on 26 Track, which were close to each other. (Tr. at 108–09.) Foreman Ward and Complainant also shared the same cafeteria, passed through the same guardhouse, and Complainant walked past 26 Track, where Foreman Ward worked, to go to material control. (Tr. at 224–25.)

(26) Complainant testified that it normally took between two to three days to inspect inbound café cars, as several of the job tasks are normally done on the second day. (Tr.

at 45, 49–50, 52.) It has never taken just eight hours for Complainant to perform inbound café car inspections. (Tr. at 64–65, 135.) Complainant does not know anyone who could do such an inspection in less than eight hours. (Tr. at 135–36.)

(27) Before the incident involving Foreman Ward on July 17, 2017, no one ever told Complainant, either orally or in writing, that the inbound inspection of the café cars should take only eight hours. (Tr. at 93.)

(28) Before the incident involving Foreman Ward on July 17, 2017, Complainant had never received a written counseling letter about taking too long to inspect inbound café cars or about not explaining to his foreman why a café car inspection took longer than eight hours. (Tr. at 47, 56.)

(29) General Foreman Mitchell admitted that before the incident involving Foreman Ward on July 17, 2017, he had never sent a written counseling letter to Complainant. (Tr. at 239.)

(30) General Foreman Mitchell admitted that the inspection of inbound café cars can take more than eight hours; it can take two days, it can even take five days. (Tr. at 213–14.) General Foreman Mitchell admitted that Amtrak encourages inspectors like Complainant and his co-workers to take the time they need to perform their inspections, because, among other things, they are looking for issues that can pose potential safety hazards to passengers. (Tr. at 216–17.)

(31) General Foreman Mitchell admitted that the inbound café car inspection records for the six months before Complainant was written up in July 2017 show numerous occasions where it took Complainant and other technicians two days to inspect the cars.³⁴ (Tr. at 214.) General Foreman Mitchell admitted that, as a General Foreman, he had access to all of those records. (Tr. at 216.) He admitted that some of the testing takes place on the second day, so it is normal for the inspection to take two days. (Tr. at 284.)

(32) If Complainant's diagnostic testing reveals that something is wrong with the car, he must take even more time to address it. (Tr. at 52.)

(33) At the hearing, General Foreman Mitchell took the position that the Written Counseling Letter was not really concerned with the amount of time Complainant was taking to inspect the café cars, but with Complainant not communicating to his bosses why it was taking extra time. (Tr. at 241.)

(34) Complainant loved his job inspecting the inbound and outbound café cars; he took pride in it. (Tr. at 29–30.)

³⁴ These records were admitted as: CX 6 (January 5, 6, 9, 2017) (Tr. at 46); CX 6-A (December 15–16, 2016) (Tr. at 214–16); CX 6-B (February 22–23, 2017) (Tr. at 214–16); CX 6-D (March 29–30, 2017) (Tr. at 214–16); CX 6-E (June 9 and 12, 2017) (Tr. at 214–16); and CX 6-F (June 21 and 22, 2017) (Tr. at 214–16.)

(35) Complainant suffered from a stress-related condition that eventually led him to take time off work. (Tr. at 69–70.) Complainant suffered physical manifestations, including diarrhea, heart palpitations, and high blood pressure. (*Id.*) Complainant testified that he was a “physical wreck”. (Tr. at 70.) He sought treatment with his primary care physician, Dr. Wilson. (*Id.*) Complainant first treated with Dr. Wilson for stress on September 25, 2017. (Tr. at 103.)

(36) The interaction with Foreman Ward on July 17, 2019 made Complainant feel stressed and afraid; he called his union president to talk about it when he got home from work. (Tr. at 39–40.) He also told his wife, who tried to calm him down. (*Id.*)

(37) Complainant suffered great stress when he received the written counseling letter because he thought that management was trying to fire him. (Tr. at 60.) Complainant believed this to be the case because, in his opinion, the reasons cited in the letter—that he was taking too long to perform the inspections and that he did not explain why it was taking more than eight hours in a single day—were frivolous, as it always took him more than eight hours over two days. (Tr. at 60.)

(38) In September 2017, Complainant had an issue with General Foreman Mitchell. (Tr. at 69.) Foreman Daly pulled Complainant off of an inbound car and had Complainant work on an outbound car, because they could not fix a door problem. (*Id.*) After Complainant found two door problems, General Foreman Mitchell called Complainant’s union leader, rather than Complainant’s foreman, wanting to know why Foreman Daly sent him down to outbound to fix one door problem, and now two door problems existed. (Tr. at 69, 136–37.) Complainant took this as harassment. (Tr. at 138.) Complainant testified that it was unusual for General Foreman Mitchell to go to Complainant’s union leader, rather than his foreman. (Tr. at 147.)

(39) Dr. Wilson prescribed Xanax for Complainant, directed Complainant not to return to work, and treated him throughout the time Complainant was on medical leave, from September 25, 2017 until December 2018. (Tr. at 70–71.) Complainant continues to treat with Dr. Wilson for stress. (Tr. at 81.)

(40) Amtrak found Complainant to be medically disqualified (“MDQ”) from his position at Amtrak and sent him a letter on March 27, 2018 stating so. (CX 7; Tr. at 71.)

(41) Amtrak did not ask Complainant for documentation of his disability beyond that provided by Dr. Wilson. (Tr. at 120–21.)

(42) Consistent with Complainant’s medical inability to work while he was out, Amtrak recorded on the company roster that Complainant was “MDQ (3/27/18).” (CX 8; Tr. at 71–72.)

(43) Complainant returned to work in December 2018 to a desk job in Wilmington. (Tr. at 72–73.) Dr. Wilson instructed Complainant not to return to Bear, where Foreman Ward was still working. (Tr. at 105.)

(44) Complainant's economic loss of straight time wages equals \$83,739. (CX 10; Tr. at 73–74.)

(45) Complainant's technician vs. C-electrician differential (the difference in wages between the two crafts) equals \$2,381.00. (CX 10; CX 21; Tr. at 75.) Complainant looked for electrical technician jobs, but he found none. (Tr. at 105–06.)

(46) Complainant's out-of-pocket expenses for medication equal \$207.56, and his out-of-pocket medical expenses for treatment equal \$820.00. (CX 25; Tr. at 77–79.) Dr. Wilson was out of Complainant's network, so insurance did not cover his treatment of Complainant, and Complainant paid him directly. (Tr. at 140.) The amounts charged on the medication invoices represents Complainant's co-pay on the total amounts of the drugs. (*Id.*)

D. Legal Standard

The purpose of the FRSA is “to promote safety in every area of railroad operations.” 49 U.S.C. § 20101. Under the 2007 amendments to the FRSA, a railroad carrier “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part” to the employee's engagement in one of numerous protected activities. 49 U.S.C. § 20109(a).

The FRSA incorporates the rules and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”) whistleblower cases. 49 U.S.C. § 20109(d)(2)(A). To demonstrate unlawful activity under the FRSA, a complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity was a contributing factor in the adverse employment action. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Samson v. Soo Line R.R. Co.*, ARB No. 15-065, ALJ No. 2014-FRS-091, slip op. at 3 (ARB July 11, 2017). A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action—any amount of causation will satisfy this standard. *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-036, ALJ No. 2014-FRS-154, slip op. at 14–15, 51–55 (ARB Jan. 4, 2016). An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. *Id.*

Should the complainant succeed, the burden then shifts to the respondent-employer to demonstrate by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B); *Araujo*, 708 F.3d at 157. Clear and convincing evidence shows “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015). The burden of proof

for clear and convincing evidence resides in between “preponderance of the evidence” and “proof beyond a reasonable doubt.” See *Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco*, ARB No. 13-057 at 7–8.

The Act at 49 U.S.C. § 20109(d)(4) states that the appropriate circuit court is the court “in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation.” Complainant’s residence and the site of the alleged violation occurred in Delaware. Thus, Third Circuit law is applicable.

E. Analysis

Complainant alleges that Respondent engaged in conduct that amounted to adverse actions that were due to Complainant’s protected activity. The undersigned agrees that Complainant has demonstrated one adverse action taken by Respondent where Complainant’s protected activity was a contributing factor.

Complainant and Respondent have stipulated that the FRSA covers this claim, so the discussion begins with protected activity below.

1. Protected Activity

49 U.S.C. § 20109(b)(1)(A) states that protected activity includes, “reporting, in good faith, a hazardous safety or security condition.” Complainant, in his post-hearing brief, argues that Complainant engaged in protected activity under 49 U.S.C. § 20109(b)(1)(A) when he reported a serious safety concern in April, 2013.

On March 26, 2013, Complainant reported to his superiors his safety concern that the battery chargers were installed while 480 wires were hanging, unconnected, inside the cover. (Tr. at 30.) He reported because he was worried that people were sabotaging the railcars on Track 30 and that someone could end up getting hurt. (Tr. at 107–08.)

Complainant also filed a safety complaint with OSHA on April 4, 2013. (CX 1-B.)

Respondent does not challenge that Complainant made these reports in good faith. (*See* Res. Br. at 11–12.)

Accordingly, the undersigned finds that Complainant engaged in 49 U.S.C. § 20109(b)(1)(A) protected activity.

2. Awareness of Protected Activity

To prevail under the FRS, Complainant must also establish that Respondent was aware of Complainant's protected activity.

Complainant, in his brief, argues that both Foreman Ward and General Foreman Mitchell were aware of Complainant making a safety complaint in April 2013.

As explained further in the weighing of the testimony above, it is logical to conclude that Foreman Ward knew that Complainant had made a safety complaint in March 2013, given that, for Foreman Ward to have made his comment about Complainant and Mr. Porter allegedly sabotaging cars, he would have to have known that there had been a safety problem with the cars, and the testimony of record demonstrates that Respondent's management culture does not protect the confidentiality of those who make complaints. Foreman Ward's comments demonstrate that he knew about the safety hazard, and that he knew Complainant had reported the safety hazard. (*See* Tr. at 31, 108, 198–99.)

It is also logical to conclude that Messrs. Ward and Mitchell knew that Complainant had filed a safety complaint with OSHA. When OSHA came to do its inspection, Complainant and the union president walked the line with them. (Tr. at 125.) Anyone working in the plant at the time would have seen Complainant walking the line with the OSHA investigators.³⁵ Messrs. Ward and Mitchell both worked at the Bear, Delaware facility in 2013, when the OSHA investigation took place. (Tr. at 178–79; 246.)

The undersigned therefore finds that Mr. Ward was aware of both Complainant's complaint to management on March 26, 2013 and his complaint to OSHA on April 4, 2013, and that Mr. Mitchell was aware of Complainant's April 4, 2013 complaint to OSHA.

3. Adverse Action

Under 49 U.S.C. § 20109(a), an employer commits an adverse action if they “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee.” The implementing regulations of the FRSA prohibit actions “to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against an employee” because of protected activity. 29 C.F.R. § 1982.102(b); *see Stallard v. Norfolk Southern Railway Company*, ARB No. 16-028, ALJ No. 2014-FRS-149, slip op. at 7 (ARB Sep. 29, 2017).

The Board has applied the standard set in *Williams v. American Airlines, Inc.*³⁶ to FRSA claims. *Fricka v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 8–9 (ARB Nov. 24, 2015):

³⁵ As Complainant testified, “Everyone in the plant knew I called OSHA.” (Tr. at 125.) Complainant answered affirmatively when asked if Foreman Ward and General Foreman Mitchell would have known of OSHA's presence. (Tr. at 145.)

³⁶ In *Williams*, the Board held that “‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 7 (ARB Dec. 29, 2010) (The ARB held that, under that definition, the respondent discriminated against the complainant when it misclassified his injury as

[A] tangible or ‘material impact’ on an employee’s terms and conditions of employment is no longer required given the very broad statutory language prohibiting discrimination ‘in any way.’ Instead, an adverse employment action under FRSA is an ‘unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions alleged.

*Id.*³⁷

Complainant asserts that the following actions undertaken by management constituted unfavorable personnel actions:

- Foreman Ward’s intimidation of Complainant on July 17, 2017, and his following announcement to the shop that overtime was cancelled;
- Foreman Ward’s conspiring with security guard Mr. Dudley to have Complainant escorted and taken into custody by an armed; uniformed police officer;
- Amtrak management’s decision to approve Complainant being escorted and taken into custody by an armed, uniformed police officer;
- Foreman Phillip Daly’s serving Complainant with (and General Foreman Kevin Mitchell’s approving) a Time Adjustment Slip; and
- General Foreman Kevin Mitchell’s serving Complainant with a Written Counseling Letter that went into Complainant’s Amtrak files and expressly referenced Amtrak’s standards of excellence (which expressly threaten discipline up to and including dismissal).

a) *Did Foreman Ward’s Actions Constitute Adverse Actions?*

The undersigned finds that the evidence demonstrates that Foreman Ward, in his decision to publicly cancel overtime after his altercation with Complainant, had the intent to harass and humiliate Complainant, and to undermine his authority as a union representative. The testimony demonstrates that Foreman Ward got confrontational and angry when Mr. Messina brought Complainant to assist with the overtime issue, and the immediacy³⁸ with which Foreman Ward canceled overtime after the altercation, and the circumstances surrounding how he announced

non-work related—that, as a matter of law, the reclassification was unfavorable and more than trivial, as then the respondent did not pay the complainant’s medical bills of \$297,797.21).

³⁷ In *Fricka*, the ARB found that Amtrak’s dropping the claimant’s performance evaluation from “2.11, Competent,” (before he reported an injury) to “1.43, Needs Development” (after he reported his injury) was an adverse action as a matter of law. The ARB also held that whether *Fricka* would have gotten a bonus was not determinative “because the lowering of the rating is significant of itself and need not effect a tangible or material impact on his salary to be considered adverse.” *Fricka*, slip op. at 9.

³⁸ Q: “So when [Foreman] Ward walked around telling all the guys no more overtime, this was right after this exchange with the union leader, [Complainant]?” A: “Yes, immediately afterwards.” (Tr. at 14.)

that overtime was cancelled,³⁹ serves to connect that decision to his anger at Complainant. (Tr. at 13.) The line that Foreman Ward said about calling the EEOC⁴⁰ also demonstrates that there was a personal element to his anger towards Complainant outside of Mr. Messina contacting a union representative. (Tr. at 14.)

The circumstances following Foreman Ward's decision to cancel overtime further demonstrate the retaliatory nature of his actions. Foreman Ward cancelled overtime for his day shift only, while the night shift continued to receive overtime for a period of two weeks.⁴¹ (Tr. at 21, 25.) Additionally, after that two-week period, Foreman Ward took three to four weeks away from work for surgery, and almost immediately, the other foreman on the line reinstated overtime.⁴² (*Id.*) Foreman Ward offered an alternative explanation as to why he cancelled overtime, but, as discussed above, the undersigned gives diminished weight to his testimony where it conflicts with a more credible witness. The circumstances surrounding the overtime also undercut his testimony about it.

Foreman Ward's actions constitute discriminatory harassment that rise beyond mere trivialities, and thus constitute, in their totality, an adverse action against Complainant. His actions humiliated Complainant and also had the potential to create friction with Complainant's other co-workers, thus diminishing their faith in him as their union representative.

b) Did the Decision to Have Complainant Escorted by Amtrak Police Constitute Adverse Action?

Complainant has established that the incident of July 18, 2017, where Amtrak police took Complainant into custody, was an adverse action, in that it was discriminatory behavior intended to harass and intimidate the Complainant.⁴³ However, Complainant has not proven by a

³⁹ Q: "When [Foreman] Ward announced, 'that's it, overtime is cancelled,' did he do that out in the open shop?" A: "Yes, he yelled it." Q: "And did he then follow up on that threat and cancel overtime for his men?" A: "He did." (Tr. at 37.)

⁴⁰ Q: "And did he shout anything after you?" A: "Yes. As I was walking away, he said the next time you call the EEOC, leave your name with it." (Tr. at 36.)

⁴¹ Mr. Messina further testified that overtime almost always existed for first shift electricians, except "some times [when] they stopped all overtime because of money constraints or whatever have you." (Tr. at 26.) The immediacy with which Foreman Ward cancelled the overtime, the duration of the overtime cancellation, the fact that only Foreman Ward's shift had no overtime, and the fact that Mr. Barry immediately reinstated overtime after Foreman Ward went out on medical leave preponderantly demonstrate that Foreman Ward did not cancel overtime due to external company-related factors.

⁴² Q: "[A]m I correct in understanding that as soon as Maurice Ward went out for his surgery after two weeks, the foreman Mr. Barry then re-instituted overtime for the men?" A: "Yes, the very next day." (Tr. at 26.)

⁴³ Even though Complainant, Foreman Ward, and Mr. Messina were all involved in the July 17, 2017 incident, there is no testimony that Amtrak police escorted anyone besides Complainant to the meeting. The meeting purportedly took place so that Complainant could explain his side of the story. Nothing in the record established a legitimate reason for police presence at the meeting. Prior to July 2017, Amtrak had never disciplined Complainant, so there is no prior conduct that may have justified taking Complainant into police custody. (Tr. at 30.) Amtrak had never used police to escort Complainant in his prior thirty-four years of employment. (Tr. at 41.)

preponderance of the evidence that “[a] railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier,” was the one who instructed the police to carry out those orders.

Complainant alleges that both Foreman Ward and Security Guard Mike Dudley conspired to have Amtrak police take Complainant into custody, but he does not provide sufficient proof to meet his burden in establishing this allegation. While Complainant did testify that he saw Foreman Ward and Mr. Dudley in Foreman Ward’s shack after the incident of July 17, 2017, and General Foreman Mitchell did express an understanding that Mr. Dudley was involved with calling the police, neither of these pieces of testimony is sufficient alone for the undersigned to find that Foreman Ward was the one who gave the order to call the police. Additionally, Foreman Ward testified that neither he nor Mr. Dudley had the authority to have Complainant escorted by armed police. (Tr. at 196.) While Foreman Ward had issues of credibility with his testimony, the undersigned credits his testimony about his lack of authority to call the police, as no testimony contradicts Foreman Ward. His statement that Mr. Dudley did not have the authority to call Amtrak police, however, is put into question by General Foreman Mitchell’s testimony that he walked away with the impression that Mr. Dudley made the decision to have Complainant escorted by Amtrak police. (Tr. at 229.) As a General Foreman and part of management, General Foreman Mitchell would likely know who did or did not have the authority to take an action like calling Amtrak police. Thus, even if it is only an assumption, the fact that General Foreman Mitchell assumed that Mr. Dudley may have been the one to call the police implies that he believed or knew that Mr. Dudley did have such authority.

While General Foreman Mitchell’s statement diminishes the credibility of Foreman Ward’s testimony on Mr. Dudley’s authority, as stated above, General Foreman Mitchell’s “assumption” does not lead to the conclusion that Mr. Dudley called Amtrak police. Additionally, even if, assuming *arguendo*, the undersigned found General Foreman Mitchell’s testimony sufficient to establish that Mr. Dudley called Amtrak police, the record does not establish that Mr. Dudley is “[a] railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier.” 49 U.S.C. § 20109(b). Nearly all of the witnesses of record refer to Mr. Dudley as the “security guard,” but no one has provided any testimony or other evidence that he is an officer or employee of Amtrak. Thus, the record does not establish that Amtrak took the adverse action of using a police escort to take Complainant from the gate to the meeting on July 18, 2017.

c) *Did General Foreman Mitchell’s Letter of Written Counseling Constitute Adverse Action?*

Complainant has also demonstrated, by a preponderance of the evidence, that Complainant’s Letter of Written Counseling was discriminatory treatment towards Complainant. While General Foreman Mitchell testified that this letter was intended only to serve as counseling for Complainant, his diminished credibility and the other testimony of record establish that the Letter of Written Counseling is disciplinary, and as such, constitutes an adverse action.

He did not make any threats to anyone that morning, had made no threats the day before, and he did not have a weapon on him. (*Id.*)

“A written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive disciplinary policy, or (c) it implicitly or expressly references potential discipline.” *Williams*, ARB No. 09-018, slip op. at 11.⁴⁴

While General Foreman Mitchell gave testimony of limited credibility that the Letter of Written Counseling was not disciplinary, nor was it necessarily the first step in a progressive disciplinary policy, even if the undersigned were to give full weight and credit to his testimony, the Letter of Written Counseling would still remain as an adverse action under the third prong of the *Williams* test: “it implicitly or expressly references potential discipline.” *Id.*

The Letter calls attention to the Amtrak Standards of Excellence (JX 4.) The Amtrak Standards of Excellence include the following language:

You should understand that failure to follow the standards of excellence outlined in this booklet—as well as the rules specific to your particular job—will result in appropriate corrective or disciplinary action up to and including dismissal.

(JX 11.) This reference to the Amtrak Standards of Excellence is an implicit reference to discipline embedded within the Letter. Additionally, the Letter of Written Counseling notes that the letter will be placed in Complainant’s file, and copies Assistant Superintendent Ortiz, the superintendent of the plant, further implying that Complainant would be subject to additional discipline if he failed to abide by the letter. (JX 4.)

Accordingly, the undersigned finds that the Letter of Counseling constituted an adverse action.

d) Did Foreman Daly’s Time Adjustment Slip Constitute an Averse Action?

On July 18, 2017, the day Amtrak police took Complainant into custody, Complainant received a Time Adjustment Slip from Foreman Daly that General Foreman Mitchell also signed. Complainant asserts that this time adjustment slip constitutes an adverse action. Complainant testified that he believed that the time adjustment slip was a form of discipline, as both Foreman Daly and General Foreman Mitchell knew where Complainant was that morning, but still made him fill out the form. (Tr. at 93.)

The undersigned finds insufficient evidence of record to conclude that having Complainant fill out a time adjustment slip constituted an adverse action. Unlike the Letter of Counseling discussed above, there is nothing in the Time Adjustment Slip that indicates any

⁴⁴ *Fricka* acknowledges that the ARB adopted the *Williams* standard of actionable adverse action. *Fricka*, ARB No. 14-047, slip op. at 7 (ARB Nov. 24, 2015). Additionally, as Judge Temin has noted, “the language of the corresponding FRSA regulation is at least as broad with regard to protected activity.” *Turner-Byrdsong v. National Railroad Passenger Corp.*, ALJ No. 2016-FRS-00086 (May 31, 2018) (citing 29 C.F.R. § 1982.102(b)).

explicit or implicit discipline. Rather, the time adjustment slip simply allowed Complainant to adjust his time sheet to record the proper hours since he was unable to punch in when taken into Amtrak police custody and unable to punch out because the clock failed. Even if Foreman Daly and General Foreman Mitchell knew where Complainant was, it does not mean that they could have adjusted Complainant's time sheet without his signature. The form itself requires Complainant's signature to verify the actual hours that he worked. (JX 3.) Accordingly, Complainant has not established that the time adjustment slip constituted an adverse action.

4. Contributing Factor

To succeed on his FRSA claim, Complainant must also prove that their protected activity was a contributing factor to the adverse employment action. 49 U.S.C. §§ 20109(a), (b); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer's decision to take adverse action; any amount of causation will satisfy this standard. *Palmer*, ARB No. 16-036 at 14–15, 51–55. An ALJ may consider all evidence relevant to this issue, including the employer's proffered reasons for the adverse action. *Id.*

As discussed above, Complainant has established that Respondent took two adverse actions against him: 1) Foreman Ward's actions against him on July 17, 2017, and 2) General Foreman Mitchell's Letter of Counseling to Complainant. The undersigned discusses whether Complainant's protected activity was a contributing factor to any of these adverse actions below.

Foreman Ward's Actions Against Complainant on July 17, 2017

Foreman Ward, during the July 17, 2017 incident, and right before he cancelled overtime, shouted, "[T]he next time you call the EEOC, leave your name with it." (Tr. at 36, 159–161, 227; JX 10.) Complainant had only ever made one EEOC complaint about Foreman Ward: the EEOC complaint that Complainant made after Foreman Ward said that Complainant was "fucking up 30 [T]rack." (Tr. at 31, 36–37.) As discussed above, Complainant has established, and the undersigned has found, that Foreman Ward knew about the March 2013 safety complaint that Complainant had made to his superiors, and the comment Foreman Ward made accusing Complainant of "fucking up 30 [T]rack" related to Complainant's complaint. (Tr. at 31.) It is thus reasonable to conclude that Complainant's 2013 complaint was a contributing factor in Foreman Ward's actions against Complainant on July 17, 2017, as: 1) Foreman Ward knew about Complainant making a safety complaint to his superiors on March 26, 2013, 2) Foreman Ward's comment on March 28, 2013 related to Complainant's complaint, 3) Complainant made an EEOC complaint about Foreman Ward concerning the comment Foreman Ward made to Complainant, which related back to Complainant's March 2013 complaint, and 4) when Foreman Ward engaged in his harassing and discriminatory behavior towards Complainant on July 17, 2017, the EEOC complaint was clearly on his mind.

Accordingly, the undersigned has found that Complainant has established that, beyond a preponderance of the evidence, a causal chain exists between Complainant's March 26, 2013 safety complaint to his superiors and Foreman Ward's adverse action towards Complainant on July 17, 2017.

General Foreman Ward's Letter of Counseling

The Administrative Review Board has explained that, to establish that a claimant's protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity "was the only or most significant reason for the unfavorable personnel action." *Rudolph v. Nat'l R.R. Passenger Corp.*, ARB Case No. 11-037, 2013 WL 1385560, at * 11 (Dep't of Labor Mar. 29, 2013). "The complainant need only establish by a preponderance of the evidence that the protected activity contributed in any way to the adverse action the employer takes against an employee who engages in such an activity." *Id.* As articulated in *Rudolph*:

[P]roof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge or a combination of individuals involved in the decision-making process. Proof of a contributing factor may be established by evidence demonstrating 'that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity.'

Id. Employers may be held liable under the "cat's paw"⁴⁵ legal concept of liability for "employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." *Id.* at 12. Under the "cat's paw" theory, the Supreme Court held that "if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action taken, then the employer will be held liable. *Id.*

The Board in *Rudolph* articulated that:

Where motivation is, as in *Staub*, a prerequisite to establishing liability, the complainant must prove that the company official responsible for the adverse employment decision, although himself harboring no discriminatory intent, acted on the advice or actions of others motivated by animus intended to cause an adverse employment action. Where, however, the complainant need establish that his protected activity was only a contributing factor in the adverse action, proof of motivation is not required. Moreover, in such cases the complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if the complainant can establish that those advising the decision-maker knew, regardless of their motives.

⁴⁵ The "cat's paw" legal concept of liability was recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

*Id.*⁴⁶

Complainant alleges a causal chain connecting his protected activity to General Foreman Mitchell's issuing of his Letter of Counseling. General Foreman Ward was the decision maker behind issuing the Letter of Written Counseling, but he consulted with Assistant Superintendent Ortiz⁴⁷ about the Letter of Written Counseling prior to issuing it to Complainant. (Tr. at 229–30, 323–24.)

Complainant has not established by a preponderance of the evidence that a causal chain connected General Foreman Mitchell's Letter of Counseling and either his March 26, 2013 safety complaint to his superiors or his subsequent complaint to OSHA. Complainant has not met his burden of proof that either General Foreman Mitchell, as the decision-maker, or Assistant Superintendent Ortiz, as an individual who advised General Foreman Mitchell in his decision to issue the Letter of Written Counseling, knew about either of Complainant's protected activities.

There is no evidence of record that Assistant Superintendent Ortiz had any knowledge of either instance of Complainant's protected activity, as he did not start working in the Bear shops until "late 2015 or late 2016," nearly three or four years after Complainant's instances of protected activity, and he had no awareness of Complainant or Foreman Ward back in 2013, when the protected activity took place.⁴⁸ (Tr. at 312.) There is also no evidence of anyone else being influential in General Foreman Mitchell's decision to issue the Letter of Counseling other than General Foreman Ortiz. As Complainant has not established that an individual influencing

⁴⁶ Other circuits have discussed and interpreted the application of the "cat's paw" theory. *See Conrad v. CSX Transportation, Inc.*, 824 F.3d 103, No. 15-1035 (4th Cir. May 25, 2016) (2016 U.S. App. LEXIS 9570) (Fourth Circuit rejected the plaintiff's argument on appeal that "knowledge of an employee's protected activities may be imputed to the decision-makers if any supervisory employee at the company knew of the subordinate employee's protected activity when the decision-maker took the unfavorable personnel action, regardless of whether the person with the knowledge played a role in the disciplinary process"); *Lincoln v. BNSF Railway Co.*, 900 F.3d 1166, 1213 (10th Cir. 2018) (Tenth Circuit joins the courts that have concluded that an FRSA complainant advancing a retaliation claim must demonstrate that the decision maker had knowledge of the protected activity); *Koziara v. BNSF Ry. Co.*, 840 F. 3d 873, 878 (7th Cir. 2016) (Employee must produce evidence that unfavorable personnel action was "motivated by animus"); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (Holding that for FRSA retaliation purposes supervisors who make decisions to terminate employees must have knowledge of the employee's protected activity).

⁴⁷ Q: "Were you involved in any way in the decision to issue this written counseling to [Complainant]?" A: "Yes." Q: "What was the nature of your employment?" A: "The nature of my involvement is that part line that [Complainant] worked on at the time, 26 Track Service, I had – it was given to me as part of my duties when I was covering components shop. And [General Foreman] Mitchell, you know, was having some issue with performance, so I was counseling [General Foreman] Mitchell to the effect, you know, that if you have to correct performance issues, you need to start with counseling. You have to let the employee know what the expectations are and what the problem may or may not be so that you can correct them." (Tr. at 324.)

⁴⁸ Q: "What was your position in 2013?" A: "2013, I believe I was a general foreman and wheel shop at the Wilmington maintenance facility." Q: "Back in 2013, did you know [Complainant]?" A: "No." Q: "Did you know [Foreman] Ward back in 2013?" A: "No." Q: "Did you know [General Foreman] Mitchell back in 2013?" A: "No." (Tr. at 311–12.)

General Foreman Oritz's decision-making process knew of his protected activity, the "cat's paw" theory is inapplicable.

Complainant has established above that General Foreman Mitchell would have known about Complainant's complaint to OSHA, but he has not provided sufficient evidence to demonstrate that that General Foreman Mitchell was aware of Complainant's March 26, 2013 safety complaint to the EEOC hotline, which is the protected activity that is causally connected to the July 17, 2017 incident with Foreman Ward. The undersigned does acknowledge that, given the culture of Amtrak, the tendency of managers to discuss safety complaints with one another, and how word of safety complaints traveled around the shop, General Foreman Mitchell likely did know about the March 26, 2013 safety complaint. Still, Complainant has not presented enough evidence to carry his burden of proof that General Foreman Mitchell had direct knowledge of the safety complaint.

In 2013, General Foreman Mitchell was a Foreman III, and he was not Complainant's direct supervisor.⁴⁹ There is limited testimony as to the duties and roles of a Foreman III, other than General Foreman Mitchell's testimony that "they are like the next step to general foreman" and attend the manager meetings on Mondays, and his affirmation that he had different duties as a Foreman III and as a General Foreman. (Tr. at 261, 264.) It is unclear from the record who was in General Foreman Mitchell's chain of command at the time, or who his own supervisors were, which makes it more difficult to connect how word of Complainant's March 26, 2013 safety complaint would have reached General Foreman Mitchell, even though with Amtrak's culture, there remains a likelihood that it did.

Even though in 2017, General Foreman Mitchell was above Complainant in the chain of command, General Foreman Mitchell was not Foreman Ward's supervisor, nor is there evidence that he was ever Foreman Ward's direct supervisor. If General Foreman Mitchell had been Foreman Ward's supervisor, this may have led credence to a potential causal chain between the protected activity, the incident on July 17, 2017, and the Letter of Counseling, as in this circumstance, General Foreman Mitchell may have felt that he had to issue something to show support for Foreman Ward and back up his manager. However, as Foreman Ward was not in General Foreman Mitchell's direct chain of command,⁵⁰ General Foreman Mitchell lacks a direct motive to issue the Letter of Counseling in support of Foreman Ward. Thus, Complainant has not established a link between General Foreman Mitchell and the protected activity through his potential support of Foreman Ward and his adverse action tied to the protected activity.

There also exist alternate explanations for why the Letter of Counseling would have nothing to do with its purported reasons. First, General Foreman Ward could be punishing Complainant for doing his union duty and questioning the fairness of an Amtrak manager's

⁴⁹ Q: "Back in March and April of 2013, what was your position with Amtrak?" A: "2013, I think I started as Foreman III at that time." Q: "Was that also in the Bear shops?" A: "Yes." Q: "Back in 2013, did [Complainant] report to you?" A: "No." (Tr. at 246.)

⁵⁰ Q: "[Foreman] Ward, I want to sort of take a step back and get some background information from you. So can you explain for the Court what your current position at Amtrak is?" A: "I am a foreman 2 at Amtrak." Q: "And who do you report to as foreman 2?" A: "Paul Malascalza. That's my general foreman." (Tr. at 177.)

decision. While this reason might have labor relations implications, it does not constitute protected activity under the FRS.

There also exist personal reasons that General Foreman Ward would potentially want to punish Complainant that are completely unrelated and detached from Complainant's protected activity. Complainant and General Foreman Ward once had a close working relationship, but it deteriorated as General Foreman Ward rose up the ranks at Amtrak. (Tr. at 217–21.) General Foreman Ward also admitted that he testified at his deposition that Complainant yelled at him in front of his men. (Tr. at 219–20.) General Foreman Ward also had the potential motivation to issue the Letter of Counseling to shift the blame for flaws in how his chain of command was performing to protect himself and his own foremen when Assistant Superintendent Ortiz began putting pressure on General Foreman Ward to increase the efficiency of his line.⁵¹ This establishes that General Foreman Ward may have had personal motivations to retaliate against Complainant, but these reasons fall outside the causal chain stemming from the 2013 protected activity.

Even if the undersigned were to find that General Foreman Mitchell issued the Letter of Counseling because of the July 17, 2017 incident with Foreman Ward, the record remains inconclusive as to whether or not General Foreman Mitchell was aware of the March 26, 2013 safety complaint. Even though General Foreman Mitchell's testimony about why he issued the Letter of Counseling is limited in its credibility,⁵² the causal chain is too attenuated, and the testimony is insufficient, to find that Claimant has proved, by a preponderance of the evidence, that the March 26, 2013 safety complaint, or the OSHA complaint, were contributing factors to General Foreman Mitchell's adverse action of issuing the Letter of Counseling.

5. Safe Harbor

As Complainant has established by a preponderance of the evidence that Respondent, through the actions of Foreman Maurice Ward on July 17, 2017, violated § 20109, Respondent

⁵¹ “If I’m going to tell you that it was harder to address these problems because these were [people in Wilmington] that I knew and people that I was friends with, you know, and I want to say that was the same problem in Bear is a lot of times they didn’t want to address these issues. But when I came down to Bear, I didn’t have any of that. So it was easier for me to push [General Foreman] Mitchell and say, [‘]Hey, you got to perform better, you got to get these guys’ – and General Foreman Mitchell’s response is, Well, you know, my inbounds are taking too long, this, that, and the other. And I’m like, Well, you need to do something about it. That’s your job to do something about it. You can’t just sit on this stuff and let it go.” (Tr. at 358.) Assistant Superintendent Ortiz further testified that he was “pushing” General Foreman Ward. (Tr. at 359.)

⁵² General Foreman Mitchell indicated that the Letter of Counseling related to Complainant taking too long to perform a café car inspection, even though the testimony of record demonstrates that it takes longer than the time he discussed to perform such an inspection, but eventually proceeded to emphasize that it was the communication, not the time, that was at issue. (Tr. at 45–46, 240, 277–78, 284, 346–47.) The Letter itself, however, did not outline these issues with communication in any detail, nor did it provide instruction to Complainant for how to communicate better in the future, which comes at odds with the testimony from the Amtrak managers that Letters of Counseling are intended to be counseling or “coaching” for employees to correct a problem; it would be very difficult for Complainant to take anything away about “communicating” more effectively from the letter if it does not explain how he failed to “communicate” or what proper “communication” would look like. (Tr. at 230, 326; JX 4.)

may avoid liability only if they presented clear and convincing evidence that they would have taken the same adverse action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv).

Respondent has failed in this burden. Respondent has offered no alternative explanation for why Mr. Ward shouted the comment about the EEOC, or why he engaged in discriminatory conduct against Complainant on July 17, 2017. Respondent only offered alternative explanations for finding that Foreman Ward's conduct did not constitute an adverse action. The undersigned finds those explanations not credible.⁵³

6. Damages

The damages available to Complainant are described in the FRSA and in the implementing regulations:

If the ALJ concludes that the respondent violated the law, the ALJ will issue an order that will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to \$250,000.

49 U.S.C. § 20109(e).

a) *Economic Damages*

Complainant asserts that he had the following economic lost damages:

- (1) Loss of straight time wages in the amount of \$83,739.00;
- (2) Loss of overtime wages in the amount of \$21,294.00;
- (3) Loss of the pay differential between a Technician and a C-Electrician in the amount of \$2,381.00;
- (4) Out-of-pocket expenses for medication in the amount of \$207.56;
- (5) Out-of-pocket expenses for doctor's bills in the amount of \$820.00;
- (6) Incurring a lien for advances from the Railroad Retirement Board in the amount of \$20,823.67; and

⁵³ Foreman Ward testified that he cancelled the overtime because he could "see the chaos coming," but given the totality of the evidence, this explanation was not credible. (Tr. at 193.)

(7) Incurring a lien for disability advances from AETNA in the amount of \$21,919.89.

(1) Loss of Wages

When appropriate, the administrative law judge may order back wages with interest.⁵⁴ 29 C.F.R. § 1982.109(d)(1). “Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.” 29 C.F.R. § 1982.109(d)(1). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002).

Complainant alleges \$83,739.00 in lost straight time wages. Complainant testified that he arrived at that figure by taking the sixty-three weeks from September 26, 2017 to December 10, 2018, and multiplying that number by forty hours and an hourly rate of \$33.23 an hour. (Tr. at 73–74.)

The parties stipulated that Complainant’s medical leave of absence from work began on September 26, 2017 and that Complainant returned to work on December 11, 2018 at the Amtrak Wilmington facility. (Tr. at 72.) This matches the period that Complainant used for his calculation. Complainant also substantiated his hourly rate of pay as a technician with un rebutted testimony. (Tr. at 75.) The undersigned thus finds Complainant’s method of calculation for his lost straight time wages to be reasonable. Complainant is entitled to **\$83,739.00** in lost straight time wages, with interest.

Complainant alleges a loss of overtime wages in the amount of \$21,294.00. Claimant alleged that he lost overtime wages from September 2017 through December 2017 and from January 2018 until December 10, 2018. (Tr. at 74.) Claimant calculated his loss of overtime wages for September 2017 through December 2017 to be \$5,378. (*Id.*) He arrived at this figure by looking at the overtime he earned in 2016, which was \$16,000.00, and dividing that by fifty-two weeks and then “put the weeks [he] lost and came up with \$5,378.00.” (*Id.*) CX 22-A is a pay stub for year-end 2016. (Tr. at 74; CX 22-A.) It shows that Complainant had \$16,553.95 in overtime for 2016. (*Id.*) CX 22-B is a pay stub for the period leading up to the time that Complainant went out of work following the incident with Mr. Ward. (Tr. at 74; CX 22-B.) For those nine months, Complainant earned \$11,175.50 in overtime. (Tr. at 75; CX 22-B.) The difference between the figures is the difference Complainant has listed on Exhibit 10. (Tr. at 75; CX 10.)

Complainant has demonstrated through the evidence that he offered that he routinely worked overtime hours. (*See* CX 22-A; CX-22-B.) The undersigned does, however, recognize that there is a speculative element to overtime wages where Complainant is not guaranteed a given number of overtime hours per pay period. Accordingly, to account for the speculative nature of overtime wages, the undersigned finds that Complainant is entitled to five hours of lost

⁵⁴ The Order will also require Respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. 29 C.F.R. § 1982.109(d)(1).

overtime wages a week for the sixty-three weeks he was out of work from September 26, 2017 to December 10, 2018 at an overtime rate of \$49.84, which is one and one-half times Complainant's hourly rate of \$33.23 an hour. (See Tr. at 73–74.) This calculation yields lost overtime wages in the amount of **\$15,699.60**.

Complainant alleges a pay differential between a Technician and a C-Electrician in the amount of \$2,381.00. The differential period is from December 11, 2018 through June 30, 2019, when he returned to work, but in the lower paid position. (Tr. at 75; CX 10.) Complainant found the difference in pay rate to be \$2.14 an hour. (Tr. at 75–76; CX 10.) Employer has not rebutted Complainant's testimony as to the wage rate between a Technician and a C-Electrician. The undersigned thus finds this pay differential to be reasonable. Complainant is entitled to lost pay differential wages of **\$2,381.00**.

Following the findings above, Complainant is entitled to \$83,739.00 in lost straight-line wages, lost overtime wages of \$15,699.60, and \$2,381.00 in lost pay differential wages for a total of **\$101,819.60** with interest.

(2) Out-of-Pocket Medical Expenses

Complainant asserts that he is entitled to out-of-pocket expenses for medication in the amount of \$207.56 and doctor's bills in the amount of \$820.00. Complainant testified to and documented his out-of-pocket medical expenses. (Tr. at 77–79; CX 25 and CX 26). As Complainant substantiated these medical expenses, and they are unrebutted, the undersigned finds it appropriate to compensate Complainant for **\$1,027.56** for out-of-pocket medical expenses and doctor's bills.

(3) Compensation for Liens

Complainant asserts that he is entitled to reimbursement for the liens that he had to take out with the Railroad Retirement Board in the amount of \$20,823.67 and with AETNA in the amount of \$21,919.89. Complainant testified as to these amounts at hearing and submitted exhibits documenting these liens. (Tr. at 80–81; CX 23–24.) As Complainant substantiated these lien expenses, and they are unrebutted, the undersigned finds it appropriate to compensate Complainant in the amount of **\$42,743.56** for the repayment of his liens to the Railroad Retirement Board and AETNA.

b) *Emotional Distress Damages*

A complainant can obtain damages for emotional distress as compensatory damages under the FRSA. *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101 & 09-121, ALJ Nos. 2008-FRS-00003 & 2008-FRS-00004, slip op. at 8 (ARB Sept. 29, 2011). To recover damages for mental suffering or emotional anguish, a complainant must prove such injury by a preponderance of the evidence. *Testa v. Consol. Edison Co. of N.Y.*, ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010); *Ferguson v. New Prime Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, slip op. at 7 (ARB Aug. 21, 2011); *Memphis Comm. School Dist. v. Stachura*,

477 U.S. 299, 307–08 (1986) (a party may “recover compensatory damages only if he proved actual injury”); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 723 (8th Cir. 2017) (a claim for emotional distress damages must be supported by competent evidence of a genuine injury). A complainant’s credible testimony alone is sufficient to establish emotional distress. *Hobson v. Combined Transport Inc.*, ARB Nos. 06-016 & 06-053, ALJ No. 2005-STA-035 at 8 (ARB Jan. 31, 2008).

Complainant asserts in his brief that he is entitled to emotional distress damages because he has “proven by a preponderance of the evidence that the Respondents’ unfavorable personnel actions caused him mental suffering and emotional anguish, and he is intitled [sic] to be awarded compensatory damages for those injuries.” (Com. Br. at 35.)

Respondent asserts that Complainant’s emotional distress claims are merely malingering, as Complainant waited nearly two months to seek out treatment from his family doctor, failed to treat with any medical health professional, and relied solely on information Dr. Wilson, his family doctor, provided to him without undergoing an independent medical evaluation of his condition. (Res. Br. at 21–22.) Respondent further argues that the undersigned should discard Dr. Wilson’s testimony as to Complainant’s condition because he was not disclosed as an expert witness under Rule 702 of the Federal Rules of Civil Procedure.⁵⁵ (Res. Br. at 22.)

Complainant provided testimony as to his emotional state after the incident with Foreman Ward. He testified that, after the incident, he became stressed, and the stress had physical effects on him, including diarrhea, headaches, heart palpitations, high blood pressure. He testified that he was a “physical wreck.” (Tr. at 70.) Claimant sought medical treatment from his primary care physician, Dr. Wilson. (*Id.*) He first saw Dr. Wilson about his symptoms on September 25, 2017. (*Id.*) He testified that Dr. Wilson prescribed him Xanax and told him to stay out of work. (*Id.*) Complainant continued to treat with Dr. Wilson until he eventually returned to work in December 2018. (Tr. at 70–71.)

Amtrak medically disqualified Complainant from work from September 26, 2017 until December 11, 2018. (CX 7; Tr. at 71; *see* Stipulations 7–8.)

Complainant provided deposition testimony from Dr. Wilson. (JX 12.) Dr. Wilson is a family physician⁵⁶ who treated Complainant. (JX 12 at 6.⁵⁷) Complainant treated with Dr. Wilson from 1997 until around 2005 or 2006, and he began treating with Dr. Wilson again on

⁵⁵ Dr. Wilson testified as a fact witness and not an expert witness; thus Complainant had no obligation to comply with Fed.R.Civ.P. 702. Moreover, Respondent’s counsel attended Dr. Wilson’s deposition and had adequate opportunity to cross-examine him. The undersigned declines to reject Dr. Wilson’s testimony. (*See* JX 12.)

⁵⁶ Dr. Wilson testified that, as part of his practice, he treats patients for “anxiety, depression, bipolar, the full spectrum of any psychiatric diagnosis.” (JX 12 at 8.)

⁵⁷ The page numbers for JX 12 reference the page number of the deposition, not the page number of the document itself.

September 25, 2017.⁵⁸ (JX 12 at 9–10.) Dr. Wilson diagnosed Complainant with debilitating anxiety and severe symptomatic anxiety. (JX 12 at 14–15.) Dr. Wilson prescribed Complainant Xanax to treat his anxiety and found this to be medically reasonable and necessary. (JX 12 at 9–10.) Dr. Wilson also directed Complainant to stay out of work because of his anxiety, finding it medically reasonable and necessary for Complainant to remain off work with Amtrak from September 25, 2017 until December 2018. (JX 12 at 11, 14, 21.)

A determination of non-economic damages is a subjective one. *Evans v. Miami Valley Hospital*, ARB Case Nos. 07-118, -121, ALJ No. 2006-AIR-22, slip op. at 51 (Jun. 30, 2009).

Many emotional distress damage awards fall in the range of about \$5,000 to \$10,000, though awards can be significantly higher. *See Rothschild v. BNSF Railway Company*, 2017-FRS-00003, slip op. at 61 (Jan. 2, 2019) (Judge Gee discusses the range of cases where judges awarded damages ranging from \$5,000 to \$10,000). In the range of cases Judge Gee analyzed in *Rothschild*, however, there was no evidence of medical or psychological treatment, which Complainant has demonstrated through his own testimony and Dr. Wilson’s deposition testimony. Thus, this suggests that Claimant is entitled to emotional distress damages beyond the \$10,000 that Judge Gee considered in *Rothschild*. In considering the higher end of the emotional distress damages, however, it becomes apparent that \$50,000 is too high of an award in this imminent matter. In *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ Case No. 2012-STA-11, slip op. at 7–8 (Apr. 30, 2014), the Board affirmed the Administrative Law Judge’s award of \$50,000, where the Administrative Law Judge based his findings off of Anderson’s testimony that “his discharge ha[d] affected his credit, savings, and living circumstances.” While Complainant did incur liens as a result of being out of work, *Anderson* is distinguishable because his suffering included having to “rely on public assistance for support” and having to stay in others’ homes. *Anderson v. Timex Logistics*, 2012-STA-11, slip op. at 21 (Nov. 8, 2012).

Complainant’s testimony and Dr. Wilson’s deposition testimony establish that Complainant did suffer from a diagnosed anxiety disorder that was not present prior to the incident with Mr. Ward, and Complainant did demonstrate that the situation impacted his financial situation through the need to take out liens, but it does not rise to the complete upheaval the complainant suffered from in *Anderson*. Complainant is still able to work,⁵⁹ still lives at home with his wife,⁶⁰ and is undergoing treatment to manage his anxiety.⁶¹ Additionally,

⁵⁸ Complainant was a previous client of Dr. Wilson’s, but he had to find another physician because of insurance changes after 2005 or 2006. (JX 12 at 9.) He re-established himself as a patient of Dr. Wilson’s practice when he came in for the office visit on September 25, 2017. (*Id.*)

⁵⁹ As the parties stipulated, Complainant resumed working on December 11, 2018.

⁶⁰ Complainant testified that he lives in Milton, Delaware, with his wife, and, occasionally, his two kids. (Tr. at 27.)

⁶¹ Q: “And, finally, Doctor, did you see [Complainant] on January 14th of 2019, after he returned to work at a different location?” A: “Yes.” Q: “And how was he doing at that time?” A: “He was doing much better. His anxiety was not nearly as high as it had been previously. So he was doing much better.” (JX 12 at 20.) Complainant also testified that he was doing much better, although he reported still having some anxiety from working in the same shop as Mr. Mitchell at the Wilmington facility. (Tr. at 81.)

Complainant's anxiety is manageable through treatment with his family doctor, and it is not severe enough that he needed to see a specialist.⁶² Accordingly, the undersigned finds that \$20,000 is appropriate.

c) *Entitlement to Punitive Damages*

“Relief may include punitive damages in an amount not to exceed \$250,000.” 49 U.S.C.A. § 20109(e)(2). An administrative law judge must first consider whether the evidence is sufficient to award punitive damages and then must consider what amount is necessary for punishment and to deter such conduct in the future. *Carter v. BNSF Railway Co.*, ARB Nos. 14-089, 15-016, 15-022, ALJ No. 2013-FRSA-082 (ARB June 21, 2016); *Jackson v. Union Pacific Railroad Co.*, ARB Case No. 13-042, ALJ Case No. 2012-FRS-017 (Mar. 20, 2015), (citing *Smith v. Wade*, 461 U.S. 30, 51 (1983)). Punitive damages are appropriate where there has been a “reckless or callous disregard for the plaintiff’s rights” or willful violations of federal law. *Jackson*, ARB Case No. 13-042; *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017, PDF at 5 (ARB Nov. 20, 2014); *Youngerman v. UPS, Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013). “Gross or reckless indifference to the law” can establish the intentional component. *D’Hooge v. BNSF Railways*, ARB Case Nos. 15-042 & 15-066, ALJ Case No. 2014-FRS-002 (Apr. 25, 2017) (citing *Kolstad v. Am. Dental*, 527 U.S. 526, 535–36 (1999)). “Written anti-retaliation policies without more,” such as efforts to implement and enforce the policies, “do not insulate an employer from punitive damages liability.” *Carter*, ARB Nos. 14-089 & 15-022 (citing *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999)). An employer has the burden of proof to establish that it made a good-faith effort to comply with the law. *D’Hooge*, ARB Case Nos. 15-042 & 15-066 (citing *Youngerman*, ARB No. 11-056).

The amount of punitive damages is a fact-based determination. *Youngerman*, slip op. at 10. The ARB has upheld an award for as little as \$1,000 in punitive damages up to the statutory maximum of \$250,000. *See Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 11-056, ALJ Case No. 2010-FRS-018 (Dec. 21, 2002) (\$1,000 punitive damages upheld following an investigation and threatened discipline after an employee’s injury report); *D’Hooge*, ARB Case Nos. 15-042 & 15-066 (ARB upheld \$25,000 in punitive damages when complainant lost favorable working conditions and a small amount of pay after reporting a suspected safety problem on a train); *Carter*, ARB Nos. 14-089, 15-016, 15-022; *Petersen v. Union Pac. R.R. Co.*, ARB No. 13-090, ALJ No. 2011-FRS-017 (ARB Nov. 20, 2014); *Griebel v. Union Pacific R.R. Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011 (ARB Mar. 18, 2014) (ARB upheld \$50,000, \$100,000, and \$100,000, respectively, in punitive damages after complainants were terminated for reporting work related-injuries); *Raye v. Pan Am Railways, Inc.*, ARB Case No. 14-074, ALJ Case No. 2013-FRS-084 (Sept. 8, 2016) (ARB upheld \$250,000 of punitive damages where an ALJ noted especially egregious conduct by an employer in a case where employee was terminated for a safety rule violation after reporting an injury caused by a safety hazard he had also reported weeks earlier). The ARB has also upheld decisions to award no punitive damages where the employer did not show “callous disregard” of the complainant’s rights. *Bailey v.*

⁶² Q: “Is there any reason that you decided not to refer him to a mental health professional for his symptoms?”
A: “Yeah. I thought that his condition could be managed here at the office properly with a physician who was aware with the patient.” (JX 12. at 24.)

Consolidated Rail Co., ARB Nos. 13-030 & 13-033, ALJ No. 2012-FRS-012 (ARB Arp. 22, 2013); *see Ben Graves v. MV Trans., Inc.*, ARB Case No. 12-066, ALJ Case No. 2011-NTS-004 (Aug. 20, 2013).

Complainant, in his brief, argues that Respondent's conduct was "reprehensible," and he is thus entitled to punitive damages. Complainant does not specify how much he is requesting in punitive damages. (Com. Br. at 36–37.) Respondent, meanwhile, asserts that Complainant has not presented any evidence that Amtrak acted with malice or ill will or reckless disregard for the law, and Complainant is thus not entitled to punitive damages. (Res. Br. at 24–25.)

The record establishes that it is part of Amtrak's culture to recklessly disregard a complainant's privacy when he or she engages in protected activity or other confidential reporting. As discussed above,⁶³ Lou Woods, a superintendent of the Bear facility, confirmed to Foreman Ward that Complainant had filed an EEOC complaint against him. Further, none of the Amtrak managers who testified seemed neither surprised nor bothered by the lack of confidentiality with respect to complaints. Foreman Ward stated that word of complaints spreading around the workplace was just part of the railroad⁶⁴ and that complaints just get around the shop.⁶⁵ General Foreman Mitchell expressed the ambivalent answer of "I guess not,"⁶⁶ when asked if the senior management should not be able to leak confidential complaints and the identity of complainants.

Complainant's incident with the Amtrak police also demonstrates a problematic part of Amtrak's culture relating to protected activity. The record does not demonstrate who, specifically, called the police. However, someone from Amtrak called the police, and Amtrak managers allowed the police to publicly escort a union representative to and from discussions about an incident with an Amtrak manager; in effect, publicly harassing Complainant for doing his job as a union representative. The incident in 2017 between Complainant and Foreman Ward started when Complainant tried to assist a worker with a union issue (skipping him for overtime). Other workers observing Complainant escorted by the police the following morning to a meeting

⁶³ See Note 30, *supra*.

⁶⁴ Q: "You said that you know that [Complainant] has made multiple anonymous calls. How do you know that?" A: "I'm going to put this so I don't—it's the railroad. He'll make a call, he'll in discretion tell his buddies, who in discretion tells one of his buddies, and then it gets around the shop." Q: "And what are these calls about?" A: "The nature of them all? I don't know what they're all about. A lot of them have to do—not even a lot of them. Let me see. I'm trying to find one in particular. I know there's been a call on, one on safety, I believe. It's been so long, I forget the nature of the calls, to be quite honest, Your Honor." (Tr. at 198.)

⁶⁵ Q: "But even the anonymous complaints, you know who files them. I mean, you just said, you told him the reason that you're saying that you weren't referring in 2017 what you testified to is I wasn't referring back to 2013 because I know he makes these complaints all the time, he makes these anonymous complaints all the time and I know that. But how do you know that? What is going on there that you would know that?" A: "Well, like I said, once again, the call will be made and he'll come in and tell one of his buddies thinking it's, you know, telling him in confidence, and then his buddy goes and tells another buddy. And like I said, once again, it gets around the shop." (Tr. at 200.)

⁶⁶ Q: "A manager like Lou Woods, a senior management employee, he's not supposed to leak to a foreman like [Foreman] Ward the identity of an employee who made a complaint of [Foreman] Ward?" A: "I guess not." Q: "You guess not?" A: "Yeah." (221–22.)

with managers would definitely have a chilling effect over other workers. Employees may become fearful that by engaging in protected activity (reporting a safety complaint) or contacting their union representatives about workplace issues, they too could end up escorted about the worksite by an armed officer. Workers would then choose to forego making any complaint or speaking up out of fear of the consequences.

The culture of Amtrak does not serve to protect the anonymity of potential complainants. Amtrak managers testified that word of complaints (and who made the complaints) would get around the entire Bear facility. Again, this culture of not protecting anonymity will have a chilling effect on other workers who might wish to report bad conduct by managers or co-workers. This culture of Amtrak, when taken in its totality, amounts to a reckless disregard for the rights of both Complainant and any other potential would-be complainants. Accordingly, the undersigned awards \$35,000.00 in punitive damages.

d) Attorney Fees

Relief also includes costs, expenses and reasonable attorney fees. 49 U.S.C.A. § 20109(e)(2). Complainant's counsel is entitled to submit a petition for attorney fees and costs for his work before the Office of Administrative Law Judges. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses stating the work performed, the time spent on such work, and the reasonable basis for counsel's rate within sixty days from the issuance of this Decision and Order. Respondent's counsel has thirty days from receipt of the fee petition to file an objection, if warranted. Complainant's counsel shall reply to any objection made by Respondent to Complainant's Petition for attorney's fees and costs, within fifteen days of receipt of objections.

e) Other Relief

An employee is entitled to "all relief necessary to make the employee whole." 49 U.S.C.A. § 20109(e)(1). Relief includes reinstatement with the same seniority status that the employee would have had, but for the retaliation. *Id.*, 29 C.F.R. § 1982.109(d)(1).

Complainant requests the expungement of his counseling letter from all Amtrak records, including his personnel and medical files. The Board has held that expungement is not a realistic remedy, as employers are often charged with the maintenance of records. *Leiva v. Union Pacific Railroad Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036, slip op. at 6, n. 11 (ARB May 17, 2019) (per curiam). Instead, the Board offers as an alternative remedy for the information to be sealed, placed in a restricted folder, or the employer to be specifically prohibited from relying on the information in future personnel actions or referencing it to future employers. *Id.* Accordingly, the undersigned finds it appropriate to order Respondent to seal the counseling letter, restrict access to it to the extent it is permitted by Respondent's record-keeping requirements, and prohibit Respondent from relying on the information in any future personnel actions and from referencing it to future employers.

IV. ORDER

For the foregoing reasons, the undersigned finds that Respondent retaliated against Complainant in violation of the Federal Railroad Safety Act. It is hereby ORDERED that:

- Respondent pay Complainant lost wages in the amount of \$83,739.00 for lost straight-line wages, \$15,699.00 for lost overtime wages, and \$2,381.00 in lost pay differential wages, for a total amount of **\$101,819.60** in lost wages, at the rate prescribed in 28 U.S.C. §1961.
- Respondent reimburse Complainant for his out-of-pocket medical expenses (\$207.56 for medication and \$820.00 for doctor's bills) for a total amount of **\$1,027.56**;
- Respondent reimburse Complainant for the repayment of his liens (\$20,823.67 to the Railroad Retirement Board and \$21,919.89) for a total amount of **\$42,743.56**;
- Respondent pay Complainant **\$20,000.00** in emotional distress damages;
- Respondent pay Complainant **\$35,000.00** in punitive damages;
- Respondent will pay Complainant's litigation costs and reasonable attorney's fees. Complainant's attorney may submit a petition for fees within thirty (30) days.
- Respondent will seal Complainant's Letter of Written Counseling, restrict access to it, and not rely on the information in any future personnel actions or reference it to future employers.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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 (e-File) 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 away 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. There sponse 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).