

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 30 June 2020**

CASE NO.: 2018-FRS-00129

*In the Matter of:*

**KEICHIE CAMPBELL,**  
Complainant,

v.

**NATIONAL RAILROAD PASSENGER CORP. (AMTRAK),**  
Respondent.

Appearances: Keichie Campbell, *pro se*  
Complainant

Gina Nicotera  
For the Respondent

Before: Evan H. Nordby  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises out of the employee-protection provisions of the Federal Railroad Safety Act (“FRSA”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. Complainant Keichie Campbell, *pro se*, (“Campbell” or “Complainant”) alleges that her employer, the National Railroad Passenger Corporation, better known as Amtrak (“Respondent” or Amtrak”),<sup>1</sup> violated the whistleblower protection provisions of the FRSA by firing her after she reported in good faith a hazardous safety condition.

Complainant also alleged violation of Section 402 of the Food Safety Modernization Act, arising from the same conduct. 21 U.S.C. § 399d; *see* 29 C.F.R. Part 1987.

I find that the Complainant has not established that the Respondent violated Section 20109 of the FRSA, or the whistleblower provisions of the FSMA.

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<sup>1</sup> Amtrak is a federally chartered corporation with the federal government as majority stockholder.

## **PROCEDURAL HISTORY**

Campbell filed her complaint alleging whistleblower retaliation with the Occupational Safety and Health Administration's ("OSHA") whistleblower office on January 31, 2017. OSHA issued findings dated December 19, 2017, finding no reasonable cause to believe that Respondent violated the Act. Complainant did not receive them.<sup>2</sup> Upon discovering its error, OSHA re-served them on the Complainant, by now *pro se*, who received them on July 3, 2018. HT 248-49. Complainant filed objections July 27, 2018, within 30 days following her receipt of OSHA's findings. *See* 29 C.F.R. § 1982.106(a).

This claim was docketed with the Office of Administrative Law Judges ("OALJ") on August 27, 2018. This case is before me de novo.

I held a formal hearing in this case on January 30-31, 2019, in San Francisco, CA, at which Campbell and Amtrak appeared and presented evidence.<sup>3</sup> At the hearing, Campbell submitted Complainant's Exhibits A-Z and AA-AG, which I admitted. HT 15. Amtrak submitted Respondent's Exhibits A-Y, which I admitted. HT 35. I also admitted ALJ Exhibits 1 and 2, explained below. I also admitted Complainant's Rebuttal Exhibit 1. HT 186.

The findings and conclusions below are based on a review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent.

## **STATEMENT OF THE CASE**

Complainant, a 14-year veteran of Amtrak, feels that she did her job – “see something, say something” – and was retaliated against as a result. On each occasion, she reported what she saw in good faith. In 2014, she was retaliated against and won her job back for reporting the same condition – unsafe storage of pillows and food at the Raleigh crew base – but in December 2016, within days after reporting the same conditions again, she was fired and it was “dressed up as something else,” i.e., a pretext. Losing her job has resulted in a great deal of hardship, including having to uproot herself from North Carolina and move to California.

Respondent notes that there are many undisputed facts: among them, Complainant has made many complaints regarding her supervisor, Lisa Roberge, the Onboard Services manager at the Raleigh crew base. While the 2014 complaint was well founded, Complainant has also made a string of bad faith complaints against Roberge and other supervisors. Here, in December 2016, there was no scheme to force Complainant out. Rather, Complainant was furloughed – not fired

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<sup>2</sup> By order dated December 4, 2018, I denied a motion from the Respondent to dismiss on timeliness grounds. Respondent preserves that issue for appeal in its filings at hearing, and reargues it in closing. I incorporate my December 4, 2018 order by reference, which fully explains the issue. In sum, there is no need for equitable tolling here, as the plain language of OSHA's regulations applied to the available evidence controls. As set out by OSHA when it re-sent the findings, neither Complainant nor her attorney *received* the OSHA findings when they were originally mailed. The Complainant received them July 3, 2018, and therefore, Complainant's *pro se* appeal mailed on July 27, 2018, was timely. *See* 29 C.F.R. § 1982.106(a).

<sup>3</sup> Exhibits are cited as “CX” for Complainant's exhibits, “RX” for Respondent's exhibits, and ALJ EX for the ALJ exhibits, plus the page number if necessary and available. Most exhibits in the record are not page numbered. The hearing transcript is cited as “HT” and page number. Briefs are cited as “P. Br.” or “R. Br.” and page number.

– by operation of her union’s collective bargaining agreement (“CBA”). There had been a series of displacements within the union in the region, on a seniority basis. Amtrak managers worked with her to find a new placement, which would have kept her employed and allowed her to use her seniority to eventually regain a position she preferred. She declined the new position. This series of events would have occurred apart from any safety complaint.

## **FINDINGS OF FACT**

### **1. Stipulations**

The parties signed a set of stipulations at the hearing, based on their prehearing statements, which I admitted as ALJ Exhibits 1 and 2. HT 125-26. I set out the stipulated facts here, and have also incorporated the stipulated facts as relevant below.

1. Complainant began working for Respondent on September 12, 2002, as a Police Dispatcher in Philadelphia, PA.
2. Complainant transferred to Raleigh, NC and became Secretary-1 OBS/Crew Base [on] September 30, 2013 still employed by Respondent.
3. Complainant was employed by Respondent as a Secretary-1 On Board Service and Crew Base located at Respondent's Raleigh, NC Crew Base.
4. Respondent restored Complainant employment September 15, 2014.
5. Complainant’s job was abolished January 6, 2017.
6. Complainant last day of employment for Respondent was January 10, 2017.
7. Complainant[’s] Collective Bargaining Agreement Bump was denied January 11, 2017.
8. On January 31, 2017, Complainant filed a complaint with OSHA.
9. On December 19, 2017 OSHA dismissed Complainant’s Complaint.
10. Complainant Keichie Campbell (hereafter “complainant” or “Campbell”) was born on June 26, 1981.
11. Complainant was initially hired by Respondent National Railroad Passenger Corporation (hereafter “Respondent” or “Amtrak”) on or about September 12, 2002.
12. As of September 30, 2013, Complainant was employed by Respondent in the position of OBS-Secretary 1 (OBS crew base) at Amtrak’s Raleigh, North Carolina crew base (“OBS Secretary 1”).
13. “OBS” stands for “Onboard Service.”
14. In her position as OBS[] Secretary 1, Complainant reported directly to Amtrak employee Lisa Roberge (hereafter “Roberge”), who was OBS manager at the Raleigh crew base.
15. On or about Wednesday, December 7, 2016 Amtrak posted Bulletin # RGH0032-JB for bidding on a vacancy for the position of Secretary, reporting to Jeffrey Brown (“Brown”).
16. In December 2016, Brown was employed by Amtrak in the position of District Manager of Stations in Raleigh, North Carolina.
17. Mr. Brown worked in the same building as Ms. Roberge.
18. Mr. Brown and Ms. Roberge each reported to Karen Shannon, who served in the position of Silver Star Route Director.
19. On or about Tuesday, December 13, 2016, Amtrak accepted the bid of TCU union member Josh Randall to fill the position of Secretary for Mr. Brown posted in Bulletin # RGH0032-JB.

20. On or about December 14, 2016, the acceptance of the bid of Josh Randall for the position of Secretary for Mr. Brown was rescinded.
21. On or about December 14, 2016, Amtrak awarded the bid of Complainant to fill the position of Secretary for Mr. Brown.
22. An Amtrak Bulletin dated December 14, 2016 set forth that Ms. Campbell would assume the position of Secretary to Mr. Brown effective December 19, 2016.
23. Ms. Campbell returned to work from her vacation on Monday, January 4, 2017.
24. Mr. Wood had himself been bumped from his position as a Customer Service Representative (“CSR”) at the Raleigh crew base by William Wyandt.
25. On January 5, 2017,<sup>4</sup> Ms. Campbell and others participated in a telephone conference call with Amtrak employee Craig Roodenburg, Senior Manager, Labor Relations.
26. Ms. Campbell was advised that January 10, 2017 would be the last day she would be held in Mr. Brown’s secretarial position.

## **2. Complainant’s background, history of protected activity, and conflict with a supervisor**

Campbell began working for Respondent on September 12, 2002, as a Police Dispatcher in Philadelphia, PA. Stip. 1. She transferred to Raleigh, NC and became Secretary-1 OBS/Crew Base [on] September 30, 2013 still employed by Respondent. Stip. 2. She was employed by Respondent as a Secretary-1 On Board Service and Crew Base located at Respondent's Raleigh, NC Crew Base. Stip. 3. In her position as OBS[] Secretary 1, Complainant reported directly to Amtrak employee Lisa Roberge (hereafter “Roberge”), who was OBS manager at the Raleigh crew base. Stip. 14.

Campbell had a history of conflict with Roberge. In March 2014, Campbell filed a race discrimination complaint against Roberge, first internally with Amtrak and then with the EEOC. RX R. The EEOC was unable to find a violation. *Id.* Campbell also made other complaints and grievances. RX S-U.

In August 2014, Campbell made an internal complaint of improper and unsafe storage of food and beverage items by Roberge and others at the Raleigh crew base. CX C-D. Campbell was investigated and taken off of work by Roberge for insubordination shortly following Campbell’s complaint. RX J. In September 2014, however, Amtrak paid Campbell back pay for her time lost and expunged the discipline. *Id.* Amtrak also barred storage of such items in Raleigh, though an exception was made soon after for packaged pillows. RX K.

Campbell and Roberge’s relationship remained poor, which Campbell attributes to Roberge being “retaliatory.” HT 161-62.

Campbell presented testimony from two witnesses regarding her work history at Amtrak, her good faith, and the effect of her furlough on her well-being.

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<sup>4</sup> The date is “2018” in the stipulation in ALJ EX 2. I have corrected what I assume was a typographical error.

Carol Nael and Campbell were hired the same day at Amtrak, and worked together, at Amtrak PD. HT 54. They were friends outside of work, and came to family events at each other's homes. HT 73. Nael was their union vice president, and doesn't think Campbell was ever disciplined there. HT 56.

Nael relayed that Campbell told her in 2016 that the same problems she had complained about in 2014 were occurring again. HT 57. Once Campbell was furloughed, Nael gave Campbell about \$250 to help on one occasion and an unknown amount on another, HT 70, and went to visit her in January 2017. HT 58-59. Nael saw that Campbell appeared thin and unkempt and had the shades drawn at her house, and was suspicious that her phone was tapped or she was being followed. HT 59-61

Doris Combs was an Amtrak police officer, lieutenant and captain for a total of 33 years, from 1979 to 2012. HT 76, 86. She had regular contact with Campbell while they worked together in Philadelphia, and has kept in regular touch after her retirement HT 86, 88. Combs observed that Campbell had "always done outstanding work" and also served others as a union representative. HT 77. Combs saw how Campbell's personality changed, and how she went through a rough time, both after the 2014 retaliation and after losing her job in early 2017. HT 78-80.

### **3. Complainant's renewed reports of improperly stored food and beverage items**

On December 19, 2016, Campbell re-raised by email to managers Shannon and Thomas Kirk, and Amtrak Inspector General Tom Howard, that pillows, pillow cases, and food and beverage items, were "yet again being removed from the train and being stored here at the crew base." CX H; *see also* RX N. She continued, "[i]t's not safe to receive and store any food & beverage items or pillows and pillow cases here at the crew base in that filthy garage." *Id.* Campbell described why the garage was unsuitable storage for these items: squirrels, mice, loose insulation from rodent damage, dirt and dust, roaches and wasps. *Id.* Campbell submitted, at hearing, photographs that substantiate her complaint email. CX AA.

On December 19, 2016, Shannon wrote to Kirk, "I have no issue with Keichie sending this info. I have an issue that we are reverting back to bad habits again," CX H, referring to storing linens and food items in a dirty, dusty garage in Raleigh. HT 136. Kirk replied to Shannon within a half hour, stating "Agreed. Where's Lisa?" presumably referring to Roberge. CX H.

Brown recalled receiving a call from Shannon asking if he was aware of anything being stored in the storeroom in Raleigh that shouldn't have been there. HT 290. He walked out and looked, and found that pillows were there, but no food items. HT 291. He did not know who had prompted Shannon to call him. *Id.*

Campbell's understanding is that Brown and Roberge were made aware by Karen Shannon about the complaint right away that day, because Shannon told her she told them. HT 176. She saw Brown and Roberge go back to the garage "and they were back there for quite some time." *Id.* Campbell said that she had been bringing up the subject of storage in the garage

to Roberge, though she was not aware of the approval Roberge had obtained for pillow storage, following Campbell's 2014 complaint. HT 177, 180.

#### **4. Complainant's termination**

Complainant's renewed complaints about storage of pillows, pillow cases, and food and beverage items, occurred against the backdrop of a reshuffling of positions within the collective bargaining unit. RX G. The contract between Amtrak and the union to which Campbell belongs, the Transportation Communications Union, HT 170-71, includes the right to exercise seniority, informally known as "bumping," more junior employees out of their jobs. HT 170; RX A. In order to bump a junior employee from a ticket clerk position, however, a more senior employee must already be qualified for the position by having attended ticket clerk training. RX A, RX Q at 17.

On or about Wednesday, December 7, 2016 Amtrak posted Bulletin # RGH0032-JB for bidding on a vacancy for the position of Secretary, reporting to Jeffrey Brown ("Brown"). Stip. 15. In December 2016, Brown was employed by Amtrak in the position of District Manager of Stations in Raleigh, North Carolina. Stip 16. Mr. Brown worked in the same building as Ms. Roberge. Stip 17. Mr. Brown and Ms. Roberge each reported to Karen Shannon, who served in the position of Silver Star Route Director. Stip. 18.

Jeff Brown is the district manager in Raleigh, and was a customer service representative prior to August 2015. HT 280. Both he and Roberge report to Shannon. HT 290-91. Shannon reported to Thomas Kirk. HT 291.

Brown said that he had a fine working relationship with Campbell, but knew that she had a tense relationship with Ms. Roberge, though he had not personally observed it. HT 281-82.

In December 2016, Brown's secretary was leaving. Both Randall and Campbell bid on it. As Randall had seniority, he was awarded the position, but the award was rescinded as Randall's typing test was out of date. HT 284. Campbell was awarded the position by bulletin effective December 19, 2016. HT 286-87; RX F; *see also* Stip. 19-22. Brown told Campbell she could take her previously scheduled vacation. HT 287; Stip. 23.

At the time, Amtrak had an ongoing initiative to eliminate positions. HT 288. Brown had eliminated nine jobs in his district, and had one vacant job. *Id.* As positions became vacant, they were abolished, unless the relevant manager sought approval from "up the ladder" to retain the position and retention was approved. HT 289-90. For the Onboard Services secretary position under Roberge, Roberge would have had to justify keeping the position. HT 290. Brown doesn't believe Roberge sought that approval. *Id.* The policy is described in an open letter from Amtrak's CEO dated February 19, 2016, CX Z, and also in testimony by Kirk, discussed below.

In Campbell's view, despite the bulletin awarding her the new position effective December 19, 2016, based on what she was told by management she believed she continued to hold her existing Onboard Service position to January 5, 2017. HT 175. She believed she was still holding that position as of January 4 when she returned from vacation. HT 95, 159-60.

Campbell returned from vacation on January 4 and learned she would be bumped from her new position for Brown. HT 95-96. She testified that in her view, since she never took “ownership” of the new position, because she was bumped before she took the new position, in her view she was entitled to stay in and continue to hold the Onboard Service position. HT 95-96. Campbell notes that the Amtrak CEO letter says that positions are abolished when an “employee leaves the company.” CX Z; HT 105.

Brown expected to see Campbell in her new position working for him on January 4, 2017. HT 292. Later in the day, Campbell spoke to him and asked “how come you didn’t tell me I was going to be bumped?” HT 293. At that point, Campbell had not yet been bumped from the secretary position for Brown, because a bump takes effect when the bumping employee shows up prior to the shift and tells the employee being bumped. HT 293-94. Brown discussed a set of bump slips in the record, showing a series of bumps dating back to December 14, 2016, that resulted in Campbell being bumped from the secretary position for Brown. HT 294-95; RX G.

Campbell asked Brown for help and he agreed. HT 295. He shared information with Campbell about people with less seniority and when they were scheduled to work. *Id.*<sup>5</sup> At the time, Brown believed Campbell could bump into a CSR ticket agent position, based on Rule 8 of the TCU CBA, which in general allows an employee 30 days to qualify in a new position. *Id.*; RX A at 4. Brown knew that Campbell did not have the ticket agent training yet. HT 296.

After Campbell was bumped on January 5th, she asked Brown she asked about going back to her old job. HT 297. Brown said she could not, because she had already bid off of her old job, and a job has to go up for bid before someone can bid on it. *Id.* In his attempts to help Campbell, Brown also spoke to Shannon about whether Campbell could bump a CSR job, and was told Campbell could not bump a CSR job. HT 297-98. He specifically recalled Shannon’s response: “I don’t know what the hell you all are doing up there in North Carolina, but she cannot bump a CSR job.” HT 298. He emphasized to Shannon that he was just trying to do the right thing. *Id.*

Shortly after the conversation with Shannon, Brown participated in a conference call with union representatives on Campbell’s behalf. HT 299-300. The union was advocating for Campbell to be allowed to return to her old position under Roberge, but also, to be allowed to go to ticketing school and not be subject to the “automatic bidder” rule in the union contract under which she would be required to bid on any nearby CSR position that came open, after completing the school. HT 300-01; Stip. 25. Brown would not agree out of fairness to other employees, and believed he would need approval from Shannon or Kirk in any event. HT 300.

Brown spent the whole day on January 5 working to help Campbell find a position. HT 302. He kept her in the secretary position for him for the day, and for January 6 also, as he continued to research options for Campbell. *Id.* Brown spoke to another senior manager, Debbie Benham in Florida, who confirmed that Campbell could not bump into a CSR position without having already completed ticketing school. HT 302-04; RX E.

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<sup>5</sup> The seniority roster is at RX H.

Brown told Campbell all of this information, and as he testified, “[s]he became very defensive.” HT 304. He testified that she said “she could bump anyone junior to her and that they were trying to get her out of there.” *Id.* Brown said that was not true. *Id.* Brown also told Campbell by email on January 6 that if her old position was not abolished, she could bid for it. CX H.

Brown also talked to Tom Kirk, who confirmed that the secretary position under Roberge was being abolished and would not be reposted without an exception being made; Brown issued a Notice of Abolishment on January 6. HT 304-05. Kirk also told Brown to hold Campbell in the secretary position for Brown through January 10, so that Campbell would continue to get paid while Kirk tried to get an answer on whether her former position would be reposted. HT 308; Stip. 26.

In his testimony, Kirk, the Deputy General Manager for the Southeast Region, explained that the review process for vacant positions came through him but included executives above him. HT 379-80, 411. As he was responsible for 1200 to 1600 employees, he did not didn’t know until the specific OBS-I Secretary position below Roberge came up to him, the Tuesday after New Year’s as he recalled, that it was vacant. HT 380-81. Kirk spoke with his boss regarding the position, because he understood that his boss wanted to review clerical, staffing, non-operating and non-customer-facing positions given the standing order to reduce positions. HT 377-78, 381. He recalled speaking with Brown on January 6, and testified that the abolishment notice for the OBS-I Secretary position below Roberge should have been issued earlier. HT 382, 386. He attributed the delay to the holidays. HT 413-14.

The Onboard Service position was formally abolished on January 6. HT 102; CX I. Campbell alleges that there are technical irregularities in how the abolishment was drafted and published. HT 103. In particular, she suggests that since the abolishment of her old position was not effective until January 13, CX I, she should have been held through January 13 in her old position. This is significant because in her view had she been held to January 13, because the next ticket qualifying class started Tuesday, January 17, 2017, she argues she would worked to Friday, rested over the weekend, traveled Monday, January 16 to training, then started the training class.

On her last regular day of work, which Campbell recalled was January 5,<sup>6</sup> Campbell could not go back to the Onboard Services secretary position, and had been bumped from the secretary job, so she was cleaning out her desk. HT 155. As Campbell described, she was approached by Roberge, who asked if she had done any payroll. *Id.* Campbell asked Roberge if she was being asked to do the work of her old position that was abolished, and that she wasn’t being allowed to return to. HT 156. Roberge became upset and began “standing over me, pointing her finger and balling her fist,” and “yelling.” HT 154-57. Campbell called Raleigh Police, and made a workplace violence report through Amtrak police. CX J.

Brown witnessed the argument between Campbell and Roberge altercation on January 10. HT 309-10. He intervened and explained that the Onboard Services payroll work Roberge was requesting was in fact done by his secretary when Roberge’s secretary – the position

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<sup>6</sup> This appears to be a misstatement as others’ recollections and the records place the date as January 10.

Campbell had just left – was unavailable. HT 309. He did not see Roberge threatening or intimidating or making any gestures at Campbell. HT 309. He spoke to Campbell outside while she calmed down, and then fielded a call from Amtrak police regarding a workplace violence report made by Campbell against Roberge. HT 310. Eventually Campbell came back inside and continued discussing her work options with Brown, before she left for the day. *Id.*

The same day, January 10, Brown found Campbell a position in Lorton, VA, for which Campbell was qualified, and Kirk contacted the supervisor in Lorton to make sure it could be available for Campbell. HT 313-14. Brown also arranged for Campbell to attend ticketing school beginning on January 17, and, confirmed with the supervisor in Lorton, Keith Olofson, by email on January 11 that Campbell would be allowed to go to ticketing school, which lasts four or five weeks, while holding the Lorton position. HT 314-17; RX E.

Instead of going to Lorton, on January 11, Campbell went to bump Cote Moak, a CSR at Rocky Mount, NC, who happened to be Roberge's son. The bump was denied because Campbell was not qualified. HT 312; CX K-L. Campbell continued to insist to Brown that she could bump, and did not appear to Brown to be interested in the Lorton position. HT 315-17.

Campbell believes that she should have been allowed to “post” for the ticket agent position. HT 108-113. In general the CBA allows 30 days to qualify in a new position, RX A, which Campbell believed applied here. “Posting” means doing the work of a CSR position with on the job training, while waiting to go to the training class, i.e. are allowed to qualify for the position in the station. *Id.* Campbell notes that other employees before and after her who were allowed to hold ticket agent positions without having attended, or while going to attend, the training. HT 109-14; CX U. She believed that supervisors may have discretion to allow posting. HT 112-13. Both ticket agent and secretary positions are in the clerical craft. HT 132. Kirk agrees, but only to the extent that new hires “off the street” are allowed to post in ticket agent positions until the next training class begins. HT 390-93. This is an exception that management has negotiated to the general policy in the CBA of allowing 30 days to qualify, because of the complexity and responsibility of the CSR position. HT 389; RX Q at 22. Kirk acknowledged that one exception was made for a current employee to post as a CSR in Jacksonville, FL. HT 396-98. There was not a displacement of a current, qualified CSR in that case. *Id.*

Campbell also questioned the real reason why her bump into the ticket agent position in Rocky Mount, NC, was denied. In particular, she believed that nepotism played a role, since the agent whom she would have bumped was Roberge's son. HT 115; CX W (nepotism policy). Also, she states that Brown said on the phone that day that she couldn't bump Moak because Moak was out sick, not because she was not qualified for the position. HT 106.

At hearing, Campbell acknowledged understanding that she could have taken the Lorton position and been allowed to then take the ticket agent training class and work as a ticket agent. HT 239-40. She questioned whether someone with greater seniority, however, could have bumped her from Lorton. *Id.* Campbell noted that the Lorton, VA, position was posted and rescinded the same day, after the union made an inquiry. HT 144; CX R, S.

Campbell was furloughed effective January 15. HT 318. She could not go to ticketing school while on furlough. HT 318-19. Brown learned that Campbell did not bump into the Lorton position and emailed her on January 16 to clarify that she was not authorized to attend ticketing school on January 17. RX E. Campbell replied with an email asserting that Brown was engaging in retaliation and “bullying” and that he had “made it clear that [he had] no intentions of helping me.” *Id.*

Campbell filed a union grievance. HT 322-23; RX Q. Brown was not aware of Campbell’s 2014 whistleblowing until that process. HT 323.

Campbell has never been disciplined or suspended before, except for the 2014 whistleblowing following which she was rehired and paid back pay. HT 117. She believes that this time, “has gotten a little clever in how they dress up a firing, by blaming it on the Collective Bargaining Agreement.” HT 117-18. Her 2014 complaint “really upset a lot of people.” HT 119. Since 2014, Campbell has continued to file complaints, HT 122-24, CX AE, though she acknowledges that the Amtrak health department approved some storage of items at the Raleigh Onboard Service Building. HT 119-21. Campbell believed that the true, poor condition of the garage where the items were being stored must not have been made known to the approval authority. HT 136-39.

Shannon also asked Kirk whether Campbell could post into a ticket agent position. CX H, p PL000350; HT 140-43. Shortly thereafter, Shannon told Campbell that Shannon had been terminated. HT 143.

Campbell submits that an email from Karen Shannon, in CX H, shows that Campbell was being “singled out,” that “this was being planned,” and that Shannon did not want to be a part of it. HT 133. This appears to be the email dated February 17, 2017, to Julia Costello from an unknown sender that I infer is Shannon as it appears to be a reply to Costello from someone who “was not actually working when the decisions were made,” and the only other persons on the email were Brown and Kirk who were working. CX H at PL000350.

Campbell believed her work computer was logged into remotely by someone. HT 150-52. Also, Campbell’s old discipline record wasn’t actually expunged until spring 2017, after she was unemployed. HT 129. In her view, leaving the discipline records in was an ongoing adverse action even though they had acknowledged in 2014 that the discipline then, for protected activity, should be expunged. *Id.* In her view, expunging the 2014 discipline records after she was terminated was an effort to clean house prior to further investigations.

## ANALYSIS

Before turning to the substance of the FRSA, I will address witness credibility.

### 1. Credibility generally

Credibility “has been termed as ‘the quality or power of inspiring belief.’” *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971) (citation omitted). “Credibility involves

more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Id.* at 52 (quoting *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but "be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it," as well as "meet[] the test of plausibility." *Id.* (internal quotations omitted).

As the finder of fact in this matter, I am entitled to determine the credibility of witnesses, to weigh evidence, to draw my own inferences from evidence, and am not bound to accept the opinion or theory of any particular witness or advocate. *Stevedoring Servs. of Am. v. Dir., OWCP*, 10 F. App'x 440 (9th Cir. 2001); *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 290 U.S. 459, 467 (1968). I am not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991).

The ARB has stated its preference that ALJ's "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

I have considered the testimony of all of the witnesses at the hearing, including the Complainant. I base my credibility findings as to the Complainant and the other witnesses on a review of the entire record, giving due regard to the demeanor of the witnesses who testified before me, the logic of probability, and "the test of plausibility," in light of the record and reasonable inferences drawn from the record. I will make express findings here as to the Complainant, and discuss the weight and credibility I give others' testimony below as necessary.

Overall, I find the Complainant mostly credible. Complainant testified with clear recollection about events, and her testimony was generally consistent with extensive documentation that she put forth. She was a capable self-represented litigant and advocate. As I discuss below, she engaged in protected activity and ended up without a job for Amtrak within a few weeks, which reasonably caused her to ask some additional questions as to why. Where I do not find Complainant credible it is where she makes assertions and draws conclusions that are contrary to the objective record. For one example, I find Complainant's credibility eroded by her email to Brown in which she accused Brown of retaliation and "bullying," and asserting that he had "made it clear that [he had] no intentions of helping me," RX E, when Brown had spent considerable time and effort – efforts that he was not required to make, and that were made known to Campbell in real time – over the immediate past few days helping her stay employed by Amtrak.

## **2. General standard**

The FRSA provides that railroad carriers “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 any protected activities. 49 U.S.C. § 20109(a). FRSA cases are governed by the burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”). See 49 U.S.C. § 20109(d)(2)(A)(i) (citing 49 U.S.C. § 42121(b)); see also *Frost v. BNSF Railway Co.*, 914 F.3d 1189, 1194-95 (9th Cir. 2019) (citing *Rookaird v. BNSF Railway Co.*, 908 F.3d 451, 459 (9th Cir. 2018)).

To prevail, a complainant must show: (1) she engaged in protected activity (protected activity); (2) the employer knew that she engaged in protected activity (knowledge); (3) she suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action (contribution). See 49 U.S.C. § 20109(d)(2)(A) (citing 49 U.S.C. § 42121(b)); 29 C.F.R. § 1982.109(a); see also *Rookaird*, 908 F.3d at 459-61 (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, 2006 WL 282113, slip op. at 7 (Jan. 31, 2006))<sup>7</sup>; *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-0054, slip op. at 11-12 (ARB May 19, 2020); see generally *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Jan. 4, 2017). The complaining employee bears the initial burden, and must show “by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a); see, e.g., *Palmer*, ARB No. 16-035, slip op. at 53.

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate “by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); see *Frost*, 914 F.3d at 1195; *Riddell*, ARB No. 2019-0016, slip op. at 20; see also *Araujo*, 708 F.3d at 157; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11<sup>th</sup> Cir. 1997) (“For employers, this is a tough standard, and not by accident”). Clear and convincing evidence is evidence that 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) (“*DeFrancesco II*”) (citing *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); see also *Palmer*, ARB 16-035, slip op. at 52, 56-57; *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014); *Brune*, ARB No. 04-037, slip op. at 14.

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<sup>7</sup> Because *Rookaird* was tried in federal district court rather than at OALJ, the discussion of elements and burden shifting in *Rookaird* is confusing. See 908 F.3d at 459-61. In *Rookaird*, the Ninth Circuit panel discusses a FRSA plaintiff’s “prima facie” case and “substantive” case, and “prevailing” at each. *Id.* This is a valiant effort to translate into the district court milieu what we are familiar with within the USDOL administrative process as the OSHA complaint and investigation, and then adjudication at OALJ. The “prima facie” “case” or “stage” is really just a requirement to file a complaint containing some factual detail with OSHA, in order to limit the burdens of full investigations on respondents to potentially meritorious cases. The closely analogy is the recent heightened requirement, in district court, to plead a plausible case. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). I cite *Rookaird*’s reference to the ARB decision in *Brune* above to make clear that what I am deciding here is solely what the Ninth Circuit describes in *Rookaird* as the “substantive” case. See also *Palmer*, ARB No. 16-035, slip op. at 3-4.

**3. Complainant's case for retaliation: has Complainant shown by a preponderance of the evidence that her protected activity was a contributing factor in Respondent's adverse actions?**

**a. Did Complainant engage in protected activity?**

To establish a case for retaliation, a complainant must first show that he or she engaged in protected activity. *E.g. Araujo*, 708 F.3d at 157. The FRSA identifies several categories of protected activity, *see* 49 U.S.C. §§ 20109(a)(1)-(7), (b)(1)-(3), (c)(2), including notifying in good faith the railroad of a work-related personal injury, *see* 49 U.S.C. §§ 20109(a), (a)(4), and reporting in good faith a hazardous safety or security condition. 49 U.S.C. §§ 20109(b)(1)(A). The parties agree that the level of “good faith” required under both subsections (a) and (b) is subjective belief and objective reasonableness to have that belief. *See, e.g., Rookaird*, 908 F.3d at 458 (discussing subsection (a) and citing cases).

I find that Campbell's December 19, 2016 email to Shannon and others was a good-faith report of a hazardous safety condition. Even if Campbell had some understanding that since her 2014 complaint, there had been approval issued to store pillows in Raleigh, I find that the poor condition of the garage provided objective reasonableness and fueled Campbell's subjective good-faith belief to re-raise the issue to management. I note also that Shannon's immediate response was to take Campbell's complaint seriously and act on it, to make sure that there was no backsliding. Campbell's 2014 complaint was protected activity also.

**b. Did Respondent take adverse action against Complainant?**

Second, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *E.g. Araujo*, 708 F.3d at 157. A railroad may not “discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” on the basis of protected activity. 49 U.S.C. § 20109(a); *see also* 49 C.F.R. § 1982.102(b)(1) (interpreting the statute to add “including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee”).

Interpreting this “expansive” language, the Board has explained that an adverse actions in FRSA cases are “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Riddell*, ARB 2019-0016, slip op. at 20; *see also Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010)). The FRSA / AIR-21 standard for adverse action is broader than the Title VII rule. *See Williams*, ARB No. 09-018 slip op. at 10-14 (ARB Dec. 29, 2010) (discussing *id.*). Under AIR-21 framework cases, including the FRSA, the *starting point* for an adverse action is any action that “would dissuade a reasonable employee from engaging in protected activity.” *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-2005, slip op. at 20 (ARB Sept. 13, 2011). No tangible job consequence is required; that question goes to remedy. *Id.* Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21.

Hence, under the FRSA, there is an extraordinarily broad range of potential adverse actions, but the quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

And here, the parties do not dispute that Campbell no longer actively works for Amtrak. While technically she was furloughed under the CBA rather than fired, I find the complete absence of hours and pay from January 11, 2017 forward to be sufficiently adverse to constitute an adverse action.

c. Was Complainant's protected activity a contributing factor in Respondent's adverse action?

The final element in a complainant's case for retaliation is a showing, by the preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. *See Frost*, 914 F.3d at 1195-97 & n.5 (citing *Araujo*, 708 F.3d at 158). This is not meant to be a difficult showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013). "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Rookaird*, 908 F.3d at 461-62 (quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017)); *see also, e.g., Feldman v. Law Enft Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams*, ARB No. 09-092 at 5. "Showing that an employer acted *in retaliation for* protected activity is the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent." *Frost*, 914 F.3d at 1195; *see also id.* at 1196 (citing *Rookaird*).

Necessarily, a complainant must show that the respondent knew about her protected activity. *E.g. Araujo*, 708 F.3d at 157.<sup>8</sup> It is not enough for a complainant to show that her employer, as an entity, was aware of his protected activity; rather, the complainant must establish that the decision-makers who subjected her to the adverse actions were actually or constructively aware of his protected activity. *See Conrad v. CSX Transp.*, 806 F.3d 103, 107-08 (4th Cir. 2016); *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 09-015, slip op. at 16-17 (ARB Mar. 29, 2013) ("*Rudolph I*"); *see also Riddell*, ARB No. 2019-0016, slip op. at 17. By constructively aware, I am referring to a "cat's paw" theory of liability. Under a cat's paw theory, even if there is no evidence that the final decision maker in the adverse action was aware of the protected activity, the complainant may still prevail if the evidence shows that a lower-level supervisor knew of the protected activity and that the activity was a contributing

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<sup>8</sup> The ARB has made clear that absent governing circuit precedent, *see, e.g., Araujo*, 708 F.3d at 157, a complainant proves knowledge as part of contributing factor causation, not as a separate element. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011) ("*Bobreski I*")); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016) (knowledge not a distinct element in a complainant's required showing under Sarbanes-Oxley Act); *DeFrancesco II*, ARB No. 13-057 at 5 (knowledge omitted as separate element in FRSA claim).

factor in that supervisor's actions to advise or influence the final, higher-level decision maker. *See id.*

A complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. *Frost*, 914 F.3d at 1195-97 & n.5; *Thorstenson*, ARB No. 2018-59, slip op. at 8.<sup>9</sup> *Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9th Cir. 2010). Nor is it necessary to show any animus. *Frost*, 914 F.3d at 1195; *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) ("*DeFrancesco P*"). Contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action, even when there is no evidence of retaliatory animus or motive. *E.g. Hutton*, ARB No. 11-091 slip op. at 6-7.

Even if a respondent has the honest belief that a complainant engaged in the conduct for which it was stated she was terminated, the complainant may still prevail, *Frost*, 914 F.3d at 1195-97; this is the case even if the protected activity "played only a very small role in [the railroad's] decision-making process." *Id.* at 1197. A fact-finder may not simply compare one reason for the adverse action to another, because "[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent's] reasons are pretext." *Coates*, ARB No. 14-019, slip op. at 3-4. In sum, "if the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Palmer*, 16-035, slip op. at 53 & n. 219 (citing *Bechtel*, ARB No. 09-052, slip op. at 12).

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<sup>9</sup> As my office is in the Ninth Circuit, I am familiar with *Frost* and *Rookaird*. At footnote 5 in the *Frost* opinion, the panel acknowledges a circuit split on whether a plaintiff must explicitly show retaliatory motive or intent as an additional element. *Compare Frost*, 914 F.3d at 1195-97 & n.5 with *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 790-91 (8th Cir. 2014). As Respondent did in *Asmore v. Amtrak*, ALJ No. 2018-FRS-00040 (ALJ June 17, 2020), Respondent argues that *Frost* is not reliable authority while *Rookaird* is reliable in citing *Kuduk*. And as I explained in *Asmore*, the authors of the *Frost* opinion covered this:

*Rookaird's* citation to *Kuduk* does not imply, much less impose, an obligation to prove retaliatory intent that is not included within the FRSA's clear and explicit statutory scheme. Instead, *Rookaird* simply confirms that although intent or animus is part of an FRSA plaintiff's case, showing that plaintiff's protected conduct was a contributing factor is the required showing of intent or "intentional retaliation[.]" *Id.* That is, by proving that an employee's protected activity contributed in some way to the employer's adverse conduct, the FRSA plaintiff has proven that the employer acted with some level of retaliatory intent.

*Frost*, 914 F.3d at 1196. However, though neither party has briefed this case in this manner, the binding circuit precedent to follow would be that of the Fourth Circuit. *See* 49 U.S.C. § 20109(d)(4) (appeals directed to "the circuit in which the violation . . . allegedly occurred or the circuit in which the complainant resided on the date of such violation"). That said, the Fourth Circuit follows the Third and Ninth Circuits on this issue. *See McCarty v. Norfolk S. Ry. Co.*, No. 2:18CV21, 2019 WL 8888163, at \*12 (E.D. Va. Feb. 7, 2019) (citing cases). Therefore, I adopt the above rationale in relying on both *Frost* and *Rookaird*, as well as cases consistent with them.

As noted, a complainant may show contribution through a cat's paw theory in cases under the FRSA. *See, e.g., Kuduk*, 768 F.3d at 790-91. This theory of liability applies when "a supervisor performs an act motivated by [a prohibited reason] 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, then the employer is liable." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (USERRA). However, *Staub* was a USERRA case, under which a plaintiff must show that the protected activity or prohibited reason was a "motivating factor." *Id.* at 417. Under the FRSA, if the prohibited reason *contributed* to actions of one supervisor, and those actions contributed to the ultimate decision resulting in the adverse action, then the impermissible factor was a contributing factor in the adverse action. *Rudolph I*, ARB No. 11-037, slip op. at 16-17 (citing *Bobreski I*, ARB No. 09-057, slip op. at 13-14); *see also Riddell*, ARB No. 2019-0016, slip op. at 17. The complainant need only show that one individual among multiple decision makers influenced the final decision and acted, in part, because of the protected activity. *Id.*

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)).

A non-exhaustive list of relevant circumstantial evidence "include[s] temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *DeFrancesco I*, ARB No. 10-114 at 6-7 (citing *Bobreski I*, ARB No. 09-057 at 13) (*overruled on other grounds in Thorstenson*, ARB No. 2018-59). It could also include "work pressures [or] past and current relationships of the involved parties." *Bobreski I*, ARB No. 09-057 at 13; *see also, e.g., Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 19-21 (ARB March 30, 2016); *Bobreski II*, ARB No. 13-001 slip op. at 17; *Bechtel*, ARB No. 09-052 slip op. at 13. An ALJ may closely examine an employer's evidence and stated rationale for the adverse action, and whether the action corresponds with that of a "prudent" supervisor, to shed light on whether there was contribution by the protected activity. *See Ledure*, ARB Case No. 13-044, slip op. at 8-9. Furthermore, an ALJ must consider the circumstantial evidence *as a whole* and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 17-18 (ARB Aug. 29, 2014) ("Bobreski II"). Pieces of evidence that each might be insufficient can together make a very strong case. *See id.* at 19-22.

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *See, e.g., Bobreski I*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69; *Zinn American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 19 (ALJ Nov. 19, 2012). It is possible for temporal proximity alone to show contribution, but in most cases it must be analyzed within its "factual setting." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *Riddell*, ARB No. 2019-0016 at 18 & n.9 (citing *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8 (ARB Jan. 22, 2020) ("The mere

circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.”)); *Dietz*, ARB No. 15-017, slip op. at 20. Courts must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *See, e.g., Kuduk*, 768 F.3d at 790-92. A finding of no contribution may be sustained despite temporal proximity when there is a greater weight of evidence against contribution, such as a lack of knowledge of protected activity by the decision maker, a longer timeline disfavoring contribution, and the existence of a credible, non-pretextual intervening cause for the adverse action. *See Folger*, ARB No. 15-021, slip op. at 3-6; *see also Acosta*, ARB No. 2018-0020, slip op. at 8-9.

I must also consider the credibility of Amtrak’s stated reason for termination: the operation of the union CBA and standing policy to abolish vacant positions without an approved exception. I may weigh the credibility of a respondent’s stated reason for termination as evidence of whether the protected activity was a contributing factor to the adverse action. *See, e.g., Palmer*, ARB No. 16-035, slip op. at 53-56. Both “indications of pretext” and the “falsity of an employer’s explanation for the adverse action taken” tend to show that protected activity was a contributing factor in adverse actions. *DeFrancesco I*, ARB No. 10-114 at 6-7; *see also St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (“The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the [Title VII] *prima facie* case, suffice to show intentional discrimination.”); *Hamilton v. G. E. Co.*, 556 F.3d 428, 436 (6th Cir. 2009). “[W]hen an ‘employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee,’ the employer’s actions constitute ‘the very definition of pretext.’” *Hamilton*, 556 F.3d at 436 (citation omitted).

At a more granular level, “the *evidence* of the employer’s nonretaliatory reasons must be *considered* alongside the employee’s evidence” in deciding whether protected activity was a contributing factor, “for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct.” *Palmer*, ARB No. 16-035, slip op. at 55.

I agree with Campbell that her termination has temporal proximity to her protected activity, as it resulted less than four weeks after her renewed complaint regarding storage of pillows and food in the garage storage room in Raleigh. I also agree that the relevant managers, including Roberge and Brown, had sufficient knowledge of her protected activity to potentially support a cat’s paw theory of retaliatory termination, if they were taking action to make sure she was left without a job at Amtrak by their superiors.

The problem here for Campbell’s case is that Amtrak’s reasons for terminating her are clear and straightforward, and based on an application of published company-wide policy and the CBA, each of which is in the record. There is no indication of pretext.

I found Brown to be a credible witness. Observing his testimony, he was clear and straightforward, and had no animus toward Campbell. He had no knowledge of her 2014 protected activity. And with at least some knowledge of Campbell’s most recent protected activity in December 2016, Brown went out of his way to keep Campbell employed while

finding Campbell a position that she could claim, the Lorton, VA secretary position. Furthermore, he arranged with the supervisor in Lorton for her to claim the position and then almost immediately attend the four-plus week Amtrak-paid ticket training that Campbell needed to bump into a CSR position, such as the Rocky Mount CSR position close to her home. This is, to say the least, not the behavior of a manager who is discriminating *against* an employee.

Campbell notes procedural irregularities in when and how her position was abolished, such as a delay from December 19 until January 6 in issuing the abolishment. While irregular procedures *can* give rise to an inference of pretext, I find that the irregularities were well explained by Kirk. I find Kirk's explanation credible for several reasons: both in his manner of his live testimony and the substance, he had no animus toward Campbell. In particular, when Shannon forwarded Campbell's December 16 complaint to Kirk, Kirk took the complaint seriously and agreed with Shannon that she should look into it. Furthermore, with this knowledge of her protected activity, he helped Campbell by directing she be held in the position for Brown through January 10 while he worked to get answers for her regarding her former position; and he noted that the delay was an error and substantially due to the holidays. Also, here, I credit the plain language of the bulletin awarding Campbell the new position for Brown effective December 19, 2016, and in the process vacating the position under Roberge; though Campbell did not start until January, the record shows she was in the secretary position for Brown as of December 19.

Roberge did not testify, and there is ample evidence in the record to support longstanding animus between Roberge and Campbell. But Roberge did not write the CBA. Roberge did not insist on abolishing Campbell's former position; the standing Amtrak policy required it absent an exception. It is true that Roberge did not apply for an exception to keep the position after Campbell vacated it, but there is no evidence that that decision (likely made in December) was motivated in any part by the chance that Campbell would bid on and be awarded her former position after she was bumped out of the position for Brown (in January). Moreover, there is no evidence that Roberge prevented Campbell from taking the Lorton position, which Brown found for her and encouraged her to go and claim at least so that she could attend ticket agent training.

It appears that Campbell could have appeared in Lorton and claimed the position there with as few as one or two work days, then attended ticket training, and then with her seniority and the ticket training successfully bumped Roberge's son from his ticket agent position in Rocky Mount. I asked this question of Campbell at the hearing, as to why she did not do exactly this, and her response was because "nobody else was being forced into a position with a four-hour commute." HT 268-70.

Even if I assumed that a four-hour commute for two work days was on its own an adverse action, which under the FRSA precedent discussed above it could be, Campbell would still have to prove that she was forced into it in any part because of her protected activity. Again, the evidence shows that the seniority and position-qualification rules of the CBA, and not Campbell's protected activity, entirely caused Campbell's predicament.

Instead of taking the Lorton position, Campbell insisted on a series of exceptions being made for her, and opted to try to prove that exceptions are made for others. Even if she proved

that exceptions were consistently made for others, which she did not, she would still have also needed to prove that the exception was not made for her at least in any part as a result of her protected activity. *See, e.g., Rookaird*, 908 F.3d at 459-61. Campbell presents no persuasive evidence on this point.

Campbell does cite a February 2017 email from Shannon, but Shannon's vague statement of her own discomfort with Campbell's furlough is not persuasive evidence that Campbell was retaliated against. As she says herself, Shannon was not present, and at the time of the email may not have been aware of the details, including that Kirk and Brown both tried to help Campbell remain employed.

Where a credible, non-pretextual intervening cause for the adverse action arises, the protected activity may not have been a contributing factor. *See Folger*, ARB No. 15-021, slip op. at 3-6; *see also Acosta*, ARB No. 2018-0020, slip op. at 8-9. That is what I concluded happened here. Campbell's decision not to claim the Lorton position or another position on or before January 10, 2017, when her retention in the secretary position for Brown expired, was the reason she was furloughed. I find that Campbell's protected activity played no role in Amtrak's adverse action against Campbell.

Based on this finding, I need not evaluate whether Amtrak proved its affirmative defense, i.e., whether it showed by clear and convincing evidence that it would have taken the same action regardless.

d. Complainant's FSMA claim

Campbell did not discuss at hearing or brief her FSMA allegations. While I could find them waived, instead I address them here. The FSMA has the same substantive standards as the FRSA for adverse action and causation. *See* 21 U.S.C. § 399d; 29 C.F.R. § 1987.109. Even if I assume without deciding that Campbell engaged in protected activity under FSMA, *see* 21 U.S.C. § 399d(a), for all of the same reasons discussed above any FSMA-protected activity was not a contributing factor in Amtrak's adverse action, her furlough.

**ORDER**

For the foregoing reasons, Complainant has not established that the Respondent violated Section 20109 of the Federal Railroad Safety Act or Section 402 of the Food Safety Modernization Act. It is ORDERED that Complainant's complaint is denied.

EVAN H. NORDBY  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

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

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

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