



**Issue Date: 27 December 2019**

Case No.: 2018-FRS-00106

In the Matter of:

**LANCELLOT A. GIVANS**  
Complainant

v.

**METRO-NORTH COMMUTER RAILROAD**  
Respondent

**DECISION AND ORDER DENYING COMPLAINT**

This matter arises from the complaint of retaliation filed by Mr. Lancelot Givans (“Complainant”) against Metro-North Commuter Railroad (“Respondent” or “Metro-North”) pursuant to the Federal Rail Safety Act (“FRSA” or “the Act”), 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982. A formal hearing in a claim filed under the Act is conducted by a U.S. Department of Labor Administrative Law Judge (“ALJ”). 29 C.F.R. § 1982.107.

Complainant filed his FRSA complaint with the Occupational Safety and Health Administration (“OSHA”) on March 30, 2018. (JX 18.) Complainant alleged he was disciplined in retaliation for raising a safety concern. OSHA investigated the complaint and dismissed it on June 11, 2018. (RX 8.) Complainant timely appealed on June 19, 2018. I held a hearing in this matter on April 22, 2019, in New York, New York. Both Complainant and Respondent timely submitted closing briefs.

**I. Evidence**

At the hearing, Complainant introduced twenty-eight exhibits (“CX”). After considering Respondent’s objections, I admitted CX 1-16 and 21-27 to the record. (Tr. 19-40.) Respondent introduced eleven exhibits (“RX”), the parties introduced twenty-five joint exhibits (“JX”), and I introduced one administrative law judge’s exhibit, (“ALJX”) all of which were admitted into evidence. (Tr. 46-47, 270; 18-19; 76.) The table below briefly describes each exhibit in the record.

<b>Exhibit</b>	<b>Exhibit Description</b>
JX 1	Metro-North Railroad Harmon Blue Signal Procedures Training Qualification (2014)
JX 2	L. Givans Investigation/Trial Waiver (signed October 11, 2016)

JX 3	Appendix B – Blue Signal Application and Release Record Sheet (November 29, 2017)
JX 4	Handwritten statement of M. Miller regarding the events of November 29, 2017
JX 5	Second handwritten statement of M. Miller regarding the events of November 29, 2017
JX 6	Guy Giglio’s summary of conversation with M. Miller (November 29, 2017)
JX 7	Handwritten statement of M. Rodriguez (November 29, 2017)
JX 8	Metropolitan Transportation Authority Police Department, Voluntary Statement of M. Rodriguez (November 29, 2017)
JX 9	Handwritten statement of B. Rivera regarding the events of November 29, 2017
JX 10	Timecard of B. Rivera (November 29, 2017)
JX 11	Handwritten statement of L. Givans (November 29, 2017)
JX 12	Metropolitan Transportation Authority Police Department, Voluntary Statement of L. Givans (November 29, 2017)
JX 13	Letter from K. Fleming to L. Givans (November 30, 2017)
JX 14	Metro-North Railroad Case Information Form (signed by K. Fleming on November 30, 2017)
JX 15	Letter from J. Dorney to L. Givans (December 6, 2017)
JX 16	L. Givans Investigation/Trial Waiver (signed December 29, 2017)
JX 17	Metro-North Railroad Corporate Policy and Operating Procedure: Workplace Violence Prevention (effective December 15, 1994, revised January 8, 2016)
JX 18	L. Givans complaint letter to OSHA (March 30, 2018)
JX 19	L. Givans deposition transcript (February 21, 2019)
JX 20	Audio recording of conversation between M. Rodriguez and L. Givans (November 29, 2017)
JX 21	Audio recording of Harmon channel 5 radio transmissions (November 29, 2017, between 6:00 p.m. and 11:00 p.m.)
JX 22	Assignment sheet (November 29, 2017)
JX 23	Metro-North Railroad Operating Rule 16: Blue Signal Protection of Workers (effective February 27, 2011)
JX 24	Memorandum from J. Kesich (CEO) to All Maintenance Equipment Employees (January 1, 2012)
JX 25	Excerpt from Metro-North Railroad General Safety Instructions (effective March

	2014)
CX 1	Excerpt from Metro-North Railroad Operating Rules: Employee Rules of Conduct
CX 2	Metro-North Railroad President's Statement on Respect in the Workplace (July 26, 2018)
CX 3	Metro-North Railroad Statement from the President: Working Together to Ensure a Respectful Workplace (June 26, 2018)
CX 4	L. Givans cell phone records (November 24, 2017, to November 30, 2017)
CX 5	Text messages from L. Givans to S. Soto (October 24, 2017) and L. Givans cell phone records (October 13, 2017, to October 24, 2017)
CX 6	Metro-North Railroad Red Alert: Roadway Worker Safety Briefings and Communicating Safely (July 2018)
CX 7	M. Rodriguez's Position Title History (1986-2018)
CX 8	M. Rodriguez Notice of Discipline (December 28, 2010)
CX 9	Croton-on-Hudson Village Police Department Report (November 29, 2017)
CX 10	"Summary of Rail Whistleblower Rights" attributed to "internet sources"
CX 11	Metropolitan Transit Authority Police Department Report (November 29, 2017)
CX 12	Letter from counsel for Metro-North Railroad to L. Givans (May 15, 2018)
CX 13	Statement of T. Ellis (June 12, 2016)
CX 14	Statement of F. Lugo (June 12, 2016)
CX 15	Text of 42 U.S.C § 20109 (FRSA)
CX 16	Letter from counsel for Metro-North Railroad to L. Givans (July 31, 2018)
CX 21	Three photographs of the foreman's office (and surrounding area) in the yardmaster building at Metro-North's Harmon facility (2018) <sup>1</sup>
CX 22	Letter from L. Givans to counsel for Metro-North Railroad (March 19, 2019)
CX 23	Death Registration Form (December 30, 2017)
CX 24	Audio recording of M. Rodriguez work assignment (November 29, 2017)
CX 25	Audio recording of M. Rodriguez job safety briefing (November 29, 2017)
CX 26	Audio recording of conversation between L. Givans and E. Ocana (October 24,

<sup>1</sup> Complainant testified the photographs were taken in "the beginning of 2018." (Tr. 71.)

	2017)
CX 27	Audio recording of L. Givans pre-trial meeting (December 11, 2017)
RX 1	Metro-North Railroad Equipment Maintenance Instruction: M7 Daily Inspection (March 30, 2011)
RX 2	Metro-North Railroad Equipment Maintenance Instruction: M7 Cab Signal Departure and Daily Test (July 11, 2005)
RX 3	Metro-North Railroad Equipment Maintenance Instruction: Class I Brake Test M7 Cars (November 8, 2004)
RX 4	Metro-North Railroad Daily Report of Units Inspected (November 29, 2017)
RX 5	Metro-North Railroad Cab Signal Certification forms (November 29, 2017)
RX 6	Metro-North Railroad Class I Air Brake Inspection forms (November 29, 2017)
RX 7	Metro-North Discipline Tracking System records (January 1, 2016, to November 16, 2018)
RX 8	OSHA dismissal letter (June 11, 2018)
RX 9	L. Givans Revised Answers to Interrogatories and Requests for the Production of Documents (October 26, 2018)
RX 10	Email from M. Rodriguez to J. Dorney and S. Soto (May 9, 2016)
RX 11	Certification of B. Gurung (April 12, 2019)
ALJX 1	Complainant's prehearing statement (March 22, 2019)

Complainant testified at the hearing regarding the events of November 29, 2017, the disciplinary process related thereto, his allegations of retaliation in this case, and alleged related damages. (Tr. 53-155.) Mr. Monserrate Rodriguez (Tr. 157-202), Mr. Kirk Fleming (Tr. 202-26), Mr. Matthew Miller (Tr. 227-49), and Mr. Benjamin Rivera (Tr. 250-63) each testified on behalf of Respondent primarily regarding the events of November 29, 2017. I will discuss the testimony offered in this case in further detail below. I have reviewed the entire record in this matter.

## **II. Issues and Stipulations**

The purpose of the FRSA is to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101; *see also Niedziejko v. Del. & Hudson Ry. Co.*, 2019 U.S. Dist. LEXIS 51466 at \*66 (N.D.N.Y. Mar. 27, 2019). Generally, the FRSA prohibits railroad carriers from taking any adverse employment action against an employee because that employee engaged in certain protected activities relating to rail safety and security. 49 U.S.C. § 20109. Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 49 U.S.C. § 20109(d)(2)(A)(i).

Accordingly, to prevail on a claim under the FRSA, Complainant must prove, 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. If Complainant succeeds, Respondent can avoid liability only if it proves, by clear and convincing evidence, that it would have taken the same adverse employment action even absent the protected activity. *See, e.g., Riley v. Dakota, Minnesota & Eastern Railroad Corp.*, ARB Nos. 16-010 & 16-052, slip. op. at 4 (July 6, 2018); *Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, slip op. at 4, 52 (Sept. 30, 2016); *see also* 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv); 29 C.F.R. § 1982.109(a)-(b); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013).

At the commencement of the hearing, the parties offered the following stipulations:

- Respondent is a rail carrier engaged in interstate commerce within the meaning of the Act. (Tr. 7.)
- At all times relevant to this case, Complainant was an employee of Respondent. (Tr. 8.)
- Complainant timely filed a complaint with OSHA on March 30, 2018. (Tr. 8.)
- OSHA dismissed the complaint on June 11, 2018. (Tr. 8.)
- Complainant timely objected to OSHA's dismissal of his complaint and requested a hearing. (Tr. 8.)
- Complainant suffered an adverse employment action when he was removed from service at approximately 10:24 p.m. on November 29, 2017, pending an investigation. (Tr. 8-9, 15.)

Consequently, the issues that remain to be decided are as follows:

1. Did Complainant engage in protected activity as defined by 49 U.S.C. § 20109 pursuant to the following subsections:
  - (a)(1)(A); or
  - (a)(1)(C); or
  - (a)(2); or
  - (b)(1)(A); or
  - (b)(1)(B)?
2. Was Complainant's protected activity, if any, a contributing factor in the adverse employment action?
3. If so, has Respondent established that it would have taken the same adverse employment action even absent the protected activity?

(Tr. 9-15.)

### **III. Findings of Fact**

Complainant began working for Respondent in November 2010. (Tr. 54, 104-05.) Since 2013, he has worked as a carman. (Tr. 54.) Prior to November 29, 2017, Complainant worked at Respondent's Croton-Harmon, New York facility ("Harmon"). (Tr. 54.) At the time of the

hearing in this matter, Complainant worked at Respondent's White Plains, New York facility. (Tr. 54.)

### *Calendar Day Mechanical Inspections*

As a carman, one of Complainant's duties is to perform calendar day mechanical inspections ("CDMI") of Respondent's equipment. (Tr. 108.) A CDMI includes, among other things, a visual inspection of both the interior and exterior of the train, a cab signal test, and a Class I brake test ("brake test"). (RX 1.<sup>2</sup>) The brake test requires two employees: one to actuate the braking system from within the train and a second to visually inspect the brakes from outside the train to ensure they are working properly. (Tr. 166-67, 244; RX 3.)

Accordingly, it is Respondent's practice to pair a carman and an electrician together to perform a CDMI. (Tr. 55-56, 129, 163, 165.) Generally, when assigned to perform a CDMI, the electrician and the carman each perform separate aspects of the inspection, so the two work independently until the brake test is to be performed. (Tr. 165-66.) At this point, the electrician will actuate the brakes from inside the train, and the carman will visually inspect the brakes from outside the train. (Tr. 167, 244.) After the CDMI is completed, the carman and the electrician must fill out the Daily Report of Units Inspected, along with other necessary paperwork, and submit it to a foreman. (RX 1 at 10; Tr. 245-46; RX 4.)

### *Blue Signal Protection*

Before beginning a CDMI, Respondent's employees must first secure "blue signal protection," which is designed to protect railroad workers working on, under, or between rolling equipment. (RX 1 at 1; JX 1;<sup>3</sup> JX 23; JX 24; Tr. 109, 216; 49 C.F.R. Part 218, Subpart B.) To do this, an employee first must request blue signal protection from the designated movement authority. (JX 1 at 2; Tr. 114, 231.)

Once the requesting employee receives authorization from the designated movement authority, the employee then takes steps to ensure that the track is physically secure. (JX 1 at 2; Tr. 114, 117-18.) This includes ensuring switches and derails are in the proper place and confirming they are locked, as well as applying physical blue signals (blue flags) to the track. (JX 1 at 2; Tr. 117-18, 119, 233.)

Lastly, the requesting employee must physically apply blue signals (illuminated blue lights) to the rolling equipment itself. (JX 1 at 2; Tr. at 119.) This involves "keying on," or activating, blue lights from within the train. (Tr. 233-34.) The lights are illuminated on both the inside and the outside of the train. (Tr. 234.) Once the designated movement authority authorizes blue signal protection, he will not grant any requests to move equipment onto or off of the track. (RX 11.) Employees are not supposed to board a train to conduct a CDMI unless blue signal protection has been authorized and applied. (Tr. 111-12, 230.)

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<sup>2</sup> RX 1, RX 2, and RX 3 were each in effect in November 2017. (Tr. 113, 164, 166, 168.)

<sup>3</sup> JX 1 was in effect in November 2017. (Tr. 113.)

Once the CDMI is completed, the requesting employee must remove the physical blue signals and also must contact the designated movement authority to release the blue signal protection. (RX 1 at 10; JX 2 at 3; Tr. 239.) The designated movement authority must track both blue signal authorization and blue signal release on the Blue Signal Application and Release Record Sheet. (JX 1 at 6; RX 11.)

In November 2017, the designated movement authority for the mechanical tracks at Harmon was the switching foreman on duty. (Tr. 115.) Employees working on mechanical tracks had access to and could sign out handheld radios. (Tr. 116, 232.) Employees typically requested blue signal protection from the switching foreman by handheld radio on either channel 2 or channel 5. (Tr. 115, 180, 231.) Conversations on channel 5, generally used for communication regarding yard moves, are recorded. (Tr. 169.)

#### *Events of November 29, 2017*

In November 2017, then-foreman Mr. Monserrate Rodriguez,<sup>4</sup> supervised Harmon's carmen, electricians, laborers, pipe fitters, and cleaners, and he was responsible for delivering job safety briefings. (Tr. 158-59.) On November 29, 2017, at approximately 4:30 p.m., Mr. Rodriguez delivered a job safety briefing, handed each employee an assignment sheet, and read the assignments aloud. (Tr. 55, 161, 228; JX 22.) During his briefing, Mr. Rodriguez said: "no slipping, no sliding, no ambulance riding," and he instructed employees to "make sure the wheels ain't falling off." (CX 25; Tr. 55.)

Later, at approximately 6:00 p.m. or 6:30 p.m., while they were in the locker room, Mr. Rodriguez assigned Complainant, a carman, and Mr. Matthew Miller, an electrician (Tr. 227), to perform a CDMI of the test train<sup>5</sup> on track N160. (Tr. 55-56, 162-63, 228-29; CX 24.) While he was still in the locker room, Complainant called the yardmaster on his personal cell phone to find out what time the test train was supposed to leave. (Tr. 56, 130; CX 4.)

As Complainant was gathering his gear, Mr. Miller left the locker room. (Tr. 56, 130, 231.) Upon leaving the locker room, Mr. Miller radioed Mr. Binod Gurung, switching foreman, on channel 2 to obtain blue signal protection authorization. (Tr. 231-32.) Mr. Miller did not have any trouble reaching Mr. Gurung over the radio. (Tr. at 232.) Mr. Miller requested blue signal protection on track N160, and Mr. Gurung granted the authorization. (Tr. 233; JX 3; RX 11.) When Mr. Miller arrived at track N160, he applied the physical blue signals. (Tr. 233.)

Shortly after Mr. Miller left the locker room, Complainant also left the locker room and walked to track N160. (Tr. 56, 131.) Complainant had a handheld radio turned to channel 5 while he was walking to track N160. (Tr. 131.) As Complainant approached track N160, he observed the physical blue signal protections in place. (Tr. 131-32.) When Complainant arrived at track N160, Mr. Miller had begun the inspection. (Tr. 56, 132, 235.) Complainant boarded the train. (Tr. 56, 133, 235.) Complainant and Mr. Miller were onboard the train together for

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<sup>4</sup> Throughout the record, Mr. Rodriguez is also referred to by his nickname "J.R." (Tr. 157-58.)

<sup>5</sup> A test train is a train scheduled for a test run (for instance, after a repair is completed), and it does not carry revenue passengers. (Tr. 129, 163.) The test train Complainant and Mr. Miller were assigned to inspect consisted of four electric cars known as M7s. (Tr. 129.) The instructions submitted as RX 1-3 apply to M7 trains.

approximately fifteen to twenty minutes. (Tr. 134.) During that time, Complainant did not perform any of his CDMI tasks. (Tr. 133-34.)

After partially completing the inspection, Mr. Miller took down the blue signals and left track N160.<sup>6</sup> (Tr. 56-57, 136, 238-39.) Mr. Miller radioed the switching foreman to release the blue signal authorization. (Tr. 239; JX 3.) Complainant radioed Mr. Rodriguez on channel 5 to report that he needed an electrician to complete the brake test because Mr. Miller had left. (Tr. 58, 169; JX 21 at 23:53.) Complainant did not refer to blue signal protection during this exchange. (Tr. 136, 170; JX 21 at 23:53.) Mr. Rodriguez walked to track N160. (Tr. 170-71; JX 21 at 29:12.) He walked around and through the train but did not observe anyone present there. (Tr. 171.)

Subsequently, Mr. Miller radioed Mr. Rodriguez on channel 5 and requested that Mr. Rodriguez come to the foreman's office in the yardmaster building. (Tr. 171-72, 239; JX 21 at 29:12.) Mr. Rodriguez began to walk to the office. (Tr. 172.) While Mr. Rodriguez was walking to the office, Complainant radioed him a second time to request an electrician, and Mr. Rodriguez told Complainant to stand by. (JX 21 at 29:32.) Complainant did not refer to blue signal protection during this exchange. (JX 21 at 29:32.) After waiting and seeing no one arrive at track N160, Complainant left track N160 and walked toward the office. (Tr. 58-59.)

In the meantime, Mr. Rodriguez spoke with Mr. Miller in the foreman's office. (Tr. 174, 239.) Mr. Miller reported to Mr. Rodriguez that he and Complainant were not communicating well and could not work together. (Tr. 175, 239.) Because Mr. Miller indicated he would not work with Complainant, Mr. Rodriguez directed Mr. Miller to write a statement. (Tr. 175, 239; JX 4.)

After his conversation with Mr. Miller, Mr. Rodriguez left the office and walked back to track N160 to find Complainant. (Tr. 176.) Complainant radioed Mr. Rodriguez to tell him he was in front of the office (JX 21 at 31:42), but Mr. Rodriguez did not hear that transmission and continued to track N160 where he again looked for Complainant but did not find him. (Tr. 176-77.) Mr. Rodriguez radioed Complainant and indicated that he was looking for Complainant at track N160. (JX 21 at 32:20.) Upon learning Complainant was at the office, Mr. Rodriguez indicated he would return to the office. (Tr. 177; JX 21 at 32:20.)

While Mr. Rodriguez was walking to the office, he saw Complainant outside the yardmaster building. (Tr. 177-78.) Complainant and Mr. Rodriguez had a conversation in which the following exchange took place:

Rodriguez: What's the problem, bro?

Complainant: I have no idea

Rodriguez: He said he's trying to communicate with you and you don't want to communicate with him.

Complainant: Right, same thing here.

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<sup>6</sup> Later in the evening, at Mr. Rodriguez's direction, Mr. Miller completed the CDMI with another carman, Ms. Monica Watson. (Tr. 189, 243-44.) No defects were found with the equipment. (Tr. 245; RX 4-6.)

Rodriguez: You have to talk to each other. You're partners.

Complainant: Right.

Rodriguez: You're partners. You have to talk to each other.

Complainant: Last time I called the lights, you asked us...

Rodriguez: You guys did it up here, that's why I don't understand what the problem is.

Complainant: Right, I called up the lights. I didn't even hear him call up the lights this time, so.

Rodriguez: I didn't hear it either. I actually went upstairs –did he call up the lights up over on N160?

Complainant: He put up the lights. I didn't hear him call up the lights. So I don't know.

Rodriguez: There were no lights when I went up there.

Complainant: I need him to do the holding in apply and release so I can look at it and do the brake test with him, so, if he doesn't want to do that, then ...

Rodriguez: He said he's trying to communicate with you and you don't want to talk to him.

Complainant: The only thing he asked me to do was get out of the way so he can close the doors. That was it. I asked –I was trying to communicate with him, he didn't answer me, turned his head. Don't know what the problem is.

Rodriguez: I'm trying to get someone to work with you. Everybody is like, no, no –we're doing this weird thing. Everybody, you know, you gotta, you gotta talk to everybody, though, because you gotta to work with everybody. And these guys don't want, they don't seem to want to work with you.<sup>7</sup>

(JX 20.)

During the course of their conversation, Complainant and Mr. Rodriguez entered the yardmaster building and then entered the foreman's office. (Tr. 138; 183.) At the conclusion of the conversation, Mr. Rodriguez directed Complainant to write a statement regarding why he did not want to work with Mr. Miller. (Tr. 60; 182.) Complainant was reluctant to do so. (Tr. 60, 182.)

The conversation escalated into an argument. (Tr. 61, 183,<sup>8</sup> 240-42, 253.) Complainant was gesturing with his hands. (Tr. 139, 183, 186, 260.) Complainant put his hand against Mr. Rodriguez's chest. (Tr. 183, 186, 253-54.) Mr. Rodriguez immediately informed Complainant that he was out of service.<sup>9</sup> (Tr. 183, 256.) Complainant then left the office. (Tr. 243, 256.) Mr. Rodriguez did not touch Complainant. (Tr. 140, 186.) Complainant did not refer to blue signal protection while he was in the office. (Tr. 186.)

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<sup>7</sup> The conversation continues, but it is not necessary to relay the remainder of the conversation here. Complainant did reference blue lights once more before the audio recording unexpectedly cuts off: "he should be able to communicate with me enough. Last time I called up the lights, he asked..." (JX 20)

<sup>8</sup> Each man described the other as "belligerent."

<sup>9</sup> Removal from service is an unpaid suspension from work. (Tr. 211.)

During the argument between Complainant and Mr. Rodriguez, Mr. Miller was still in the office writing his statement. (Tr. 183-184, 240, 252; JX 4.) Complainant and Mr. Rodriguez were directly behind Mr. Miller, so Mr. Miller could not see them. (Tr. 242-43.) Mr. Miller heard Mr. Rodriguez tell Complainant not to put his hands on him. (Tr. 243.) Though the denial was not immediate, Mr. Miller did hear Complainant deny touching Mr. Rodriguez while Mr. Miller was still in the office. (Tr. 243, 249.)

During the argument between Complainant and Mr. Rodriguez, Mr. Benjamin Rivera, electrician (Tr. 250), was also in the yardmaster building clocking out for the day. (Tr. 240, 251-52; JX 10.) While he was standing at the time clock, Mr. Rivera could see Complainant and Mr. Rodriguez arguing. (Tr. 253, 255.) Mr. Rivera saw Complainant touch Mr. Rodriguez. (Tr. 253-54.) The next day, Mr. Rodriguez directed Mr. Rivera to provide a statement. (Tr. 257; JX 9.)

After the argument between Complainant and Mr. Rodriguez, Mr. Rodriguez called the Metropolitan Transit Authority (“MTA”) police. (Tr. 188.) Complainant called the local Croton-on-Hudson police. (Tr. 61.) Mr. Rodriguez and Complainant both provided voluntary statements to the MTA police. (JX 8; JX 12.) Mr. Rodriguez and Complainant also both submitted handwritten statements to Respondent. (Tr. 189; JX 7; JX 11.) The MTA police and the Croton-on-Hudson police issued incident reports.<sup>10</sup> (CX 9; CX 11.)

Mr. Rodriguez also called Mr. Kirk Fleming, Deputy Assistant Chief Mechanical Officer and Mr. Rodriguez’s superior. (Tr. 187, 203-04, 206.) Mr. Rodriguez reported to Mr. Fleming that Complainant had put his hand on Mr. Rodriguez’s chest. (Tr. 187, 206.) Mr. Fleming credited Mr. Rodriguez’s report. (Tr. 210, 225-26.) Mr. Rodriguez did not refer to blue signal protection during this exchange. (Tr. 188, 206.)

Mr. Fleming directed the general foreman on duty, Mr. Guy Giglio, to respond to the situation and to gather statements from the involved parties and witnesses. (Tr. 207, 209; JX 6.) Upon review of the information he received from Mr. Giglio, Mr. Fleming confirmed that Complainant should be taken out of service. (Tr. 211.) On November 30, 2017, Mr. Fleming issued a letter to Complainant formally removing him from service. (JX 13.)

### *Workplace Violence Policy*

Respondent has a workplace violence prevention policy.<sup>11</sup> (JX 17.) The policy defines workplace violence broadly and includes “physical assaults or acts of aggressive behavior” such as “threatening behavior, whether physical or verbal, or intentional or wrongful physical contact.” (JX 17 at 41.) This policy also describes Respondent’s “zero tolerance” approach to workplace violence and subjects any employee found to be in violation to discipline “up to and including dismissal.” (JX 14 at 43.) Physical contact between employees, even if it does not rise to the level of hitting or punching, can be a violation of Respondent’s workplace violence policy. (Tr. 209.) Complainant was aware of this policy and its parameters while working as a carman at

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<sup>10</sup> Both police departments determined no crime had been committed, and the matter should be handled internally by Respondent. (CX 9; CX 11.)

<sup>11</sup> This policy was in effect in November 2017. (Tr. 208.)

Harmon. (Tr. 105-06.) From 2016 to 2018, Respondent disciplined numerous employees under this policy with penalties including removal from service, suspension, and dismissal. (RX 7 at 42-91; Tr. 212.)

### *Disciplinary Process*

On December 6, 2017, Complainant was notified in writing that he was being investigated for the charges of: conduct unbecoming an employee, failure to perform duties as assigned, violation of the workplace violence policy, and violation of a general safety instruction. (JX 15.) On December 11, 2017, Respondent held a pretrial meeting with Complainant, Complainant's union representative, Mr. Fleming, a superintendent, and a hearing officer. (CX 27.)

Subsequently, on December 29, 2017, Complainant signed an investigation/trial waiver. (JX 16.) Complainant pled guilty to the charges of: conduct unbecoming an employee, failure to perform duties as assigned, violation of the workplace violence policy, and violation of a general safety instruction. (JX 16.) The waiver indicates that, on November 29, 2017, Mr. Rodriguez met with Complainant "about difficulties you were reportedly having working with an electrician, Matt Miller and other employees generally." (JX 16.) The waiver also provides that Complainant was "uncooperative and became increasingly agitated," spoke in a "raised voice," acted "in a confrontational manner," and placed his hand on Mr. Rodriguez's chest "in a physical and threatening way." (JX 16.) Complainant was banned from working at the Harmon facility for two years, and he received a sixty-day suspension (thirty days actual and thirty days deferred). (JX 16.)

In 2016 (in a disciplinary incident unrelated to the issues to be decided in this case), Complainant signed an investigation/trial waiver pleading guilty to the charges of: conduct unbecoming an employee and failure to perform duties as assigned. (JX 2; Tr. 107.) Complainant received a deferred suspension of fifteen days, which Complainant would only serve if he was disciplined again in the following two years. (JX 2; Tr. 107.) Because of this 2016 disciplinary incident, Complainant served an actual suspension of forty-five days beginning in November 2017 (thirty days for the November 2017 incident and fifteen days for the 2016 incident). (Tr. 78, 91, 142.)

## **IV. Protected Activity**

In general terms, and consistent with its overall purpose, the FRSA protects employees from discrimination and adverse employment actions taken because they engaged in one of three categories of protected activity relating to rail safety and security: (1) providing information or otherwise assisting in the investigation (or refusing to assist in the violation) of railroad safety laws or regulations; (2) reporting, in good faith, a hazardous safety or security condition or refusing to work around such a condition; or (3) requesting medical treatment for a work-related injury. 49 U.S.C. § 20109(a)-(c); *March v. Metro-North*, 369 F.Supp.3d 525, 533 (S.D.N.Y. 2019).

Complainant generally avers that he engaged in the first two categories of protected activity on November 29, 2017, by raising to Mr. Rodriguez a safety concern regarding blue signal protection on track N160.<sup>12</sup> Specifically, Complainant alleges that he engaged in activity protected by the Act pursuant to 49 U.S.C. §§ 20109(a)(1)(A), (a)(1)(C), (a)(2), (b)(1)(A), and (b)(1)(B). (Tr. 11-14.) Respondent, on the other hand, denies that Complainant engaged in any protected activity. Complainant bears the burden to prove that he engaged in protected activity. 29 C.F.R. § 1982.109(a); *Riley v. Dakota, Minnesota & Eastern Railroad Corp.*, ARB Nos. 16-010 & 16-052, slip. op. at 4 (July 6, 2018); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013).

A. FRSA § 20109(b)(1)(A)

Complainant's primary contention is that he reported a hazardous safety or security condition to Mr. Rodriguez on November 29, 2017. Section 20109(b)(1)(A) provides that a railroad carrier, or an employee thereof, "shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for ... reporting, in good faith, a hazardous safety or security condition." § 20109(b)(1)(A). For his actions to be considered protected activity, Complainant must have (at least) subjectively<sup>13</sup> believed that he was reporting a hazardous safety condition. *See D'Hooge v. BNSF Railways*, ARB Nos. 15-042 & 15-066, slip op. at 7-8 (Apr. 25, 2017); *Winch v. CSX Transp. Inc.*, ARB No. 15-020, slip op. at 7-8 (ARB Jul. 19, 2016). Complainant need not establish that the hazardous safety or security condition actually existed, but knowingly false reports are not protected. *See Walker v. Amer. Airlines*, ARB No. 05-028, slip op. at 15 (Mar. 30, 2007) ("The provision of 'information' is protected activity only when the complainant actually 'believe[s]' in the existence of a violation.").

Complainant alleges that he engaged in protected activity when he stated to Mr. Rodriguez on November 29, 2017, that he "didn't even hear [Mr. Miller] call up the lights this time" and later in the same conversation again stated he "didn't hear him call up the lights." (JX 20; Compl. Brief at 2.) Complainant testified that, by making these statements, he intended to raise a safety concern. (Tr. 59.) Specifically, Complainant maintains he was unsure whether or not Mr. Miller had requested and been granted blue signal protection from the switching foreman, as required. Complainant insists that sharing his uncertainty with Mr. Rodriguez was tantamount to reporting a hazardous safety condition. (Compl. Brief at 1; Tr. 59-60.) In contrast, Respondent contends that Complainant did not believe either that a hazardous safety condition

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<sup>12</sup> There is no allegation or evidence that Complainant engaged in the third category of protected activity, requesting medical treatment for a work-related injury.

<sup>13</sup> Respondent asserts that Complainant's belief must also be *objectively* reasonable. This point is not entirely clear because, whereas § 20109(a)(1) expressly requires that the employee "reasonably believes" the conduct at issue constitutes a safety violation, § 20109(b)(1)(A) requires only that the employee report "in good faith" a hazardous safety or security condition. In one recent case, a federal district court noted that the Second Circuit has not addressed this issue directly, but the district court decided § 20109(b) does require *both* a subjective belief and a belief that is objectively reasonable. *March v. Metro-North*, 369 F.Supp.3d 525, 533 (S.D.N.Y. 2019); *see also Samson v. Soo Line Railroad Co.*, ARB. No. 15-065, slip op. at 4 (affirming dismissal where the ALJ reasoned that the complainant's belief regarding a hazardous safety condition was not objectively reasonable). For all the reasons set forth herein, I conclude that Complainant cannot establish the objective prong of the test. In any case, Complainant cannot prevail because I also conclude he cannot establish the subjective prong of the test.

existed on track N160 or that he was reporting such a hazardous safety condition to Mr. Rodriguez.

It is undisputed that blue signal protection is an important safety precaution. It is undisputed that Complainant referenced blue signal protection (specifically, blue lights) in his conversation with Mr. Rodriguez on November 29, 2017. Thus, if Complainant's testimony is credited, it is conceivable that one could conclude that Complainant believed he was communicating a safety concern because blue signal protection authorization may not have been properly obtained. Consequently, if Complainant's testimony is credited, one may conclude that Complainant reported "in good faith, a hazardous safety or security condition."

However, for the reasons set forth below, I do not credit Complainant's testimony. Rather, I conclude that Complainant's own contemporaneous actions and communications undermine his testimony, and I conclude Complainant did not subjectively believe that a hazardous safety or security condition existed on track N160 on November 29, 2017. Therefore, I also conclude that Complainant did not report a hazardous safety or security condition in good faith and, thus, did not engage in protected activity under section 20109(b)(1)(A).

### *Complainant's Actions*

To begin with, Complainant did not raise the issue of blue signal protection when he first radioed Mr. Rodriguez on November 29, 2017, regarding the events at track N160. Instead, Complainant initiated his first radio conversation with Mr. Rodriguez by requesting that Mr. Rodriguez send another electrician to work with him at track N160. Specifically, Complainant said: "I need an electrician, somebody who's gonna hold the train in release/apply and do the bake test with me." (JX 21 at 23:53.) Rodriguez responded: "I sent an electrician with you," referring to Mr. Miller. (JX 21 at 23:53.) Complainant acknowledged this but insinuated that he and Mr. Miller were not working well together ("Roger, but it's been a negative so far, so something has to happen. ... maybe Penny or another electrician ... can come out"). (JX 21 at 23:53.)

Subsequently, Complainant again radioed Mr. Rodriguez to request that an electrician be sent to track N160 to work with him. (JX 21 at 29:32.) Thus, Complainant spoke with his supervisor twice over the radio and did not mention blue signal protection or any other safety concern. The fact that Complainant twice requested a new partner to work with, without any mention of blue signal protection, does not support Complainant's contention that he believed there was a hazardous safety condition on track N160. These communications had nothing to do with a purported safety concern. Instead, it appears that the reason Complainant contacted Mr. Rodriguez was to report that he and Mr. Miller were not working well together, and he needed another partner to complete his inspection.

The first time Complainant mentioned blue signal protection to Mr. Rodriguez was during their in-person conversation in front of the yardmaster building. (JX 20.) Even in this conversation, Complainant did not immediately mention a safety concern. Mr. Rodriguez reported that Mr. Miller "said he's trying to communicate with you and you don't want to communicate with him." Complainant responded: "Right, same thing here." Upon

Mr. Rodriguez's direction that Complainant and Mr. Miller are partners and "have to talk to each other," Complainant explained that, the last time he performed a CDMI with Mr. Miller, Complainant had called up the lights himself, whereas this time "I didn't even hear him call up the lights." (JX 20.)

As Respondent points out, Complainant reported only that he did not *hear* Mr. Miller request blue light authorization. The fact that Complainant did not hear Mr. Miller request blue light authorization is not in itself a hazardous safety condition. That Complainant did not hear Mr. Miller request blue light authorization does not compel the conclusion that Mr. Miller had not actually obtained such authorization. In fact, the record reflects that Mr. Miller had obtained proper blue signal protection authorization. The Blue Signal Application and Release Record Sheet for November 29, 2017, reflects that Mr. Miller requested blue signal protection, and the switching foreman (Mr. Binod Gurung) authorized it at 6:41pm. (JX 3<sup>14</sup>; RX 11; Tr. 231-33.) The fact that there was no actual blue signal protection violation on track N160 on November 29, 2017, would not defeat Complainant's claim, as long as Complainant actually believed such a violation had occurred. However, I find the totality of the facts and circumstances surrounding the events of November 29, 2017, belie such a conclusion.

Complainant's statement to Mr. Rodriguez ("I didn't even hear him call up the lights this time") was made in the context of a conversation about the communication problems between Complainant and Mr. Miller. It thus appears Complainant was offering this statement, not as a safety concern, but as an example of a specific failure of communication between the partners. Even after Complainant made this brief mention of blue signal protection, Complainant himself shifted the conversation back to needing another electrician. ("I need him to do the holding in apply and release so I can look at it and do the brake test with him."). It is hard to imagine that Complainant was reporting a hazardous safety or security condition when he mentioned blue signal protection only in passing, and his statements reflect a desire to continue working on the CDMI, with or without Mr. Miller.

Next, Complainant admits that Mr. Miller left the locker room before him on November 29, 2017, and the record reflects that Mr. Miller had ample time to request blue signal authorization from the switching foreman before Complainant arrived at track N160. At the hearing, Complainant acknowledged that, once an employee contacts the switching foreman by radio, it could take only five or ten seconds to request blue signal protection. (Tr. 117.) Complainant testified he stayed behind in the locker room for approximately two to five minutes after Mr. Miller left the locker room. (Tr. 56, 130.) Mr. Miller testified that he radioed the switching foreman to request blue signal authorization while he walked from the locker room to track N160. (Tr. 232.) Mr. Miller testified that he had no trouble contacting the switching foreman to request blue signal protection, and he indicated his conversation with the switching foreman took, at most, two minutes. (Tr. 232-33.) Thus, Complainant should have known that

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<sup>14</sup> Complainant apparently objects to the authenticity of JX 3 on the basis that Mr. Gurung's certification of JX 3 provides that it is a true and correct copy of the Blue Signal Application and Release Record Sheet from November 29, 2017, "except that I understand counsel has added certain designations to the document for the purpose of this proceeding." (RX 11.) It appears this language refers to the fact that counsel added an exhibit number to the document, so Complainant's objection is without merit.

Mr. Miller could have completed his request for blue signal protection before Complainant left the locker room.

Importantly, Complainant testified that, when he arrived at track N160, the physical blue signal protections (blue lights) had been applied, and Mr. Miller had begun his inspection. (Tr. 131-32.) Complainant was aware that blue signal protection must be applied before an employee conducts a CDMI. (Tr. 109.) Complainant had previously performed CDMIs with Mr. Miller, and Complainant offered no reason or possible explanation why Mr. Miller would have applied the physical blue signals and begun the CDMI without first obtaining blue signal authorization.<sup>15</sup> Given these facts and circumstances, and Complainant's own training and knowledge, it is simply not credible that Complainant believed either that Mr. Miller had not obtained blue light authorization or that a hazardous safety condition existed on track N160.

Finally, it is notable that Complainant himself *boarded the train* and remained there for at least fifteen to twenty minutes while Mr. Miller performed his inspection. (56, 133-34.) He did so despite knowing that Respondent's policies prohibit an employee from boarding a train to perform a CDMI unless blue light protections have been properly authorized and applied. (Tr. 111-12.) It strains credulity to think that, if Complainant actually believed that a hazardous safety condition existed on track N160, he would have boarded the train and remained there.

#### *Complainant's Arguments*

I recognize Complainant testified that he asked Mr. Miller whether he had requested blue signal authorization, and Mr. Miller did not respond. (Tr. 56.) However, Mr. Miller testified that he specifically told Complainant, while they were still in the locker room, that he was going to set up the blue lights, and it was Complainant who did not respond. (Tr. 229.) The record clearly reflects that Complainant and Mr. Miller had difficulty communicating. I need not determine what statements, if any, they made to one another on November 29, 2017, because, for the foregoing reasons, I find that (regardless of what was or was not communicated between Complainant and Mr. Miller), Complainant did not believe (reasonably or subjectively) that there was a hazardous safety condition on track N160.

Complainant points out that the recording of the conversations on channel 5 from November 29, 2017 (JX 21), does not include a request from Mr. Miller to the switching foreman for blue signal protection on track N160. However, the record reflects that Mr. Miller made his request on channel 2, not channel 5. It is true that there are no recordings from channel 2 in the record. However, there is other evidence of Mr. Miller's request in the record, and, more importantly for the purpose of these proceedings, Respondent is not required to prove that Mr. Miller requested blue signal protection. It is Complainant who is required to prove that he engaged in protected activity.

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<sup>15</sup> I do not credit Complainant's hearing testimony that he had observed such behavior on several prior occasions. (Tr. 122-23.) Complainant could not recall the details of any such particular instance, and this hearing testimony contradicts Complainant's deposition testimony, in which he indicated he could not recall any prior instances of an employee applying physical blue signals without requesting authorization. (JX 19 at 66-67.) In any case, Complainant indicated he had not witnessed Mr. Miller apply blue signals without authorization. (Tr. 123.)

Complainant also argues that Mr. Rodriguez “confirmed” his safety concern and echoed his doubt as to whether blue signal protection had been requested from the switching foreman. (Tr. 59-60.) When Complainant indicated he had not heard Mr. Miller request blue signal protection, Mr. Rodriguez stated that he “didn’t hear it either.” (JX 20.) Contrary to Complainant’s interpretation, this statement does not amount to a safety concern. Again, the fact that Mr. Rodriguez did not *hear* the protection requested and authorized does not mean it was not requested and authorized. As Mr. Rodriguez explained at the hearing: “I don’t need to hear Mr. Miller call up the lights. Mr. Miller can call them up on another channel.” (Tr. 180.) As set forth above, the record reflects that is precisely what happened. Moreover, Mr. Rodriguez testified that, at the time of his conversation with Complainant, he did not understand Complainant to be raising a safety concern. (Tr. 181.) I therefore reject Complainant’s argument that Mr. Rodriguez’s statement—that he did not hear Mr. Miller call up the lights—somehow supports the conclusion that Complainant raised a safety concern and thereby engaged in protected activity.

Complainant next notes that that Mr. Rodriguez “initiated an accusatory dialogue” (Tr. 60) by indicating that no one wanted to work with Complainant (“they don’t seem to want to work with you”). (JX 20.) Complainant apparently suggests that the fact that Mr. Rodriguez made this statement only after Complainant mentioned blue signal protection is evidence that Mr. Rodriguez retaliated against him for raising a safety concern. I disagree. As set forth above, Complainant’s conversation with Mr. Rodriguez was primarily about Complainant’s communication difficulties with Mr. Miller. After Complainant raised the subject of blue lights, it was Complainant himself who redirected the conversation: “I need him to do the holding in apply and release so I can look at it and do the brake test with him, so, if he doesn’t want to do that, then ...” (JX 20.) The fact that Mr. Rodriguez made his statement (“they don’t seem to want to work with you”) *after* Complainant mentioned blue signal protection does not mean he made the statement *because* Complainant mentioned blue signal protection. Rather, it appears Mr. Rodriguez was simply trying to explain (in the context of a discussion about communication difficulties) that Mr. Miller was not the only employee who had problems communicating with Complainant

Finally, and perhaps most importantly, each of Complainant’s arguments related to Mr. Rodriguez’s conduct is largely irrelevant to the issue of whether *Complainant* engaged in protected activity. I address these points to ensure Complainant that I have thoroughly reviewed the record and arguments before me, but the relevant question (which I have already answered) is whether Complainant reported, in good faith, a hazardous safety or security condition. Mr. Rodriguez’s actions have no bearing on this question. For all the reasons set forth above, I have determined that Complainant did not believe in good faith either that there was a blue-signal-related hazardous safety condition on track N160 or that he was reporting such a condition.

### *Conclusion*

Overall, the record reflects that Complainant knew that blue signal protection was required to perform a CDMI, Complainant knew that Mr. Miller had time to request blue signal protection before Complainant arrived at track N160, Complainant saw the physical aspects of blue signal protection at track N160, Complainant saw Mr. Miller performing part of an

inspection at track N160, Complainant boarded the train and remained there while Mr. Miller continued the inspection, and Complainant twice spoke with Mr. Rodriguez to request another electrician to work with him at track N160 before making any mention of blue signal protection. Complainant's knowledge and actions undermine any contention that he was unsure whether blue signal protection had been properly requested and authorized, and they do not suggest that he was concerned with resolving or reporting a hazardous safety condition on track N160.

For all these reasons, I conclude that Complainant did not subjectively believe that a blue-signal-related hazardous safety or security condition existed on track N160 on November 29, 2017, and (when he referred to blue signal protection in his conversation with Mr. Rodriguez) he did not subjectively believe that he was reporting a safety or security condition.<sup>16</sup> Therefore, Complainant was not "reporting, in good faith, a hazardous safety or security condition," and he cannot establish that he engaged in protected activity under § 20109(b)(1)(A).

B. FRSA § 20109(b)(1)(B)

Complainant also alleges that he refused to work upon encountering a hazardous safety and security condition, thereby engaging in protected activity under section 20109(b)(1)(B). (Tr. 13-14.) That section provides that a railroad carrier, or an employee thereof, "shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for ... refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties." § 20109(b)(1)(B). Such a refusal to work is protected only if "the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee." §§ 20109(b)(2)(A).<sup>17</sup> Complainant apparently contends that, because he did not perform his CDMI tasks when he was at track N160, he engaged in a protected refusal to work. Respondent disputes this characterization.

First, Complainant has not established that he refused to work because of concern relating to railroad safety at any time on November 29, 2017. As discussed above, I find that Complainant did not believe, in good faith, that a hazardous safety or security condition existed on track N160. Because he did not believe that any hazardous safety or security condition existed, he could not have refused in good faith to perform his work for that reason.<sup>18</sup>

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<sup>16</sup> To the extent it is necessary, and for all the same reasons, I also conclude any such belief would not have been objectively reasonable. *See infra* Part IV.C.

<sup>17</sup> Additionally, it is also required that a reasonable person under the circumstances would conclude that "the hazardous condition presented an imminent danger of death or serious injury" and that "the urgency of the situation did not allow sufficient time to eliminate the danger without such refusal." § 20109(b)(2)(B). Finally, the employee must have notified the employer "of the existence of the hazardous condition and his or her intention not to perform further work ... unless the condition is corrected immediately." § 20109(b)(2)(C). The record does not support a finding that Complainant could establish these elements.

<sup>18</sup> It is not even clear that Complainant refused to work. He testified that he did not perform his CDMI tasks while onboard the train. (Tr. 133-34.) However, he explained that he remained on the train so that he would not be perceived to be abandoning his assignment (Tr. 59) and because he "wanted to see what [Mr. Miller] was doing ... And then I was going to see if I could get in some kind of communication with him." (Tr. 133-34.) By boarding the train, remaining on it, attempting to communicate with his partner, and subsequently requesting a new partner, it appears Complainant may have at least intended to perform his assigned duties eventually. Complainant certainly

Even assuming, *arguendo*, that Complainant refused to work because of a hazardous safety or security condition, he certainly cannot establish that “no reasonable alternative to the refusal to work was available.” § 20109(b)(2)(A). Rather, an entirely reasonable alternative to refusing to work clearly existed in this case. Complainant could simply have radioed the switching foreman or the yardmaster to confirm whether blue signal protection had been authorized. (Tr. 64, 132, 135.) He was equipped with a radio (Tr. 131), and he had ample opportunity to do so while onboard the train on track N160. This would have eliminated any doubt as to whether Mr. Miller had properly requested blue signal protection. Alternatively, Complainant could himself have requested blue signal protection from the switching foreman. Again, Complainant was equipped with a radio, he had training and knew how to request blue signal protection (Tr. 110), and he had done so in the past. (JX 20 (“Last time I called the lights”).) It is beyond dispute that Complainant could have taken either of these reasonable and straightforward actions instead of refusing to perform his work on track N160.<sup>19</sup>

In short, even if Complainant refused to work (which is not clear), he cannot establish that he engaged in protected activity under section 20109(b)(1)(B) because there was a reasonable alternative to such a refusal. Complainant easily could have radioed the switching foreman to confirm or request blue signal protection on track N160, which would have eliminated any purported concern about a blue-signal-related hazardous safety or security condition.

C. FRSA § 20109(a)(1)

Complainant also alleges he assisted in an investigation relating to railroad safety. Section 20109(a)(1) of the Act protects employees who provide information or otherwise assist in an investigation relating to railroad safety. In pertinent part, this section prohibits a railroad carrier, or employee thereof, from taking an adverse employment action or discriminating in any way against an employee based on “the employee’s lawful, good faith act done”:

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security ... if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency ... or

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did not communicate (to Mr. Rodriguez or anyone else) that he was refusing to work, and Complainant did not indicate at the hearing that he refused to perform his CDMI tasks because of a safety concern.

<sup>19</sup> Complainant’s failure to take such an easy step to remedy any potentially dangerous condition also weighs against the idea that he subjectively believed a hazardous safety condition existed. Complainant explained that he chose to contact Mr. Rodriguez instead of contacting the switching foreman. (Tr. 135.) However, it is still unclear why (if he truly believed there was a hazardous safety condition and refused to perform his CDMI tasks because of that condition) Complainant would have stayed onboard the train for fifteen to twenty minutes before taking any action to remedy or report the allegedly hazardous condition.

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct.

§ 20109(a)(1). Though Complainant testified that he was not aware of any ongoing safety investigation on November 29, 2017 (Tr. 153-54), Complainant alleges that Respondent violated §§ 20109(a)(1)(A) and (a)(1)(C) of the Act. (Tr. 11-12.) Based on my review of the record, it appears Complainant contends that he engaged in protected activity by providing information to assist in: (1) the investigations conducted by the Croton-on-Hudson and/or MTA police departments and (2) Respondent's own internal investigation of the events of November 29, 2017. In contrast, Respondent asserts that Complainant did not assist with or trigger any investigation into any matter related to railroad safety.

First and foremost, the Act requires that Complainant provide information “regarding any conduct which the employee *reasonably believes* constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security.” § 20109(a)(1) (emphasis added). As set forth in detail above, I conclude that Complainant did not subjectively believe that a hazardous safety or security condition (specifically, lack of proper blue signal protection) existed on track N160 on November 29, 2017.

For all the same reasons, I also conclude that such a belief would not have been objectively reasonable. In other words, a reasonable person in Complainant's position would not have believed that any Federal law, rule, or regulation relating to railroad safety had been violated on track N160 on November 29, 2017. Again, Complainant knew that blue signal protection was required to perform a CDMI. Because Mr. Miller left the locker room before Complainant, there was ample time for Mr. Miller to have requested blue signal protection before Complainant reached track N160. When he arrived at track N160, Complainant observed that the physical blue signals had been applied, and Mr. Miller had begun his inspection. Complainant had previously performed CDMIs with Mr. Miller without incident. Based on these facts and circumstances, a reasonable person in Complainant's position would have concluded that Mr. Miller requested and received blue light authorization from the switching foreman prior to Complainant's arrival at track N160 (and, in fact, the record reflects that is precisely what happened).

Again, it is not necessary for Complainant to have personally heard Mr. Miller request blue signal authorization in order for all proper blue signal protection to have been in place. Therefore, I conclude the record does not reflect any valid factual basis on which a reasonable person in Complainant's position (with his knowledge, experience, and training) could have concluded that there was a violation of blue signal protection laws, rules, or regulations on track N160. Accordingly, I also conclude Complainant did not provide information “regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security.” This alone precludes a finding that Complainant engaged in protected activity under § 20109(a)(1).

Moreover, the record does not reflect that the Croton-on-Hudson and MTA police departments engaged in any investigation related to railroad safety. Both police departments

were called to the scene after Complainant made physical contact with Mr. Rodriguez. The police report completed by the Croton-on-Hudson police shows that the officers responded to a report of “possible harassment” and a “dispute” between Complainant and “his boss” (Mr. Rodriguez). (CX 9.) This report does not make any mention of blue signal protection or of any issue related to railroad safety or security.

The MTA police report likewise demonstrates that officers responded to a report of a “verbal disagreement” between Complainant and Mr. Rodriguez concerning “work ethics.” (CX 11.) The MTA police also noted that Complainant and Mr. Rodriguez have had a history of conflict and that “the situation” between the two “has been ongoing for some time.” Again, this report does not give any indication that the MTA police investigated any matter related to railroad safety. Thus, the record reflects that, if the Croton-on-Hudson and/or the MTA police departments were investigating anything,<sup>20</sup> they were investigating an altercation between two of Respondent’s employees, not a matter relating to railroad safety.

Finally, regarding Respondent’s internal investigation of the events of November 29, 2017, I likewise conclude that the record does not support a finding that any such investigation was related to railroad safety. The record shows that Mr. Fleming and Mr. Rodriguez took actions that could be described as “investigations.” Specifically, Mr. Fleming, after receiving a phone call from Mr. Rodriguez reporting a potential incident of workplace violence, instructed Mr. Guy Giglio to evaluate or investigate the situation on his behalf. (Tr. 206-07, 209.) Mr. Fleming testified that Mr. Rodriguez never mentioned blue signal protection during this phone call, and I credit his testimony. (Tr. 206.) After investigating the situation, Mr. Giglio relayed his findings to Mr. Fleming, who formally removed Complainant from service. (Tr. 209, JX 13.) A report signed by Mr. Fleming the following day indicates Complainant was removed from service for insubordination and physical contact with Mr. Rodriguez, in violation of Respondent’s workplace violence policy. (JX 14.) Thus, I conclude the investigation ordered by Mr. Fleming and conducted by Mr. Giglio related solely to the altercation between Complainant and Mr. Rodriguez, and not a violation of any law, rule, or regulation relating to railroad safety.

Finally, foreman Rodriguez testified that he investigated whether Mr. Miller had actually requested blue signal protection from the switching foreman before beginning the CDMI on track N160. (Tr. 182.) He explained that he asked the yardmaster (serving as the movement authority) whether or not she had heard Mr. Miller make the request over the radio. (Tr. 182, JX 20.) The yardmaster told Mr. Rodriguez that she did not hear Mr. Miller make a request. (Tr. 182.) After the altercation, Mr. Rodriguez apparently did confirm that Mr. Miller had requested and received blue signal protection. (Tr. 199-200.)

Because this investigatory action taken by Mr. Rodriguez related to blue signal protection, it could conceivably constitute an investigation, however brief, of a violation of a law or regulation related to railroad safety. However, the purpose of Mr. Rodriguez’s “investigation” is not clear. Mr. Rodriguez testified that, at the time of his conversation with Complainant, he did not understand Complainant to be raising a safety concern. (Tr. 181.) Rather, he understood that Complainant “needed an electrician to do something, and the electrician and him weren’t

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<sup>20</sup> It is not even clear from the record that either police department actually conducted any investigation because both agencies determined this was an internal matter to be handled by Respondent’s human resources department.

communicating. That was the situation at hand. It wasn't a blue light issue." (Tr. 179.) Thus, it appears that a reasonable interpretation of Mr. Rodriguez's action in contacting the yardmaster was that it was intended simply to clarify the chain of events in an effort to resolve the communication difficulties between Complainant and Mr. Miller, and not to determine whether Mr. Miller had committed a safety violation. In any case, as set forth above, Complainant did not have a reasonable belief (either subjective or objective) that blue signal protection laws had been violated. Therefore, his reference to blue signal protection during his conversation with Mr. Rodriguez could not have constituted protected activity under § 20109(a)(1).

I conclude the potential investigations implicated here (by Respondent, and by the police) were not related to railroad safety. More importantly, Complainant himself did not reasonably believe (subjectively or objectively) that there was a violation of any railroad safety law, rule, or regulation on track N160 on November 29, 2017. Accordingly, Complainant has not established that he engaged in protected activity as defined in § 20109(a)(1)(A) or (a)(1)(C).

D. FRSA § 20109(a)(2)

Finally, Complainant contends that he refused to violate blue signal protection laws and regulations and thus engaged in protected activity under § 20109(a)(2) of the Act. This section provides that a railroad carrier may not take an adverse employment action or discriminate in anyway against an employee because of "the employee's lawful, good-faith act done or perceived by the employer to have been done ... to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security." § 20109(a)(2).

Complainant contends that he refused to violate blue signal protection laws (Tr. 13), apparently by refusing to perform the CDMI when he was unsure whether blue signal protection had been properly authorized and applied. Complainant's argument is without merit. No one acting on Respondent's behalf asked Complainant to violate blue signal protection laws. There was no actual violation of blue signal protection laws on track N160 on November 29, 2017. Most importantly, for all the reasons set forth above, I find Complainant himself did not believe there was any violation of blue signal protection laws. Therefore, Complainant could not have refused in good faith to violate or assist in the violation of such laws,<sup>21</sup> and I conclude Complainant did not engage in protected activity under § 20109(a)(2).

E. Conclusion

Based on the foregoing analysis, I conclude that Complainant did not engage in protected activity under 49 U.S.C. § 20109(a)(1)(A), (a)(1)(C), (a)(2), (b)(1)(A), or (b)(1)(B). Complainant did not provide information or otherwise assist in the investigation (or refuse to assist in the violation) of railroad safety laws or regulations, and he did not report, in good faith, a hazardous safety or security condition or refuse to work around such a condition. Therefore, Complainant cannot establish an essential element of his claim.

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<sup>21</sup> Additionally, as Respondent points out, if Complainant had believed blue signal protection was not properly authorized and applied, then, by boarding the train, he actually committed a safety violation (as opposed to refusing to commit or assist in such a violation).

## V. Same Action Defense

Because Complainant did not engage in protected activity, his complaint necessarily fails, and I need not address the other elements of his claim or Respondent's defenses. However, in the interest of a complete review, I will review Respondent's same action defense.<sup>22</sup> Respondent asserts that the disciplinary action taken against Complainant was initiated solely because he engaged in workplace violence. In other words, Respondent argues that the record reflects, by clear and convincing evidence, that it would have taken the same adverse employment action, even if Complainant had not engaged in the alleged protected activity. In contrast, Complainant denies engaging in any sort of workplace violence. He claims he did not physically touch Mr. Rodriguez, and Mr. Rodriguez falsified the allegation against him.

### A. Legal Standard

To avoid liability in the event a complainant establishes his claim, the employer must demonstrate, by clear and convincing evidence, that, in the absence of the protected activity, it would have taken the same adverse action. *Palmer v. Canadian National Railway*, ARB No. 16-035, slip op. at 52 (Sept. 30, 2016); *see also* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b); *Bechtel*, 710 F.3d at 447. This is essentially a hypothetical analysis: in the absence of the protected activity, would the employer, nonetheless, have taken the same action?

“Clear” evidence refers to a situation where the employer has “presented evidence of unambiguous explanations for the adverse action in question.” *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, slip op. at 11 (Apr. 25, 2014). “Convincing” evidence is that which demonstrates that a proposed fact is “highly probable.” *Id.* Taken together, clear and convincing evidence is evidence that shows “the thing to be proved is highly probable or reasonably certain.” *See e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, slip op. at 8 (Sept. 30, 2015); *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (explaining that “[f]or employers, this is a tough standard, and not by accident”).

### B. Violation of Workplace Violence Policy

The record reflects that Respondent has a zero-tolerance workplace violence policy and that physical touching is a violation of that policy. (JX 17; Tr. 209.) Complainant was aware of this policy and its parameters in November 2017. (Tr. 105-06.) Respondent established that it has removed from service, suspended, and dismissed other employees for violations of this policy. (RX 7; Tr. 212.)

I also conclude Respondent has established that Complainant violated the workplace violence policy by physically touching Mr. Rodriguez during their argument on November 29, 2017. Mr. Rodriguez testified that Complainant put his hand against Mr. Rodriguez's chest in a “threatening” manner. (Tr. 183, 186.) The fact that Complainant touched Mr. Rodriguez is

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<sup>22</sup> The parties stipulate, and the record reflects, that Complainant suffered an adverse employment action when he was removed from service (and subsequently suspended). For purposes of this section, I assume without deciding that, had Complainant established the element of protected activity (which he has not), Complainant's alleged protected activity was a factor that contributed to the adverse action.

corroborated by Mr. Rivera's testimony. (Tr. 253-54, 255.) Even Complainant admits that he was gesturing with his hands. (Tr. 139.)

Mr. Fleming testified that Complainant's reports regarding blue signal protection played no role in the decision to remove him from service. (Tr. 211-12.) Respondent's Case Information Form, signed by Mr. Fleming on November 30, 2017, indicates Complainant was removed from service for insubordination and violation of the workplace violence policy. (JX 14; Tr. 214.) Complainant was notified in writing that he was being investigated for the charges of: conduct unbecoming an employee, failure to perform duties as assigned, violation of the workplace violence policy, and violation of a general safety instruction. (JX 15.)

Moreover, Complainant himself signed a voluntary trial waiver, in which he pled guilty to violating the workplace violence policy on the grounds that he "act[ed] in a confrontational manner before placing [his] hand on [Mr. Rodriguez's] chest in a physical and threatening way." (JX 16.) Though Complainant now contends he was "forced" to sign the waiver (Tr. 141), he offers no further explanation as to who allegedly forced him to sign, why they would have done so, or how that was accomplished. Thus, the record reflects that Complainant voluntarily accepted a suspension for his violation of Respondent's workplace violence policy in lieu of proceeding to a trial.

I recognize that Complainant denies touching Mr. Rodriguez and contends that Mr. Rodriguez falsified the allegation against him.<sup>23</sup> Complainant strenuously challenges the credibility of both Mr. Rivera and Mr. Rodriguez, as discussed below. Upon consideration of all the relevant evidence and arguments, I conclude the record supports Mr. Rodriguez's version of events.

Complainant makes much of the fact that Mr. Rivera has referred alternately to Mr. Rodriguez's chest and his upper arm when describing where Complainant touched Mr. Rodriguez. (Compl. Brief at 2.) I do not find that such a minor inconsistency is a reason to doubt Mr. Rivera's testimony or his credibility. If, for instance, Mr. Rivera had vacillated between referring to Mr. Rodriguez's head and his foot, that would be cause for concern. As it is, the chest and the upper arm are in the same general region of the body, and Mr. Rivera has been consistent in his account that Complainant touched Mr. Rodriguez. (Tr. 260; JX 9.)

Complainant also challenges Mr. Rivera's testimony based on photographs of the foreman's office area. (CX 21.) Complainant contends Mr. Rivera could not have seen

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<sup>23</sup> Complainant also alleges Mr. Rodriguez falsified the allegations against him in the May 2016 disciplinary incident. Complainant submitted two statements from coworkers (CX 13; CX 14) related to his conduct in May 2016 in an apparent attempt to corroborate his own version of events. These statements are unsubstantiated hearsay that lack sufficient indicia of reliability to serve as the basis for the conclusion that Mr. Rodriguez previously falsified an allegation against Complainant. These two statements are identical except for the signatures, they are contradicted by other evidence in the record (Tr. 190, 258; RX 10), the record does not reflect whether the declarants are credible and/or disinterested, and Complainant did not offer an adequate explanation for failing to call these witnesses if he thought their testimony was relevant. The May 2016 disciplinary incident is not at issue here, and, though he alleges the May 2016 and November 2017 disciplinary events are similar because Mr. Rodriguez falsified allegations against him in both instances, Complainant has not offered sufficient evidence to justify such a conclusion.

Mr. Rodriguez and Complainant arguing from his perspective at the time clock. However, Mr. Rivera testified that he could see Mr. Rodriguez and Complainant. (Tr. 256.) Complainant failed to fully explain how these photographs illustrate his point. (*See* Tr. 70.) Moreover, Mr. Rodriguez, Mr. Miller, and Mr. Rivera all testified that these photographs do not accurately depict the office area as it was on November 29, 2017. (Tr. 184, 240, 255-56.) Therefore, the photographs do not provide an adequate basis on which to question Mr. Rivera's eyewitness account of the events at issue.<sup>24</sup>

Complainant next emphasizes that Metro-North highly values (or purports to value) railroad safety and respect in the workplace. (CX 1; CX 2; CX 3; CX 6.) In an effort to challenge Mr. Rodriguez's credibility, Complainant suggests that, in violation of such values, Mr. Rodriguez does not take seriously his responsibility for railroad safety. To support this allegation, Complainant points to the job safety briefing, during which Mr. Rodriguez made statements such as: "no slipping, no sliding, no ambulance riding," and "make sure the wheels ain't falling off." (CX 25; Tr. 55.) Mr. Rodriguez explained that he came up with these "jingles" to reinforce the message of safety because they are easier to remember than specific rule numbers. (Tr. 161.) I find Mr. Rodriguez's explanation reasonable, and I do not think these statements were intended as jokes or are any indication that Mr. Rodriguez does not take railroad safety seriously. These statements do not cause me to question Mr. Rodriguez's credibility.

Complainant also submitted a Notice of Discipline issued to Mr. Rodriguez in 2010. The notice indicates Mr. Rodriguez "failed to adequately assign, evaluate, and oversee work assignments given to electricians ... to ensure that operational and safety procedures were adhered to by the employees, which contributed to a fire and extensive damage to" a train. (CX 8.) Complainant asserts this is relevant to show that Mr. Rodriguez has a blatant disregard for railroad safety. Again, I disagree. A one-sentence summary of a disciplinary incident that occurred seven years prior to the events at issue is an insufficient basis on which to conclude that Mr. Rodriguez has a reputation for acting unsafely.<sup>25</sup>

Finally, Complainant contends the police reports in the record prove that he did not touch Mr. Rodriguez. They do not. Both reports indicate that this was an internal matter to be handled by human resources. (CX 9; CX 11.) I acknowledge that the MTA police report indicates that Complainant and Mr. Rodriguez had a verbal disagreement, and "[n]o physical altercation or injuries were incurred." (CX 11.) However, the basis for this statement is entirely unclear, and the fact that a police officer did not report a physical fight or injuries (or conclude that any crime had been committed) does not prove that Complainant did not place his hand on Mr. Rodriguez's chest. In any case, I will not credit these hearsay statements over the firsthand testimony in the record.

Overall, the record reflects that Complainant violated Respondent's zero-tolerance workplace violence policy, Complainant voluntarily pled guilty to that violation, and Respondent disciplined Complainant because of that violation, consistent with its general practices.

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<sup>24</sup> I am also aware that Complainant contends Mr. Rivera previously provided false testimony against him regarding the May 2016 disciplinary incident. There is simply no support in the record for this baseless allegation.

<sup>25</sup> Likewise, Complainant's self-serving allegations that Mr. Rodriguez has previously behaved inappropriately and falsified documents (Tr. 95-97) find no support in the record, and I do not credit them.

Accordingly, I conclude that Respondent has proven, by clear and convincing evidence, that it would have removed Complainant from service (and suspended him) even absent his alleged protected activity related to blue signal protection. In other words, I find it is highly probable that, in the absence of the alleged protected activity on November 29, 2017, Respondent would still have removed Complainant from service (and suspended him) based on his violation of Respondent's workplace violence policy. *See Palmer v. Canadian Nat'l Railway*, ARB No. 16-035, slip. op. at 52, 56-57 (Sept. 30, 2016).

## **VI. Order**

Based upon applicable law and a review of all the evidence, I conclude Complainant has not established that he engaged in protected activity, as defined by the FRSA. I also conclude Respondent has established that it would have taken the same adverse employment action, even absent Complainant's alleged protected activity. Therefore, Complainant is not entitled to relief, and his complaint is hereby **DENIED**. *See* 29 C.F.R. § 1982.109(d)(2).

**SO ORDERED.**

**LAUREN C. BOUCHER**  
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 (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).