

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 30 June 2020

CASE NO.: 2018-FRS-00059

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*In the Matter of:*

ROBERT A. HAHN,  
*Complainant,*

v.

PAN AM RAILWAYS,  
*Respondent.*

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Before: Jerry R. DeMaio, Administrative Law Judge

Appearances

Robert A. Hahn, *Complainant, pro se*

Kathleen McCaffrey Baynes, Esq., Kathleen McCaffrey Baynes, Esq. PLLC, *for Respondent*

**DECISION AND ORDER DISMISSING COMPLAINT**

This matter arises from a complaint filed by Robert A. Hahn (“Hahn” or “Complainant”) on May 28, 2016, with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against Pan Am Railways (“Pan Am” or “Respondent”), under the employee protection provisions of the Federal Rail Safety Act (“FRSA” or “the Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). Upon review of the evidence, the Court finds that Hahn engaged in protected activity, but the evidence was not sufficient to show that it was a contributing factor in Pan Am’s decision to terminate his employment. Accordingly, Hahn’s complaint will be dismissed.

**I. STATEMENT OF THE CASE**

On May 28, 2016, Hahn filed an FRSA Complaint with OSHA. Hahn alleged that Pan Am had retaliated against him for his participation in two derailment investigations. On March 27, 2018, the Secretary of Labor (“Secretary”), acting through an agent, found Hahn’s alleged protected activity was not a contributing factor in Pan Am’s decision to terminate his employment. The Secretary dismissed the complaint and Complainant requested a hearing before the Office of Administrative Law Judges. The case was assigned on May 2, 2018.

A hearing was held in Albany, New York, on June 6th and 7th, 2019. At the hearing, the Parties were afforded the opportunity to present evidence and oral arguments. Administrative Law Judge Exhibits (“ALJX”) 1 and 2 were admitted into evidence. The Parties’ Joint Pre-Hearing Statement is marked as ALJX-3 and is now admitted into evidence. Complainant’s Exhibits (“CX”) -C through -S<sup>1</sup> and Respondent’s Exhibits (“RX”) -1 through -12 were also admitted into evidence.

The following individuals testified at the hearing:

1. Robert A. Hahn, Complainant;
2. John Steininger, Pan Am Vice President of Transportation;
3. David Nagy, Executive Director of Safety and Security at Pan Am;
4. Harold Raven, Superintendent of Transportation for Pan Am and Hahn’s supervisor when he worked for the Transportation Department;
5. John Dietz, Director of Operating Rules for Pan Am in 2015;
6. Malcolm Holden, Trainmaster for Pan Am in Ayer, Massachusetts, in 2015;
7. Deborah Bourassa, Director of Personnel Administration for Pan Am during the relevant time periods;
8. Jeff Gerossie, Pan Am Superintendent of Transportation, based in East Deerfield, Massachusetts, in 2015, and Hahn’s immediate supervisor;
9. Andrew Jacobs, General Manager of Pan Am Southern in 2015;
10. Matthew Keenan, West End Track Supervisor for Pan Am in Mechanicville, New York, during 2015; and
11. William Wallace, Superintendent of Track at Pan Am and one of Hahn’s supervisors in November 2015.

The record is now closed. Both Parties submitted post-hearing briefs, and the case is ripe for a decision.

## **II. FINDINGS OF FACT<sup>2</sup>**

### **A. Stipulations**

The Parties entered into a number of stipulations. ALJX-3. The Court finds that the stipulations are supported by the record, and makes the following relevant findings of fact based on those stipulations:

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<sup>1</sup> CX-R consists of the deposition exhibits previously attached to proposed CX-A, which was not admitted into the record. And, CX-S consists of the deposition exhibits previously attached to proposed CX-B, which was also not admitted into the record.

<sup>2</sup> All evidence of record was reviewed for this Decision and Order, even though not all evidence of record is referenced. A portion of the evidence in the record overlaps or is repetitive.

1. Hahn started employment with Pan Am Railways on June 1, 2015;
2. Hahn was initially employed in the position of Trainmaster, Road Foreman of Engines and Designated Supervisor of Locomotive Engineers in the Pan Am Transportation Department;
3. Hahn passed all required testing and classes associated with the aforementioned position;
4. Hahn performed a derailment investigation on October 2, 2015, in the East Deerfield train yard;
5. Hahn was approached by Melody Sheehan on or around October 20, 2015, and was offered the position as Assistant Superintendent of Engineering;
6. In November 2015, Hahn began working in Pan Am's Engineering Department;
7. Pan Am's safety rules PGR-C and PGR-L were in effect in 2015;
8. Hahn was extremely dissatisfied with the position in the Engineering Department and wanted to be transferred back to the Transportation Department;
9. On November 17, 2015, Hahn attended a meeting with Jeff Gerossie, Bill Wallace and Drew Patterson;
10. At the meeting, Hahn told Bill Wallace he had an engineer's license;
11. Bill Wallace offered to accept Hahn's resignation at the meeting;
12. Following the meeting, Hahn asked to speak to Jeff Gerossie; during that conversation, Hahn stated that he did not want the job in the Engineering Department;
13. Following the meeting, Hahn sent a text message to Bill Wallace;
14. On November 29, 2015, Hahn performed a derailment investigation in the Ayer Yard;
15. Malcom Holden was the Trainmaster in Ayer Yard at the time of the incident;
16. Hahn's conclusions regarding the derailment findings, along with supporting pictures, were sent via email to Drew Patterson, Bill Wallace, Andrew Jacobs and Hal Raven;
17. The phone number of Hahn's company issued cellular device was \*\*\*-\*\*\*-3526;
18. Statements by Jeff Gerossie and Matt Keenan were emailed to Melody Sheehan on November 30, 2015;
19. On December 1, 2015, Pan Am conducted an investigation, which included an interview of Hahn by Robert Murphy;

20. As a result of its investigation, Pan Am concluded that Hahn's behavior violated Pan Am's policies, specifically, General Rules PGR-C and PGR-L;
21. On the morning of December 2, 2015, Pan Am decided to request Hahn's resignation, and if he refused, to terminate his employment;
22. On December 2, 2015, Pan Am requested Hahn's resignation, and when he declined, Hahn's employment was terminated the same day;
23. The Mechanicville Police were called to assist with the termination and Hahn was taken into police custody;
24. While at the police station, Hahn was observed to be shaking and was ultimately taken to Saratoga Hospital for a mental health evaluation; and
25. Hahn had undergone evaluations for anxiety, stress and fatigue on two prior occasions.

## **B. Witness Testimony**

### *1. Complainant's Testimony*

Hahn started work at Pan Am on June 1, 2015, and his employment was terminated on December 2, 2015. Tr. 22. When he started working for Pan Am he had already been in the railroad industry for 21 years. Tr. 27. From June 1, 2015 to November 1, 2015, he was a Trainmaster. Tr. 22. This role made him the designated supervisor for locomotive engines. Tr. 22. He was in charge of field training, evaluations, efficiency tests and stop tests. Tr. 22. Hahn explained that "it was a management position plus planning the daily train schedule and crew utilization, locomotive utilization, figuring out tonnage profiles, and moving traffic along the Pan Am in a timely fashion." Tr. 22.

From November 1, 2015 to December 2, 2015, Hahn was the Assistant Superintendent of the Engineering Department for the West End, the same territory he worked with as Trainmaster. Tr. 22. His duties in this new role included overseeing the operations of the section crews, inspection and repair foremen, and track supervisors. Tr. 24. For the first three to four weeks after the transfer to this new role, Hahn also maintained duties from the Trainmaster job. Tr. 24. He explained that Pan Am was having a hard time completing federally mandated stop tests by their deadlines, so he offered to help by performing some of his old Trainmaster duties even after starting his new job. Tr. 24-25.

As Trainmaster, Hahn felt "fully supported" by his managers. Tr. 27. He testified that within three months of starting work, he had passed all the required testing, was running the daily operation and was riding trains and qualifying as a locomotive engineer. Tr. 28. On October 2, 2015, Andrew Jacobs, the General Manager for Transportation at Pan Am Southern, called Hahn to inform him of a derailment in the East Deerfield Yard. Tr. 30-31. Jacobs asked Hahn to drive down to look at the derailment, which Hahn did. Tr. 31. On the drive down, Hahn spoke with Harold Raven who asked him to perform a derailment investigation; Hahn had performed such investigations for his previous employer, Canadian Pacific. Tr. 31.

At the site, Hahn performed a derailment investigation by taking measurements and performing a visual inspection of the track and rolling stock. Based on the investigation, Hahn found that Pan Am was in violation of federal safety track standards under the Act, 49 C.F.R. § 213. Tr. 32. He found “inefficient effective cross ties in a turnout area and insufficient effective fasteners railroad spikes.” Tr. 32. When he arrived at the derailment, he testified that he was confronted by the Engineering Department, asked why he was there, asked what his purpose was and told that “they had the situation under control.” Tr. 33. After the investigation, Raven sent an email to Paul Levasseur, the East Deerfield Track Supervisor, with Hahn’s findings. Tr. 34; CX-G at 19. Hahn testified Levasseur was not pleased with the derailment findings. Tr. 33-34.

Melody Sheahan, former Vice President of Engineering, and John Steininger, Vice President of Transportation, approached Hahn and informally asked him to transfer to the Engineering Department, based on his performance at the October 2, 2015, derailment investigation. Tr. 35-36. Sheahan told Hahn at a meeting that she wanted him in the Engineering Department to “step on Levasseur’s throat” and to address the many issues the department had. Tr. 38. Before he formally decided to work for the Engineering Department, Hahn made himself available and would get calls at 11 PM or even 3 AM to come into work. Tr. 37. He testified that he put 400 miles a day on his car driving between locations. Tr. 37. Hahn testified that he was very hesitant to take the engineering job because of the hours and stress it would cause. Tr. 37-38; CX-I.

On November 6, 2015, Deb Bourassa, Human Resources Representative for Pan Am, told Hahn that he had been transferred to the Engineering Department. Tr. 38-39. Sheahan had, in fact, signed off on his transfer on October 16, 2015, and Human Resources approved his transfer on October 19, 2015, with a \$2,000 raise. Tr. 39, 96. Hahn asked Bourassa if there was any way he could not be transferred, and she told him to speak with Jim Patterson, the Chief Operating Officer. Tr. 39. Hahn met with Patterson who told him, “Your derailment investigation on October 2 was spot on. . . . We want you to go over there [meaning, the engineering department], we want you to fix things, bring your enthusiasm and expertise to the department, try it out.” Tr. 40. Hahn testified Steininger did not want to lose him in the transportation department and even told Hahn he would leave his name tag on his desk so he could come back if he wanted. Tr. 40.

On November 10, 2015, Hahn’s first day in his capacity as Assistant Superintendent for the Engineering Department, he was picking up ties along the right-of-way in Eagle Bridge, New York. Tr. 41. Hahn explained, “when the railroad changes ties out, they just lump all the ties in a big pile along the track, and they will eventually come back and pick them up.” Tr. 41. He testified that if the ties were left on the side of the track, Pan Am faced fines from New York State and the Department of Environmental Protection. Tr. 41. Hahn understood that he and his crew should pick up as many ties as they could that day. Tr. 41. However, at some point after 5 PM, Hahn was instructed that he had to be off the track by 5 PM. Tr. 44-42. Throughout the day, Hahn tried to call Jeff Gerossie, Superintendent of Transportation and Hahn’s immediate supervisor, and Sheahan to give them progress updates. Tr. 24, 42-43. He also wanted to ask permission to keep picking up the ties and keep the crew late because it was not ultimately his call. Tr. 43. Eventually he called Steininger to get permission. Tr. 43. Hahn and the crew

completed picking up the ties by 6:10 PM. Tr. 44. At 5:36 PM on November 10, 2015, Gerossie finally called Hahn and told him he was supposed to be off the track by 5 PM. Tr. 44.

On October 20, 2015, Hahn started counseling with Caleo Counseling Center in Hudson Falls, New York, to address some personal issues, including some incident to going through a divorce. Tr. 44. Hahn's then wife had a restraining order against him. Tr. 95. On November 12, 2015, Hahn sent an email to Bill Wallace, Patterson and Gerossie with his outline for the West End of the railroad, which included his plan for getting work done and completing work. Tr. 45. Wallace, Patterson, Gerossie and Hahn met on November 17, 2015, to discuss Hahn's outline. Tr. 45. Hahn testified that before the meeting, he had gone to counseling to prepare for the meeting and to address things going on in his personal life. Tr. 45-46. This was the first time Hahn had met these men; Hahn said, "I know from my conversation with Melody Sheahan what I had to do. I was there to fix things." Tr. 46.

Hahn testified that at the November 17, 2015 meeting, "we had some elevated conversation." Tr. 46. Hahn described the meeting as anxiety-provoking and "bullying." Tr. 47. He felt that he was "put on the defense" and started to feel "a little anxiety," which he was going to counseling to work out. Tr. 49. After the meeting, Hahn spoke separately with Gerossie to explain that he did not sign up for this job, but he wanted to work together. Tr. 47. After this meeting, Hahn texted Wallace and apologized. Tr. 49; RX-12. Hahn testified, "I didn't want to go in there and kick in doors, but I had ideas. I'm an idea man." Tr. 47.

Hahn's impression of the Engineering Department after this meeting was that he was not liked and not wanted. Tr. 48. He testified:

Where is the integrity? Where is the accountability? That's what I want to see coming into this department. And I don't think they liked it, I don't think they liked it from the beginning. I don't think they liked it from the time I set foot on the property in Deerfield Yard to do that derailment investigation. I think there was a lot of pretense when I walked in that room about what kind of character I was. You know, there was rumors around the railroad about me being a hothead. I can be very professional at times and that's the way to conduct businesses professionally.

Tr. 48. Hahn knew it was not working out with the Engineering Department and began talking with Jacobs and Steininger in transportation about returning to his old job. Tr. 48.

The next day, on November 18, 2015, Hahn went to a railroad crossing at Ferry Street where there was an emergent situation. Tr. 50-52. He began to tear out the old crossing and replace it, when he was notified Patterson and Gerossie were coming. Tr. 53. Hahn did not think they needed to come because he was capable of doing the project, but sensed they may have been "coming as sort of maybe an intimidation factor" to him. Tr. 56. Once they arrived, Hahn left to go to two work meetings, but came back a little after dark. Tr. 57. Patterson asked Hahn to go to Terryville, Connecticut, the next day, which was Friday, November 19, 2015, but Hahn had an appointment to get his car serviced. Tr. 58. Hahn told Patterson he would go to Terryville to look at a tunnel, on Monday, November 22, 2015. Tr. 58.

On Monday, Hahn went to Terryville at Patterson's request and found out the tunnel was in worse shape than expected. Tr. 59. Hahn testified that Patterson asked for his opinion on how to best fix the tunnel, so Hahn believed their relationship was improving. Tr. 59. Next, Hahn testified that he went with the tie gang to Rotterdam, New York, to install new ties, pick up the old ties and dump rock on top. Tr. 60. Hahn was instructed to "dump stone," but there was "a broken rail on the main line" and all "these guys that were available to dump stone end up going out to fix a broken rail on the main line." Tr. 60. Hahn sent an email to Patterson and Wallace explaining the stone dumping would be delayed due to the broken rail. Tr. 60-61. Patterson responded saying "No, dump stone." Tr. 61. Hahn testified "well, maybe we're not in good communication here" after receiving that email. Tr. 61. He eventually ended up dumping the stone. Tr. 61.

Later that week, on November 29, 2015, Hahn was the acting manager on call when he was told there was a three-section derailment in Ayer Yard, about a three-hour drive away. Tr. 61-62. He decided to go and check out the derailment to make sure it was properly reported and handled and notified Raven and Jacobs he was doing so. Tr. 63-64. Hahn spoke with Malcom Holden ("Holden"), the Trainmaster at Ayer Yard, and asked about what happened and told him he was coming to the derailment site. Tr. 64-65. When he was an hour from the site, Hahn called Holden who told him not to come because everything was already fixed because Sheahan already called the track guys to come out. Tr. 66. When Hahn arrived at Ayer Yard he took measurements and believed that the derailment was not properly fixed. Tr. 66. He stated to the onsite track foreman: "when you put the rail back in, you laid it in the same spot it was before and just spiked it down. . . it's still wide." Tr. 66. Hahn made a determination about the derailment and emailed Wallace, Patterson, Raven and Jacobs with his findings. Tr. 70-71; CX-G at 31E. Hahn worked all day Sunday, November 29, 2015, at the Ayer Yard after the derailment. Tr. 72-73.

At 2:00 AM on Monday, November 30, 2015, Hahn was called into work to work on a run-through switch in Mechanicville. Tr. 71-72. After working through the night, Hahn alerted Patterson that he was going home because he was exhausted. Tr. 73. Patterson told Hahn that his hours were 6:30 AM to 3 PM, so he was expected to show up to work Monday morning. Tr. 73. Hahn decided to go home after explaining how much he had been working and how tired he was to Patterson. Tr. 73.

On December 1, 2015, Hahn was working in Rotterdam dumping stone. Tr. 75. That morning, he was approached by Robert Murphy, a railroad police officer, who asked him to get into his car. Tr. 75. Murphy asked Hahn about the incidents from November 10, 17 and 18, 2015. Tr. 76; CX-F; RX-3. Hahn told Murphy he was having a lot of stress and anxiety and that he did not believe Patterson respected him. Tr. 76-77. He testified, "I was told I was to come over to the department and fix things and I've been met with resistance every step of the way." Tr. 77. He told Murphy he was in counseling and that he didn't agree to or want to take this new job in the engineering department. Tr. 77-78. Murphy encouraged Hahn to reach out to Debbie Bourassa in the Human Resources department. Tr. 78. After this interview, Hahn returned to work dumping stone. Tr. 79. Hahn called Bourassa and told him about his anxiety and workload. Tr. 80; RX-8.

She was happy to hear that Hahn was in counseling and offered her help if needed. Tr. 81. Hahn got a note from his counselor and sent it to Bourassa. Tr. 81.

On December 2, 2015, Hahn worked a full day dumping stone and was driving home when he got a call from Gerossie, who asked him to return to the office at Mechanicville. Tr. 82. It took Hahn about an hour to get there and when he arrived the railroad police were there with Gerossie and Matt Keenan, the track supervisor. Tr. 83. Gerossie offered Hahn the opportunity to resign or told him he would be terminated. Tr. 83. Hahn called Bourassa, who told him that the decision was made and he could not return to the transportation department. Tr. 84.

Hahn ultimately decided to resign, but wanted to do an expense report for what he was owed, including mileage, meals and such. Tr. 84. Hahn was trying to do his expense report, but was rushed and testified that he started having a panic attack “because I’m trying to do all this stuff in a hurry.” Tr. 86. Hahn testified that he was walking to his car when the railroad officer “shoved [him] down the ramp from the building.” Tr. 86. Hahn worked on his expense report in his car for a while, but at some point his car doors were opened and he was pushed down in the front seat. Tr. 87. Hahn was informed that his employment had been terminated, and he was taken by a Mechanicville police officer to the police cruiser while Gerossie and Murphy went through his car and his wallet. Tr. 87-88. He was taken to the Mechanicville police station, where he was held for two hours before his then wife came to pick him up. Tr. 88. Hahn had another panic attack in the jail cell for which he was transported to the Saratoga Hospital for a mental evaluation. Tr. 89; CX-C at 25-40. His wife went to the railroad to get his car and picked him up from the hospital. Tr. 89.

In retrospect, Hahn believes that he was retaliated against based on his derailment investigation. Tr. 90-91. He testified:

They allow me to continue to work under all of these alleged things I had done, and all at once twenty-four hours after I submit a derailment investigation, which the Vice President of Engineering specifically called the track employees to fix it, so I couldn’t find what was wrong . . . I feel that the carrier’s investigation into me was based on retaliation for my findings in the derailment on November 29<sup>th</sup> of 2015 when the vice-president of engineering essentially called people to cover that derailment.

Tr. 90-91.

## *2. Testimony of John Steininger*

Steininger was Vice President of Transportation at Pan Am during the relevant time periods. Tr. 101. He worked with Hahn and testified that he had never had any conflict with him. Tr. 101-02. Steininger testified Hahn always did his job as Trainmaster to the fullest and that he was happy with Hahn’s performance. Tr. 102-03. He never felt threatened by Hahn. Tr. 106. Steininger also testified that Raven had considered Hahn as a replacement for Gerossie and Levasseur in the Engineering Department. Tr. 105-06; CX-G.

### *3. Testimony of David Nagy*

In 2015, Nagy was the Executive Director of Safety and Security at Pan Am. Tr. 108. Nagy oversaw the Safety Department for Pan Am, including the investigation of derailments on tracks owned and operated by Pan Am. Tr. 108-09. Nagy described the derailment investigation protocol:

the Safety Department is the reporting department for the FRA [Federal Railroad Administration] on derailment. So when a derailment happens. . . the different departments, transportation, engineering and mechanical, and safety at times as well goes out and looks at the derailment. . . Each head of the department in that area can investigate and look at the derailment, and then come up with a cost and a cause and the full cost and cause, then come to the Safety Department, and when I tally them all up, if the cost is over the reportable amount of a derailment then it becomes reportable. If it's not, it just becomes accountable. And then if the cause is all four the same, then that's the cause [of the derailment]. If there is any stipulation or difference. . . from one department to another, then it's my job to get them together and try to determine what the actual cause is.

Tr. 109. Next, if the derailment is above the reportable limit of \$10,700, it is submitted to the Federal Railroad Administration and, if not, it stays in the file for when the FRA does an audit of the Pan Am Safety Department. Tr. 109-110.

Nagy was not involved in the two derailment investigations in question, but had recently reviewed the Safety Department's files—on October 2, 2015, and during the week of November 29, 2015. Tr. 110-11. Nagy testified that the October 2, 2015, derailment did not meet the reportable limit and that Wallace's opinion was decisive because the derailment had been caused by an engineering problem. Tr. 111. Nagy testified that there was actually no derailment on November 29, 2015, but that there was a "roll rail" and that cars did not actually derail. He said, "They stayed on the roll rails and then re-railed themselves back on the regular rails." Tr. 111-12. Since there was no derailment, the November 29, 2015 incident was not reportable to the FRA. Tr. 111-12. Nagy testified that no report was created and only the Engineering Department was involved because "they repair the track with the broken rail that rolled over." Tr. 112.

In December 2015, Nagy was asked by Patterson to look into Hahn's alleged threats to other employees. Tr. 113. During this time, Nagy was not aware of Hahn's October 2 or November 29, 2015 derailment investigations. Tr. 113, 124-25. In reviewing materials for this case, Nagy later saw Hahn's emails to his superiors about his derailment investigations for the first time. Tr. 124-25. Nagy's investigation included review of statements from Gerossie, Matt Keenan, another Pan Am employee, and Murphy's interview of Hahn. Tr. 114; RX-3. According to Nagy, the investigation had nothing to do with Hahn's two derailment investigations. Tr. 114-15. Nagy concluded that Hahn had violated three specific Pan Am Safety Rules: PGR-A, PGR-B, PGR-C and PGR-L. Tr. 116-117; CX-N.

Nagy testified that Hahn's violation of PGR-C and PGR-L was the reason he was terminated. Tr. 117. PGR-C states, "Employees must devote themselves exclusively to the

Company's service while on duty. . . . Any act of insubordination, hostility or willful disregard of the Company's interests will not be condoned and is sufficient cause for dismissal." CX-N at 1. PCR-L states, "Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in department and who are careless of the safety to themselves or of others will not be retained in the service." CX-N at 2.

After his investigation, Nagy met with Cindi Scarano and Deborah Bourassa from Human Resources. Tr. 119. The three collectively decided it was in the best interest of Pan Am to allow Hahn to resign, or if he would not, to terminate his employment. Tr. 119. According to Nagy, this decision was based on Hahn's quarrelsome nature and threats to other employees, not because of his two derailment investigations. Tr. 120-21. Additionally, Nagy testified that Officer's Murphy's report indicated that Hahn had issues communicating directly with his supervisors, Gerossie and Keenan and, instead, went over their heads to Wallace, Sheahan and Steininger. This, Nagy said, also influenced the decision to terminate his employment. Tr. 134.

#### *4. Testimony of Harold Raven*

In 2015, Raven was the Superintendent of Transportation for Pan Am and was Hahn's supervisor when he worked for the Transportation Department. Tr. 150. Raven never felt threatened by Hahn. Tr. 152.

#### *5. Testimony of John Dietz*

John Dietz was the Director of Operating Rules in 2015. Tr. 157. His job entailed maintaining the timetable and rulebook, teaching classes and issuing bulletins. Tr. 157. Hahn took Dietz's General Code of Operating Rules and Northeast Operating Rules Advisory Committee classes. Tr. 158. Dietz thought Hahn was a good student and tested well. Tr. 158. In fact, he testified Hahn got a perfect score on the signals test. Tr. 158. Dietz was impressed by Hahn's performance of field tests and thought he acted professionally. Tr. 160-61.

#### *6. Testimony of Malcom Holden*

Holden was the Trainmaster in Ayer, Massachusetts in 2015. Tr. 163. Holden did not recall much about the alleged October 2, 2015 derailment. Tr. 163-171.

#### *7. Testimony of Deborah Bourassa*

Deborah Bourassa was the Director of Personnel Administration for Pan Am during the relevant time period. Tr. 173. Bourassa testified at the formal hearing and provided a voluntary statement to the Boston and Maine Railroad Police on January 28, 2016. Tr. 173-89; RX-5. Bourassa first directly interacted with Hahn on November 5<sup>th</sup> or 6<sup>th</sup>, 2015, at a supervisor training, where she went over drug and alcohol testing, post-accident testing and other supervisory responsibilities. Tr. 174; CX-L. It was at this time, Hahn told Bourassa that he was unsure if he was going to accept the position in the Engineering Department. Tr. 176-177. The second and only other time Bourassa interacted with Hahn personally was by telephone on

December 1, 2015, when they spoke for 38 minutes, according to the phone records. Tr. 177-78, 185-86; CX-L; RX-5; RX-8.

On December 4, 2015, Bourassa received a note from Hahn's counselor. Tr. 180-81; CX-C at 26; CX-R. On December 1, 2015, before 11:40 AM, Bourassa knew that Hahn was going to be let go from Pan Am. Tr. 183. On December 2, 2015, at 2:52 PM, Bourassa responded to an email from Hahn indicating she had not received his doctor's note and asking him to re-fax it. Tr. 181-83; CX-R at 35. Bourassa testified that she had told Hahn to fax the note because she knew that he had not been notified about his termination yet. Tr. 183-84.

Bourassa testified that Hahn was fired based on solely his behavior and his actions. Tr. 188. She stated that, in the decision to terminate his employment, there was no discussion about Hahn's involvement with any derailments or potential derailments, or the fact that he was in counseling. Tr. 188-90. Bourassa stated that she keeps records of her interactions with employees, but could not find a record of her conversation with Hahn on December 1, 2015, which happened outside of her normal business hours. Tr. 189.

#### *8. Testimony of Jeff Gerossie*

Jeff Gerossie was the Superintendent of Track West at Pan Am, based in East Deerfield, MA in 2015. Tr. 193. Gerossie worked for Melody Sheahan, who was then Vice President of Engineering. Tr. 195. Gerossie testified at the formal hearing and provided a voluntary statement to the Boston and Maine Railroad Police on December 4, 2015. RX-4. He also provided a statement regarding incidents involving Hahn. RX-11.

On November 10, 2015, Hahn asked for more track time from Steininger, his old boss. This was Hahn's first day in engineering and Gerossie explained the only reason he would call his old boss to ask for more track time was "because he knew he was supposed to clear up so clearly he was lying." RX-11.

Gerossie testified about the meeting on November 17, 2015, where Hahn, Wallace and Patterson were present. Tr. 200. He described Hahn as angry and visibly agitated. Tr. 200, 208. He testified that Hahn stood up and sat down repeatedly in the meeting, and boasted that he had an engineer's license, so he did not need the job in the Engineering Department. Tr. 208; RX-11. According to Gerossie, Hahn called him and Patterson "a bunch of do-nothings." Tr. 208. He also testified that Hahn had made a gesture as if to punch the wall, and was so upset that "he could not see straight." Tr. 209; RX-11.

Gerossie said that, at another point, not in the meeting, Hahn told Gerossie that he wanted to punch Patterson in the face. Tr. 211. Additionally, Gerossie testified that Erick Harrington, a track foreman, called him because he was very upset based on his interaction with Hahn, but admitted that he was not afraid of Hahn. Tr. 209, 212. Still, Gerossie testified that Hahn did a good job overall, showed up to work on time, followed the safety rules and otherwise communicated professionally. Tr. 206. Gerossie was present for Hahn's termination of employment. RX-4.

### *9. Testimony of Andrew Jacobs*

Andrew Jacobs was the General Manager of Pan Am Southern during the relevant time period in 2015. Tr. 225. Jacobs testified that he never felt fearful of Hahn. Tr. 225.

### *10. Testimony of Matthew Keenan*

Matthew Keenan worked in Mechanicville, New York, as a West End Track Supervisor during the relevant time period in 2015. Tr. 231-32. His role at Pan Am put him in charge of “all the crews on a day-to-day basis, whether it be track inspections, track maintenance, FRA inspections, DOT inspections, everything that goes along with the track constructors.” Tr. 232. Keenan testified at the formal hearing and was deposed by the Boston and Maine Railroad Police Department. Tr. 231-34; RX-6. He also wrote a statement dated November 30, 2015, and sent it to Respondent. RX-2.

Keenan testified that on November 18, 2015, Hahn came to the Ferry Street Crossing where Keenan was working with his crew. Tr. 232-33. Keenan believed Hahn was “pissed off” and “was just yelling at the guys. Just nothing professional about it, just constantly bashing them and running around and throwing his weight around and being a hothead.” Tr. 233. Keenan testified, “One of my guys tried to calm him down and tried to shake the guy’s hand, and he refused.” Tr. 233. On that same day, Hahn told Keenan about the meeting he had with Gerossie, Wallace and Patterson on November 17, 2015, and said: “he wanted to jump across the table and kill them at the meeting. . . he couldn’t stand them.” Tr. 234; RX-2, RX-11. Keenan also heard Hahn say that he hoped to get fired so he could strangle Patterson. Tr. 234; RX-2; RX-6. Keenan was present when Hahn was terminated and described the encounter in his deposition with the Railroad Police. RX-6.

### *11. Testimony of William Wallace*

In November 2015, Wallace was Superintendent of Track at Pan Am. Tr. 248. During this time period, Wallace was one of Hahn’s supervisors Tr. 249. Wallace recalled the meeting with Hahn on November 17, 2015, and explained that the purpose of the meeting was to “discuss finishing up certain projects before the ground freezes, to discuss communication . . . and coming up with a plan to finish the work that we needed to get done.” Tr. 249-50. Wallace testified that “[i]t was rocky and confrontational,” as soon as Hahn began working in the Engineering Department. Tr. 250. At the meeting, Wallace characterized Hahn as “agitated”; he said Hahn was talking over everyone, interrupting and standing up. Tr. 250-51. Wallace said he did not believe the meeting was productive and he cut it short. Tr. 251. Wallace testified that Hahn said he did not need this job because he was a certified engineer, so Wallace told him he would accept Hahn’s resignation. Tr. 251.

Wallace did not think Hahn’s behavior at the meeting was professional. Tr. 252. After the meeting, he said, Hahn openly discussed that he did not want to be in the Engineering Department. Tr. 253. After the meeting, Hahn sent an apology to Wallace by text message, but Wallace did not believe it to be genuine because he had never seen behavior like that from an employee to their supervisors. Tr. 260-61; RX-12.

Prior to the meeting on November 17, 2015, Wallace wrote an email on November 12, 2015, reminding his inferiors to follow the proper chain of command. CX-G at 24. Hahn wrote back, "I know this was directed at me but I am very frustrated and not very happy with my change in employment status. I hope things will work out, but I have a headache for three days and have not been sleeping well. Sorry." CX-G at 24. Wallace followed up his email with an email to Sheahan explaining that this email was, in fact, directed at Hahn because he had been complaining to Patterson about the Engineering Department. CX-G at 25.

Wallace was aware of Hahn's involvement in investigating derailments on October 2, 2015 and on November 29, 2015. Tr. 262. Wallace thought it made sense and was part of Hahn's job for Hahn to go and check out each derailment. Tr. 263.

## **C. Documentary Evidence**

### *1. Hahn's Derailment Investigations*

Hahn wrote various emails about the first derailment that happened on October 2, 2015. CX-G. On October 2, 2015, at 2:37 PM, Hahn wrote an email to Raven about his derailment investigation, to which he attached pictures. CX-G at 9, 20-21. Hahn wrote, "Pictures of POD [point of derailment] showing last wheelset still on rail, cause of derailment attributed to wide gauge, insufficient gauge side fasteners and defective ties." CX-G at 9. At 2:55 PM on the same day, Hahn wrote another email to Raven explaining that a close up of the point of derailment shows "tell tale marks of drop in acct wide gauge." CX-G at 14. Hahn sent two more emails with pictures and his opinion about the derailment. CX-G at 15-18. Raven sent Hahn's findings and pictures to Steininger, Jacobs and Sheahan. CX-G at 19. Raven praised Hahn saying "I love a trainmaster that carries level boards in his trunk." CX-G at 19. He also said, "Paul [Levasseur] was less than pleased at his findings. I did not find 'rain and soft ground' to be an acceptable answer." CX-G at 19.

On November 29, 2015, Hahn sent emails to Wallace, Patterson and Gerossie about the second derailment he investigated, this time while assigned to the Engineering Department. CX-G at 22-41. At 4:14 PM, Hahn sent an email to Wallace, Raven, Patterson and Jacobs describing his findings after the derailment investigation. CX-G at 22-23. Hahn explained that the "derailment can be attributed to insufficient effective switch timbers in the frog/guard area... It is recommended to install new or good quality relay switch timbers in this area and bring the gauge in to compliance without issues of pushing in deteriorated or spike killed timbers." CX-G at 23-24.

### *2. Pan Am's Investigation by Officer Murphy*

On December 1, 2015, Officer Murphy interviewed Hahn and recorded it. RX-3; CX-F. Murphy explained that Hahn did not have to answer his questions, but that he was looking into circumstances when Hahn first started working in the Engineering Department. RX-3 at 2-3. Murphy characterized this interview as "informal." RX-3 at 4. First, Murphy asked about November 10, 2015, when Hahn was with a crew picking up ties. RX-3 at 4-5. According to the

report, Hahn told Murphy that, at 5:27 PM, Sheahan had called him and told him he was supposed to be off the track at 5 PM. RX-3 at 5. Hahn explained that Steininger, his boss from the Transportation Department, told him he could be out there until 6 PM and that he had called Raven and Gerossie to ask for additional time, but did not get a call back until 5:45 PM. RX-3 at 5.

Murphy next asked about the meeting on November 17, 2015. RX-3 at 6. Hahn told Murphy that there was not a confrontation and characterized it as “a little more elevated” than their interview tone. RX-3 at 7. Hahn further explained that, at the meeting, he had made clear that he did not want to be in the Engineering Department and would like to return to the Transportation Department. RX-3 at 7-8. Hahn told Murphy that he was so mad at the meeting that his vision was blurred. RX-3 at 10. Murphy encouraged Hahn to call Bourassa and to give a letter to the Human Resources Department which showed he was in counseling. RX-3 at 8, 12.

Officer Murphy also wrote a report about Hahn’s termination of employment. RX-9. Murphy explained that Hahn had been given the option to resign or be terminated. RX-9 at 1. Murphy said that he felt unsafe and explained that Hahn did not listen to him during his exit. RX-9 at 2. Murphy stated that Hahn became so uncooperative that Murphy arrested him. RX-9 at 3. Murphy stated that, during the encounter, Hahn had reached for Murphy’s hand gun and told Murphy to “shoot him”; Murphy called the Mechanicville Police Department for backup. RX-9 at 3. Murphy said Hahn fought with the police officers for two to three minutes before he was finally placed in restraints. RX-9 at 3. Murphy then drove Hahn to Glen Falls Hospital for a medical evaluation. RX-9 at 4; CX-C at 32-37.

### III. CONCLUSIONS OF LAW

#### A. Legal Standard

Under 49 U.S.C. § 20109, “[a] railroad carrier engaged in interstate or foreign commerce . . . 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 activity. 49 U.S.C. § 20109. A claim brought within this section is analyzed under the two-step burden shifting framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”). 49 U.S.C. § 20109(d)(2)(A)(i). Using the AIR-21 standard, a complainant must first prove by a preponderance of the evidence that (1) he engaged in a protected activity, as defined by the FRSA; (2) he suffered an adverse action; and (3) his protected activity contributed, in whole or in part, to the adverse action taken against him. *See Palmer*, ARB No. 16-035, slip op. at 16, n. 74; *see also Johnson v. BNSF Ry. Co.*, ARB No. 14-083, ALJ No. 2013-FRS-059, slip op. at 3 (ARB June 1, 2016); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014); *Araujo*, 708 F.3d at 157. If a complainant proves that a respondent retaliated against him, due whole or in part to the protected activity, then a respondent can only escape liability by presenting clear and convincing evidence it would have acted the same regardless. *Palmer*, ARB No. 16-035, slip op. at 52-53, 56-57. The issues before the Court are, therefore: (1) whether Hahn engaged in protected activity under the FRSA; (2) whether Hahn suffered an unfavorable personnel action; and (3) assuming the first two elements are found, whether the protected activity was a contributing factor in the unfavorable personnel action. If Hahn has met that

standard, the burden will shift to Pan Am to show that it would have taken the same adverse action against Hahn absent the protected activity. ALJX-3.

## **B. Hahn's Case for Retaliation**

### *1. Adverse Action*

On December 2, 2015, Hahn's employment with Pan Am was terminated and the Parties stipulate to this fact. ALJX-3. The termination is an adverse action under the Act, and the second prong of Hahn's case is, therefore, met. The elements remaining under Hahn's burden are whether or not he engaged in protected activity and whether this protected activity resulted in his termination. The Court will look at each.

### *2. Protected Activity*

Hahn argues he engaged in protected activity under 49 U.S.C. § 20109(a)(1), which states:

[it is protected] to provide information, directly cause information provided, or otherwise directly assist in any investigation regard any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety and security, if 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...

...

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

49 U.S.C. § 20109(a)(1)(A)-(C).

As a threshold matter, Pan Am argues this claim does not fall within the whistleblower provisions of the FRSA because no information was provided to "a Federal, State, or local regulatory or law enforcement agency." (Resp. Brief at 10); 49 U.S.C. § 20109(a)(1)(A). This argument holds no weight as 49 U.S.C. § 20109(a)(1)(C) explains that information provided to a supervisor, "who has the authority to investigate, discover, or terminate the misconduct," constitutes protected activity. 49 U.S.C. § 20109(a)(1)(C). In this case, Hahn provided information related to his derailment investigations to his supervisors. ALJX-3; CX-G at 9- 41.

Pan Am next argues that Hahn did not engage in protected activity. Pan Am argues that Hahn's October 2, 2015, derailment investigation, did not trigger any FRA reporting requirements and his November 29, 2015, derailment investigation was also not a reportable derailment. Resp. Brief at 10. Pan Am argues, "Hahn's investigations did not actually yield information or assistance to any FRA investigation and necessarily would not have done so

because the underlying events never triggered FRA oversight in the first place.” Resp. Brief at 10-11.

Hahn counters that his activity in the derailment investigations were protected, and specifically, his actions on November 29, 2015. Compl. Brief at 12-14. Hahn argues that his November 29, 2015, derailment investigation at the Ayer, Massachusetts, yard “showed neglect on Pan Am’s part for upholding standards,” outlined in 49 C.F.R. § 213.109.05. Tr. 32; Compl. Brief at 13.

In this matter, Hahn is found to be credible in that he subjectively believed he was engaging in protected activity when he performed the derailment investigation on October 2, 2015, and November 29, 2015. As required by the FRSA to establish protected activity, Hahn reported his investigations of the two derailments to his superiors, namely Raven, Wallace, Patterson and Gerossie, by email. ALJX-3; CX-G at 9-41. While these investigations did not trigger specific enforcement actions, Hahn reported his findings of these derailment investigations in good faith, and they, therefore, constitute protected activity under the FRSA. The Court next looks at whether the protected activity contributed to Pan Am’s termination of Hahn’s employment.

### 3. *Contributory Factor*

The final element in a retaliation complaint under the FRSA is contribution. To establish this element, a complainant must show by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action. *Araujo v. N.J. Transit Rail Oper.*, 708 F.3d 152, 157 (3d Cir. 2013); *Palmer v. Canadian Nat’l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 18 (ARB Sept. 30, 2016), *reissued* Jan. 4, 2017 (en banc). A contributing factor is *any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision. *Palmer*, ARB No. 16-035, slip op. at 53 (emphasis in original). The ARB has held that this is a relatively low standard for the employee to meet, explaining that “[a]ny factor really means *any* factor. It need not be significant, motivating, substantial or predominant.” *Palmer*, ARB No. 16-035, slip op. at 53 (internal quotation marks omitted). Essentially, the protected activity need only play some role, and even an insignificant or insubstantial role suffices. *Id.*

A complainant can connect his protected activity to the adverse action either directly or indirectly through circumstantial evidence. *Araujo*, 708 F.3d at 157; *Williams*, ARB No. 09-092 at 6; *DeFrancesco*, ARB No. 10-114 at 6-7; 29 C.F.R. § 1984.104(e)(3). Direct evidence conclusively links the protected activity and the adverse action and does not rely upon inference. *Williams*, ARB No. 09-092 at 6 (*citing Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114 at 6. A complainant may also rely upon circumstantial, or indirect, evidence, which may include “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 a complainant after he or she engages in protected activity.” *DeFrancesco*, ARB No. 10-114 at 7; *Bechtel v. Competitive Technologies*, ARB No.

09-05, ALJ No. 2005-SOX-00033, PDF at 13 n.69 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011); 29 C.F.R. § 1984.104(e)(3). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057 at 13-14. This is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (quoting *Sylvester v. SOS Children’s Vills. Ill.*, 453 F.3d 900, 903 (7th Cir. 2006)). When considering direct or circumstantial evidence, the ALJ must make a factual determination based on all of the relevant, admissible evidence and must be persuaded that it is more likely than not that the complainant’s protected activity played some role in the adverse action. See *Palmer*, ARB No. 16-035, slip op. at 17-18, 55-56.

Where an employer suggests the only reasons for its adverse actions were nonretaliatory reasons, the ALJ must take the nonretaliatory reasons into consideration. *Id.* at 53, 55. However, in order to establish the contributing factor element, a complainant does not necessarily need to prove that the respondent’s articulated reason for the adverse action was a pretext, because a complainant alternatively can prevail by showing that “the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Bechtel*, ARB No. 09-052 at 12. “Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.” *Palmer*, ARB No. 16-035 at 53.

To begin, there is limited, if any, direct evidence suggesting that Pan Am considered Hahn’s derailment investigations in their termination decision. The only person to address the question directly was Nagy, who investigated complaints of Hahn’s behavior and threats, and credibly testified that he did not know about the two derailment investigations until after his investigation and Hahn’s termination. Tr. 124-25. He stated that the derailments played no part in his decision to terminate Hahn’s employment. Tr. 117. Conversely, the individuals who received the reports of the derailment investigations—Raven, Wallace, Patterson and Gerossie—did not testify that the information they received about the investigations had any effect on Hahn’s termination, and Bourassa, from Human Resources, also did not testify directly to any connection.

The Court must then turn to examine any circumstantial evidence linking the protected activity to the employment decision. One aspect of the case that works, at least partially, in Hahn’s favor is temporal proximity. Temporal proximity between the protected action and the adverse action is one form of acceptable circumstantial evidence in the contributory factor analysis. *Bechtel v. Competitive Technologies*, ARB No. 09-052, ALJ No. 2005-SOX-00033, slip op. at 13 &n. 69 (ARB Sept. 30, 2011). The AIR-21 framework does not contain a *per se* knowledge/timing rule, and the temporal proximity inference to contribution is permissive, not mandatory. *Palmer*, ARB No. 16-035, slip op. at 55-56. The ARB has, however, held that “[w]hile not always dispositive, the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation.” *Smith v. Duke Energy Carolinas*, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 7 (ARB June 20, 2012). The ARB has explained the context surrounding a claim is a significant factor in determining whether a temporally

proximate relationship exists between the protected activity and adverse action. *Franchini v. Argonne Nat'l. Lab.*, ARB No. 11-006, 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012).

The timeline of relevant events is as follows:

- October 2, 2015: Hahn investigated a derailment and sent emails with his evaluations and pictures to Raven. CX-G at 9, 14-18, 20-21.
- October 20, 2015: Hahn was offered the position as Assistant Superintendent of Engineering, and started work in this position a couple of weeks after.
- November 12, 2015: Wallace emailed subordinates and reminded them to follow their proper chain of command. CX-G at 24. Both Hahn and Wallace testified that this email was taken as primarily directed at Hahn.
- November 17, 2015: Hahn met with Wallace, Patterson and Gerossie to discuss Hahn's plans for the West End of the railroad. All of the participants describe the meeting as becoming heated; Wallace described Hahn as "agitated" and Gerossie described Hahn's behavior in the meeting as unprofessional. Tr. 45-47, 200, 208, 211, 250-51.
- November 18, 2015: Hahn was at the Ferry Street Crossing. Keenan described Hahn as "pissed off," yelling and acting unprofessionally at the scene. Tr. 233.
- November 29, 2015: A derailment occurred in Ayer Yard. Hahn drove three hours to the derailment and worked all day. Tr. 61-62, 72-73. He sent emails to Wallace, Patterson and Gerossie about this derailment with his evaluations. CX-G at 22-24.
- November 30, 2015: (Monday) At 2 AM, Hahn was called into work at Mechanicville and worked through the night. Hahn did not show up for work on Monday morning, though he was instructed to do so by Patterson. Tr. 71-73.
- December 1, 2015: Hahn worked dumping stone in Rotterdam and was interviewed by Officer Murphy. Tr. 75-79. Hahn called Bourassa and told her about his anxiety and workload. Tr. 80; RX-8.
- December 2, 2015: At the end of the day, Gerossie called Hahn and asked him to return to the office in Mechanicville. Tr. 82. Hahn was asked to provide his resignation or have his employment terminated. Tr. 83. Hahn was ultimately terminated from employment; Murphy described Hahn as uncooperative, leading to Hahn's arrest. Tr. 84-88; RX-9 at 3. Hahn was taken to the hospital for evaluation. Tr. 89.
- December 4, 2015: Bourassa received a note from Hahn's counselor. Tr. 180-81; CX-C at 26.

Hahn's protected activity, the two derailment investigations, took place on October 2, 2015 and November 29, 2015. Hahn's employment was terminated on December 2, 2015. The first investigation was two months before the termination, so by pure passage of time, this suggests much less potential connection between the two. Furthermore, he was offered a new job in the meantime, and there were no complaints or conflicts up until that time. Steininger and

Raven, Hahn's supervisory chain at the time, described Hahn's work as excellent and neither felt threatened or testified about any inappropriate or unprofessional behavior by Hahn.

The second derailment investigation was closer in time to his termination—only a few days before—so is a more likely candidate to have an effect on the decision. However, by this time, Hahn was well into his time at the Engineering Department, where it is clear that there were issues arising between Hahn and some of the other individuals in that department. The investigation also came after the November 17<sup>th</sup> meeting, which was a large focus of Pan Am's criteria for terminating Hahn's employment, and makes the overall situation more complex, and less likely to have a direct connection.

The Court understands Hahn's perception of the situation, and why it could be taken as pretextual. The testimony was otherwise unanimous that Hahn was very well-qualified, very knowledgeable and very competent at his job. He had had over 20 years' experience in the industry before coming to Pan Am, and he passed his qualification and field tests with flying colors. But from early on, he testified, he felt prejudged and unliked in the Engineering Department, and if he was called on by his superiors to "fix things" in the Department, it is easy to see how there could have been tension and conflict from both sides. He tried a number of times to leave the Engineering Department and go back to his old position, to no avail.

That said, there is evidence, some corroborated by Hahn himself, that supports Pan Am's position. Hahn was perceived by a number of others as having acted unprofessionally, including at the November 17, 2015, meeting with Wallace, Patterson and Gerossie; and at the Ferry Street Crossing on November 18, 2015. His behavior was described as agitated, confrontational and angry. Tr. 200, 208, 250-251. At least one person said he made a gesture as if to punch a wall and explained he was so upset he could not see straight. Tr. 209; RX-11. Hahn himself admits that the November 17<sup>th</sup> meeting got heated, and was more intense than a typical conversational meeting. On November 18, 2015, at the Ferry Street Crossing, there were reports of Hahn acting unprofessionally. Tr. 233. The internal investigation led to the conclusion that Hahn had violated Pan Am's safety and conduct rules.

While Pan Am did have evidence of unprofessional behavior to base its decision on, the Court does want to point out that it will not go so far as to give credence to Pan Am's overblowing of statements like "I wanted to jump across the table and kill them..." or "I could strangle him..." into potential violence. After listening to the testimony, to the Court, these statements seemed to be made in the vein of hyperbole, born out of anger and frustration, rather than as true threats or with intent to cause physical harm to someone. Plenty of people—likely most people—who use similar phrases do so with no actual threat of violence, and that seemed to be the case here.

Unfortunately for Hahn, none of this connects the protected activity with the termination of employment, even circumstantially. While there was some temporal proximity, and a few indications of pretext, there was never any significant hostility toward Hahn's protected activity, nor a significant change in Pan Am's attitude after the protected activity. There was no evidence that Hahn was treated differently than others who performed similar investigations. Regardless of whether the circumstances were blown out of proportion, or based on personality conflicts, the

change in Pan Am's stance came primarily after the heated November 17<sup>th</sup> meeting, and was added to by several other reports of his behavior that occurred afterwards. This does not add up to a conclusion that, more likely than not, Hahn's protected activity contributed to Pan Am's decision to terminate his employment.

This Court is not here to determine whether or not Pan Am had sufficient "cause" for dismissal, or whether Pan Am's decision was "wise," but rather on the initial, narrower issue of whether his work on the derailment investigations entered into the termination decision. The evidence is not sufficient to show that it did.<sup>3</sup>

### **C. Conclusion**

In summary, Complainant has failed to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in Respondent's decision to terminate his employment. Accordingly, Respondent is not liable under the FRSA, and Complainant's May 28, 2016 complaint will be dismissed.

### **ORDER**

For the reasons set forth above, it is hereby **ORDERED** that Complainant's May 28, 2016 complaint is **DISMISSED**.

**SO ORDERED.**

**JERRY R. DeMAIO**  
Administrative Law Judge

Boston, Massachusetts

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<sup>3</sup> There was also a thread of discussion, addressed at the hearing, that some aspect of the termination may have violated the Americans with Disabilities Act ("ADA") as it related to Hahn's mental health counselling. As the Court discussed with the Parties, the Court does not have jurisdiction to determine if there was a violation of the ADA and does not address it here. The Court considered the fact of the counseling to the extent that it was relevant to the case before it.