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Office of Administrative Law Judges
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Issue Date: 29 April 2020

Case No.: 2018-FRS-00069

In the Matter of:

JEROME YELDER,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

Appearances:

Eric Holland, Esq.
Carl Kessinger, Esq.
Holland Law Firm
St. Louis, MO
For the Complainant

Joseph Devine, Esq.
Samuel Endicott, Esq.
Baker & Hosteller, LLP
Columbus, OH
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER

This claim arises under the employee-protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C. § 20109, and its implementing regulations at 29 C.F.R. Part 1982. Complainant, Jerome Yelder, alleges that Respondent, Norfolk Southern Railway Company (NS), retaliated against him in violation of the FRSA's employee-protection provisions. Specifically, Yelder alleges that NS took him out of service and terminated his employment because he reported (1) the conduct of a van driver hired to transport him, which was a hazardous safety or security condition, and (2) a psychological injury arising out of his interaction with the van driver. NS asserts that it took Yelder out of service and terminated his employment for striking the van driver.

I conducted an on-the-record prehearing telephone conference on October 25, 2019, and a formal hearing in Detroit, Michigan on October 29 and 30, 2019. All parties were represented by counsel and afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.¹ I admitted in evidence without objection Joint exhibits (JX) 1-14, Complainant's exhibits (CX) 11-15, 17, 24, and 25, and Respondent's exhibits (RX) 3-10, 12-13, 19, and 21-22. (telephone conference transcript (TCTr.) 6; hearing transcript (Tr.) 503-506, 509, 511.) CX 23 was admitted in evidence over NS's objection. (Tr. 509, 511.) RX 2, 11, and 15 were admitted in evidence over Yelder's objections. (Tr. 503-506.) Further, I accepted various joint stipulations and took official notice of pages 46 and 47 of the Federal Rail Administration (FRA) Guide for Preparing Accident/Incident Reports published May 23, 2011. (TCTr. 5-6, 22.)

The record was left open for the parties to submit certain deposition testimony with exhibits, which they did. By Order issued December 12, 2019, I admitted in evidence CX 18, including subparts, and CX 27, including subparts A-D.² By Order issued January 8, 2020, I admitted in evidence: (1) Dr. Cindy Devassy's deposition transcript, including exhibits thereto, subject to the objections sustained by such Order; and (2) April Danford's deposition transcript without any exhibits, subject to any objections sustained by such Order. The parties submitted closing briefs. The record is closed.³

In reaching a decision, unless noted otherwise herein, I reviewed and considered all the parties' stipulations, testimony and exhibits admitted in evidence, and the parties' arguments.⁴

¹ 29 C.F.R. Part 18, subpart A.

² I sustained NS's objection to subpart E of CX 27. That subpart was not admitted in evidence.

³ Federal appellate jurisdiction of FRSA cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation. 29 C.F.R. § 1982.112. Because the factual circumstances giving rise to the claim occurred within Ohio and/or Michigan, I will apply the law of the United States Court of Appeals for the Sixth Circuit.

⁴ On March 20, 2020, NS filed a Notice of Supplemental Authority or, in the Alternative, Motion to Reopen the Record to Accept U.S. District Court Judge Berg's Order into Evidence. On April 15, 2020, Yelder filed a Response in Opposition. The Response is timely as all procedural deadlines are suspended and tolled until at least June 1, 2020. See Supplemental Administrative Order and Notice, *In Re: SUSPENSION OF HEARINGS AND PROCEDURAL DEADLINES DUE TO COVID-19 PANDEMIC*, Case No. 2020-MIS-6, issued by the Office of Administrative Law Judges on April 10, 2020.

In NS's Notice/Motion, NS provides notice that United States District Judge Terrence Berg granted NS summary judgement against Yelder in his race discrimination lawsuit in the United States District Court, Eastern District of Michigan, Case No. 2:18-CV-10576-TGB, on March 6, 2020. NS asks that I take judicial notice of Judge Berg's holdings that NS conducted a reasonable investigation, had a honest belief that Yelder violated NS's policy, and terminated Yelder for doing so. Further, NS asserts that under the doctrine of issue preclusion, such holdings by Judge Berg foreclose successive litigation on these issues. Alternatively, NS requests that I reopen the record to introduce Judge Berg's decision in evidence. Yelder argues that issue preclusion does not apply because Judge Berg's finding regarding NS having a honest belief that Yelder violated NS's policy was dicta; it was not essential or necessary to Judge Berg's summary judgment.

“Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Abbs v. Con-Way Freight, Inc.*, ARB No. 08-017, ALJ No. 2007-STA-37, PDF at 9, 2010 WL 3031374, *5 (July 27, 2010) (citing *Montana*, 440 U.S. 147, 153 (1979), citing, inter alia, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). “A prior court resolution has preclusive effect when the following four elements are satisfied: (1) the precise issue raised in the present case was raised and actually litigated

I. PROCEDURAL HISTORY

On September 26, 2017, Yelder filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that NS terminated his employment in retaliation for protected activity under the FRSA. (*See Compl.*) On April 13, 2018, the OSHA issued a determination that there is no reasonable cause to believe that NS violated the FRSA. (JX 12.) On April 27, 2018, Yelder requested a hearing before the OALJ.

II. THE FEDERAL RAIL SAFETY ACT

The FRSA was enacted “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”⁵ The FRSA provides, in pertinent part:

(a) In General.-A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, **good faith act** done, or perceived by the employer to have been done or about to be done-

* * *

(4) **to notify, or attempt to notify, the railroad carrier** or the Secretary of Transportation **of a work-related personal injury** or work-related illness of an employee;

(b) Hazardous Safety or Security Conditions.-**(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad**

in the prior proceeding; (2) determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.” *Id.* (citing *Montana*, 440 U.S. at 153-154; *Parklane Hosiery*, 439 U.S. at 328, 332; *Quinlan*, 2010 WL 1565473, slip op. at 4, citing *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997) (*en banc*) (quoting *Detroit Police Officers Ass’n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987))).

Although I appreciate NS bringing Judge Berg’s decision to my attention, NS’s motion to find that Judge Berg’s decision has preclusive effect in this proceeding and reopen the evidentiary record is denied for multiple reasons. First, this proceeding is not successive or prior litigation. According to Judge Berg’s case number, 2:18-CV-10576-TGB, the case before him likely was filed in 2018, after Yelder filed his claim with the OSHA in September 2017. Second, this proceeding was fully tried with all evidence submitted before Judge Berg issued his decision. Accordingly, applying the principal of issue preclusion here would not serve any purpose behind such principal, except perhaps the theoretical purpose of avoiding conflicting judicial decisions. Third, Yelder is correct, Judge Berg did not have to reach the issue of whether NS had a honest belief that Yelder violated NS’s policy. That finding was dicta since Judge Berg determined that Yelder failed to make out a *prima facie* case of retaliation before ever addressing the issue of NS’s honest belief. *Yelder v. Norfolk Southern Ry. Co.*, No. 2:18-CV-10576-TGB, 2020 WL 1083785, *12-13. Accordingly, while I have reviewed Judge Berg’s decision, I give it absolutely no weight in making any of my determinations.

⁵ 49 U.S.C. § 20101.

carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for-

(A) reporting, in good faith, a hazardous safety or security condition;

* * *⁶

“The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).”⁷ For a complainant to prevail under Section 20109, he “must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; (3) and the protected activity was a contributing factor in the unfavorable personnel action.”⁸ If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected activity.⁹¹⁰

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW¹¹

A. Background

Yelder and NS were covered under the FRSA at all relevant times. NS employed Yelder as a Conductor assigned to the Detroit/Toledo (DT) pool. A collective bargaining agreement (CBA) governed the terms and conditions of Yelder’s employment with NS. (Stipulated Facts filed on Oct. 8, 2019 (Stip. F.) ¶¶ 1-3; TCTr. 5-6.)

⁶ 49 U.S.C. § 20109 (emphasis added).

⁷ *Rathburn v. The Belt Ry. Co. of Chicago*, ARB No. 16-036, ALJ No. 2014-FRS-35, PDF at 3 (ARB Dec. 8, 2017) (citing 49 U.S.C. § 42121(b)). “The 2007 FRSA amendment incorporated AIR-21’s burden-of-proof provision, stating ‘any action [under the substantive subsections of the FRSA whistleblower protection provision] shall be governed by the legal burdens of proof set forth in [the AIR-21 whistleblower protection provision].’” *Powers v. Union Pacific R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, 2017 WL 262014, *8 (ARB Jan. 6, 2017) (*en banc*) (citing 49 U.S.C. § 20109(d)(2)(A)).

⁸ 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121 (b)(2)(B)(iii)(iv); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune*, ARB No. 04-037, slip op. at 13). Whether the employer had knowledge of the protected activity is part of the causation analysis in this test. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015).

⁹ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

¹⁰ *Riley v. Dakota, Minnesota & E. R.R. Corp.*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *2 (ARB Jul. 6, 2019).

¹¹ In accordance with *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-13, Slip Op. at 2, n. 3 (Mar. 11, 2019), I have attempted to make tightly focused findings of fact and conclusions of law without summarizing all the evidence. My findings are based on the entire record before me, unless noted otherwise herein. More specific bases for my findings are provided by way of citations to the record and, where necessary, narrative explanation. For the sake of clarity, the information in Sections III.A, B, and C are findings of fact, unless qualified by terms such as “testified,” “argues,” “allegedly,” or the like. Sections III.D, E, and G include findings of fact, explanations of the bases for those findings, and discussions and conclusions of law. Section III.F.3(a) is a discussion of the law with legal conclusions. Section III.F.3(b) is a summary of various testimony and evidence. The remainder of Section III.F includes findings of fact, explanations of the bases for those findings, and discussions and conclusions of law.

B. The April 21, 2017 Incident

On Friday, April 21, 2017, after completing work and clocking out for the day at the NS yard “T” center in Toledo, Ohio, Yelder and Engineer James Jackwak went off duty and got into a Professional Transportation, Inc. (PTI) taxi to go to the Comfort Inn hotel in Maumee, Ohio. The taxi was a Chrysler minivan. NS had contracted with PTI to transport Yelder and Jackwak. Yelder sat in the front passenger seat. Jackwak sat in the rear. (Stip. F. at ¶¶ 4-6; TCTr. 5-6; Tr. 23, 26-30, 68, 299; JX 1; JX 2.)

Yelder believed that the PTI driver was not taking the correct route to the hotel. Yelder asked the driver multiple times where they were headed. He then asked the driver multiple times to stop the van and let him out. At some point during this discussion, Yelder took the radio from the van’s dashboard and called the Maumee Bridge Operator, which is a NS employee responsible for coordinating PTI’s transportation of NS crew members. Yelder reported the situation to the Operator, but did not receive a response. In response to one of Yelder’s later questions, the PTI driver acknowledged hearing Yelder by sinisterly looking at him and speeding up. When the driver did not stop the van, Yelder physically contacted the driver and attempted to grab the steering wheel and stop the van. The driver resisted. At no time did Jackwak verbally or physically intercede. The driver then stopped the van and Yelder and Jackwak exited. (Tr. 32-37, 39, 41, 44, 80, 87-91, 115, 126; *see* Tr. 299-303, 325-26; JX 1; JX 2.)

Yelder retrieved his belongings from the rear of the van. He noticed an individual in a hoodie standing in the vicinity of where the van stopped. He attempted to call the police with his cell phone, but the phone had not powered up. The van departed without Yelder and Jackwak. (Tr. 41-43, 117-18; *see* JX 1; JX 2.)

Subsequently, another PTI vehicle picked up Yelder and Jackwak and took them to their hotel. Yelder reported the incident, including the PTI driver’s behavior and the physical altercation to NS and the Toledo police that day. Yelder reported less of the driver’s behavior to the police than he did to NS. (Tr. 45-46, 48, 52-53, 78; *see* JX 1; JX 2.)

C. NS’s Reaction and Investigation

After having Yelder and Jackwak complete written statements about the incident, NS took Yelder to report the incident to the Toledo police as Yelder requested. NS then pulled Yelder out of service. (Tr. 52-53, 119, 127, 299.)

On April 27, 2017, NS charged Yelder with a violation of Safety Rule 900 – conduct unbecoming of an employee – for striking the PTI driver, attempting to take control of the steering wheel and attempting to operate the brakes of the moving PTI vehicle. (Stip. F. ¶ 7; TCTr. 5-6; Tr. 158-59; RX 7; *see* RX 8; RX 9; RX 10.) NS’s Safety Rule 900 provides:

Employees are to conduct themselves in a professional manner and not engage in behavior or display material that would be considered offensive or inappropriate

by co-workers, customers, or the public. Offensive or inappropriate behavior includes making disparaging remarks, telling jokes or using slurs

(JX 11; Tr. 159-60.)

On May 29, 2017, NS held an investigatory hearing as part of the CBA required investigation into Yelder's conduct. (Stip. F. ¶ 8; TCTr. 5-6.) NS did not bring the PTI driver to testify at the investigatory hearing. (Tr. 55.) During the investigatory hearing, Yelder testified as follows:

Q: Have you experienced any problems since this incident (of April 21, 2017)?

A: Absolutely. I haven't been able to sleep, and the only reason why I'm here is because I did take medications to – that I've been prescribed by my physician to help me sleep. I've had nightmares about being in this van with this driver.

(JX 13 at 80.) NS's hearing officer at the investigatory hearing, Stephen Myrick, heard such testimony. (Tr. 168-69.) Yelder argues that this was his report of psychological injury to NS. (Yelder's Brf. at 9.) Yelder did not otherwise report or attempt to report any injury arising out of the incident to NS before NS terminated his employment. (*See* Tr. 101-02.)

On June 12, 2017, NS terminated Yelder's employment. The Public Law Board (PLB) reinstated Yelder without back pay on January 2, 2019. (Stip. F. ¶¶ 9-11; TCTr. 5-6; Tr. 56; JX 6; JX 8.) However, Yelder has not returned to work allegedly because of psychological injury that he suffered from the incident and his termination. (Tr. 62-64, 104.)

Yelder timely filed his complaint with the OSHA and his appeal with the OALJ. (Stip. F. ¶ 12; TCTr. 5-6; Tr. 5.)

D. Protected Activity

Injuries and hazardous safety or security conditions must somehow be work-related for the act of reporting them to constitute protected activity under the FRSA.¹² Even if an

¹² Sept. 20, 2019 Order, *Yelder v. Norfolk Southern Railway Company*, 2018-FRS-00069, PDF at 4-5. In this Order, I explained:

Within the Sixth Circuit, reporting a non-work related injury is not protected activity under the FRSA. [*Grand Trunk Western Railroad Company v. U.S. Dep't of Labor*, 875 F.3d 821, 831 (6th Cir. 2017).] This court was unable to find any precedent from the United States Court of Appeals for the Sixth Circuit regarding whether a hazardous safety or security condition must be work-related for the report of such condition to constitute protected activity.

However, in *Port Authority Trans-Hudson Corp. v. Secretary, U.S. Dep't of Labor*, [776 F.3d 157, 165-66 (3d Cir. 2015).] the United States Court of Appeals for the Third Circuit took the position that Section 20109(b)(1)(a), which prohibits retaliation for reporting, in good faith, a hazardous safety or security condition, "must be read as having at least some work-related limitation, even though no such limitation appears on the face of the statute." [*Id.*] The Third

employee's injury or a hazardous safety or security condition occurs or is present while that employee is off-duty, such injury or condition can still be work-related.¹³

Circuit's rationale for this dicta is that "[t]he purpose of the entirety of the FRSA is as obvious as it is express: 'to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.' 49 U.S.C. § 20101." [*Id.*] This rationale is persuasive. The position taken by the Department of Labor (DOL or Department) in *Port Authority Trans-Hudson Corp.* regarding Section 20109(b)(1)(a) is not:

At oral argument the DOL was presented with a *reductio ad absurdum*: a PATH employee, wearing a PATH sweatshirt, protests pollution at a power plant "entirely unrelated" to railroads, his conduct at that protest impugns PATH's reputation (since he was wearing a PATH sweatshirt), and PATH disciplines him as a result. The DOL, remaining consistent, responded that such discipline would violate subsection (b)(1)(A).

[*Id.* at 166.] In accordance with *Port Authority Trans-Hudson Corp.*, this court will require that for the report of any hazardous safety or security condition to constitute protected activity, such condition must somehow be work-related.

¹³ Sept. 20, 2019 Order, *Yelder*, 2018-FRS-00069, PDF at 5-6. The Order provides:

The question is whether Yelder's alleged injury and alleged report of a hazardous safety or security condition can be work-related even though he was off-duty at the time both the injury and the condition occurred. Neither the FRSA nor its implementing regulations define the term "work-related." [*Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-35, PDF at 10 (ARB Nov. 24, 2015) (Corchado, J., concurring); see 49 U.S.C. § 20101, *et seq.*; 29 C.F.R. Part 1982; [sic]] And, none of the legal authority cited by the parties clearly resolves this issue. However, "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents," [49 U.S.C. § 20101,] it would make sense not to equate off-duty status with non-work related injuries or conditions in all circumstances. For example, an employee's job is to check for obstructions on the tracks and he notices and reports an obstruction after going off-duty and while driving home – it would be counterintuitive to say that his report of the obstruction is not work-related. He may not be in the course of his employment while reporting the obstruction, but that activity is certainly within the scope of employment.

NS relies upon the Federal Railroad Administration's (FRA) application of the federal hours of service laws concerning train service employees to support its argument that Yelder's alleged injury and alleged hazardous safety or security condition were not work-related. (*See* Mot., Ex. C at 21.) [Exhibit C to NS's Motion is the FRA's Operating Practices Technical Bulletin (OP-04-29), Operating Practices Agency Interpretation (OPAI-98-01).] However, according to the FRA, whether an employee is off-duty during his travel between an away-from-home release/on duty point and the crew's lodging facilities depends upon whether the trip actually takes more or less than 30 minutes, including delays, not how long the trip should take as argued by NS. (*Id.*; Mot. at 3.) Such a post-hoc determination of duty status for the purpose of assuring that employees are adequately rested for work has little actual bearing on whether Yelder's alleged injury and alleged report of a hazardous safety or security condition are work-related.

More appropriate guidance from the FRA might be its Guide for Preparing Accident/Incident Reports, which states:

'Note: An employee in deadhead transportation is considered an "employee on duty" regardless of the mode of transportation. Deadhead transportation occurs when an employee is traveling at the direction or authorization of the carrier to or from an assignment, or the employee is involved with a means of conveyance furnished by the carrier or compensated by the carrier.

Further, an employee's report of a personal injury and a hazardous safety or security condition must be made in good faith.¹⁴ Courts disagree regarding whether this "good faith" requirement includes both a subjective and an objective element.¹⁵ The parties have not cited any governing precedent from the United States Court of Appeals for the Sixth Circuit on this issue. And, it does not appear that the Administrative Review Board has resolved the conflict.¹⁶ I need not resolve this conflict because as discussed below, Yelder satisfies the good faith requirement regardless of whether it includes an objective component.

Having established the legal parameters that govern whether Yelder's actions are protected activity under the FRSA, my primary finding regarding the protected activity element of Yelder's claim and explanations of those primary findings follow. All such findings are based on the record before me as well as the explanations below.

1. Yelder was a credible witness. Yelder's eye contact, speech, emotion, lack of evasiveness, and recollection were all appropriate under the circumstances of testifying in court about a traumatic experience. Further, much of his testimony regarding the incident is corroborated by Jackwak's testimony and written statements. (*See* Tr. 297-329; RX 11.)

Exception: If an employee is housed by the carrier in a facility such as a motel, and part of the service provided by the motel is the transportation of the employee to and from the work site, any reportable injury to the employee during such transit is to be recorded as that of a Railroad Employee Not On Duty (Class B). Likewise, if the employee decides upon other means of transportation that is not authorized or provided, and for which he would not have been compensated by the railroad, the injury is not considered work-related.'

[*Fricka*, ARB No. 14-047, PDF at 2-3 (emphasis added).] Based on the highlighted language in this quote, it would appear that Yelder may have been on-duty despite the parties' position to the contrary. In any event, the FRA's guidance regarding on-duty/off-duty status for different regulatory purposes does not control this court's determination of what is and what is not work-related. Thus, for the purpose of deciding NS's Motion, this court finds that Yelder's off-duty status does not mean that his alleged injury or his alleged report of a hazardous safety or security condition are not work-related.

¹⁴ 49 U.S.C. § 20109(a) and (b)(1)(A).

¹⁵ Compare *March v. Metro-North R.R. Co.*, 369 F. Supp. 3d 525, 533 (S.D.N.Y. 2019) (good faith report of hazardous safety condition includes a subjective and objective component); *Armstrong v. BNSF Ry. Co.*, 128 F. Supp. 3d 1079, 1089 (N.D. Ill. 2015) (for an injury report to be made in good faith, the employee must "subjectively believe his reported injury was work-related" and that belief must be "objectively reasonable"); and *Davis v. Union Pacific R.R. Co.*, No. 5:12-cv-2738, 2014 U.S. Dist. LEXIS 101708, 2014 WL 3499228, *6-7 (W.D. La. July 14, 2014) (citing *Griebel v. Union Pacific R.R. Co.*, ALJ No. 2011-FRS-11 (Jan. 31, 2013); *Ray v. Union Pacific R.R. Co.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013)) (if a plaintiff actually believed, at the time he reported the injury, that it was work related, then his report was made in good faith).

¹⁶ *See D'Hooge v. BNSF Railways*, ARB Nos. 15-042 & 15-066, PDF at 7-8, ALJ No. 2014-FRS-2 (Apr. 25, 2017) (substantial evidence supported the administrative law judge's finding that complainant's actions were protected under either the subjective or objective standard of good faith).

2. The PTI driver's behavior during the incident was a hazardous safety or security condition.

The PTI driver was operating a moving motor vehicle with passengers Yelder and Jackwak inside. It was his job to transport them. The driver's failure to exercise reasonable care in the performance of his duties had the potential to result in harm to his passengers.

NS issued Operations Bulletin 6 (OB-6) to "enhance the safety of both our crews and drivers." (JX 10.) Based on OB-6, the PTI driver should have provided Yelder and Jackwak with a "safety briefing" at the beginning of the trip, which should have included the route he was taking to the hotel. (JX 10.) OB-6 requires a new safety briefing anytime a situation changes that requires re-briefing. (JX 10.) And, pursuant to OB-6, "the driver should ask the passengers to apply the "TELL ME" principle and notify the driver if they see the driver do something unsafe or if they see something that would compromise safety." (JX 10.) Even absent this emphasis on good communication between PTI drivers and NS's crews, the PTI driver's verbal unresponsiveness to Yelder's repeated requests for an explanation of where they were headed and to stop the van and let him out was unreasonable. The driver's unresponsiveness in the face of OB-6 and Yelder's repeated requests followed by Yelder picking up the radio and calling the Maumee Bridge Operator is absolutely inexplicable. This made the driver's behavior a hazardous safety or security condition.

This finding is further bolstered by the fact that the driver's behavior actually endangered the wellbeing or lives of NS's employees, Yelder and Jackwak. The driver's behavior foreseeably precipitated the very incident that NS took seriously enough for it to discipline Yelder, i.e., the physical altercation and Yelder's attempt to take control of the van. Such foreseeability was not unreasonable given the driver's inexplicable unresponsiveness at a time when he was responsible for the safety and wellbeing of his passengers.

3. Yelder suffered a psychological injury during the incident. Yelder testified that he was diagnosed with severe post traumatic stress disorder (PTSD) growing into depression after this event. He suffers panic attacks, anxiety attacks, nightmares, and loss of appetite, and has lost weight. He receives treatment, including medication for his injury. (Tr. 58-62, 105, 129.) I credit such testimony. Further, Dr. Cindy Devassy, Yelder's treating psychiatrist, diagnosed Yelder with anxiety, depression, and PTSD and opined to a reasonable degree of medical certainty that these conditions resulted from the incident with the PTI driver. (Dr. Cindy Devassy's deposition of Nov. 22, 2019, at 16, 18, 21, 28-29; *see* NS' Brf. at 30.)¹⁷ I credit this testimony as well.

4. Although Yelder was off-duty during the incident, both the hazardous condition, i.e., the driver's behavior, and Yelder's injury were work-related. They were work-related because of the degree of control that NS exercised or attempted to exercise

¹⁷ Dr. Devassy is a board certified psychiatrist. (Dr. Devassy's depo., at 10-11.) I find her qualified to provide opinions regarding Yelder's psychological condition and the cause thereof.

over the cab ride and the fact that NS was contractually obligated to provide such transportation. Such control is evidenced by the following: Yelder was required to follow NS's rules while in the PTI van, including OB-6;¹⁸ the PTI van was contracted by NS; NS attempted to assert control over PTI by issuing OB-6, which placed various responsibilities on PTI drivers; the Maumee Bridge Operator coordinates PTI shuttle vans and is employed by NS; there was a radio in the PTI van to contact the Maumee Bridge Operator; and Yelder called the Maumee Bridge Operator during the incident and before the physical altercation for assistance. (Tr. 17-23, 35, 147-48; JX 10; NS's Brf. at 4.)¹⁹

5. Yelder testified that when he reported the incident to NS Trainmaster Courtney Siffre, Yelder told him that he felt that he was in danger and that the PTI driver was a hazard. (Tr. 46-47.) Even without this testimony, Yelder's acts of yelling at the driver, contacting the Maumee Bridge Operator while in the van, attempting to take control of the van and stop it, and reporting the incident to his superiors at NS and the police on the night of the incident all lead to the conclusion that Yelder honestly believed the driver's behavior was a work-related, hazardous safety or security condition.

6. Nonetheless, NS argues that Yelder's report of the driver's behavior was not protected activity because Yelder has failed to prove that it was objectively reasonable for him to believe he was being kidnapped. (NS's Brf. at 18-20.) It may not have been objectively reasonable to believe that he was being kidnapped, but given all the circumstances of the incident, including the driver's inexplicable unresponsiveness and the importance NS placed on good communication between PTI drivers and NS crews, Yelder's concern for his safety and personal security was reasonable – his belief that the driver's behavior was a work-related, hazardous safety or security condition was reasonable.

Facts or arguments that may negate an objective belief of kidnapping do not necessarily negate the objective belief in a hazardous safety or security condition. For instance, whether Yelder may have jumped to the conclusion that he was being kidnapped too quickly or that the van was actually headed towards the hotel, as argued by NS, do not explain the driver's unresponsiveness in the face of an escalating situation or the concern it may have caused to any reasonable passenger. And, the facts that PTI had no incidents with the driver before April 21, 2017, that Jackwak had ridden with the driver before without incident, or that Jackwak knew PTI drivers sometimes took different routes to the hotel are of no import because there is no evidence that Yelder was aware of these facts at the time of the incident.

Nor does Jackwak's lack of concern for his own safety or belief that the driver was polite and courteous assist NS. Jackwak had one or more prior experiences with the

¹⁸ NS crews were required to comply with OB-6 and ensure the safety briefing was given by the PTI driver. (CX 18 at 34-36; *see* Tr. 152.)

¹⁹ This finding is further supported by the testimony of Stephen Myrick, Superintendent of Terminals, Conway, Pennsylvania for NS. He testified that railroad workers riding in vans "is actually part of the activity that allows the railroad to operate its trains from point A to point B keeping these workers in the area staying at the railroad hotel and transporting them by van." (Tr. 145; *see* Tr. 142.)

driver and knew drivers sometimes took different routes to the hotel. Yelder did not. Thus, they had different frames of reference. Further, when Jackwak was asked whether “at any time during that first part of the [incident] did you consider doing something,” he responded:

No, I didn't. I was kind of froze. I mean, when he was asking -- there was no need for me to get involved or anything when he was just asking, you know, if we're going to the hotel. I mean, I didn't really understand why. I mean, I just happened -- I happened to notice actually enjoying the ride for a change, there's no traffic out here, nice, smooth road. And when he got loud with the driver and the little swearing at him, I kind of got scared myself and I kind of froze, didn't know what to do.

(Tr. 325-26.) Although I understand that Jackwak may have reasonably frozen up at some point during the escalation of the incident, I find it odd that he did absolutely nothing to intercede before then. For these reasons, I give little weight to Jackwak's view of the safety and security implications of the incident in assessing whether Yelder's belief was reasonable.

NS argues that based on the relative heights of the PTI driver, 5'10", and Yelder, 6'2", Jackwak being a “larger fellow,” and the numerical superiority of the passengers over the PTI driver, it was not reasonable for Yelder to fear being kidnapped. Again, this does not negate or explain the driver's behavior. Jackwak's lack of either verbal or physical intervention or assistance at any point during the incident further deflates NS's numerical superiority argument. And, relative heights are not very persuasive as both the driver and Yelder were seated. Further, Yelder may have been taller than the driver, but at 165 lbs., Yelder was not physically imposing. (*See* Tr. 58.)

The failure of law enforcement and the prosecutor to bring charges against the PTI driver also does not assist NS. A decision not to bring criminal charges against the PTI driver for kidnapping or anything else does not explain or negate the driver's behavior, which is what I have found to be a hazardous safety or security condition. Such a condition need not arise to the level of a crime.

7. Based on the foregoing, Yelder's report to NS of the hazardous safety or security condition, i.e., the driver's behavior, was made in good faith.

8. Based on the foregoing, Yelder's report to NS of the hazardous safety or security condition constituted protected activity under the FRSA.

9. Yelder's description of his psychological problems at NS's investigatory hearing was honest and made in good faith. Whether such description was a **good faith, notification or attempted notification of a personal injury** within the meaning of 49 U.S.C. § 20109(a)(4) is a different and more difficult issue. At the hearing before me, Yelder confirmed that during his January 10, 2019 deposition, he testified that he never reported any injury to NS. (Tr. 101-02; *see* Tr. 67.) He explained that:

When I applied for -- well, I made an injury report when I was at the hearing, when I went to my hearing on May 29th, 2017, at the dismissal hearing. That is when I first informed them of what those symptoms were and what I was experiencing. I hadn't been officially diagnosed with those conditions until after the fact, after that.

(Tr. 102.) Certainly a person can have an injury without knowing it. I infer from Yelder's testimony that he either did not know that his symptoms (inability to sleep and nightmares) were the result of an injury or that he did not consider himself injured at the time of NS's investigatory hearing because he had not been diagnosed with an injury at that point in time.

Good faith in reporting a personal injury within the meaning of Section 20109(a)(4) requires a "good faith belief that an injury was work-related, and good faith in making the injury report."²⁰ Further, the claimant must actually or genuinely believe, at the time he reported the injury, that it was work-related.²¹ Stated another way, honestly believing, at the time of reporting, that a work-related injury occurred is a prerequisite for a finding that the report was made in good faith. I see no good reason to relax this standard for attempted reports. By his own admission, Yelder did not actually believe (through lack of knowledge or otherwise) that he had suffered an injury at the time of his report to NS. Thus, his report of injury was not made in good faith.

10. Based on the foregoing, Yelder's report or attempted report to NS of his injury was not protected activity under the FRSA.

E. Unfavorable Personnel Action

Pulling a railroad employee out of service and terminating his employment are both adverse employment actions.²² NS pulled Yelder out of service, without pay, from the date of the incident until his termination. (Tr. 119.) These actions against Yelder were adverse employment actions under the FRSA.

F. Contributing Factor

To prevail, Yelder must demonstrate, "by a preponderance of the evidence, that his protected activity was a contributing factor in the unfavorable personnel action."²³ "A

²⁰ *Miller v. CSX Transp., Inc.*, No. 1:13-cv-734, 2015 U.S. Dist. LEXIS 112507, 2015 WL 5016507, *6 (S.D. Ohio Aug. 25, 2015) (citing *Murphy v. Norfolk So. Ry. Co.*, No. 13-cv-863, 2015 U.S. Dist. LEXIS 25631, 2015 WL 914922 (S.D. Ohio Mar. 3, 2015)).

²¹ *Davis*, 2014 WL 3499228, *6-7; see *Mosby v. Kansas City Southern Ry. Co.*, Case No. CIV-14-472-RAW, 2015 WL 4408406, *5 (E.D. Okla. July 20, 2015).

²² *Rathburn*, ARB No. 16-036, PDF at 4; 49 U.S.C. § 20109(a).

²³ *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, PDF at 30 (ARB Sept. 30, 2016) (*en banc*). "This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in

contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’ . . . ‘[I]t just needs to be a factor;’ the ‘protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial role suffices.’ ‘[I]f the ALJ believes that the protected activity and the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.’”²⁴ In making this determination, the judge must consider “all the relevant, admissible evidence.”²⁵

According to the Board, “[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.”²⁶ However, in satisfying this standard, the Board has held that “an employee need not prove retaliatory animus, or motivation or intent, to prove that this protected activity contributed to the adverse employment action at issue.”²⁷

order to overturn that action.” *Id.*, PDF at 53 (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

²⁴ *Powers*, 2017 WL 262014, at *10 (internal citations omitted).

²⁵ With regard to the evidence an administrative law judge is to consider and how to weigh such evidence when determining whether protected activity is a contributing factor, the Board has stated:

Because the protected activity need only be a “contributing factor” in the adverse action, an ALJ ‘should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.’ ‘Since in most cases the employer’s theory of the facts will be that the protected activity played no role in the adverse action, the ALJ must consider the employer’s nonretaliatory reasons, but only to determine whether the protected activity played any role at all.’

When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, ‘in general, employees are likely to be at a severe disadvantage in access to relevant evidence.’ Thus, an employee ‘may’ meet his burden with circumstantial evidence.’ So an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity. But, . . . the AL[J] must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Powers, 2017 WL 262014, at *10 (internal citations omitted).

²⁶ *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, 2018-0060, ALJ No. 2015-FRS-00052, slip op. at 8 (Nov. 25, 2019) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)).

²⁷ *Rathburn*, ARB No. 16-036, PDF at 8 (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012)); *Riley v. Dakota, Minnesota & E. R.R. Corp.*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *4 (ARB Jul. 6, 2019) (declining to follow *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014), which required a complainant to prove intentional retaliation); *see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) (“the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a ‘contributing factor’ in the resulting adverse employment action”); *but see Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (“while a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was a motivating factor”).

“[M]any trial courts within the Sixth Circuit have considered the following factors when faced with the ‘contributing factor’ analysis proven by circumstantial evidence:

(i) temporal proximity; (ii) indications of pretext; (iii) inconsistent application of an employer’s policies; (iv) shifting explanations for an employer’s actions; (v) antagonism or hostility toward a complainant’s protected activity; (vi) falsity of an employer’s explanation for the adverse action taken; and (v[ii]) change in the employer’s attitude toward the complainant after he engages in protected activity.”²⁸

Yelder does not argue that NS’s explanation for pulling him out of service or terminating his employment shifted, that there was a change in NS’s attitude toward him other than its actions of removing him from service and terminating him, or that NS was hostile towards reports of hazardous safety or security conditions. (*See* Yelder’s Brf.) And, there is no evidence of same. Thus, these factors do not assist Yelder in proving contributing factor causation.

Yelder focuses on the inextricably intertwined test and the quality of NS’s investigation of the incident to argue that contributory factor causation exists. (*See* Yelder’s Brf. at 9-15.) As discussed below, the reasonableness of NS’s investigation is relevant to whether NS’s purported reason for terminating Yelder was pretextual. Thus, I will address these issues as well as temporal proximity, NS’s applications of its policies, and the credibility of NS’s explanation for the adverse actions it took against Yelder.

1. Inextricably Intertwined

In *Riley v. Dakota, Minnesota & E. R.R. Corp.*,²⁹ the Board held that where it is impossible to separate the cause of discipline from the protected activity, such that the two are inextricably intertwined, causation is presumptively established as a matter of law. In my Order on Respondent’s Motion for Summary Decision, I held that:

[U]nder *Riley*, the two are inextricably intertwined and causation may be presumptively established as a matter of law. And, even if the cause of Yelder’s termination is not inextricably intertwined with his alleged protected activity, there is a genuine issue of material fact regarding whether such activity was a contributing factor in Yelder’s termination.³⁰

However, I have reconsidered this prior holding. Neither Yelder’s report of a hazardous safety or security condition nor his alleged report or attempted report of injury are inextricably intertwined to the adverse employment actions taken against him.

The incident with the PTI driver, including Yelder’s physical contact with the driver could easily have come to NS’s attention without Yelder’s report. All that needed to happen was

²⁸ *Bostek v. Norfolk S. Ry. Co.*, Case No. 3:16-cv-2416, 2019 U.S. Dist. LEXIS 110623, at *11-12, 2019 WL 2774147 (N.D. Ohio July 2, 2019).

²⁹ ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *3 (ARB Jul. 6, 2019).

³⁰ Sept. 29, 2019 Order.

for PTI to report the incident to NS before Yelder did. NS could have then taken the same adverse actions against Yelder without any report by him. Thus, it is entirely possible to discuss the incident with the PTI driver, including Yelder's physical contact with the driver without reference to Yelder's report. This differs from a situation where an employee is disciplined for untimely reporting an injury or makes false statements in his injury report because the report of injury still lies at the heart of those situations. Yelder's report of the incident did not set in motion the chain of events that eventually led to his discipline. The incident with the PTI driver set in motion the chain of events that led to Yelder's discipline. Thus, Yelder's report of the hazardous safety or security condition is not inextricably intertwined with the adverse employment actions taken against him.³¹

Further, after the hearing in this proceeding, the Board overruled its rule of "inextricably intertwined" and "chain of events" causation in *Riley*.³² The Board no longer requires that administrative law judges apply this analysis. Instead, if a judge finds that an adverse action and protected activity are intertwined such that contributing factor causation is factually established, the judge "must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event."³³

2. Temporal Connection

There is a close temporal connection between the adverse personnel actions taken against Yelder and his protected activity. NS took Yelder out of service within 24 hours after he reported the PTI driver's behavior, which occurred on April 21, 2017. NS terminated Yelder on June 12, 2017. However, such temporal connection adds nothing to the analysis in this case because the same connection exists between the adverse personnel actions taken against Yelder and NS's purported reason for taking such actions.

3. NS's Decision to Take Adverse Action Against Yelder and the Bases For Its Decision

(a) Pretext, Board Precedent, and the "Honest Belief Rule"

NS relies on the honest belief rule to argue that it "properly exercised its reasonable business judgment and had a honest and good faith belief that Yelder violated NS Safety Rule 900 (conduct unbecoming of an employee) and the START policy and should be terminated as a result. Under the 'honest belief rule,' 'if an employer demonstrates an honest belief in its

³¹ Similarly, Yelder's alleged report or attempted report of injury is not inextricably intertwined with the adverse employment actions taken against him. The alleged report of injury did not set in motion the chain of events that eventually led to his discipline. NS had already decided to send Yelder to an investigatory hearing for his part in the incident with the PTI driver. It was not until Yelder was in the investigatory hearing that he allegedly reported his injury. Moreover, the adverse employment actions against Yelder can be discussed solely in terms of Yelder's physical contact with the PTI driver without any reference to Yelder's alleged report or attempted report of injury.

³² *Thorstenson*, ARB Nos. 2018-0059, 2018-0060, slip op. at 8-11.

³³ *Id.* at 10.

proffered reason for the adverse employment action, the inference of pretext it not warranted” (NS’s Brf. at 23.)³⁴

In *Powers*, the complainant claimed that the respondent terminated him for reporting a work-related injury in violation of the FRSA. The respondent claimed that it terminated the complainant for dishonesty relating to his post-injury activities. The Board affirmed an administrative law judge’s decision to deny the claim even though respondent’s managers turned out to be wrong in their belief that the complainant had been dishonest about his medical restrictions, where the judge thought they had been “correct in believing that [the complainant] was dishonest during the . . . conversation.”³⁵ The Board stated that:

An employer doesn’t need to have *any* reason to fire an employee, let alone a ‘legitimate business reason.’ Unless the employer posits a nonretaliatory reason, however, a factfinder is very likely to conclude that retaliation was the real reason for, or at least a contributing factor in, the discharge. That is why the employer’s belief not only is relevant but also is crucial to determining whether protected activity was a contributing factor in the adverse action.

The ‘relevant causal connection’ is thus not between ‘a legitimate business reason and an adverse action.’ Rather, the ‘relevant causal connection’ is between *the protected activity*’ and an adverse action.³⁶

Consistent with the Board’s description of the relevant causal connection in *Powers*, the Board recently affirmed an administrative law judge’s denial of a FRSA claim in *Austin*.³⁷ In *Austin*, the complainant reported a hazard and work-related injury and was allegedly terminated for dishonesty/theft. In affirming the judge’s decision, the Board noted that:

The ALJ . . . found that ‘McConaughey[, Respondent’s decision-maker,] had a good faith belief that Complainant had taken Elledge’s personal property without consent, and thus, he genuinely believed Complainant violated GCOR Rule 1.6. McConaughey’s belief that Complainant engaged in theft was supported by the surveillance video and Elledge’s testimony that Complainant did not have consent to enter her purse while she was not present. **The ALJ correctly stated that** even if Complainant had sincerely believed she was not stealing, it would not change the effect of [Employer’s] belief that Complainant was stealing in making his decision to terminate her employment. The ALJ found that there was no pretext in the Respondent’s reasons for making its decision to fire Complainant.’³⁸

In another case, *Fricka*, a railroad classified its employee’s injury as not work-related and refused to pay his medical bills. The employee alleged that the railroad retaliated against him for

³⁴ Quoting *Tibbs v. Calvary United Methodist Church*, No. 11-5238, 505 Fed. Appx. 508, 513 (6th Cir. Nov. 20, 2012) (unpub.)

³⁵ *Powers*, 2017 WL 262014, at *14.

³⁶ *Id.* at *15 (internal citations omitted).

³⁷ ARB No. 2017-0024, PDF at 9.

³⁸ *Id.* (emphasis added).

reporting the injury by not paying his medical bills and giving him unfavorable performance appraisals. The Board remanded the case after finding adverse personnel actions as a matter of law, contrary to the administrative law judge's findings. In a concurring opinion, Administrative Appeals Judge Luis Corchado noted that:

The thorny causation issue the ALJ will face as to the refusal to pay medical bills, among others, will be deciding (1) whether Amtrak **truly believed** that Fricka's injury was nonwork related and, if so, (2) how such belief plays into the question of contributing factor. In the end, the ALJ must be convinced that Fricka's act of *reporting* his work-related injury (as defined by FRSA) was in fact a reason that Amtrak refused to pay his medical bills. Stated differently, despite the fact that Amtrak's decision for medical benefits could only have occurred because of Fricka's reporting, can the ALJ find that a **good faith belief** that the injury was not work related was the sole cause of the refusal to pay medical benefits?³⁹

The takeaways from *Powers*, *Austin*, and Judge Corchado's concurring opinion in *Fricka* are that the employer's **belief** regarding the reasons it took an adverse action are relevant and crucial to the court's contributing factor determination, while the employee's belief regarding such reasons are not. And, the employer's belief must be a good faith belief.

The foregoing takeaways are consistent with the "honest belief rule" utilized by the United States Court of Appeals for the Sixth Circuit and in other federal Circuits in certain types of discrimination cases.⁴⁰ In *Tibbs*, a case involving claims under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, the Sixth Circuit analyzed whether employer Calvary's reason for terminating plaintiff Tibbs was pretextual.⁴¹ The court found that the "honest belief rule" protected employer's termination decision. The court described the rule as follows:

Under this rule, if an employer demonstrates an honest belief in its proffered reason for the adverse employment action, the inference of pretext is not warranted. We have previously explained that

³⁹ *Fricka*, ARB No. 14-047, PDF at 11 (Corchado, J., concurring).

⁴⁰ See, e.g., *Tibbs v. Calvary United Methodist Church*, No. 11-5238, 505 Fed. Appx. 508 (6th Cir. Nov. 20, 2012) (unpub.); *Armstrong*, 880 F.3d at 381-83; *Cash v. Lockheed Martin Corp.*, No. CIV 15-506 JAP/LF, 2016 WL 8919403, *7-10 (D.N.M. July 1, 2016) ("the court's inquiry is limited to whether the defendant honestly believed the reasons it offered to explain its decision and whether it acted in good faith as to those beliefs").

⁴¹ In *Tibbs*, the district court applied the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to both of plaintiff's claims. Under this framework,

if an aggrieved employee cannot prove discriminatory intent by direct evidence, the employee may do so by making a prima facie case of age discrimination through circumstantial evidence. Once a prima facie case has been established, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. 'Once the defendant meets this burden, the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation' as pretextual.

Tibbs, 505 Fed. Appx. at 512-13 (internal citations omitted).

an employer's proffered reason is considered honestly held where the employer can establish it reasonably reli[ed] on particularized facts that were before it at the time the decision was made. . . .

* * *

Moreover, so long as the employer has established its honest belief, 'the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless.'

* * *

Although Tibbs continues to assert she was not, as a factual matter, insubordinate, 'arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*.' The test is whether a reasonable jury could find that Calvary 'failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process unworthy of credence. . . .'⁴²

And, to determine whether an employer made a reasonably informed and considered decision, the Sixth Circuit has examined whether the employer conducted a reasonable investigation before making its decision.⁴³ The court does "not require that the decisional process used by the employer be optimal or that it left no stone unturned."⁴⁴ But, it must be reasonable.⁴⁵

Applying Board precedent and the law of the Sixth Circuit, whether NS was correct in believing that Yelder engaged in a physical altercation without adequate justification is irrelevant to the contributory factor issue. Rather, whether NS's belief in the reasons it took the adverse actions against Yelder was honest and in good faith, e.g., supported by a reasonable investigation or circumstances, is the inquiry pertinent to my determination of the contributory factor issue.

(b) Testimony Regarding the Decision to Take Yelder Out of Service and Terminate His Employment

(1) Courtney Siffre

Courtney Siffre is a Senior Marketing Manager for NS. (Tr. 226.) In April 2017, he was Trainmaster, Toledo North Row District for NS. (Tr. 224.) He supervised Yelder. (Tr. 227.)

⁴² *Tibbs*, 505 Fed. Appx. at 513-14 (internal citations omitted); *Chen v. Dow Chemical Co.*, 580 F.3d 394, 401 (6th Cir. 2009); *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 598-600 (6th Cir. 2007) ("The key inquiry in assessing whether an employer holds such an honest belief is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action") (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998)); *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001).

⁴³ See, e.g., *Michael*, 496 F.3d at 598-600.

⁴⁴ *Id.* at 599.

⁴⁵ *Id.* at 598-600.

Siffre investigated the incident as NS's charging officer. (Tr. 229.) He spoke with Yelder and Gerald Simon, Trainmaster, Toledo for NS. Simon had begun the initial investigation and obtained written statements from Yelder and Jackwak. Siffre obtained those statements as well as Simon's written statement. (Tr. 231-36; *see* JX 1; JX 2; JX 3.)

Simon and John Turpie, Superintendent, Toledo Terminal for NS assisted Siffre with the investigation. Turpie helped Siffre obtain documents and information from PTI and "reaching out multiple times to try to get a hold of – make sure – ensuring that PTI got a hold of Mr. Balthaser[, the PTI driver involved in the incident]." (Tr. 241.)

Siffre did not have the opportunity to talk with the PTI driver because:

Mr. Simon tried to meet with him and he pulled off when Mr. Simon was going to kind of like interview him and get his statement. And PTI was unsuccessful in getting any further information or comment or getting a hold of the guy at all, kind of just went dark almost.

(Tr. 242; *see* Tr. 247, 281-82, 389-90.) The PTI driver quit after the incident. (Tr. 392; JX 4.) Siffre recalls being told that the Toledo Police Department could not get a hold of the PTI driver. (Tr. 269.) Siffre did not ask NS's police force to get involved in the investigation because he believed the Toledo Police Department was already involved. (Tr. 270-71.)

Siffre also attempted to obtain any DriveCam footage of the incident, but there was none. (Tr. 243-45.) He kept Michael Grace, Dearborn Division Superintendent for NS apprised of his progress and Grace told him that he needed to have another meeting with Yelder to make sure NS was not missing anything. (Tr. 248-49.) Additional documents that Siffre obtained during the investigation included PTI's Accident Report, GPS data from the PTI van, and a police report. (*See* Tr. 242-43, 245-46, 251-52; RX 3; RX 5; RX 6.) After Siffre had met with Yelder a second time and obtained the police report, he further updated Grace on the investigation and Grace advised Siffre to send Yelder a charging letter for an investigatory or formal hearing. (Tr. 253-54.) Siffre sent Yelder a charging letter and testified or provided information at the investigatory hearing, but he was not involved in the decision to terminate Yelder. (Tr. 259.)

(2) Stephen Myrick

In April 2017, Stephen Myrick was the Terminal Superintendent, Detroit, Michigan for NS. He was also the hearing officer at NS's investigatory hearing in this matter. (Tr. 146-47.) He described his role as a hearing officer as follows:

The hearing officer makes sure there's a hearing and it gets recorded properly, there's a proper transcript, and they listen to all the evidence, both sides. And if there is going to be some type of discipline, usually I will be the one to recommend that discipline, but the discipline has to be vetted properly and things of that nature.

(Tr. 185.) He further testified:

Q. And what is the vetting process for discipline?

A. That's why there's a transcript by a third-party company. And that goes to Labor Relations, to division superintendent/upper-management types, and they will look over the transcript and make sure the discipline is consistent with what we've done in the past, and just to make sure there's no big procedural errors or things of that nature. They vet over.

Q. And in this case did you involve Labor Relations?

A. I did, yes.

Q. And who did you involve from Labor Relations?

A. Spencer Bolander.

Q. And did Mr. Bolander object to or otherwise challenge your conclusion that dismissal was the appropriate penalty?

A. No, sir, there was no challenge.

(Tr. 185.)

Myrick never talked to the PTI driver involved in the incident. (Tr. 160, 172.) But, he did hear and consider the testimony of the witnesses who testified at the investigatory hearing, Yelder, Jackwak, and Simon, and the testimony or information provided by Siffre, and reviewed and considered the documents that were submitted at the hearing, including Yelder's hand-written statement, Jackwak's hand-written statement, a police report dated April 22, 2017, PTI's Accident Report dated April 22, 2017, and Safety Rule 900. (Tr. 189-94, 197, 257-58; JX 13; JX 14.)⁴⁶ He did not draw any conclusions regarding Yelder's credibility because Yelder's various statements about what happened during the incident remained consistent. (Tr. 161, 181-82.) He considered Yelder's defense. (Tr. 172-73.) But, he did not know how self-defense was defined in Ohio. (Tr. 174.)

Myrick recommended dismissal "[b]ecause the evidence was clear that Mr. Yelder had struck the PTI driver, tried to take control of the vehicle while it was moving. All of the charges, it was proven in his own words in the hearing." (Tr. 189-90; JX 5; *see* Tr. 169, 195.) He did not recommend lesser discipline because:

A START Major, you get terminated. Just taking all the facts into consideration, he punched a guy that was driving a vehicle. That could have been really bad for Norfolk Southern if that guy would have wrecked the vehicle. There was a lot of things that could have went wrong there. So you can't go around punching people because you think something is not going the right way. You just can't do that.

⁴⁶ Although Myrick's testimony is a little confusing regarding whether he reviewed the documents submitted at NS's investigatory hearing before or after he recommended dismissal, I understand the testimony to indicate that he reviewed the documents presented at the hearing before making his recommendation, but did not review the transcript of the investigatory hearing before making his recommendation. (*See* Tr. 189-90, 198.)

(Tr. 194.)

NS's progressive discipline policy is called the START Policy. (Tr. 188.) The most serious offenses under the policy are Major Offenses, which "are those that warrant removal from service pending a formal hearing and possible dismissal from service for a single such occurrence if proven guilty. Examples of such offenses include: altercation, theft, insubordination, . . . and acts that recklessly endanger the safety of employees or the public." (RX 21 at 5; Tr. 188-89.) Grace testified that the type of altercation that would constitute a major offense under the START policy could be a fistfight or a shouting match. (Tr. 411, 432-433; RX 21 at 5.)

Myrick communicated his recommended decision to his supervisor, Grace, who concurred in and approved Myrick's decision. (Tr. 195, 221, 426.) And, after Myrick's recommended decision was vetted through NS's Labor Relations, Myrick's decision became a final decision. (Tr. 200-01; *see* Tr. 426.)

(3) Michael Grace

Michael Grace is the President of The Belt Railway Company of Chicago. (Tr. 405.) He was the Dearborn Division Superintendent for NS at the time of the incident. (Tr. 162.) He was above everyone in the chain of command in the terminals in that Division. (Tr. 162-163, 247.)

It was Grace's role to take employees out of service. He made the decision to take Yelder out of service because "it was recommended by one of the supervisors. [Grace] felt it was appropriate, given that Mr. Yelder had admitted to striking somebody [and because that is listed as a major pertinent act]." (Tr. 413.)

After taking Yelder out of service, Grace had oversight of the investigation and of the supervisors that were conducting the investigation. (Tr. 414.) During the investigation he reviewed and considered various documents, including Yelder's written statement, Jackwak's written statement, the police report, and emails summarizing PTI's investigation. He also had a couple of NS supervisors, including Siffre meet with Yelder a second time. (Tr. 414-22.) He decided not to involve NS's police department because Yelder had already requested to report the incident to the Toledo police, the incident happened off NS property, and the NS police would not be able to do anything that the Toledo police could not. (Tr. 429-30.)⁴⁷

Grace wanted Siffre to meet with Yelder a second time because:

At that point in time, the fact that Mr. Yelder resorted to physical violence to take control of the situation, I didn't understand it. It seemed to me to be an overreaction. And I wanted to make sure there wasn't something else there that he -- that we weren't aware of that had prompted him to try to take control of a moving vehicle. To me, it just didn't make -- it didn't seem like it all added up.

⁴⁷ When Grace was informed by one of the supervisors that Yelder wanted to report the incident to the Toledo Police Department, Grace "told the supervisor that would be a really good idea, make sure you go right now." (Tr. 412.)

(Tr. 445.) When asked about the PTI driver's behavior before the physical contact between Yelder and the driver, Grace testified that:

In my mind I wondered -- you know, of course, we didn't get to interview the driver, but I wondered, was Mr. Yelder -- was he reacting to Mr. Yelder coming on too strong, too quickly and he clammed up -- I don't know. We'll never know that. But I was trying to understand, you know, why he was ignoring Mr. Yelder.

(Tr. 446.)

Grace had no role in the investigatory hearing. (Tr. 423.) He did deny Yelder's appeal of the dismissal decision, which is his responsibility under the CBA. (Tr. 424; JX 7.)

Grace supported Myrick's dismissal decision because "[b]ased on all the information we had gathered up to -- prior to having the collective bargaining agreement formal investigation, all the facts supported everything that had been put in the charges." (Tr. 425.) Grace considered whether the circumstances of the incident excused Yelder's actions and found that they did not because "[p]hysical violence . . . was not the way to solve the issue at hand." (Tr. 427.) Both Grace and Myrick testified that NS would have handled the incident the same had it been reported by PTI instead of Yelder. (Tr. 195-96, 427-28.)

(4) Spencer Bolander and Other Incidents of Physical Violence by NS Employees

Spencer Bolander is NS's Assistant Director of Labor Relations. (Tr. 448.) He testified that the role of Labor Relations with regard to discipline is to "provide a third-party review of discipline recommendations, discipline assessments, to ensure consistency of application, to ensure the START Policy, which is [NS's] discipline policy is complied with and to ensure that the [CBAs] are complied with." (Tr. 449.) Bolander performed these tasks with respect to Yelder and was comfortable that NS had proven its case. (Tr. 450; 457-58.) He considered Yelder's defense that the PTI driver's conduct should excuse his behavior, but believed that:

[T]here were other alternatives for Mr. Yelder beyond attempting to take control of a moving vehicle, striking the driver of a moving vehicle. There was evidence that it had only been, I believe, less than two or three minutes since he contacted the Bridge dispatcher to request help. This all happened in a very short period of time. He went from no issue to essentially to assaulting a driver of a moving vehicle.

(Tr. 463; *see* Tr. 488.)

Bolander testified that RX 12 is the result of his search of NS training and engine employees for the 6 years before Yelder's incident who had been charged with physical altercations. RX 12 shows that of the 7 employees identified, 6 were dismissed and 1 was suspended after accepting responsibility and the discipline offered. (Tr. 464-469, 493-96; RX 12.)

With respect to other evidence regarding how NS handles physical altercations by its employees, Yelder testified that Conductor Nicholas Greficz and Engineer Jason Gervins got into a fist fight while off duty, but were not pulled out of service. Yelder does not know whether NS disciplined them. (Tr. 56-58.)

Further Yelder testified that Engineer James Clark threatened Conductor Tom Dillon on Facebook and in person, but NS did not pull Clark out of service. Yelder does not know whether NS disciplined Clark. (Tr. 56-58.) According to Myrick, who investigated this incident, NS did take Clark out of service for a period of time, but did not dismiss him. (Tr. 178-179.) I credit Myrick's testimony over Yelder's regarding whether NS took Clark out of service because of Myrick's superior knowledge regarding such subject.

Grace testified that he would be surprised if two people involved in an altercation in a yard office were not charged with conduct unbecoming. (Tr. 433.)

Myrick testified that in another investigatory hearing over which he presided, involving physical violence by Norm Hiler while off-duty, Myrick recommended dismissal. And, NS terminated Hiler. (Tr. 199-200.)⁴⁸

(c) Primary Findings Regarding NS's Decision to Take Adverse Actions Against Yelder

My primary findings regarding contributing factor causation and explanations of those primary findings follow. All such findings are based on the record before me, the summarized testimony and evidence above, and the explanations below.

1. I closely observed Courtney Siffre, Stephen Myrick, Michael Grace, and Spencer Bolander testify. They testified candidly, intelligently, and without evasion. They were credible witnesses and I credit their testimony.

⁴⁸ Two other witnesses testified at the hearing before me, Roy Kennedy and Mark Nichols. Kennedy is a Sergeant in the Investigative Services Bureau of the Toledo Police Department. (Tr. 330-31.) Kennedy was the police investigator in the Yelder case. (Tr. 344.) He became familiar with Yelder's incident when Yelder called, unhappy that his report of the incident had been filed as a non-offense report. Yelder described the incident to Kennedy and Kennedy told him that he did not view the incident as a kidnapping. (Tr. 341-42.) Kennedy contacted NS's police and was told that they were familiar with the incident, but did not do much with it because they did not see any legitimacy to Yelder's claim. (Tr. 344-45.) He also contacted PTI and left a voice message for the PTI driver, but his call to the driver was never returned. (Tr. 345.) Kennedy felt that if any crime was committed, it was assault by Yelder. (Tr. 346.) He found that the offenses of kidnapping and abduction were unfounded, and although he does not make decisions about misdemeanors, he believed that the misdemeanor offense of unlawful restraint was also unfounded. (Tr. 351-52, 372-73; RX 2.)

I find that Kennedy had substantially less information available to him than NS in making his determinations. Further, Kennedy was assessing whether a crime had been committed, not whether Yelder had violated an NS disciplinary rule with or without justification. Accordingly, I have given Kennedy's testimony very little weight.

Nichols is the Director of Operations for PTI's Ohio Division. In April 2017, he was a General Manager for PTI. (Tr. 375.) Nichols examined the GPS data from the time of the incident. He testified that it shows that the PTI driver was not speeding. (Tr. 383-85; RX 6.) Also, he explained that the PTI van's DriveCam showed no speed or change of velocity triggering event during the incident. (*See* Tr. 378-79, 391; RX 4.) This and other information was provided to NS, including Grace. (*See* Tr. 391-92; EX 4.)

2. Grace was the primary decision maker with respect to pulling Yelder out of service. He made that decision based on the recommendation of one of the supervisors, Yelder's admission to striking somebody, and the fact that "altercation" is listed as a major offense in the START Policy. Given the serious nature of a physical altercation in a moving vehicle with the driver of that vehicle, it was unnecessary for Grace to wait until NS had completed its full investigation before pulling Yelder out of service. Grace's decision was thoughtful and reasonable based on the information available to him at the time, namely Yelder's written statement found at JX 1.

3. NS's investigation of Yelder's conduct during the incident was reasonable under the circumstances. It took written statements from Yelder and Jackwack, interviewed Yelder twice, took testimony from both gentlemen at the investigatory hearing, obtained GPS, DriveCam, and other information from PTI, and obtained a report from the Toledo Police Department. An investigation does not need to be perfect or leave no stone unturned to be reasonable. NS's inability to interview the PTI driver, who was uncooperative, and any reliance it may have had on the Toledo police to conduct a more thorough investigation than it did does not make NS's investigation unreasonable. Further, NS's explanation for not involving its own police in the investigation is credible and does not make NS's investigation unreasonable. There were no gaping holes in NS's investigation that it could have reasonably cured.⁴⁹

4. Myrick considered all the testimony and documents submitted at NS's investigatory hearing. His consideration of such testimony and documents and whether Yelder was justified in taking the actions he did during the incident was thoughtful and reasonable. (See Tr. 200-206.) Likewise, Grace's and Bolander's consideration of the evidence they saw and whether Yelder was justified in taking the actions he did was thoughtful and reasonable. All three gentlemen demonstrated a basic understanding of the facts surrounding the incident – the PTI driver was unresponsive to Yelder's repeated requests and Yelder initiated a physical altercation with the driver while he was operating a moving motor vehicle. An altercation is a major offense under the START Policy, which can permissibly lead to dismissal based on a single occurrence. All three gentlemen articulated a reasonable explanation for why they chose to reject Yelder's claimed justification and why dismissal was appropriate – mainly that physical violence was inappropriate under the circumstances.

NS's investigators and/or decision makers were questioned at great length at the hearing before me regarding their understanding of whether Yelder "struck" the PTI driver or had some other physical contact with him. There was also a significant amount of testimony regarding whether the PTI driver was actually headed to the hotel and whether he was supposed to take a certain route or not. I find that none of these minor evidentiary disputes are of import. Yelder believed that the PTI driver was headed

⁴⁹ NS's formal investigations are covered by the CBA. (Tr. 153-154.) Discovery is not a part of the process. (Tr. 481, 155-56.) Employees are not permitted counsel at the investigatory hearings, but can have union representation. (Tr. 482.) Any alleged deficiencies in the bargained for procedure required by the CBA is beyond the purview of this tribunal.

somewhere other than the hotel and no one at NS doubted Yelder's sincerity. Further, it is of no consequence whether Yelder "struck" the PTI driver because the evidence shows that he did initiate a physical altercation with the driver and tried to take control of the vehicle. This is a sufficient basis to support the reasonableness of NS's disciplinary decision. Whether NS relied on Yelder's word "struck" from his initial written statement, mistakenly or otherwise, does not diminish the reasonableness of NS's investigation, consideration of the information developed during the investigation, or ultimate disciplinary determination.

5. Based on its reasonable investigation, NS terminated Yelder for conduct unbecoming under Safety Rule 900 because it found he committed a major offense under its START Policy, namely engaging in a physical altercation.

6. NS had an honest and good faith belief in such basis for terminating Yelder's employment. NS did not shift its explanations for its actions against Yelder. It did not demonstrate any falsity in its explanation for the disciplinary actions it took. Such asserted basis was not a pretext for terminating Yelder. I may not agree with NS's decision. Indeed, if I had to decide whether Yelder was justified in the actions he took during the incident, I likely would decide that he was. However, to determine the outcome of this case on such belief would involve me substituting my judgment for that of NS, which the law constrains a judge from doing.

7. The evidence discussed above regarding how NS handles employees involved in physical altercations reveals that NS dismissed 6 out of the 7 training and engine employees involved in physical altercations in the 6 years before Yelder's incident. Although Yelder testified that 2 employees were not taken out of service for a physical altercation, he did not know whether NS disciplined them. Thus, his testimony does not contradict my view of the evidence. Further, I find that evidence of how NS handled non-physical altercations is not substantially similar enough to the situation in this case to have any bearing on my decision. Overall, NS's treatment of other incidents of employees engaging in physical altercations is consistent with its decision to terminate Yelder, and thus, supports a finding of no pretext.

8. NS did not take Yelder out of service or terminate his employment because of Yelder's protected activity. Stated another way, Yelder's protected activity played no part in NS's decision to take adverse employment actions against him. Yelder has failed to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in NS's adverse personnel actions against him.⁵⁰

9. NS terminated Yelder's employment on June 12, 2017, approximately 2 weeks after he allegedly reported or attempted to report his injury. Had I found this report to be protected activity, the temporal connection between such report and Yelder's termination would have weighed in favor of finding contributory factor causation, but would not have changed my final determination that Yelder has failed to demonstrate that

⁵⁰ In light of this finding and unless expressly noted otherwise herein, I have not considered any evidence relevant solely to the issue of damages.

his protected activity was a contributing factor to the adverse personnel actions taken against him. He had already been taken out of service for attempting to take control of the PTI van, etc. at the time he allegedly reported his injury to NS. And, the alleged report of injury was vague enough that it did not even elicit additional questions regarding his condition at NS's investigatory hearing. (*See* JX 13 at 80-93.) Indeed, Myrick and Grace did not even consider it an injury report. (Tr. 183-184, 207-208, 428.) While I do not consider NS's belief regarding whether Yelder reported an injury relevant to a determination that such alleged report was protected activity, it is relevant to whether the report was a contributing factor in NS's disciplinary decision.

Further, Bolander testified that RX 15 is a compilation of career service records for 53 employees from the Dearborn Division. These employees reported injuries in the 12 months preceding April 21, 2017. After reviewing RX 15, Bolandar determined that none of these individuals received discipline in connection with the event that had led to their injuries. (Tr. 463-64, 492-93.) Such evidence further supports my determination that had Yelder's alleged injury report been protected activity, I still would find that he has failed to demonstrate that his protected activity was a contributing factor in NS's adverse personnel actions against him.

G. Clear and Convincing Evidence That NS Would Have Taken Adverse Action Against Yelder in the Absence of His Protected Activity.

As stated above, “[i]f a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected activity.”⁵¹ “Clear” evidence means the employer has presented an unambiguous explanation for the adverse action(s) in question. ‘Convincing’ evidence has been defined as evidence demonstrating that a proposed fact is ‘highly probable.’ Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.”⁵² Given my findings above and based on the record before me, I find that NS would have taken the same adverse actions against Yelder in the absence of his protected activity and his alleged report or attempted report of injury.

⁵¹ *Riley*, 2019 WL 4170436, at *2 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)); *see Powers*, 2017 WL 262014, at *10.

⁵² *DeFrancesco*, ARB No. 10-114, slip op. at 7-8.

IV. Order

Based on the foregoing, it is ORDERED that Complainant Jerome Yelder's claim is DENIED.

SO ORDERED.

Jason A. Golden
Administrative Law Judge

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

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

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

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

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

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

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

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

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