

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 February 2019

CASE NO.: 2018-FRS-9

IN THE MATTER OF:

JEFF YOWELL

Complainant

v.

FORT WORTH & WESTERN RAILROAD

Respondent

APPEARANCES:

COREY KRONZER, ESQ.

For the Complainant

RORY DIVIN, ESQ.

For the Respondent

BEFORE: LEE J. ROMERO, JR.

Administrative Law Judge

DECISION AND ORDER

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act (herein the FRSA or Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

I. PROCEDURAL BACKGROUND

On September 15, 2017, Jeff Yowell (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor alleging that on or about September 13, 2017, Fort Worth & Western Railroad (herein Respondent) violated Section 20109 of the FRSA by terminating his employment for reporting an injury to management on August 29, 2017.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on November 2, 2017. OSHA determined that the evidence developed during the investigation was not sufficient to support the finding of a violation.¹ (ALJX-1).

On November 3, 2017, Complainant filed his objections to the Secretary's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ). (ALJX-2).

A de novo hearing was held in Dallas, Texas on April 4, 2018. (ALJX-3). Complainant offered no exhibits, Respondent proffered three exhibits, the parties offered 21 joint exhibits, all which were admitted into evidence, along with six administrative law judge exhibits.² This decision is based upon a full consideration of the entire record.

Post-hearing briefs were received from Complainant and Respondent on the extended brief due date of July 20, 2018. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

II. UNDISPUTED FACTS

At the commencement of the hearing, the parties stipulated, and I find:

1. That from May 30, 2017, through the date of his discharge on September 13, 2017, Complainant worked as an employee of Fort Worth & Western Railroad.
2. At all times material, Fort Worth & Western Railroad was a railroad carrier within the meaning of 49 U.S.C. §§ 20109.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Respondent's Exhibits: RX-____; Joint Exhibits: JX-____; and Administrative Law Judge Exhibits: ALJX-____.

² In particular, the joint exhibits 1-12 and 15-23 were admitted into evidence. (Tr. 6-7).

3. Complainant was terminated by Respondent on September 13, 2017.

(ALJX-4).

III. SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Complainant testified at the formal hearing that he currently resides with his wife, Bertha, who works for an insurance company. He is not presently employed. (Tr. 20). Complainant's last full-time employment was with Respondent, which ended on September 13, 2017. Complainant began employment with Respondent on May 30, 2017, working as a "brakeman/conductor trainee." For three to four years, Complainant attempted to be hired by Respondent prior to obtaining employment with them in May 2017. (Tr. 21). Complainant completed an application for employment with Respondent, and subsequently, he was interviewed by Tim Pope, Justin Silva, and Jared Steinkamp. (Tr. 22; JX-21, p. 25).

After being hired by Respondent, Complainant went through two days of orientation and thereafter, two weeks of classroom training. (Tr. 23). Complainant received his orientation instruction from Mr. Chance Gibson, with whom he got along. (Tr. 24). After the classroom training, Complainant began hands-on training for five consecutive weeks, which continued bi-weekly for approximately 16 weeks. Complainant was to undergo testing for "certification" at the end of his 16-week training. (Tr. 24-25).

On August 28, 2017, Complainant reported to Respondent's Everman Yard for the 11:00 p.m. shift where he moved trains to the industry to be served. (Tr. 25-26). He was working an eight hour shift while shadowing another conductor, "Keith." (Tr. 26). During his shift, Complainant "got injured" when he twisted his "knee" stepping off a boxcar onto a slippery surface. (Tr. 26-27). He noticed pain immediately when he twisted his knee, but he continued to work despite having trouble bending, climbing on cars, and squatting. (Tr. 27). At the time he injured his knee, the train was going into "Westrock," where the train had to switch tracks. (Tr. 28). Complainant identified a photo of the "Westrock lead," which is a track from the main line into Westrock. (Tr. 29; JX-1, p. 2).

After he twisted his knee, Complainant immediately noticed pain, which continued to worsen throughout the day. By the time Complainant arrived at Green Bay Packing, he was unable to continue working. (Tr. 30). While at Westrock, Complainant had difficulty bending and climbing up on the cars. Complainant communicated to the two other employees with whom he was working, that he was experiencing pain.

The employees told Complainant "to sit in the locomotive" until they got to the "shanty" even though they had more work to complete. (Tr. 31). Complainant explained that the "shanty" (i.e., crew shanty) was by the main line in the Everman Yard, and is a shack that contains a computer and other things for crew members. (Tr. 32). When Complainant arrived at the crew shanty, Ben Aceves, Chance Gibson, and Jared Steinkamp were awaiting Complainant. (Tr. 32-33). Complainant did not call Mr. Aceves to meet him at the crew shanty, nor did he communicate to Mr. Aceves that he was experiencing pain. Mr. Steinkamp asked Complainant to write a statement, but Mr. Steinkamp did not provide any instructions. (Tr. 33). Complainant was alone when he wrote his first statement, which Mr. Steinkamp collected from Complainant. (Tr. 33-34). However, Complainant wrote a second statement, during which he was not alone because Mr. Steinkamp was telling Complainant to describe where his "injury occurred and such." (Tr. 34). During his meeting with Mr. Aceves, Mr. Gibson, and Mr. Steinkamp, Complainant communicated that he bumped his knee approximately one week before his August 29, 2017 injury,³ but Complainant was able to continue working and he did not seek any medical treatment. (Tr. 35).

Complainant confirmed he provided three written statements in total, the third of which was to provide "additional information" at the request of Mr. Steinkamp. (Tr. 35). Complainant identified JX-11 as the second written statement he wrote while sitting in the crew shanty with Mr. Steinkamp. (Tr. 35-36). Complainant further identified JX-12 as the third written statement he provided while sitting in the crew shanty. (Tr. 36-37). On August 29, 2017, Complainant was under the impression that he was reporting his injury that occurred that day, that is, "the twisting of his knee." He was not reporting any injury that occurred prior to August 29, 2017. (Tr. 37). Upon completing his written statements, Complainant was released to return home, and Ben Aceves drove Complainant home because Complainant was unable to drive, stating he was "too injured."⁴ (Tr. 38). After leaving work, Complainant sought medical treatment from a general practitioner, whom he presented to on two different occasions. (Tr. 38-39).

Complainant identified JX-17, p. 2, as a letter dated August 29, 2017, from the general practitioner who treated Complainant. Likewise, Complainant identified JX-17, p. 3, as a second letter from his treating physician. After presenting to his doctor for a second time, Complainant was under the impression that he could return to work on September 11, 2017. (Tr. 39). However, on September 11, 2017, Complainant did not go back to work because he had to complete a

³ Although Complainant reported to work on August 28, 2017, at 11:00 p.m., it appears that his injury occurred early in the morning on August 29, 2017. Accordingly, the undersigned will refer to August 29, 2017, as the date of Complainant's injury.

⁴ Complainant confirmed he drove himself to work on August 28, 2017. (Tr. 38).

return-to-work physical at Fort Worth and Western Railroad. (Tr. 39-40). On September 12, 2017, Complainant underwent his return-to-work physical and he was cleared to resume work. Nonetheless, on September 13, 2017, Complainant was called into work only to be terminated after meeting with Mr. Steinkamp and Gene Cox. (Tr. 40). Complainant confirmed JX-18 is the letter he received on September 13, 2017, from Mr. Steinkamp, stating Complainant was terminated from his employment with Respondent. According to Complainant, Mr. Steinkamp did not give him any explanation as to why he was being terminated. Nevertheless, Complainant understood he was being terminated for failing to report an injury or late reporting of an injury that had occurred one week prior to his August 29, 2017 injury. (Tr. 41). Complainant testified the "incident" from the week before did not cause him to be injured because it did not prevent him from completing his job duties. His pain from his August 29, 2017 injury was "a lot worse" such that Complainant could not work. To Complainant's knowledge he was the only person to inform Respondent about the "incident" prior to his August 29, 2017 injury. (Tr. 42).

Complainant also experienced another injury in July 2017, when he bruised the "left side of his shin muscle" closing the "anglecock" too fast which caused the "glad hand" to hit his left leg. (Tr. 43). Complainant explained the "anglecock" is a piece of equipment that releases the air in a freight car, and a "glad hand" is the metal couple that couples the air hoses in between the cars and the locomotive. (Tr. 43-44). On the same day of the July 2017 incident, Complainant informed Mr. Steinkamp, Mr. Gibson, and Mr. Cox about his injury. (Tr. 44). Complainant was not asked to write a statement about the July 2017 incident, and he did not seek any medical treatment even though he was bruised. (Tr. 44-45). The bruise on Complainant's left leg remained for three months. Complainant continued working on the day Complainant bruised his left shin. (Tr. 45).

Upon reviewing JX-15, a Fort Worth and Western Railroad Injury and Illness Incident Report, Complainant testified he did not complete this report nor was he present when it was completed. (Tr. 45-46).

Other than reporting an injury, Complainant testified there was nothing related to his work performance that would have led him to believe he would be terminated by Respondent. After his termination, Complainant felt "horrible" because he lost his job. (Tr. 46). His great-grandfather, grandfather and father worked for the railroad, so Complainant was the fourth generation railroad worker. While working for Respondent, Complainant's hourly rate was \$21.62 and he worked 40 hours per week. (Tr. 47).

When Complainant was injured one week prior to his August 29, 2017 incident, he was working with a 2-man crew, but no one reported Complainant's injury. On August 29, 2017, when Complainant met with Mr. Gibson, Mr. Aceves, and Mr. Steinkamp in Respondent's crew shanty, none of them took notes. (Tr. 48).

On cross-examination, Complainant testified he is 41 years of age and left high school during his freshman year. He received a GED three to four years before the hearing, at the age of 38. (Tr. 49). Complainant has held four jobs over the last 25 years: (1) as a mail carrier with the United States Postal Service for six months, after which he quit the job; (2) as a maintenance man with the United States Postal Service for six months before he resigned; (3) with Werner Enterprises as a truck driver for two to three months before leaving his employment; and (4) with Respondent for three and one-half months prior to his termination and before finishing training. (Tr. 49-51). He also performs as "The Ultimate Elvis" where he sings and plays guitar. (Tr. 52).

In his deposition, five weeks before the formal hearing in this matter, Complainant could not recall the duration of his orientation and drew a "complete blank." (Tr. 52-53). Complainant confirmed JX-8 shows that on May 30, 2017, he signed off on a receipt for Respondent's employee handbook. (Tr. 53). He confirmed JX-2 is the employee handbook he received which states at page 27 "employees are to follow safety rules and accurately and in a prompt manner report all accidents, incidents, including injuries." (Tr. 54-55). He also confirmed JX-2, p. 28, states Respondent is committed to "complete accurate and timely reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad." Complainant carried a backpack with him while at work, which could have carried his employee handbook. (Tr. 56). In his deposition, Complainant stated he could not recall anything Mr. Gibson presented during his two week training, but at the hearing he could recall some of the details about training. (Tr. 57-58). Complainant also could not recall if he asked any questions of Mr. Gibson during his training, but he did recall they looked over some "paperwork." (Tr. 59).

Complainant testified he could not recall what he was doing during the July 2017 incident in which he bruised his left leg. (Tr. 60-61). However, Complainant recalled he met with Mr. Steinkamp and Mr. Gibson following the July 2017 incident and reported to them the events that transpired. (Tr. 61). Complainant confirmed Mr. Steinkamp and Mr. Gibson offered him medical attention, they did not appear "mad" at Complainant for reporting an injury, and appeared interested in Complainant's welfare. (Tr. 62-63). Complainant does not recall what he told Mr. Steinkamp and Mr. Gibson. They spoke with the conductor too, but Complainant does not know what the conductor told Mr. Steinkamp and Mr. Gibson. (Tr. 63). After the July 2017 incident, Mr. Gibson moved Complainant to more relaxed training at the Hodge Yard, which Complainant appreciated. (Tr. 64).

One week before his August 29, 2017 injury, Complainant bumped his knee climbing up on a locomotive and felt pain, but did not report the incident. (Tr. 65). Complainant could not recall if he had Mr. Steinkamp's phone number at the time he bumped his knee on a

locomotive, but during his deposition Complainant recalled having Mr. Steinkamp's phone number. (Tr. 66). When Complainant bumped his knee it may have resulted in swelling and he wore a knee brace, but he still did not report the incident. (Tr. 67).

Complainant testified that he wrote statements about the August 29, 2017 incident, the first of which was a handwritten statement that he signed. In this first statement, Complainant reported that he came off of the car and slipped on a "slippery substance" and he twisted his knee. (Tr. 69). Complainant confirmed JX-11 is the second statement he provided to Respondent about his August 29, 2017 incident, but he does not recall if it differs from his first statement. (Tr. 69-70). Complainant testified that JX-12 is another statement he provided about the same incident, which differs only in that it contains "additional information." Complainant stated he did not believe the incident occurring one week prior to his August 29, 2017 incident resulted in an injury. (Tr. 70). Nevertheless, in JX-11 Complainant stated "my knee was injured about a week ago in Everman." (Tr. 70-71). Complainant confirmed JX-12 states that "on the week of August 21st and 23rd I injured my right knee in Everman." (Tr. 71). Complainant explained he provided two different dates because he "banged his knee" around this time. (Tr. 72-73). At first, Complainant assumed that he only suffered a "minor injury." Complainant believes that on August 29, 2017, he may have informed Mr. Keith Powell that he re-aggravated a prior injury, but he is not sure he informed Mr. Oka Woodard, a locomotive engineer, about the same.⁵ (Tr. 73).

With respect to Complainant's August 29, 2017 injury, he testified it occurred when he was going into the Westrock, on a piece of track that runs from the main line towards Westrock. (Tr. 74). Complainant could not recall going through a fenced area, but he recalled there was asphalt on each side of the track going towards Westrock. (Tr. 74-75). However, when Complainant stepped off of the boxcar into mud there was no asphalt. (Tr. 75). In JX-12, Complainant wrote he "noticed knee pain again as I bent down to lace up a car," which he recalled occurred when the train arrived at Westrock. (Tr. 75-76). Complainant explained that he noticed his pain became worse as he would bend down and climb on the ladders of cars. Mr. Gibson and Mr. Steinkamp asked Complainant if he required medical treatment, and offered to take Complainant to the emergency room. (Tr. 76). Complainant believed Mr. Steinkamp and Mr. Gibson were his friends and they did not appear to be angry with him for being injured. (Tr. 79-80). Mr. Steinkamp and Mr. Gibson never told Complainant to write down something that was false. Complainant confirmed the only reason stated for his termination from employment with Respondent was failing to timely report his injury in accordance with Respondent's rules. (Tr. 80). Even though Complainant stated he injured himself one week prior to reporting his August 29, 2017

⁵ The prior injury to which Complainant referred, is his injury that occurred at some time between August 21, 2017 and August 23, 2017. (Tr. 74).

injury, Complainant does not believe he violated Respondent's rule about reporting an injury because he reported his injury when he began to feel pain. (Tr. 81-82). Complainant acknowledged that when he "banged his knee" on or around August 21, 2017, he did not report an injury because he thought he "was going to be able to work through it." (Tr. 82-83).

Complainant testified he was offered a job with UPS in late 2017. He met the qualifications and a full-time position with UPS would pay \$22.00 an hour, but as a seasonal driver his hourly rate would have been \$17.00 per hour. (Tr. 83). Complainant attended UPS' orientation, but he decided the "job was not for [him]" because he "did not care for the culture." (Tr. 83-84).

On re-direct examination, Complainant noted that JX-2, p. 27, states "supervisors will provide you with necessary forms that must be promptly completed." (Tr. 84-85). However, when Complainant injured his left leg, none of his supervisors provided him with any forms. Mr. Gibson and Mr. Steinkamp were Complainant's supervisors. (Tr. 85). Complainant stated he was not alone when he wrote the statements contained in JX-12, and Mr. Steinkamp provided instructions to Complainant while he was writing his statements. (Tr. 86). Complainant confirmed his August 29, 2017 injury occurred after the train left Everman, and he did not experience pain climbing onto the train in Everman. (Tr. 86-87). In his statement at JX-11, Complainant confirmed that about halfway through writing his statement Mr. Steinkamp told Complainant to write "when his knee was injured about a week ago." (Tr. 87).

On re-cross examination, Complainant acknowledged that during his deposition (at page 107), Complainant stated he did not recall anything Mr. Steinkamp stated while Complainant was completing his written statements. (Tr. 87-89).

Chance Gibson

Mr. Gibson testified at the formal hearing that he is currently employed by Respondent as General Director of Operating Practices and has been so employed since 2015. (Tr. 90-91). His position is a management position. Mr. Gibson's first interaction with Complainant was during orientation and training, which lasted two weeks. (Tr. 91-92). However, Mr. Gibson no longer conducts the training classes for new hires because Respondent hired a Manager of Safety and Training who reports to him. (Tr. 92). The new hire training consists of classes, homework, and study guides, all of which are provided to prepare for a final exam. (Tr. 94).

In July 2017, Mr. Gibson was called out due to a report that Complainant was injured when an air hose hit Complainant on the shin. (Tr. 94-95). However, Mr. Gibson explained there is no file on Complainant's July 2017 injury because Complainant did not want medical treatment nor did he want to report an injury. According to

Mr. Gibson, Complainant could not recall whether he was on a locomotive or car when the hose struck him. In addition, there were contradictory statements from employees gathered during the investigation. (Tr. 95). Mr. Gibson was not aware that Complainant was bruised for a considerable amount of time. (Tr. 96). Mr. Gibson is aware of Respondent's safety rules, but he did not complete a form for Complainant's July 2017 incident because Complainant repeatedly stated he did not have an injury nor did he want to report an injury. Mr. Gibson explained there was no incident to report because he could not even determine where Complainant was injured. (Tr. 97). The engineer called Mr. Gibson to inform him that Complainant reported his knee was hurting. (Tr. 97-98). Complainant alleged that he hurt his knee between the locomotive and cut of cars, but the engineer stated Complainant was never in such a place.⁶ Therefore, Mr. Gibson stated there was nothing to report. (Tr. 98).

On August 29, 2017, Mr. Gibson was called again about another incident in which Complainant was involved. (Tr. 100). Mr. Gibson went to the shanty (crew office) where Mr. Aceves was present with Complainant. (Tr. 100-01). Mr. Gibson explained that the crew shanty is about as big as a Suburban (SUV), but all four men were not present at one time in the crew shanty. (Tr. 101). Mr. Gibson interviewed Complainant about the incident, and offered medical treatment to Complainant on several occasions, but Complainant stated he did not want treatment at the time. (Tr. 101-02). Thereafter, Mr. Steinkamp joined them in the crew shanty. (Tr. 102). Complainant described two different areas where the incident may have taken place, that being, between Track 104 and the main line or Track 104 and the storage track, and that he stepped in "mud." (Tr. 102-03). However, Mr. Gibson stated the areas described by Complainant "threw up a red flag" because he knew there was no mud in the first location, but rather solid ballast (a rock walkway) that was placed there by Respondent so employees could walk there. Therefore, Mr. Gibson knew Complainant's incident could not have occurred at the first location because there was no mud. As to location number two, Mr. Gibson described it as the asphalt crossing right before entering into Westrock. (Tr. 103). Likewise, Mr. Gibson knew Complainant's incident did not occur there either because all workers step out onto asphalt. Consequently, Mr. Gibson asked Complainant to write a statement so Mr. Gibson could review it and determine exactly where Complainant's incident occurred. Mr. Gibson was frustrated because Complainant alleged he was injured, but Complainant provided two different locations. (Tr. 104). Mr. Gibson explained to Mr. Steinkamp, who had just pulled up to the crew shanty, what had transpired and the issues with determining where

⁶ Mr. Gibson initially testified Complainant reported an air hose hit his shin, but later Mr. Gibson stated Complainant injured his knee. Therefore, it is unclear whether in July 2017, Complainant was alleging a shin or knee injury had occurred. (Tr. 94-95, 97-98). Nonetheless, the record evidence demonstrates that Complainant ultimately did not file a report of injury because he stated he was not injured in July 2017. (Tr. 97).

Complainant's alleged incident occurred, and that there was no mud at either location. (Tr. 104-05).

Mr. Gibson confirmed Complainant began to write a statement while he was in the crew shanty, but Mr. Gibson walked out of the shanty. Mr. Steinkamp entered the crew shanty while Complainant was writing his statement, and Mr. Gibson continued walking in and out of the shanty because he was trying to contact the train crew. Mr. Gibson could not recall if Mr. Steinkamp retrieved Complainant's first written statement. (Tr. 109). According to Mr. Gibson, Mr. Steinkamp was in the crew shanty while Complainant wrote his second statement. (Tr. 110). Mr. Gibson explained that Complainant was asked to write multiple statements because of the different locations Complainant described, and because the first statement about the August 29, 2017 incident did not comport with Complainant's version of events at the end of the investigation. (Tr. 110-11).

Mr. Gibson questioned whether Complainant really suffered from any pain as a result of the August 29, 2017 incident, based on what Complainant reported to him and what he saw. Mr. Aceves drove Complainant home that day. (Tr. 112). On September 13, 2017, Mr. Gibson learned Complainant was terminated, based in part, on Mr. Gibson's recommendation for violating Respondent's rule requiring an employee to immediately report an injury. (Tr. 114). Mr. Gibson explained that by Complainant waiting one week to report an injury, Respondent was unable to ensure the area was safe for other employees working in the same area. (Tr. 115). He confirmed that no other employees reported that Complainant had suffered an injury one week prior to the August 29, 2017 incident, rather Mr. Gibson relied on Complainant's account that he was injured the week before August 29, 2017. Mr. Gibson testified Complainant was terminated from his employment with Respondent because he failed to immediately report his injury. (Tr. 116). Mr. Gibson confirmed an employee would be terminated if he suffered an injury, even if the pain did not surface until one week later, but did not immediately report the injury. (Tr. 116-17). Mr. Gibson agreed that as soon as an employee feels any pain, the employee should report the injury and/or incident. However, Mr. Gibson stated that in Complainant's case, Respondent was not able to conduct an investigation because Complainant did not immediately report the August 21, 2017/August 23, 2017 incident. (Tr. 117).

Mr. Gibson testified he is familiar with Respondent's General Code of Operating Rules ("GCOR"), which addresses the reporting of injuries. (Tr. 117). Mr. Gibson confirmed the GCOR Assessment Table in Respondent's employee handbook reflects that failing to promptly report an injury results in a level one violation, which requires a coaching session and/or a letter of reprimand. (118-19). However, according to the Respondent's handbook, a supervisor can choose the discipline to impose, which Mr. Gibson believed was fair for employees. (Tr. 119-20). Mr. Gibson acknowledged that Respondent's employee handbook discusses progressive discipline steps, but implementation of any progressive discipline was not applied in

Complainant's case. Irrespective of Complainant's report of injury, Mr. Gibson stated he had a good relationship with Complainant. When asked whether other employees got along with Complainant, Mr. Gibson stated "for the most part, yeah." (Tr. 120). Mr. Gibson had no written documentation supporting his recommendation for Complainant's discipline, rather his recommendations were made orally. (Tr. 121).

On cross-examination, Mr. Gibson testified he has worked for Respondent for 16 years, and he began conducting Respondent's safety training when he was promoted to General Director of Operating Practices in 2015. (Tr. 121-22). He conducted the safety training for Complainant at Respondent's Hodge Yard, which lasted two weeks, with five to six employees in the training class. (Tr. 122). The new employee training covered railroad operating rules and safety rules, some air brake and train handling, and GCOR. (Tr. 122-23). In particular, Mr. Gibson covered Respondent's injury reporting rule with Complainant, as well as the other new employees. Mr. Gibson tells all the new hire employees that if they do not immediately report an injury, seeing somebody doing something wrong, or a safety violation, then he would personally walk them off the property, which he communicated to Complainant. (Tr. 123). He told the trainees, including Complainant, that any injury, accident, or derailment should be reported "as soon as it happens." (Tr. 124).

Upon completion of the initial training, Complainant went out into the field to work with one of Respondent's conductors, who was also training Complainant. Mr. Gibson identified JX-10, as Complainant's final trainee evaluation form dated August 11, 2017, which was completed by the conductor training Complainant. (Tr. 124). Mr. Gibson reviewed Complainant's evaluation form and discussed it with Complainant and the training conductor. (Tr. 124-25). Mr. Gibson stated Complainant was experiencing difficulty learning all of the rules, so Mr. Gibson provided a "couple of pointers" to Complainant on which to focus. Thereafter, Mr. Gibson suggested Complainant focus on learning the switch list, and lacing up air hoses. Mr. Gibson also offered to work out in the field with Complainant. (Tr. 125). Mr. Gibson confirmed JX-10 indicates that, according to the training conductor, Complainant could not switch a yard, customer track solo, or run a job by himself after one week of training. (Tr. 125-26). Mr. Gibson testified Complainant was experiencing difficulty with "the basics" of the job. Mr. Curtis Barkley was the conductor responsible for training Complainant. (Tr. 126). Mr. Gibson was concerned as to whether Complainant would be able to complete his training after he received the conductor's evaluation, and as a result, Mr. Gibson spoke with Mr. Steinkamp and Mr. Tim Cox about his concerns. Mr. Gibson informed Mr. Steinkamp and Mr. Cox that he would do everything he could to ensure Complainant succeeded in his training. (Tr. 127).

In July 2017, Mr. Gibson received a phone call that a personal injury was reported at "8th Avenue," which is a location where Respondent's crews go on-duty and off-duty. (Tr. 127-28). When Mr.

Gibson arrived at the location, the locomotives were on the main line, and the conductor explained to him what had transpired with Complainant. Mr. Gibson crawled into the cab where Complainant was located and asked if Complainant required any medical attention, to which Complainant stated "no." (Tr. 128). Mr. Gibson stated Complainant also did not require any help getting off the locomotive. (Tr. 128-29). Mr. Gibson drove Complainant over to the crew shanty located at 8th Avenue to talk about what transpired. Complainant reported to Mr. Gibson that he was coupling cars together, but he opened the anglecock at the request of the conductor, and in doing so, an air hose (with a flat hand) flew up and hit Complainant's leg. Mr. Gibson testified the anglecock has "90 pounds of psi" at any given time. (Tr. 129). Complainant reported that this incident occurred at the "main line shoving into Coral Sleeve," which is a sidetrack off of the main line. According to Mr. Gibson, Complainant stated he was standing between the locomotive and car when he was hit in the leg. (Tr. 130). Mr. Gibson also interviewed the engineer and conductor whose accounts were not consistent with Complainant's recollection of events. The conductor recalled that Complainant was never between the car and locomotive, where Complainant alleged the injury occurred. (Tr. 131). Due to the conflicts in reports between Complainant and the training conductor, Mr. Gibson pulled Complainant off of that job and placed Complainant in the yard to continue his training with the intention of later placing him back on his initial job. (Tr. 132). Mr. Gibson testified that it is Respondent's goal to accurately report an incident or injury, but none of the reports regarding the 8th Avenue incident were accurate, thus there was nothing to report at the conclusion of the investigation. (Tr. 132-33).

On August 29, 2017, Mr. Gibson received a phone call between midnight and 2:00 a.m. from Mr. Dennis Evez, the Manager of Train Operations, about an incident involving Complainant. (Tr. 133). Mr. Gibson got dressed and drove to Everman to speak with Complainant. (Tr. 133-34). Mr. Gibson spoke with Complainant in the crew shanty, and on numerous occasions Mr. Gibson asked Complainant whether he needed medical treatment, to which Complainant responded "no." Mr. Gibson also offered to drive Complainant to the hospital or call for an ambulance to come, but Complainant declined Mr. Gibson's offers. (Tr. 134). Thereafter, Mr. Gibson asked Complainant about what transpired, and where the incident occurred because Mr. Gibson wanted to ensure the area and equipment were also safe for other employees. (Tr. 134-35).⁷ Complainant reported to Mr. Gibson that he was injured while the train was pulling into Westrock and Complainant stepped off of a boxcar. (Tr. 136). Mr. Gibson identified RX-1, p. 1, as Respondent's switching yards located in Everman and where Complainant was working on August 29, 2017.⁸ (Tr. 137). The first location identified on RX-1, p. 1, is the area Complainant initially identified

⁷ Mr. Gibson identified RX-1, p. 2, as a "Google Earth" image of Respondent's tracks at Everman. (Tr. 135).

⁸ Respondent's Exhibit No. 1 was offered and admitted into evidence with no objections. (Tr. 137-38).

as the site where his knee injury occurred. The second location identified on RX-1, p. 1, is the area where Complainant reported he stepped off the boxcar and injured his knee as well. Finally, the third location identified on the exhibit is the area identified by Complainant when he spoke with Mr. Steinkamp about where his injury occurred, which allegedly happened after "lacing up an air hose standing up." (Tr. 141).

Mr. Gibson explained that if a train is traveling from the Everman crew shanty towards the 104 track, the trainee would be in the cab of a locomotive with the conductor and engineer, but not a boxcar. Mr. Gibson confirmed Complainant reported his injury occurred when he stepped off of a boxcar between the main line and Track 104. (Tr. 145). Mr. Gibson did not understand why Complainant would be riding on a boxcar. (Tr. 145-46). Mr. Gibson testified Complainant reported that he stepped in a "muddy spot" in between the "main line and 104 at the Westrock splits." However, Mr. Gibson had been at the same location just a couple days earlier when two locomotives were derailed, and there was no mud in the area. (Tr. 146). When Mr. Gibson communicated to Complainant that there was no mud in this area because it is ballast, Complainant stated his injury must have occurred at location number two. (Tr. 146-47). Nevertheless, location number two had an asphalt crossing with no mud there either. (Tr. 148). Consequently, Mr. Gibson asked Complainant to write a statement in order to determine where the incident occurred so that he could ensure the area was safe for other employees. (Tr. 149). While Complainant was writing his statement, Mr. Gibson walked outside due to his frustration about two potential injury sites. (Tr. 149-50). Complainant was the only person in the crew shanty after Mr. Gibson stepped outside and Mr. Steinkamp drove up to the crew shanty. (Tr. 150).

Mr. Gibson explained to Mr. Steinkamp what had transpired, that is, Complainant stated he was injured at one location, but he changed the location after Mr. Gibson informed him there was no mud at the first location. According to Mr. Gibson, Mr. Steinkamp asked him if he offered medical assistance to Complainant to which Mr. Gibson replied "yes." Mr. Gibson and Mr. Steinkamp entered the crew shanty, and Mr. Steinkamp offered medical assistance, which was refused by Complainant. (Tr. 151). Mr. Steinkamp asked Complainant to begin at the very beginning of Complainant's shift in order to determine the location where Complainant began feeling pain. (Tr. 151-52). However, during this time, Mr. Gibson was walking in and out of the crew shanty so he was not present during the entire conversation between Complainant and Mr. Steinkamp. Mr. Gibson heard Complainant identify a third location where he was injured, which was inside a warehouse with a concrete dock and ballast next to the cars where people walked to "lace them up."⁹ (Tr. 152). When Mr. Gibson heard Complainant state he was injured after lacing up the air hoses, Mr.

⁹ Respondent's Exhibit one, pages one through two were received in their entirety and admitted into evidence without objection. (Tr. 154-55).

Gibson was "confused" because he has never had an employee describe three different locations where an injury may have occurred. (Tr. 155). Mr. Gibson was "very concerned" because several employees travel around Respondent's tracks and Mr. Gibson needed to make sure all the employees remained safe. (Tr. 155-56).

While in the crew shanty, Mr. Gibson also heard Complainant mention an injury that did not occur on August 29, 2017. (Tr. 156). Mr. Gibson heard Mr. Steinkamp ask Complainant to write a separate statement about an injury, which Mr. Steinkamp told Mr. Gibson, happened the week prior to August 29, 2017. (Tr. 156-57). Complainant reported that his earlier injury occurred at a fourth location, at the "102 job while switching in the [Cow Pasture] yard." Complainant did not voice any objections to writing a second statement. (Tr. 157). Mr. Gibson was very concerned about the Complainant's report of a prior incident because it happened one week prior to the alleged August 29, 2017 incident, and Mr. Gibson did not know what equipment was involved, if it was a defective car, or something in the yard that caused Complainant's injury. (Tr. 157-58). At no point during the August 29, 2017 incident, was there any discussion about Complainant bumping his knee while climbing up an object. (Tr. 158). Mr. Gibson did not hear Mr. Steinkamp tell Complainant what to write in any of Complainant's statements. Mr. Gibson reviewed Complainant's two written statements when he returned to Hodge Yard after the investigation. (Tr. 160). Mr. Gibson identified JX-11 and JX-12 as Complainant's two written statements, neither of which state Complainant bumped his knee while climbing onto a locomotive.¹⁰ (Tr. 160-61). Both of Complainant's statements in JX-11 or JX-12 state he had an injury that occurred one week prior to August 29, 2017. (Tr. 162).

Mr. Gibson testified they were not going to let Complainant drive himself home due to his right knee pain/injury. Mr. Steinkamp requested that Mr. Aceves pull Mr. Aceves' truck up close to the crew shanty so that Complainant would not have to walk very far. (Tr. 163). Mr. Gibson explained when Complainant stepped down out of the shanty to the ground it was about a one and one-half foot drop, and Complainant "spun around and he put all of his weight on his right knee." (Tr. 163-64). Furthermore, when Complainant was climbing into Mr. Aceves' truck he used his right leg to push his weight into the truck, favoring his left knee. (Tr. 164). Consequently, after seeing Complainant get into Mr. Aceves' truck, Mr. Gibson believed Complainant was not injured. (Tr. 165).

Mr. Gibson recommended to Mr. Steinkamp that Complainant's employment with Respondent should be terminated because Complainant alleged he suffered a personal injury, but Complainant failed to

¹⁰ Mr. Gibson confirmed JX-11 stated "as I was climbing down my right foot slipped on some slick ground causing me to twist my right knee." (Tr. 161). However, JX-12 shows Complainant noticed "knee pain again as [he] bent down to lace up a car." (Tr. 162).

report it, which made it unsafe for other employees. (Tr. 165). Mr. Gibson explained he questioned Complainant's honesty due to Complainant's vacillating statements about his injury (as well as the incident just one week earlier). He did not know if Complainant's injury was due to equipment or a walkway, nor did Mr. Gibson know whether any of Complainant's alleged injuries occurred at the first, second, or third location provided by Complainant. Mr. Gibson was not present when Complainant was terminated. (Tr. 166).

Mr. Gibson identified Roman Rodriguez, Elizar Perez, Zach Schmidt, Eric Lockley, all of whom were injured while working for Respondent; they reported their injuries, and they remain employed by Respondent. (Tr. 166-68). Mr. Gibson confirmed JX-2, which contains Respondent's GCOR Assessment Table, states Respondent "may in appropriate cases elect to follow the GCOR disciplinary assessment table." (Tr. 169). However, Mr. Gibson stated that even if the GCOR Assessment Table suggests a Level 1 disciplinary action, Respondent is not limited to the assessment. (Tr. 169-70). Mr. Gibson stated there was "absolutely" no retaliation against Complainant for reporting an injury when Mr. Gibson recommended Complainant's employment be terminated. (Tr. 170).

On re-direct examination, Mr. Gibson confirmed he is not a licensed medical physician and he is not qualified to offer a medical opinion as to any treatment Complainant received. (Tr. 170-71). Mr. Gibson testified Complainant was eager to learn, and had a desire to work for the railroad and succeed. (Tr. 171). Mr. Gibson wants all of Respondent's employees, including Complainant, to succeed in their work. (Tr. 172).

With respect to Complainant being hit in the shin in July 2017, Mr. Gibson testified that the conductor and the engineer stated Complainant was riding cars and he was between the locomotives, and Complainant was not asked to open the anglecock, rather he was asked to "lace it up." (Tr. 172). On August 29, 2017, Mr. Gibson asked Complainant if he wanted to go to the emergency room for medical treatment, but Complainant declined treatment. Instead, Complainant informed Mr. Gibson that he was going home and if necessary, he would see his doctor in the morning. (Tr. 174).

Mr. Gibson confirmed Complainant was training with a conductor for five weeks, and that Complainant had to stay within 30 feet of the conductor during training. (Tr. 175). Mr. Gibson testified that when Complainant left the "cow pasture" yard, Complainant would have been in the cab of the locomotive and there would have been no reason for Complainant to ride a boxcar nor would the conductor let him ride the boxcar to Westrock. (Tr. 176). Mr. Gibson acknowledged that one of Complainant's written statements alleges Complainant stepped down from a boxcar in between the main track and lead track. Mr. Gibson did not believe Complainant was confused about the names of various tracks because he worked in the Everman subdivision for two weeks on the "102 job." (Tr. 177). Mr. Gibson explained he was concerned whether there

was defective equipment, such as the ladder rung on the boxcar, that may have caused Complainant to slip while stepping off of the boxcar. (Tr. 179). Mr. Gibson could not inspect the boxcar because the alleged injury occurred one week earlier, there are hundreds of boxcars, and he did not have the number of the boxcar or know its location. (Tr. 180).

Mr. Gibson testified he recommended Complainant be terminated, but Mr. Steinkamp made the final determination to terminate Complainant's employment with Respondent. (Tr. 181). Mr. Gibson confirmed he was not in the crew shanty during the entirety of Mr. Steinkamp's conversation with Complainant. (Tr. 183).

Jared Steinkamp

Mr. Steinkamp testified at the formal hearing he was born on June 30, 1982. (Tr. 186). Mr. Steinkamp was employed by Respondent as the Chief Transportation Officer and he has served in the position since September 2016. (Tr. 186-87). Mr. Steinkamp has worked for Respondent for eleven and one-half years, and his current position is a management position. (Tr. 187).

Mr. Steinkamp testified he served on Respondent's interview panel during Complainant's interview for employment. (Tr. 187). He identified JX-21, p. 25, as a form used by Respondent's Human Resource Department during a three-panel interview that was completed by Kim Pope. (Tr. 188-89). Upon completion of Complainant's April 17, 2017 interview, Mr. Steinkamp had a positive feeling about hiring Complainant because of Complainant's "family history." (Tr. 189). After an interview, the interview panel has a verbal conversation about the candidate for hire. In general, Mr. Steinkamp liked Complainant. (Tr. 190).

Regarding the August 29, 2017 incident, Mr. Steinkamp received a phone call from Mr. Aceves, the trainmaster, while at home. (Tr. 190-91). When Mr. Steinkamp arrived to the crew shanty, Mr. Gibson met him in the parking lot and Complainant was in the shanty writing a statement. (Tr. 191). Mr. Gibson briefed Mr. Steinkamp about Complainant providing two different locations where his injury occurred. Mr. Steinkamp confirmed it is common practice for an employee to complete forms in the crew shanty. Mr. Steinkamp did not recall Mr. Aceves being in the parking lot when he spoke with Mr. Gibson. (Tr. 192).

Mr. Steinkamp testified that when he entered the crew shanty, Complainant was in the process of completing his first statement, but Mr. Steinkamp requested Complainant write a second statement. When Mr. Steinkamp initially walked into the crew shanty he asked Complainant whether he required medical treatment, and in doing so, Mr. Steinkamp interrupted Complainant writing the first statement. Mr. Steinkamp had a discussion with Complainant and explained that there was confusion about the location of Complainant's injury.

Complainant communicated he was experiencing difficulty in remembering the events that transpired. (Tr. 193). Consequently, Mr. Steinkamp requested Complainant go back through each move in order to determine where his pain began and determine the root location and cause of the incident/injury. (Tr. 193-94). Thereafter, Mr. Steinkamp asked Complainant to put in writing what Complainant had explained verbally. Mr. Steinkamp did not provide any "ground rules" in directing Complainant to write his statement. It was during Mr. Steinkamp's initial discussion with Complainant that he learned of Complainant's prior injury on or around August 23, 2017. (Tr. 194). Complainant was having difficulty articulating when the prior injury occurred, but he stated it was at the beginning of the week which led Mr. Steinkamp to believe an injury occurred on August 21, 2017 or August 23, 2017. Mr. Steinkamp confirmed no other employees reported any kind of incident or injury during the week of August 23, 2017, and Mr. Steinkamp never gained any information about the incident from anyone other than Complainant. (Tr. 195).

When Complainant wrote his first statement, Complainant indicated to Mr. Steinkamp that he had stepped off of a boxcar and twisted his knee. (Tr. 195). Consequently, Mr. Steinkamp asked Complainant, in his second written statement, to clarify where he first began to feel pain because Complainant also stated he felt pain while inside the Westrock facility. (Tr. 196).

Mr. Steinkamp explained that generally a train coming from Everman to Westrock will only have to "throw the switch" for the lead track into Westrock, which will be done by a conductor. The conductor gets down from the locomotive to throw the switch, and thereafter, the conductor climbs into the boxcar to move it until it is in the Westrock station. (Tr. 197). Mr. Steinkamp confirmed that during a "shove movement" it is not uncommon for a conductor to ride on a boxcar. (Tr. 198).

Mr. Steinkamp testified that Complainant was not asked to write a second statement for further clarity, rather Complainant had changed the location where he initially suffered injury. (Tr. 198). Mr. Steinkamp was trying to determine where Complainant stepped off of the boxcar, twisted his knee, and felt knee pain. When asked if it was possible that an injury occurred when Complainant twisted his knee and all the other incidences (i.e., different locations where Complainant felt pain) occurred because Complainant felt pain after initially twisting his knee, Mr. Steinkamp replied "no." Mr. Steinkamp explained that the context of his conversation with Complainant was to determine the place and location where Complainant was actually injured. (Tr. 199).

Mr. Steinkamp identified JX-15 as an injury report he completed while talking with Complainant on August 29, 2017. Mr. Steinkamp did not ask Complainant to sign the injury report, but he did show Complainant the completed report. (Tr. 200). Mr. Steinkamp is not aware of any injury report form that permits an employee to sign the

report. (Tr. 201). Mr. Steinkamp confirmed that JX-20 contains two of Respondent's injury reports, both of which have a specific box for an employee's signature and was signed by Mr. Steinkamp. (Tr. 201). Mr. Steinkamp confirmed JX-15 reflects that Mr. Aceves was notified at 3:42 a.m. about Complainant's injury, and by 5:00 a.m. Mr. Steinkamp had completed the investigation. (Tr. 202). Mr. Steinkamp wrote on Complainant's injury report that Complainant "stated he twisted his knee on a slick spot of mud, but then he changed his statement and said that he recognized the pain after lacing up two air hoses inside of Westrock's facility." (Tr. 203). Mr. Steinkamp explained that Complainant did not claim he was injured at both locations, rather Complainant clarified that he was injured when he was "lacing up the air hoses." (Tr. 204). Based upon Complainant's statement contained in JX-12, Mr. Steinkamp understood that Complainant injured himself one week prior to August 29, 2017, but felt pain again while lacing up the car, which was confirmed by Complainant during the investigation. (Tr. 205). Complainant identified three different locations where he reportedly injured himself, but then Complainant reported to Mr. Steinkamp that he was injured one week prior and he re-aggravated his knee on August 29, 2017. Mr. Steinkamp explained that when he was going through the initial investigation he was not under the impression Complainant re-aggravated an injury, rather he was looking for the root cause of an injury that occurred either on August 28, 2017 or August 29, 2017. (Tr. 206).

On August 29, 2017, when Mr. Steinkamp interviewed Complainant he was not under the impression that Complainant was pretending to have an injury, instead Mr. Steinkamp wanted to determine where Complainant's injury transpired. (Tr. 206-07). Mr. Steinkamp never received any notice from other employees about any injury occurring one week prior to August 29, 2017. (Tr. 207). Mr. Steinkamp confirmed Complainant was the only reason he learned about the incident one week prior to August 29, 2017, in which Complainant suffered a knee injury. (Tr. 207-08).

On September 13, 2017, Mr. Steinkamp met with Complainant at his office after Complainant received medical clearance to return to work. (Tr. 209-10). Complainant had not worked since August 29, 2017, because he was under a physician's care. (Tr. 210). Mr. Steinkamp identified JX-18 as Complainant's termination letter dated September 13, 2017, which states Complainant's employment was terminated because he failed to comply with Respondent's "employee handbook work and safety rules, reporting of accidents, incidents, and impacts." (Tr. 210-11). Complainant signed his September 13, 2017 termination letter, which is required by Respondent's Human Resources Department. (Tr. 211-12). Mr. Steinkamp made the decision to terminate Complainant because he failed to timely report an injury one week prior to August 29, 2017. (Tr. 212). Mr. Steinkamp confirmed that to his knowledge Complainant was not absent from work due to an injury prior to August 29, 2017. (Tr. 213).

Mr. Steinkamp confirmed JX-20 involves a 2010 incident involving one of Respondent's employees, Brian Pike, who reported an incident a couple of days after it occurred. Mr. Steinkamp confirmed the report states Mr. Pike had a "bite" on his leg, but he did not report it until the affected area was "red and irritated." (Tr. 214). Although Mr. Steinkamp's signature was on Mr. Pike's incident report, Mr. Steinkamp testified he was not involved with the investigation or accident report, nor did he know whether Mr. Pike was disciplined. (Tr. 214-15). Mr. Steinkamp notified his supervisor about Mr. Pike's injury, who in turn proceeded with the investigation. Mr. Steinkamp confirmed Mr. Pike was not terminated from his employment which began on June 21, 2010, approximately two months before Mr. Pike's August 19, 2010 injury. (Tr. 215). Mr. Steinkamp would classify Mr. Pike's failure to immediately report his insect bite as a violation of Respondent's work and safety rules. If Mr. Steinkamp was overseeing Mr. Pike's investigation he would have terminated Mr. Pike's employment. Mr. Steinkamp explained that Respondent does carry commodities such as sugar which can leak onto the ground and attract up to 1,000 bees, and as a result, it could be a potential hazard if any of Respondent's employees are allergic to bees. (Tr. 216). Thus, Mr. Steinkamp testified that if someone like Mr. Pike was stung or bitten, he would like to be made aware of the situation in order to mitigate any potential dangers and protect all of Respondent's employees. Mr. Steinkamp testified that although Mr. Pike was not terminated, Respondent's policies permit escalating discipline beyond the basic discipline guidelines for failing to timely report an injury. Mr. Steinkamp was not the decision-maker in Mr. Pike's case, rather Larry Hopkins, who is no longer employed with Respondent, was the ultimate decision-maker. (Tr. 217). In 2010, either Steve George or Tom Schlosser served as Respondent's CEO, and currently Mr. Kevin Erasmus serves as CEO. (Tr. 217-18). To Mr. Steinkamp's knowledge, Respondent's discipline policies have not changed since 2010. (Tr. 218).

Mr. Steinkamp identified JX-3 as a letter dated September 30, 2014, terminating Mr. Aceves for failing to timely report an injury pursuant to GCOR 1.1.3 Accidents, Injuries, and Defects, which was drafted by Respondent's Human Resources Department and signed by Mr. Steinkamp.¹¹ (Tr. 219). Mr. Steinkamp testified that a nurse at the VA Hospital believed Mr. Aceves suffered a back injury while at work, 30 days prior. (Tr. 220). Mr. Steinkamp spoke with Respondent's CEO about Mr. Aceves injury, and without speaking with Mr. Aceves, the CEO decided to terminate Mr. Aceves' employment. (Tr. 221-22). Nevertheless, Mr. Aceves reported there was a miscommunication with the VA nurse, who believed Mr. Aceves' injury was work-related. Mr. Aceves was reinstated by Respondent when he recalled he was injured while exercising at the gym, and not at work. (Tr. 222). According

¹¹ Mr. Steinkamp testified the GCOR rules are not a part of Respondent's employee handbook, but instead are contained in a separate book. However, Respondent's employee handbook notes that Respondent applies the GCOR rules. (Tr. 220).

to Mr. Steinkamp, an employee has a duty to report off duty injuries under GCOR. Consequently, Mr. Aceves was given a ten day suspension for failing to accurately report an injury. Mr. Steinkamp stated the incidents between Complainant and Mr. Aceves are different. (Tr. 223). Mr. Aceves explained to Mr. Steinkamp that the VA Hospital did not want to treat him because the nurse believed his injury was a work injury; Mr. Aceves never reported that he believed his injury was work-related, but instead he was simply "trying to get his back fixed." (Tr. 224-25).

Mr. Steinkamp notified Respondent's Human Resources Department that Mr. Aceves received treatment at the VA Hospital whose staff believed his injury was work-related. Thereafter, the CEO of the company called Mr. Steinkamp and though Mr. Steinkamp tried to inform the CEO about Mr. Aceves' situation, the CEO wanted Mr. Aceves terminated. (Tr. 225). Thereafter, Mr. Aceves disputed the CEO's decision and ultimately, he was reprimanded for failing to furnish accurate information and was suspended for ten days from work without compensation. (Tr. 225-27). Mr. Steinkamp testified that the lapse in time, approximately 30 days, between Mr. Aceves' alleged back injury and when he sought treatment was not of concern to Respondent because Mr. Aceves was not reporting a work injury. (Tr. 228). Mr. Steinkamp confirmed Mr. Aceves was suspended because he failed to furnish accurate information about the source of his injury. (Tr. 229).

Mr. Steinkamp believes Mr. Aceves' situation differs from Complainant because at no point has Complainant requested to be re-employed by Respondent or admitted he falsely reported an injury. (Tr. 230). Mr. Steinkamp receives all injury reports, whether major or minor. (Tr. 231). Mr. Steinkamp testified the GCOR does not have an assessment table for rule violations, but Respondent's employee handbook does contain a discipline assessment table. (Tr. 232-33). Respondent created its own discipline assessment table set forth in the employee handbook. (Tr. 223). Mr. Steinkamp confirmed JX-9 sets forth Respondent's newly revised "Work and Safety Rules, Reporting of Accidents, Incidents, and Impacts." (Tr. 234). Mr. Steinkamp testified Complainant violated Rule No. 8 set forth in JX-9 and JX-2, p. 27, which addresses reporting injuries accurately and promptly. (Tr. 235-36). He agreed Respondent's Rule No. 8 covers similar information to that of GCOR 1.1.3 and Rule 1.2.5, regarding the reporting of accidents, injuries, and defects, which would result in a Level 1 violation. (Tr. 236).

Nonetheless, Mr. Steinkamp explained that in Complainant's case, Respondent had a right to go beyond the GCOR guidelines for discipline. (Tr. 237). Mr. Steinkamp testified the GCOR Chapter 1, which provides for a Level 1 discipline pertains to being at work on time and prepared for work. (Tr. 237-38). Further, Respondent's employee handbook clearly states before the discipline assessment table, that it "may, in appropriate cases, elect to follow the GCOR disciplinary assessment table which is provided below." (JX-2, p.

44). According to Mr. Steinkamp, had Respondent elected to follow the GCOR disciplinary assessment table in Complainant's case, Complainant would have only received a "coaching" and/or a letter of reprimand. (Tr. 239).

Mr. Steinkamp confirmed JX-9, p. 47, describes a progressive discipline, which if not employed, requires consultation with Respondent's Human Resources Department. Whether the progressive discipline system is applied, or another form of discipline, is something Mr. Steinkamp decides on a case-by-case basis. (Tr. 240). Mr. Steinkamp consulted with the Human Resources Department about Complainant's report of injury, and in doing so, determined progressive discipline was not appropriate. (Tr. 240-41). Mr. Steinkamp acknowledged JX-2, p. 49, states "no employee shall be dismissed or separated without the concurrence of at least one level of supervision above the employee's immediate supervisor, and without first discussing it with the President, CEO, and Human Resources." After discussing Complainant's late report of injury, Mr. Steinkamp testified Respondent's President, CEO, and Human Resources Department agreed that Complainant should be terminated. (Tr. 241). Mr. Steinkamp confirmed there is no written or verbal evidence of any discussion with the CEO, President or Human Resources Department regarding Complainant's termination. (Tr. 241-42).

Mr. Steinkamp acknowledged JX-9 lists seven minor infractions, six major infractions, and 29 other potential disciplinary violations. (Tr. 242-43). He testified the violation committed by Complainant is listed in JX-9 under "other disciplinary violations." Mr. Steinkamp is not aware of any guidance from OSHA stating an employee's discipline should be equal to the effect of the violation. (Tr. 243).

In the summer of 2017, Mr. Steinkamp was made aware of an incident in which Complainant allegedly bruised his leg with an air hose, but no paperwork was completed. Mr. Steinkamp stated an employee has an obligation to report an injury, but Respondent does not necessarily have an obligation to prepare a written report. (Tr. 245). Respondent does provide for an employee to complete a "safety action request" form for any equipment in need of repair, which asks for the location and description of the safety issue. Mr. Steinkamp did not provide a safety action report to Complainant during the "air hose" incident. (Tr. 248).

Mr. Steinkamp understood that a crime of moral turpitude is a crime involving dishonesty or deceit, or intentionally giving false information. (Tr. 252). On February 1, 2010, Mr. Steinkamp was convicted of providing false information to a police officer. (Tr. 252-53).

On cross-examination, Mr. Steinkamp testified he began working for Respondent in 2006, as a brakeman and later was promoted to conductor, then locomotive engineer, train master, senior manager of train operations, director of terminal operations, general director of

operations, and then vice president, chief operating officer position. (Tr. 253-54). However, Mr. Steinkamp only served as vice president, chief operating officer for nine months before he stepped down for personal reasons. As Chief Transportation Officer, Mr. Steinkamp oversees Respondent's Transportation Department with respect to safety, service, and efficiency. (Tr. 254).

After initially interviewing Complainant for employment with Respondent, Mr. Steinkamp saw Complainant sing and play his guitar at the end of Mr. Gibson's training class. (Tr. 255). Mr. Steinkamp allowed Complainant's father, who worked for Respondent, to ride with Complainant on the railroad. (Tr. 256).

Mr. Steinkamp recalled that in July 2017, Complainant reported being hurt by the "anglecock," but there were discrepancies in Complainant's reports. When Complainant came back to Hodge Yard, Mr. Steinkamp spent two hours with Complainant trying to determine what transpired. (Tr. 257). Complainant reported he was struck by an anglecock on the locomotive, while the other crew stated Complainant was not in an area where he would have been struck by the anglecock. Mr. Steinkamp was concerned about determining the root cause of Complainant's alleged incident in order to mitigate any risk to other employees and make sure medical attention was provided if necessary. (Tr. 258). Despite spending two hours trying to determine what occurred with Complainant, Complainant stated there was no injury to report, and everyone walked away without a complete answer as to what occurred. (Tr. 259).

Following the anglecock incident, Mr. Gibson placed Complainant in Hodge Yard to work on the "101 job." (Tr. 259). Mr. Steinkamp believed Complainant was better off training in Hodge Yard because it was a slower paced environment and it would provide Complainant a chance to adjust to his new job. (Tr. 259-60). Mr. Steinkamp wanted Complainant to succeed. (Tr. 260).

Mr. Steinkamp recalled that on August 29, 2017, at approximately 4:00 a.m. he received a phone call that Complainant had been injured. (Tr. 260). If there is an injury on Respondent's property, Mr. Steinkamp will be present to interview the employee, determine if the employee needs medical attention and what transpired to cause an injury. On August 29, 2017, when Mr. Steinkamp arrived to Everman he met Mr. Gibson in the parking lot by the crew shanty. Mr. Gibson conveyed to Mr. Steinkamp that Complainant identified two different locations where he was injured, which is not typical during an investigation. (Tr. 261). Mr. Steinkamp stated that typically it is very clear where an injury occurred. (Tr. 261-62). Mr. Gibson informed Mr. Steinkamp that the first location of Complainant's injury was by the Westrock switch between the main line and 104 Track where Complainant stepped off of a boxcar and twisted his knee. Mr. Gibson stated the second location was in an area where they "shoved off of the boxcar." Mr. Steinkamp testified there is approximately 400 to 500 feet between the two locations. (Tr. 262).

After Mr. Gibson provided Mr. Steinkamp with the details of Complainant's August 29, 2017 incident, Mr. Steinkamp went into the crew shanty to speak with Complainant, who was writing a statement. (Tr. 262-63). Mr. Steinkamp asked Complainant if he needed medical treatment or would like a bottle of water. Mr. Steinkamp was under the impression that Complainant was "nervous" because he provided multiple locations of injury. Mr. Steinkamp told Complainant to relax and that he was not in trouble, rather they were just trying to determine where Complainant was injured. Mr. Steinkamp confirmed JX-11 is the first statement Complainant provided, but Complainant had not completed his statement when Mr. Steinkamp entered the crew shanty. (Tr. 263). Mr. Steinkamp communicated to Complainant that he wanted to determine where the injury occurred on August 29, 2017, and he asked Complainant to start at the very beginning and work through each move in order to recall where Complainant first remembered feeling pain. (Tr. 264). Complainant reported to Mr. Steinkamp that he did not remember feeling pain when he stepped off the boxcar at the Westrock switch (location 1). (Tr. 264-65). Likewise, Complainant reported to Mr. Steinkamp that he also did not feel pain at the second location. (Tr. 266). Complainant next described how he entered "into a building and they brought the cars in[side]" (location 3) and Complainant felt pain when he stood upright after bending down to lace up the hose. (Tr. 267-68). Mr. Steinkamp also asked Complainant if he recalled tripping, falling or bumping his knee because it made more sense to Mr. Steinkamp that one of these actions would cause knee pain rather than standing upright. (Tr. 268). Mr. Steinkamp recalled that Complainant stated he twisted his knee, and thus Mr. Steinkamp did not understand how Complainant twisted his knee when he stood upright. (Tr. 269).

After asking Complainant whether he tripped or fell, Complainant stated he actually injured himself one week prior. (Tr. 269). This was the first occasion Mr. Steinkamp heard Complainant admit he was injured on a prior occasion, and it made more sense to Mr. Steinkamp because Complainant's prior reports were not "matching up." Even though Complainant provided multiple locations where his injury may have occurred, there were no significant factors that could have caused Complainant's injury. However, when Complainant reported his injury occurred one week prior and it was raining, it made sense to Mr. Steinkamp that Complainant slipped on a wet surface and twisted his knee. (Tr. 270). Mr. Steinkamp asked Complainant where and how the prior injury occurred, but Complainant could not recall the facts surrounding his injury. (Tr. 270-71). Complainant also could not recall the specific day that he was injured, but he stated it occurred at the beginning of the prior week. Mr. Steinkamp asked Complainant if the incident occurred between August 21, 2017 and August 23, 2017, Complainant stated "yeah, probably in between those days." (Tr. 271).

Mr. Steinkamp explained that Complainant wrote the first statement (JX-11), but he did not mention lacing up the hoses. (Tr. 271). Therefore, Mr. Steinkamp asked Complainant to write a second

statement (JX-12) that included the air hose, lacing up the hoses, as well as the account of his incident/injury just one week prior. (Tr. 272). He testified Complainant could not recall any details from the incident just one week prior such as where it occurred, when it happened, or what piece of equipment was involved, only that it was raining and he stepped off a piece of equipment. (Tr. 273). Mr. Steinkamp concluded Complainant was injured one week prior at Everman, but he failed to report his injury. Mr. Steinkamp confirmed JX-15 is an August 29, 2017 injury and illness report that he completed in the crew shanty at Everman. (Tr. 274). In his report, Mr. Steinkamp included Complainant's assigned job number, the date on which Complainant's injury occurred, and when Complainant reported experiencing pain. (Tr. 275-76). Mr. Steinkamp noted that the first location Complainant reported as an injury site was between the "main line and 841-45 track" which is the area Complainant described in JX-11. (Tr. 278-79). On August 29, 2017, Complainant did not report to Mr. Steinkamp that he had an incident in which he was climbing up onto a locomotive and bumped his knee. When Mr. Steinkamp completed his statement (JX-15), he provided the statement to Complainant so that he could read the contents of the statement. Complainant did not object to Mr. Steinkamp's written statement. (Tr. 280).

Mr. Steinkamp was present at Complainant's deposition just five weeks before the formal hearing in this matter. (Tr. 280). Complainant's deposition was the first time Mr. Steinkamp heard Complainant state that on August 21, 2017 or August 23, 2017, Complainant "banged his knee climbing up onto a locomotive." On August 29, 2017, Mr. Steinkamp received four different versions of Complainant's injury, with Complainant's deposition testimony making it five versions. Mr. Steinkamp spoke with other employees who worked with Complainant, including engineer Oka Woodard and conductor Keith Powell, all from whom he collected statements. Nevertheless, their statements did not factor into Mr. Steinkamp's decision making. (Tr. 281). Mr. Steinkamp identified RX-2 as Mr. Powell's statement about what happened the day before or on August 29, 2017.¹² (Tr. 282).

Mr. Steinkamp spoke with Mr. Gibson about what would be the proper course of action regarding Complainant's employment, and Mr. Gibson recommended Complainant be terminated for failing to promptly report a personal injury. (Tr. 284-85). Mr. Steinkamp was the decision-maker in the instant case. Mr. Steinkamp terminated Complainant for failing to timely report his injury occurring between August 21, 2017 and August 23, 2017. (Tr. 285). Mr. Steinkamp explained he terminated Complainant's employment, rather than meting out a lesser discipline because by Complainant failing to timely report his injury, Respondent was not given an opportunity to address any potential safety hazards or defective equipment that posed a danger to other employees. (Tr. 285-86). Complainant left Respondent at a disadvantage to properly mitigate any type of risk and find the

¹² Respondent's exhibits two and three, consisting of Mr. Powell and Mr. Woodard's statements were offered and received into evidence. (Tr. 284).

root cause of Complainant's injury. (Tr. 286). Mr. Steinkamp testified Complainant's report of injury was unusual because there were multiple locations of injury, but that did not affect Mr. Steinkamp's decision to terminate Complainant's employment. (Tr. 286-87).

Mr. Steinkamp confirmed Respondent has employees who have reported injuries, received medical attention, and remain employed with Respondent. (Tr. 287). Mr. Steinkamp testified Mr. Aceves was initially terminated due to not timely reporting an injury, however, because Mr. Aceves admitted he did not suffer a work injury, he was reinstated in his employment. (Tr. 287-88). Mr. Aceves communicated to Mr. Steinkamp that the VA Hospital nurse was trying to determine the cause of Mr. Aceves' back pain, and Mr. Aceves explained he did a lot of bending over and throwing switches while at work. Consequently, the VA Hospital nurse instructed Mr. Aceves to call Respondent about a work-related injury. Following his termination, Mr. Aceves returned to the VA Hospital and informed them that he lost his job and he needed treatment for his back injury. Thereafter, the VA Hospital treated Mr. Aceves for his back injury. (Tr. 288). Mr. Steinkamp made the decision to re-hire Mr. Aceves. Mr. Steinkamp testified Complainant's report of injury differed from Mr. Aceves in that Complainant had a definitive injury occurring between August 21, 2017 and August 23, 2017, which he failed to report, whereas Mr. Aceves could not specify any time or cause of his back pain that would have been work-related. (Tr. 289).

Mr. Steinkamp testified that Complainant's statement as set forth in JX-11 was Complainant's recollection of his injury and Mr. Steinkamp did not direct Complainant to write any particular statement other than requesting Complainant provide it in writing. (Tr. 289-90). Mr. Steinkamp confirmed Complainant's statement in JX-12, that he "injured his right knee in Everman and [he] did not report my injury to any of [his] coworkers or other authorities," was written by Complainant. Mr. Steinkamp did not direct Complainant to use the term "other authorities." (Tr. 290-91). Mr. Steinkamp only witnessed Complainant write two statements, both of which are contained in JX-11 and JX-12, respectively. Mr. Steinkamp did request that Complainant write "Statement Number 2" on the top of his second written statement because there were two statements. (Tr. 291). Mr. Steinkamp had no retaliatory motive in terminating Complainant's employment. Mr. Steinkamp did not believe Complainant's absence from work following his injury was "a big deal" or a problem. (Tr. 292). Mr. Steinkamp has no idea about any medical costs incurred by Respondent in association with Complainant's work injury, nor did medical costs bear on Mr. Steinkamp's decision to terminate Complainant's employment. (Tr. 292).

On re-direct examination, Mr. Steinkamp confirmed that at the end of the investigation of the July 2017 incident, Complainant stated he did not suffer an injury, and as such, Mr. Steinkamp did not complete an injury report. (Tr. 293). Mr. Steinkamp never had the impression

that Complainant was being dishonest in his report of injury. (Tr. 295). After meeting with Complainant at Everman, Mr. Steinkamp did not speak with Complainant until September 13, 2017, when Complainant was terminated. (Tr. 300). Mr. Steinkamp did not agree with Respondent's initial decision to terminate Mr. Aceves' employment. The CEO supported Mr. Steinkamp's decision to re-hire Mr. Aceves. (Tr. 301). Mr. Steinkamp testified the facts surrounding Mr. Aceves' termination are not similar to that of Complainant's late report of injury. (Tr. 301-02).

On re-cross examination, Mr. Steinkamp acknowledged that when determining whether an employee violated the injury reporting rule, it makes it difficult to ensure all the proper facts are obtained if the employee provides multiple versions about the incident/injury. (Tr. 302-03). Mr. Steinkamp testified such a situation poses "a risk" because it is hard to determine the root cause of the incident, injury, or accident, which results in not being able to prevent the injury or accident in the future. (Tr. 303). In Complainant's case, Mr. Steinkamp was concerned about other employees working in the same location, or using the same piece of equipment that may have been malfunctioning, or that an employee would step into a hole or muddy spot. If Complainant had promptly informed Mr. Steinkamp about his injury (occurring between August 21, 2017 and August 23, 2017), Mr. Steinkamp would have been able to take action in order to mitigate any risks to other employees. If Complainant were to work for Respondent again, Mr. Steinkamp is not sure that Complainant could provide an accurate report of an injury or accident. (Tr. 304).

On further re-direct examination, Mr. Steinkamp did not recall any employees, other than Complainant, reporting they slipped on mud or a slippery substance during the weeks of August 21, 2017 and August 29, 2017. (Tr. 305). Mr. Pike and Mr. Aceves are the only two employees to Mr. Steinkamp's knowledge that reported injuries, but were not terminated or were rehired. (Tr. 306). However, Mr. Steinkamp testified Mr. Aceves' situation differed from Complainant because Mr. Aceves ultimately did not have a work injury. (Tr. 306-07).

IV. ISSUES

1. Did Complainant engage in protected activity under 49 U.S.C. § 20109?
2. Did Respondent have knowledge of Complainant's alleged protected activity?
3. Did Complainant suffer any adverse, unfavorable action?
4. Was Complainant's alleged protected activity a contributing factor in the alleged adverse, unfavorable personnel action?

5. If Complainant meets his burden of entitlement to relief, did Respondent establish, by clear and convincing evidence, that it would have taken the same adverse action absent the alleged protected activity?
6. Is Complainant entitled to compensatory and punitive damages, back pay for lost wages, pre-judgment interest, as well as attorney's fees?

V. CONTENTIONS OF THE PARTIES

In brief, Complainant contends he engaged in protected activity when he reported an on-the-job injury, sought medical treatment for his work injury and followed his treating physician's treatment plan. Specifically, pursuant to 49 U.S.C. § 20109(a)(4), Complainant asserts he engaged in protected activity on August 29, 2017, when he reported to Respondent that he suffered an injury to his right knee one week earlier. Similarly, pursuant to 49 U.S.C. § 20109(c), Complainant contends he engaged in protected activity when he sought medical attention from his general practitioner and followed his physicians' treatment plan by remaining off of work until September 11, 2017. Complainant contends direct evidence shows his protected activity is **inextricably intertwined** with his termination, which establishes his protected activity caused Respondent to discharge him. Complainant further contends circumstantial evidence demonstrates his protected activity was a contributing factor to Respondent's decision to terminate his employment as evidenced by temporal proximity, disparate treatment, indications of pretext, inconsistent application of Respondent's policies, and Respondent's shifting explanations for its actions. Therefore, Complainant asserts he has established a **prima facie** case pursuant to 49 U.S.C. § 20109, and that Respondent has failed to produce clear and convincing evidence that his termination would have occurred in the absence of his protected activity.

Additionally, Complainant asserts he is entitled to \$250,000.00 in punitive damages due to Respondent's egregious conduct of deterring employees, such as Complainant, from reporting on-the-job injuries. Furthermore, Complainant contends he is entitled to \$38,210.60 in back pay for lost wages, \$25,000.00 in compensatory damages for emotional distress, post-judgment interest, and attorney's fees. Finally, Complainant seeks reinstatement to his prior position with Respondent preceding his termination, and expungement of any negative reference of the present matter from Complainant's personnel file.

In brief, Respondent avers Complainant reported on August 29, 2017, that he re-aggravated a prior knee injury which occurred one week before (either on August 21, 2017 or August 23, 2017) while working for Respondent. On this basis, Respondent asserts Complainant failed to timely report his prior knee injury which violated one of

Respondent's safety rules, requiring prompt and accurate reporting of any injury no matter how insignificant. As a result, Respondent avers it terminated Complainant's employment on September 13, 2017, after Mr. Steinkamp and Respondent's CEO, President, and Human Resources Department reached the consensus that Complainant did not comply with Respondent's employee handbook and safety rules. On this basis, Respondent argues the findings of OSHA were correct in concluding "Complainant's employment was not terminated for reporting an injury, but for violating company policy."

Further, Respondent asserts Complainant cannot demonstrate that his report of a workplace injury was protected activity because he failed to report a workplace injury honestly and in **good faith**. 49 U.S.C. § 20109(a)(4); see Grimes v. BNSF Ry. Co., 746 F.3d 184 (5th Cir. 2014); see also Walker v. Am. Airlines, ARB No. 05-028, 2007 DOL Ad. Rev. Bd. LEXIS 32 (ARB Mar. 30, 2007) (an employee's false statement in a hotline call was not protected under AIR-21). Respondent avers Complainant provided four different locations as the site of his injury, and shifting explanations as to whether and when he suffered a workplace injury. Thus, Respondent contends Complainant has failed to report a workplace injury in **good faith**, and therefore has not met his burden of showing he engaged in protected activity.

In addition, Respondent argues Complainant has failed to demonstrate through direct and/or circumstantial evidence that his report of a workplace injury was a contributing factor in Respondent's decision to terminate employment. More specifically, Respondent argues Complainant has failed to show Respondent had a retaliatory motive, even in part, prompted by his report of injury, which is necessary to establish his **prima facie** case. See Heim v. BNSF Ry. Co., 849 F.3d 723, 727 (8th Cir. 2017), cert. denied, 138 S.Ct. 268, 199 L. Ed. 2d 126 (2017). Moreover, Respondent contends that any reliance on temporal proximity between Complainant's alleged protected activity and his termination is insufficient to support a retaliation claim under the FRSA when an employee's conduct, as is the case here, for which he was disciplined had long been established as a violation of Respondent's rules of conduct. Kuduk v. BNSF Ry. Co., 980 F. Supp. 2d 1092, 1101 (D. Minn. 2013), aff'd, 768 F.3d 786 (8th Cir. 2014). Respondent further contends Complainant's allegation that he wrote three statements, one of which Mr. Steinkamp threw away, is without merit. However, assuming **arguendo**, Mr. Steinkamp did throw away one of Complainant's written statements, Respondent argues it would not prove discriminatory intent because Mr. Steinkamp was not the sole decision-maker in this case, rather Mr. Steinkamp had to obtain approval from Respondent's CEO, President, and Human Resources Department. See Logsdon v. BNSF Ry. Co., 262 F. Supp. 3d 895, 903 (D. Neb. 2017) (employer's summary judgment was affirmed because employee's allegation that the supervisor coached the employee in writing the injury report so that it would not be reportable is not sufficient evidence of retaliation where the supervisor was not the sole decision-maker). Lastly, Respondent asserts Complainant has not shown he was treated disparately when compared to some of Respondent's

employees. On this basis, Respondent argues that of the two comparators identified by Complainant, Brian Pike and Benito Aceves, Mr. Steinkamp was not the decision-maker in either case.

Alternatively, Respondent argues it proved by **clear and convincing evidence** that it would have discharged Complainant even in the absence of his protected activity. In particular, Respondent argues it is undisputed Complainant failed to promptly and accurately report his workplace injury sustained on August 21, 2017 or August 23, 2017. Further, Respondent avers it has provided substantial evidence that it has a written policy, of which Complainant was aware, requiring employees to give prompt and accurate reporting of workplace injuries. Respondent also avers Mr. Gibson and Mr. Steinkamp recommended Complainant be terminated solely for late reporting of Complainant's workplace injury that occurred the week before August 29, 2017.

Notwithstanding the foregoing, Respondent asserts that if Complainant is entitled to any reprieve, then it should be extremely limited. Respondent avers Complainant has only worked a cumulative period of two years out of twenty-six years since he left high school. Moreover, Respondent contends that after Complainant's termination he did not mitigate his damages due to the fact that the only job for which he applied was with UPS, but Complainant did not "care for the culture, so he quit" after the first day of orientation. Consequently, Respondent argues Complainant's backpay should cease to accumulate as of the latter part of 2017. Likewise, Respondent avers Complainant has offered no evidence of emotional distress except that he felt "horrible" after his termination, therefore Respondent contends Complainant has failed to provide evidence that he is entitled to damage for emotional distress. Further, Respondent asserts Complainant should not be reinstated because Complainant is a safety risk due to his failure/inability to accurately and promptly report workplace safety/injury incidents. See NLRB v. Big Three Indus. Gas & Equip. Co., 405 F.2d 1140, 1143 (5th Cir. 1969) (the court held that where an employee was unlawfully discharged, reinstatement should not be permitted to a safety sensitive position when there is evidence that reinstatement would be incompatible with safety); see also Ga. Power Co. v. IBEW, 707 F. Supp. 531 (N.D. Ga. 1989) (the arbitrator determined employer violated the employee's collective bargaining rights by discharging him, but the District Court held it was appropriate to decline enforcement of the employee's reinstatement due to public policy safety conditions). Lastly, Respondent argues Complainant is not entitled to recover litigation costs, expert witness fees, or reasonable attorney's fees because he has presented no evidence of the same. In the same way, Respondent contends Complainant is not entitled to punitive damages because he has failed to present any evidence that Respondent acted with malice, ill will, or with knowledge that its actions violated federal law.

On July 26, 2018, Respondent filed a supplemental post-hearing brief in response to Complainant's allegations set forth in his post-

hearing brief. Specifically, Respondent argues Complainant is incorrect in his assertion that he has demonstrated his protected activity was a contributing factor in his termination because Complainant has shown he was terminated due to reporting his work injury. Instead, Respondent asserts Complainant must prove, by a preponderance of the evidence, that Respondent intended to retaliate against him for reporting a workplace injury. See Kuduk, supra at 791.

Further, Respondent asserts that its treatment to employees such as Danny Cook, Daniel Guido, and Brian Pike do not show that Mr. Steinkamp intended to retaliate against Complainant. Respondent avers that Mr. Cook promptly reported his injuries in 2010 and 2011, both of which were prior to Mr. Steinkamp ever being a decision-maker. Respondent contends that Complainant's report of his injury differs from any of the aforementioned employees because Complainant knew he was injured on August 21, 2017 or August 23, 2017, but failed to report it until a week later. In sum, Respondent contends Complainant failed to demonstrate Mr. Steinkamp intentionally retaliated against him for reporting a workplace injury.

VI. DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tenn. Valley Auth., Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Ind. Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so **natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe** . . . Credible testimony is that which meets the test of plausibility.

Id. at 52(emphasis added).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony.

Altemose Constr. Co. v. NLRB, 514 F.2d 8, 16 and n.5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

In the present matter, Complainant's burden of persuasion rests principally upon his testimony. Overall, I found Complainant's testimony at times to be contradictory, inconsistent, and unpersuasive concerning the most significant factual issues in this case. Specifically, there are inconsistencies and contradictions in his testimony concerning Complainant's alleged injuries, which occurred on various dates that detracts from Complainant's credibility. For example, at the formal hearing Complainant testified that in July 2017, he bruised his left shin closing the anglecock too fast which caused the glad hand to hit his left leg. (Tr. 43). However, thereafter Complainant inexplicably testified he could not recall what he was doing during the July 2017 incident when he bruised his left leg. (Tr. 60-61). Nonetheless, Complainant ultimately did not make a report of the alleged July 2017 incident because he reported to his supervisors he was not injured.

Similarly, with respect to Complainant's incident occurring between August 21, 2017 and August 23, 2017, Complainant initially testified he bumped his knee climbing up on a locomotive and he felt pain, but he did not report his injury, rather Complainant wore a knee brace. (Tr. 65). Nevertheless, Complainant later testified he believed he did not suffer an injury on August 21, 2017 or August 23, 2017. (Tr. 70). However, Complainant later admitted he "banged" his knee, and at first, he believed it was a "minor" injury. (Tr. 73). That notwithstanding, in Complainant's August 29, 2017 first written statement (JX-11), Complainant stated his "knee was injured about a week ago in Everman the first part of last week between August 21, 2017 and August 23, 2017." In his second written statement (JX-12) dated August 29, 2017, Complainant stated that between August 21, 2017 and August 23, 2017, he injured his right knee in Everman, but he did not report his injury to "other co-workers or other authorities."

Likewise, Complainant vacillated in his testimony about his alleged August 29, 2017 incident, providing three different locations where he was injured before he admitted that he suffered a prior knee injury one week ago. Complainant first alleged he stepped off of a boxcar on a slippery substance and he twisted his knee in between the main line and Track 104 (location one). (Tr. 69; JX-11). However, Complainant later stated he injured his knee stepping off a boxcar and into mud while going from the main line to Westrock (location two). (Tr. 74-75). However, Complainant also alleged he injured his knee

when he bent down to lace up a car after the train arrived inside the Westrock facility (location three). (Tr. 75; Tr. 152-53; JX-12).

Based on the foregoing, I find that while Complainant likely suffered a work injury between August 21, 2017 and August 23, 2017, and may have re-aggravated it on August 29, 2017, Complainant's testimony about the nature and whereabouts of his injury are inconsistent and unpersuasive. Therefore, I credit Complainant's testimony that he suffered an injury to his knee prior to the week of August 29, 2017, but the remainder of his testimony is largely incredulous and unpersuasive.

On the other hand, I generally found Mr. Gibson and Mr. Steinkamp to be unbiased, sincere, and credible witnesses. I observed little to no inconsistency in their respective testimony. Overall, I found Mr. Gibson's testimony to be truthful and sincere. In particular, I credit Mr. Gibson's testimony that he told all "new hires," including Complainant, they must report all injuries or safety violations immediately, and otherwise he would personally walk the employee off the property. I also found Mr. Gibson was sincere in his testimony that he was wanted to see Complainant succeed, and in doing so, offered to work out in the field with Complainant after Complainant experienced difficulty learning during training. I further credit Mr. Gibson's testimony that Complainant claimed he was injured when stepping into a "muddy spot," Mr. Gibson believed it could not have occurred in between the main line and 104 at the Westrock splits, or at track 104 and the storage track because there was solid ballast and asphalt at these locations. I also credit Mr. Gibson's testimony that he recommended Complainant be terminated, not in retaliation for reporting an injury, but because Complainant failed to immediately report his injury occurring between August 21, 2017 and August 23, 2017, which made conditions potentially unsafe for other employees.

In addition, I found Mr. Steinkamp to be an honest and credible witness, and without animus. I credit Mr. Steinkamp that he did not direct Complainant what to write in his written statements, and that Mr. Steinkamp was simply trying to obtain clarity as to where and when Complainant sustained an injury. I further credit Mr. Steinkamp's testimony that Respondent could exceed the GCOR guidelines for discipline, such as was the case with Complainant, and that Mr. Steinkamp consulted with Respondent's CEO, President, and Human Resources Department, all of whom agreed Complainant should be terminated. Mr. Steinkamp was particularly persuasive in his testimony that he terminated Complainant, rather than a lesser discipline, because by Complainant failing to timely report his injury Respondent was not given an opportunity to address the potential safety hazards or defective equipment that posed a danger to other employees. Finally, I credit Mr. Steinkamp's testimony that he wanted Complainant to succeed in his employment with Respondent.

B. APPLICABLE PROVISIONS OF THE FRSA

Complainant alleges that Respondent violated the FRSA § 20109(a)(4) and § 20109(c)(2), which provide:

(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;**

(c) PROMPT MEDICAL ATTENTION.—

(2) DISCIPLINE.—A railroad carrier or person covered under this section **may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician,** except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to **bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.**

49 U.S.C. §§ 20109(a)(4) and (c)(2)(2008) (emphasis added).

C. ELEMENTS OF FRSA VIOLATIONS AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). See 49 U.S.C. § 20109(d)(2)(A)(i).

Initially, to maintain a 49 U.S.C. § 20109 claim, the complainant must demonstrate the respondent is subject to the Act and that the complainant is a covered employee under the Act. See § 20109(d)(2)(A)(i). In view of the undisputed facts noted above, it is

found that Respondent is a carrier within the meaning of the FRSA and is responsible for compliance with the employee protection provisions of FRSA. It is also established that Complainant was a covered employee of Respondent under the FRSA. No evidence to the contrary was introduced at the hearing.

In the instant case, Complainant asserts Respondent violated Sections 20109(a)(4) and (c)(2) of the FRSA. As outlined in the post-hearing briefs of the parties, the issues to be decided are whether Complainant reported a workplace injury honestly and in **good faith**, and as such whether Complainant engaged in protected activity pursuant to Section 20109(a)(4). The other issues to be resolved are whether Complainant's report of injury, obtaining medical treatment, and following a treating physician's treatment plan were contributing factors to Respondent's decision to terminate his employment, and if so, has Respondent shown by **clear and convincing evidence** that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior.

1. Section 20109(a)(4) and (c)(2) Claims

Pursuant to 49 U.S.C. §§ 20109(a)(4) and (c)(2), the ARB set forth a "two-step burden-of-proof framework" that must be applied to actions not only arising under AIR-21, but also the FRSA and related whistleblower provisions with the same burden-of-proof framework. Palmer v. Canadian Nat'l Ry., ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15-16 (ARB Sept. 30, 2016) (en banc); 49 U.S.C. § 42121(b)(2)(B)(iii), (iv). The first step requires that an FRSA complainant demonstrate: **(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.**¹³ See Palmer, supra, slip op. at 16, n. 74; see also 49 U.S.C. § 42121(b)(2)(B)(iii); Johnson v. BNSF Ry. Co., ARB No. 14-083, ALJ No. 2013-FRS-059, slip op. at 3 (ARB June 1, 2016) (acknowledging these three essential elements); Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 14-047, ALJ No. 2013-FRS-035,

¹³ In Hamilton v. CSX Transp., Inc., ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013), the ARB found that the ALJ's legal analysis and conclusions of law on the three essential elements of a FRSA whistleblower case (protected activity, adverse action, and causation) were in accordance with applicable law. The ARB noted, however, that the ALJ and the parties had cited a fourth element, the **employer's knowledge of the protected activity**. Id. slip op. at 3. The ARB acknowledged that the final decision-maker's "knowledge" and "animus" are only factors to consider in the causation analysis; they are not always determinative factors. Id. (citing Staub v. Proctor, 131 S. Ct. 1186 (2011) (under a different anti-retaliation statute, the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation)); see Bobreski v. J. Givoo Consultants, Inc., ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011) (remanded to the ALJ to reconsider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

slip op. at 5 (ARB Nov. 24, 2015) (recognizing that the complainant has the burden of proving these elements); Rudolph v. Nat'l R.R. Passenger Corp. (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013) (to prevail, an FRSA complainant must establish these three elements by a preponderance of the evidence); Luder v. Cont'l Airlines, Inc., ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." Palmer, supra, slip op. at 17; see Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); Brune v. Horizon Air Indus., Inc., ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence, however the evidence need not be "overwhelming" to satisfy the requirements set forth in 49 U.S.C. § 42121(b)(2)(B)(iii).¹⁴ Indeed, circumstantial evidence is sufficient to meet this burden. Araujo v. New Jersey Transit Rail Operations, Inc., No. 12-2148, 708 F.3d 152, 2013 WL 600208 (3rd Cir. Feb. 19, 2013). Moreover, when the fact-finder considers whether the complainant has proven a fact by a preponderance of the evidence "necessarily means to consider all the relevant, admissible evidence and . . . determine whether the party with the burden has proven that the fact is more likely than not." Palmer, supra, slip op. at 17-18.

Step-two of the test shifts the burden of proof to Respondent when Complainant establishes that Respondent violated the FRSA. Palmer, supra, slip op. at 22. As a result, Respondent may avoid liability only if it can prove by **clear and convincing evidence** that it would have taken the same unfavorable personnel action **in the absence of Complainant's protected behavior**.¹⁵ See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 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).

¹⁴ Notably, the Palmer court instructed ALJs not to use the phrase or concept of "**prima facie**" when analyzing the complainant's burden under step one of the AIR-21 test because § 42121(b)(2)(B)(iii) does not apply this term, and therefore, the term "demonstrate" in clause (iii), which means "proves," is not equivalent to establishing a "**prima facie**" case. Palmer, supra, slip op. at 20, n. 87.

¹⁵ In Palmer, the ARB characterized step two as the "same-action defense" rather than the "clear and convincing" defense, noting that the ARB, courts, and administrative law judges have commonly referred to step one as the "contributing factor" step, and step two as the "clear and convincing" step. In doing so, the ARB explained "the phrase 'same action defense' makes clear that step two asks a different factual question from step one--namely, would the employer have taken the same adverse action?--and is not simply the same question [as step one] with the heavier 'clear and convincing' burden imposed upon employer." Palmer, supra, slip op. at 22.

The ARB noted the "clear and convincing" standard is rigorous and denotes a conclusive demonstration that "**the thing to be proved is highly probable or reasonably certain.**" Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB April 25, 2014) (emphasis added).

It is worth emphasizing that the AIR-21 burden-shifting framework that is applicable to FRSA cases is much easier for a complainant to satisfy than the McDonnell Douglas standard, and is thus more challenging for a respondent to overcome. Cf. Palmer, supra, slip op. at 26, n. 113 (holding that the McDonnell Douglas burden shifting process does not apply to the AIR-21 two-step test); see generally, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Among the reasons for this complainant-friendly standard is that the rail industry has a long history of underreporting incidents and accidents in compliance with Federal regulations. The underreporting of railroad employee injuries has long been a particular problem, and railroad labor organizations have frequently complained that harassment of employees who reported injuries is a common railroad management practice. One of the reasons that pressure is put on railroad employees not to report injuries is the compensation system; some railroads base supervisor compensation, in part, on the number of employees under their supervision that report injuries to the Federal Railroad Administration. Although many railroad companies have since changed this system, a culture of retaliation for reporting injuries unfortunately still lingers in some instances. Araujo, supra.

2. Protected Activity

By its terms, FRSA defines protected activities as including acts done by an employee in **good faith** "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," and "requesting medical or first aid treatment, or . . . following orders or a treatment plan of a treating physician." 49 U.S.C. §§ 20109(a)(4), (c)(2). The OSHA regulations regarding recording and reporting occupational injuries and illnesses provides that employers "must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." 29 C.F.R. § 1904.5(b)(5).

Complainant avers that he engaged in protected activity on August 29, 2017, when he reported to Respondent that he suffered an injury to his right knee one week earlier (between August 21, 2017 and August 23, 2017). Complainant further avers that on August 29, 2017, Mr. Steinkamp completed an injury report acknowledging Complainant's report of injury, and on September 9, 2017, Respondent reported Complainant's injury to the Federal Railroad Administration. (JX-15; JX-16). Thus, Complainant asserts he engaged in protected activity on August 29, 2017, when he reported his injury to Respondent, and that Respondent perceived he reported an injury when they completed an

injury/incident report. Similarly, pursuant to 49 U.S.C. § 20109(c), Complainant contends he engaged in protected activity when he sought medical attention from his general practitioner and followed his physicians' treatment plan by remaining off of work until September 11, 2017. (JX-17).

In brief, Respondent argues Complainant failed to prove he engaged in protected activity pursuant to Section 20109(a)(4) because he did not show that he reported his injury "honestly and in **good faith**." Specifically, Respondent argues Complainant dishonestly reported his knee injury when he provided shifting explanations about where and when he was injured. For example, Complainant reported to Mr. Gibson that he was injured on August 29, 2017, after stepping off of a boxcar and slipping in mud. However, Complainant later informed Mr. Steinkamp that he was injured on August 29, 2017, when he was bending to lace up air hoses. Nevertheless, on the same day, Complainant informed Mr. Steinkamp that he injured his knee the week prior to August 29, 2017. Notwithstanding the foregoing, Respondent avers that during Complainant's deposition, Complainant deposed he bumped his knee while climbing up into a locomotive.

Not unlike the instant case, in Ray v. Union Pacific Railroad Company, 971 F. Supp. 2d 869, 883-84 (S.D. Iowa 2013), the employer alleged the employee did not engage in protected activity because the employee was not in **good faith** based on his varying accounts about the precise contours of when and how he realized his injury was work-related. Id. at 823-83. However, the Court found the FRSA does not apply the "**good faith**" requirement to all of an employee's interactions with the employer, rather the relevant inquiry is whether "**at the time he [the employee] reported his injury**" to the employer, the employee "genuinely believed the injury he reported was work-related." Id. at 884; see Davis v. Union Pac. R.R. Co., No. 5:12-CV-2738, 2014 U.S. Dist. LEXIS 101708 *18-19 (W.D. La. July 14, 2014) (noting when a plaintiff brings a claim under FRSA alleging he was retaliated against for reporting a work injury, Ray, supra, requires that the plaintiff actually believed, at the time he reported the injury, that it was work-related. If the plaintiff did so believe, then his activities were in **good faith** and were protected).

Here, while I agree with Respondent that Complainant vacillated in the locations and times of his injury, ultimately on August 29, 2017, Complainant reported to Mr. Steinkamp that between August 21, 2017 and August 23, 2017, he injured his knee while at work. In determining whether an employee made a **good faith** report of a work-related injury, the relevant inquiry is whether the employee genuinely believed at the time he reported his injury that it was work-related. Ray, supra at 883-84. Thus, irrespective of Complainant's wavering versions of his injury as to how and where he was injured, I find Complainant was in **good faith** when he reported to Respondent on August 29, 2017, that one week prior he suffered a work-related injury to his knee. Arguably, the August 29, 2017 work-related incident was a re-aggravation of his prior work-related knee injury. See Ray, supra.

Accordingly, I find and conclude that Complainant engaged in protected activity on August 29, 2017, when he in **good faith** reported to Mr. Steinkamp that he injured his knee one week prior while working for Respondent. (JX-11; JX-12).

Complainant also asserts he engaged in protected activity pursuant to § 20109(c)(2), which prohibits the respondent from disciplining or threatening to discipline the complainant when a request for medical or first aid treatment has been made, or when the complainant is following a physician's treatment plan. 49 U.S.C. § 20109(c)(2). The ARB defined a physician's "treatment plan" to include not only medical visits and treatment, but also physical therapy, daily medication, and daily exercises during the work day. Santiago v. Metro-North Commuter R.R. Co., ARB No. 10-0147, ALJ No. 2009-FRS-00011, slip op. at 11 (ARB July 25, 2012).

Complainant avers he sought medical treatment on August 29, 2017, and was instructed by his treating physician not to return to work until September 11, 2017. (JX-17).

Respondent does not deny that Complainant sought medical treatment, but instead argues Complainant's medical treatment is negligible, that being, only two visits to a treating physician, and that Mr. Steinkamp testified he had no knowledge of the extent of Complainant's medical treatment, or the cost incurred by Respondent for such treatment.

Based on the aforementioned, I also find Complainant engaged in protected activity on August 29, 2017, when he sought medical treatment, and continued to engage in protected activity when he followed his physician's treatment plan to remain off-duty from work until September 11, 2017.

3. Alleged Unfavorable Personnel Action

By its terms, FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, **in whole or part**, to the employee's lawful, good faith act done, or perceived by the employer to have been done to notify Respondent of a work-related illness or injury, or for requesting medical or first aid treatment, or following orders or a treatment plan of a treating physician. 49 U.S.C. §§ 20109(a)(4), (c)(2).

In determining whether the alleged conduct is an unfavorable personnel action, the Supreme Court's Burlington N. & Sante Fe Ry. Co. v. White, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the U.S. Department of Labor, including the AIR-21, incorporated into the FRSA. Melton v. Yellow Transp., Inc., 2008 DOL Ad. Rev. Bd. LEXIS 170 (ARB Sept. 30, 2008). The Court stated

that to be an unfavorable personnel action the action must be "materially adverse" meaning that it "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington Northern, supra at 57. Moreover, "adverse actions" refer to unfavorable employment actions that are "**more than trivial**, either as a single event or in combination with other deliberate employer actions alleged." Fricka, supra, slip op. at 7 (citing Williams v. Am. Airlines, Inc., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)) (emphasis added) (holding that a performance rating drop from "competent" to "needs development" was more than trivial and was an adverse action as a matter of law).¹⁶

Respondent does not dispute that Complainant's dismissal on September 13, 2017, rises to the level of an adverse employment action under the FRSA. Therefore, I find Complainant has demonstrated by a preponderance of the record evidence that he was subjected to adverse action when he was terminated by Respondent on September 13, 2017.

4. Contributing Factor

The FRSA requires that the protected activity be a contributing factor to the alleged unfavorable personnel actions against Complainant. 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." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Palmer v. Canadian National Railway, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB. Sept. 2016) (en banc), reissued with full separate opinions (January 4, 2017), erratum with caption correction (January 4, 2017); Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015).

Recently the Administrative Review Board ("the Board") reemphasized in Palmer "how low the standard is for the employee to meet, how 'broad and forgiving' it is." Palmer, supra at 53; see also Rudolph, supra at 16. The Board observed "'[a]ny' factor really means **any** factor," it need not be "significant, motivating, substantial, or predominant' it just needs to be a factor." Palmer, supra at 53 (emphasis in original). The complainant need not prove that his or her protected activity was the only or the most significant reason for the

¹⁶ In Fricka, the ARB concluded that the Williams definition of adverse personnel action also applied to FRSA claims. In this case, the Board determined respondent (Amtrak) engaged in "discrimination" against the complainant when it misclassified his injury as "non-work" related, which was originally reported by the complainant as "work related." Specifically, they held the respondent's reclassification of the injury was "unfavorable and more than trivial--it led to Amtrak not paying Fricka's [complainant's] medical bills totaling \$297,797.21." Fricka, supra, slip op. at 7-8.

unfavorable personnel action, he need only prove that it played "some" role, thus even an "[in]significant" or [in]substantial role suffices." Araujo, supra at 158; Palmer, supra, at 53, n. 218. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tended to affect in **any way** the employer's decision or the adverse actions taken. Klopfenstein v. PCC Flow Techs., ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). Furthermore, the complainant is **not required to demonstrate the respondent's retaliatory motivation or animus** to prove the protected activity contributed to respondent's adverse personnel action. See Halliburton, supra at 263 (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

If the respondent claims the "nonretaliatory reasons were the only reasons for the adverse action (as is usually the case)," the evidence of employer's nonretaliatory reasons **must be considered alongside** the complainant's evidence in making such a determination. Palmer, supra at 54-55. However, the fact-finder need not compare the respondent's non-retaliatory reasons with the complainant's protected activity to determine which is more important in the adverse action. Id. at 55.

Even if the fact-finder determines that the respondent has a true nonretaliatory reason for terminating the complainant, this still does not preclude protected activity as a contributing factor in the termination of employment. Palmer, supra, slip op. at 54, n. 224 (citing Bobreski v. J. Givoo Consultants, Inc. [Bobreski II], ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 29, 2014)). A "legitimate business reason" to take an adverse action "is **by itself insufficient** to defeat an employee's claim under the contributing-factor analysis . . . **since unlawful retaliatory reasons [can] co-exist with lawful reasons.**"¹⁷ Palmer, supra at 58 (quoting Bobreski II, supra, slip op. at 17 (internal quotations omitted)(emphasis added); contra Henderson v. Wheeling Lake Erie Ry., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 11 (ARB Oct. 26, 2012)(citing Zinn v. Am. Commercial Lines Inc., ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012))(holding that the "legitimate business reason" burden of proof analysis does not apply to FRSA whistleblower cases). In the event that the ALJ believes the protected activity **and** the employer's nonretaliatory reasons **both played a role**, the Board declared "the analysis is over and the employee prevails on the contributing-factor question." Palmer, supra at 54-55.

¹⁷ The ARB noted in Palmer, that the administrative law judge specifically stated "the argument that [Illinois Central] had a 'legitimate business reason' to take the adverse action is inapplicable to FRSA whistleblower cases." The Board explained it would be "**clear error**" for the fact-finder to conclude that Illinois Central's "legitimate business reason" is **irrelevant** to the contributing-factor analysis. Id., slip op. at 58.

a. Direct Evidence

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Direct evidence is "smoking gun evidence that **conclusively links** the protected activity and the adverse action and does not rely upon inference." Williams v. Domino's Pizza, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). Protected activity and employment actions are **inextricably intertwined** when protected activity "directly leads to the adverse employment action in question, or the employment action cannot be explained without discussing the protected activity." Benjamin v. Citationshares Mgmt., LLC, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 12 (ARB Nov. 5, 2013); DeFrancesco v. Union R.R. Co., ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012) (finding the complainant's suspension was directly intertwined with his protected activity because had the complainant not reported his injury, the respondent would not have conducted an investigation that resulted in his discipline); Smith v. Duke Energy Carolinas, LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012) (the Board held the complainant's protected disclosures were inextricably intertwined with the investigation resulting in the complainant's termination where the complainant reported a rule violation and was terminated for late reporting of the same. As such, the Board found the complainant established the "contributing factor" element of his claim).

Furthermore, where protected activity and adverse employment actions are **inextricably intertwined, presumptive inference of causation is established** without need for circumstantial evidence. Benjamin, supra, slip op. at 12; Henderson v. Wheeling & Lake Erie Ry., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 12-13 (ARB Oct. 26, 2012) (finding that where the complainant was discharged, in part, for failing to report a personal injury before leaving company premises, the complainant's alleged protected activity was inextricably intertwined with his adverse action, and created a presumptive inference of causation). Nevertheless, circumstantial evidence may bolster a causal relationship between protected activity and adverse employment actions. Benjamin, supra, slip op. at 12.

In the present matter, Complainant asserts the record evidence **conclusively links** his protected activity and his termination, and does not require any inferences. Specifically, Complainant avers he was terminated on September 13, 2017, for late reporting of his knee injury, and nothing more. Complainant avers that the instant case is not one in which he was charged with numerous safety violations (including a late report of injury), rather Respondent's sole reason for terminating him was due to his failure to promptly and immediately report his right knee injury that occurred sometime between August 21, 2017 and August 23, 2017. Complainant avers Mr. Steinkamp stated the following at the formal hearing:

Question: Well, if Mr. Yowell [Complainant] had never told you about the incident a week prior of August 29th [2017], would you still have fired him for failing to timely report that injury?

Mr. Steinkamp: No, sir. There would not be anything, there would not be a violation there.

(Tr. 212). Moreover, Mr. Steinkamp testified Complainant was the sole source of information about his knee injury that occurred one week prior to August 29, 2017, and that Mr. Steinkamp had no plans on terminating Complainant prior to his late report of a work-injury. (Tr. 195, 249). Similarly, Mr. Gibson testified Complainant was terminated because "he did not report the injury immediately and give us [Respondent] an opportunity to investigate exactly what happened." (Tr. 114-15). Accordingly, Complainant asserts he clearly and directly established that had he not reported his knee injury, he would not have been discharged from his employment with Respondent.

Respondent argues Complainant has failed to demonstrate through direct evidence that his report of a workplace injury was a contributing factor in Respondent's decision to terminate employment. Respondent asserts Complainant failed to show Respondent had a retaliatory motive, even in part, prompted by his report of injury, which is necessary to establish his **prima facie** case. See Heim v. BNSF Ry. Co., 849 F.3d 723, 727 (8th Cir. 2017), cert. denied, 138 S.Ct. 268, 199 L. Ed. 2d 126 (2017). Respondent contends an employer violates the FRSA only if the adverse action is, at some level, **motivated by discriminatory animus**. Armstrong v. BNSF Ry. Co., 880 F.3d 377, 382 (7th Cir. 2018).

As discussed above, the United States Fifth Circuit Court of Appeals under whose jurisdiction this case arises, stated 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." Halliburton, supra at 262-63 (emphasis added). Furthermore, the complainant is **not required to demonstrate the respondent's retaliatory motivation or animus** to prove the protected activity contributed to respondent's adverse personnel action. Id. (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993)). Therefore, contrary to Respondent's assertion, Complainant is not required to show Respondent had a retaliatory motive in terminating him due to a late report of injury.¹⁸

¹⁸ The undersigned acknowledges the United States Eighth Circuit Court of Appeals has stated that under the FRSA "**an employee must prove intentional retaliation** prompted by the employee engaging in protected activity." Kuduk, 768 F.3d at 791 (emphasis added). On this basis, the Eighth Circuit has held an employee must demonstrate more than a mere factual connection between his injury report and discipline, and as a result, must demonstrate, at least in part, an employer intentionally retaliated prompted by an employee's injury report. Id.; Heim, supra at 727. Nonetheless, the present matter does not

Here, it is undisputed that Complainant was terminated because he did not promptly or immediately report his right knee injury, occurring sometime between August 21, 2017 and August 23, 2017, but which he did not report until August 29, 2017. Mr. Steinkamp, the ultimate decision-maker in this case, testified he would not have terminated Complainant had Complainant never told him about his knee injury occurring one week prior to August 29, 2017, because there would have been no violation of Respondent's rule concerning prompt reporting of work injuries. Indeed, Complainant was terminated on September 13, 2017, for failure to comply with Respondent's "Employee Handbook Work and Safety Rules, Reporting of Accidents/Incidents/Impacts," because he waited until August 29, 2017, to report his right knee injury which had occurred one week prior. On this basis, I find Complainant's protected activity and his September 13, 2017 termination are **inextricably intertwined** as his late report of injury **directly led** to his discharge, and his termination cannot be explained without discussing Complainant's report of injury. Benjamin, supra, slip op. at 12. Consequently, I find where protected activity and adverse employment actions are **inextricably intertwined**, as is the case here, Complainant has established a presumptive inference of causation. Id.

Notwithstanding Complainant establishing by a preponderance of direct evidence a presumptive inference that his late report of injury "alone or in combination with other factors," tended to affect in **any way** Respondent's decision to discharge him, I will address whether by circumstantial evidence Complainant has established a causal connection regarding the same. See Klopfenstein, supra, slip op. at 18.

b. Circumstantial Evidence

If the complainant does not produce direct evidence, or seeks to bolster the direct evidence demonstrating a causal relationship between his protected activity and adverse employment action, he must proceed indirectly or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment, that is, he must present circumstantial evidence. Circumstantial evidence 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 the complainant after he or she engages in protected activity. Brucker v. BNSF Ry. Co., ARB No. 14-071, ALJ No. 2013-FRS-070, slip op. at 10-11 (ARB July 29, 2016) (noting that intent and credibility are crucial issues in employment discrimination cases); see, e.g., DeFrancesco v. Union R.R. Co., ARB No. 13-057, ALJ

arise under the Eighth Circuit's jurisdiction, and as such, the Eighth Circuit's reasoning will not be applied in this case.

No. 2009-FRS-9 (ARB Sept. 30, 2015); Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Apr. 25, 2014); Palmer, supra, slip op. at 55, n. 227. Whether considering direct or circumstantial evidence, an administrative law judge **must make a factual determination**, under the preponderance of the evidence standard of proof about what happened. The ALJ **must be persuaded** and must **believe that it is more likely than not** that the complainant's protected activity played some role in the adverse action. Palmer, supra, slip op. at 55-56.

1) Temporal Proximity

"Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity was a contributing factor to the adverse employment action. See Kewley v. Dep't of Health and Human Servs., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (noting that, under the Whistleblower Protection Act, 'the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, **prima facie**, that the disclosure was a contributing factor to the personnel action')(internal quotation omitted)." Direct evidence of an employer's motive is not required. See Araujo, supra, at 161.

Determining, what, if any, logical inference can be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science, but requires a "fact intensive" analysis. Brucker, supra, slip op. at 11 (quoting Franchini v. Argonne Nat'l Lab., ARB No. 11-006, ALJ 2009-ERA-014, slip op. at 8-9 (ARB Sept. 26, 2012)). Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. Robinson v. Nw. Airlines, Inc., ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005); see Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) (the 8th Circuit reversed the Secretary for failing to appreciate that a **30-day** temporal gap in that case was sufficient to support an inference of retaliation); see also Barker v. UBS AG, 888 F. Supp. 2d 291, 2012 WL 2361211 *8 (D. Conn. 2012) (suggesting that a range **up to five months** could be a sufficiently close temporal gap to support an inference of unlawful discrimination under SOX); Goldstein v. Ebasco Constructors, Inc., No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992), rev'd on other grounds sub nom., Ebasco Constructors, Inc. v. Martin, 986 F.2d 1419 (5th Cir. 1993) (causation established where **seven or eight months** elapsed between protected activity and adverse action). However, where an employer has established one or more legitimate reasons for the adverse actions, the **temporal inference alone may be insufficient** to meet the employee's burden to show that the protected activity was a contributing factor. Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Here, on August 29, 2017, Complainant engaged in protected

activity by reporting to Respondent that one week prior he injured his knee while at work sometime between August 21, 2017 and August 23, 2017. Complainant also engaged in protected activity when he sought medical treatment of his knee injury on August 29, 2017, and thereafter, followed his treating physician's recommendation to remain off-duty from work until September 11, 2017. As discussed above, Complainant was terminated from his employment with Respondent on September 13, 2017, just two days after he was released to return to work. Thus, I find that Complainant's protected activity which began on August 29, 2017, when he reported his work-injury and concluded on September 11, 2017, when Complainant's treating physician released him to return to work is temporally close in time to his September 13, 2017 termination.

Based on the aforementioned discussion, I find any evidence of temporal proximity between his protected activity and September 13, 2017 termination establishes the requisite element of causation because there is overwhelming evidence that Complainant reported his right knee injury on August 29, 2017, sought medical treatment which concluded on September 11, 2017, and was terminated on September 13, 2017, just **fifteen days** after reporting his injury and **two days** after completing his medical treatment plan. Therefore, I find and conclude that a logical inference of retaliation can be drawn from the temporal relationship between Complainant's protected activity and the termination of his employment with Respondent. See Martin, supra; see also Couty, supra; Barker, supra.

2) Respondent's Knowledge of the Protected Activity

Although the respondent's knowledge of the protected activity is not conclusive evidence that the complainant's protected activity was the catalyst for respondent's adverse personnel action, it is certainly a causal factor that must be considered. See Hamilton, supra, slip op. at 3. Generally, it is not enough for the complainant to show that the respondent, as an entity, was aware of his protected activity. Rather, the complainant must establish that the "decision-makers" who subjected him to the alleged adverse actions were aware of his protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB, Jan. 30, 2004); see Johnson v. BNSF Ry. Co., ALJ. No. 2013-FRS-00059, slip op. at 11, n. 8 (ALJ July 11, 2014) (noting that the final decision-maker's 'knowledge' and 'animus' are only factors to consider in the causation analyses).

Where the complainant's supervisor had knowledge of his protected activity and had substantial input into the decision to fire the complainant, even though the vice president who actually fired the complainant did not know about the protected activity, such knowledge could be imputed to the respondent. Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

Mr. Steinkamp, the ultimate decision-maker in the decision to terminate Complainant, had knowledge of Complainant's injury, and report of injury on August 29, 2017.¹⁹ Mr. Steinkamp testified that on August 29, 2017, he interviewed Complainant to determine what had occurred during his shift that began at 11:00 p.m. on August 28, 2017, during which Complainant injured his knee. However, over the course of his discussion with Complainant, Mr. Steinkamp learned that in fact Complainant suffered a work-related knee injury sometime between August 21, 2017 and August 23, 2017. Mr. Steinkamp also confirmed that he completed an "Injury and Illness Incident Report" dated August 29, 2017, summarizing Complainant's report of injury. Accordingly, I find and conclude that Mr. Steinkamp had knowledge of Complainant's work-injury.

Mr. Steinkamp testified he was aware Complainant received medical treatment for his knee injury, and that Complainant had received medical clearance from his physician to return to work. However, Mr. Steinkamp did not believe Complainant's absence from work following his work-injury was "a big deal" or a problem. Mr. Steinkamp testified he had no idea about any medical costs incurred by Respondent in association with Complainant's work injury, nor did medical costs bear on Mr. Steinkamp's decision to terminate Complainant's employment. Based on Mr. Steinkamp's testimony, I also find he had knowledge that Complainant sought medical treatment for his knee work-injury, as well as Complainant following his treating physician's treatment plan.

Accordingly, I find that because Mr. Steinkamp had knowledge of Complainant's protected activity and was the decision-maker in deciding to terminate Complainant, such knowledge is imputed to Respondent. Gary, supra; Kester, supra.

3) Indications of Pretext

Under the FRSA's contributing factor standard, the complainant does not have to prove that the respondent's "proffered non-discriminatory reasons are pretext." Coates, supra, slip op. at 4. In other words, the complainant "need not necessarily prove that the railroad's articulated reason was a pretext in order to prevail,

¹⁹ Mr. Steinkamp testified that he was not the sole decision-maker with respect to Complainant's termination, but instead Mr. Steinkamp obtained approval from Respondent's CEO, President and Human Resources Department to terminate Complainant's employment after discussing the circumstances surrounding Complainant's report of injury. (Tr. 241). Notably, this comports with Respondent's Employee Handbook, which requires that no employee be terminated without concurrence of at least one level of supervision above the employee's immediate supervisor and without first discussing it with the President, CEO, and Human Resources Department. (JX-2, p. 49). Therefore, while I find Mr. Steinkamp was not the sole decision-maker, he ultimately decided to terminate Complainant's employment after obtaining approval and recommendation from Respondent's CEO, President, and Human Resources Department to terminate Complainant.

because the worker alternatively can prevail by showing that the railroad's reason, while true, is only one of the reasons for its conduct and that another reason was the worker's protected activity." See OSHA's Final Interim Rule Summary of Section 1982.104; 29 C.F.R. § 1982.104.

Nevertheless, the complainant may demonstrate that the respondent's non-discriminatory reasons are pretextual in nature when evidence is presented which indicates the respondent did not in good faith believe the complainant violated its policies, but relied on the alleged violations in bad faith pretext to terminate employment. See Redweik v. Shell Exploration & Prod. Co., ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 9 (ARB Dec. 21, 2007). However, if the complainant is terminated because the respondent was **mistaken in its belief**, it is not pretext for retaliation, if the belief is honestly held. See Swenson v. Schwan's Consumer Brands N. Am., Inc., 500 F. App'x 343, 346 (5th Cir. 2012); see also Dailey v. Shintech, Inc., 629 F. App'x 638, 642 (5th Cir. 2015); Collins v. Am. Red Cross, 715 F.3d 994, 999, (7th Cir. 2013) (the FRSA "**does not forbid sloppy, mistaken, or unfair terminations; it forbids discriminatory or retaliatory terminations.**") (emphasis added). Thus, the relevant question is not the complainant's guilt or innocence, rather it is whether the respondent terminated the complainant's employment because **it believed in good faith that the complainant violated its policies** (i.e., theft, fraud, or violated a safety policy). Villegas v. Albertsons, LLC, 96 F. Supp. 3d 624, 636 (W.D. Tex. 2015); Jauhola v. Wis. Cent., Ltd., 2015 U.S. Dist. LEXIS 109930, at *19 (D. Minn. Aug. 20, 2015) (stating "[t]he relevant question is 'not whether the stated basis for termination actually occurred, but whether the defendant believed it to have occurred[.]'"). On this basis, "federal courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." Kuduk, supra at 792 (quoting Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 898 (8th Cir. 2002)).

Consequently, in the present matter, Complainant may demonstrate by a preponderance of the evidence that reporting his knee injury on August 29, 2017, one week after it occurred, rather than immediately following his injury, was not Respondent's true reasons for terminating his employment, thereby invoking an inference that Complainant's report of protected activity was pretext for retaliation. Complainant argues the evidence clearly establishes that Respondent's sole reason for terminating Complainant is pretextual because he was terminated for violating only one rule, late reporting of an injury. Nonetheless, Complainant asserts a violation of this rule can only be triggered by reporting an injury. Therefore, Complainant contends his termination for violating Respondent's rule concerning promptly reporting an injury, essentially demonstrates he was terminated for reporting an injury.

Mr. Steinkamp, the ultimate decision-maker in this case, honestly and reasonably believed at the time of his decision to terminate Complainant that he had been injured sometime between August 21, 2017

and August 23, 2017, but Complainant failed to report his knee injury until August 29, 2017.²⁰ Mr. Steinkamp honestly and reasonably believed at the time of his decision to terminate Complainant, that Complainant violated Respondent's employee handbook work and safety rules for reporting accidents and injuries, which requires accurate and prompt reporting to a supervisor of all injuries, no matter how "small" the injury. (JX-2, p. 27; JX-9, p. 4; JX-18). Mr. Steinkamp testified that on August 29, 2017, Complainant identified three different locations where he reportedly injured himself, but then Complainant admitted to Mr. Steinkamp that he was injured one week prior and he re-aggravated his knee on August 29, 2017. Mr. Steinkamp explained that when he was going through the initial investigation he was not under the impression Complainant re-aggravated an injury, but he was looking for the root cause of an injury that occurred either on August 28, 2017 or August 29, 2017. (Tr. 206). Upon admitting he was injured one week prior to August 29, 2017, Complainant could not recall where his prior accident occurred, when it happened, or what pieces of equipment were involved, rather Complainant only remembered that it was raining and he stepped off of a piece of equipment.

Consequently, Mr. Steinkamp testified he decided to terminate Complainant's employment because Complainant failed to promptly report an injury which occurred one week prior, between August 21, 2017 and August 23, 2017. Mr. Steinkamp explained he terminated Complainant instead of meting out a lesser discipline because Complainant's actions prevented Respondent from addressing any potential safety hazard or defective equipment that posed dangers to not only Complainant, but other employees as well.

Given the foregoing discussion, I find and conclude Mr. Steinkamp had a **good faith belief** that Complainant had failed to promptly and immediately report his knee injury occurring sometime between August 21, 2017 and August 23, 2017, and thus, he genuinely believed Complainant violated Respondent's work and safety rules for reporting accidents, incidents, and injuries. Although the report of injury is undoubtedly protected activity under the FRSA, failure to comply with Respondent's safety rules which requires prompt and immediate report of the same is a legitimate non-discriminatory reason for Complainant's termination. Villegas, supra at 636.

Accordingly, I find and conclude Complainant has failed to present any circumstantial evidence that Respondent used Complainant's report of injury, or his medical treatment as a pretext to his discharge, which are only singular factors in the analysis of the circumstantial evidence of causation.

4) Disparate Treatment

Complainant argues Respondent treated him disparately when it terminated him for reporting a work-related injury on August 29, 2017,

²⁰ See supra note 19.

which had occurred one week prior. In particular, Complainant asserts that other employees who, like Complainant, also failed to timely report injuries were not disciplined and/or terminated when in violation of Respondent's employee handbook work and safety rules.

Complainant alleges Mr. Daniel Guido injured his lower back while working for Respondent, however, he did not report his injury on the day it occurred. Rather, Mr. Guido reported his injury the following day after waking up in pain in the middle of the night. On the other hand, Respondent avers that Mr. Guido's report of injury is not similar to that of Complainant because Mr. Guido promptly reported his pain upon recognizing he was in pain. According to Respondent, on May 5, 2010, Mr. Guido performed physical labor while "re-railing" during his shift (which began at 6:00 a.m.), but did not feel pain. However, around 10:30 p.m. Mr. Guido began to feel stiffness and soreness, but he woke up at 2:30 a.m. in significant pain. Thereafter, at 2:48 a.m., Mr. Guido called into work immediately upon feeling pain and reported his pain to a supervisor, Ron Preuss. (JX-20, pp. 11-13). Thus, Respondent argues Mr. Guido is not a proper comparator because his supervisor was not Mr. Steinkamp, and unlike Complainant, Mr. Guido reported his injury as soon as he recognized pain and within hours of his shift ending.

Complainant also cites Mr. Brian Pike as a comparator. Complainant contends Mr. Pike suffered a work-injury when he was stung by an insect while walking along a train. Nevertheless, Complainant claims Mr. Pike did not report his injury on the date it occurred, but he instead waited "days" until his bite became irritated. That notwithstanding, Complainant avers Mr. Pike was not terminated. Conversely, Respondent avers that on August 17, 2010, Mr. Pike was walking along the track when he was stung by an insect, but Mr. Pike did not think anything about the bite. However, it was two days later that Mr. Pike reported his injury when it became red and infected, and thereafter received medical treatment for his bite. (JX-20, pp. 20-22). Notably, Mr. Steinkamp was not the decision-maker, and Mr. Steinkamp testified that if had been the decision-maker concerning Mr. Pike's injury report, he would have terminated his employment for failing to timely report his work-injury. (Tr. 216).

Mr. Steinkamp confirmed at the formal hearing in this matter, that Mr. Pike suffered a "bite" on his leg, but he did not report it until the affected area was "red and irritated." Although Mr. Steinkamp's signature was on Mr. Pike's incident report, Mr. Steinkamp testified he was not involved with the investigation or accident report, nor did he know whether Mr. Pike was disciplined. When Mr. Steinkamp was notified of Mr. Pike's injury he notified his supervisor, who proceeded with the investigation. Mr. Steinkamp confirmed Mr. Pike was not terminated from his employment which began on June 21, 2010, approximately two months before Mr. Pike's August 19, 2010 injury. Mr. Steinkamp classified Mr. Pike's failure to immediately report his insect bite as a violation of Respondent's rules, and if Mr. Steinkamp was overseeing Mr. Pike's investigation,

Mr. Steinkamp would have terminated Mr. Pike's employment. Thus, Mr. Steinkamp testified that if someone like Mr. Pike was stung or bitten, he would like to be made aware of the situation in order to mitigate any potential dangers and protect all of Respondent's employees. Mr. Steinkamp was not the decision-maker in Mr. Pike's case, rather Larry Hopkins, who is no longer employed with Respondent, was the ultimate decision-maker.

Complainant also identified employee Danny Cook who suffered ankle injuries in 2010 and 2011. On November 30, 2010, Mr. Cook reported a sharp pain in his ankle, but he was unable to identify what caused his injury. Earlier that day, Mr. Cook stated he rolled his ankle, but he did not believe it caused his ankle pain. Significantly, Mr. Cook reported his 2010 ankle injury to Mr. Steinkamp, he also received medical treatment, was absent one day from work due to his injury, and was on restricted duty for five days. (JX-20, pp. 26-28). With respect to Mr. Cook's March 3, 2011 injury, he stepped off of a boxcar, but he was unable to determine what he stepped on to cause his injury. Mr. Cook reported his injury to manager David Dominguez, and he received medical treatment and missed one day of work due to his injury. (JX-2, pp. 29-31).

Respondent avers Mr. Cook suffered ankle injuries in 2010 and 2011, but that he promptly reported his injuries. Moreover, Respondent contends Mr. Cook is of no significance in the instant case because he was not disciplined and thus, Mr. Steinkamp was not a decision-maker.

Finally, Complainant identified Mr. Benito Aceves as another comparator. Complainant avers that on September 30, 2014, Respondent terminated Mr. Aceves employment for late reporting of a work-injury. Prior to being terminated, Mr. Aceves sought medical treatment at the VA Hospital for back pain, during which, a nurse at the VA Hospital believed Mr. Aceves suffered a back injury while at work, 30 days prior. Mr. Aceves called Mr. Steinkamp about his situation, but he did not make a formal injury report. Nevertheless, without any investigation into the matter, the CEO requested Mr. Steinkamp terminate Mr. Aceves for failing to timely report an injury pursuant to GCOR 1.1.3 Accidents, Injuries, and Defects. However, Complainant avers Mr. Aceves stated his injury was not work-related, and in doing so, was rehired by Respondent and suspended for 10 days without pay for not providing proper information regarding his back injury.

Respondent admits Mr. Aceves, a weightlifter and veteran, sought treatment at the VA Hospital on September 29, 2014, to have his back examined. However, the nurse at the VA Hospital refused to treat Mr. Aceves because the nurse believed his back injury was work-related. Mr. Aceves called Mr. Steinkamp to inform him that he would be missing work due to back pain, and that the VA Hospital nurse refused to treat him under the belief that Mr. Aceves' back pain was work-related. When Mr. Steinkamp did not find a report of Mr. Aceves' alleged work-injury, Respondent's acting CEO terminated Mr. Aceves for failing to

comply with GCOR 1.1.3. Nonetheless, Mr. Aceves clarified that he did not have a work injury, rather the VA Hospital nurse misconstrued the cause of injury in order to refuse treatment. Consequently, Mr. Aceves was reinstated by Respondent. On this basis, Respondent argues Mr. Aceves is not a proper comparator because he never communicated to Respondent that he suffered a work injury.

Mr. Steinkamp also testified that Mr. Aceves was terminated for failing to timely report an injury pursuant to GCOR 1.1.3 Accidents, Injuries, and Defects, which was drafted by Respondent's Human Resources Department and signed by Mr. Steinkamp. Mr. Steinkamp testified that a nurse at the VA Hospital believed Mr. Aceves suffered a back injury while at work, 30 days prior. The Respondent's CEO called Mr. Steinkamp and he tried to inform the CEO about Mr. Aceves situation, but the CEO instructed Mr. Steinkamp to terminate Mr. Aceves. Nevertheless, Mr. Aceves reported there was a miscommunication with the VA nurse, who believed Mr. Aceves' injury was work-related. Mr. Aceves was reinstated by Respondent when he recalled he was injured while exercising at the gym, and not at work. According to Mr. Steinkamp, the incidents between Complainant and Aceves are different. Mr. Aceves explained to Mr. Steinkamp that the VA Hospital did not want to treat him because the nurse believed his injury was a work injury; Mr. Aceves never reported to Mr. Steinkamp that he believed his injury was work-related, but instead he stated he was "trying to get his back fixed." Though Mr. Aceves had been terminated, Mr. Aceves disputed the CEO's decision and ultimately, Mr. Aceves was reprimanded for failing to furnish accurate information and was suspended for ten days from work without compensation. Mr. Steinkamp testified that the lapse in time, approximately 30 days, between Mr. Aceves' alleged back injury and when he sought treatment was not of concern to Respondent because Mr. Aceves was not reporting a work injury.

The United States Fifth Circuit Court of Appeals, within whose jurisdiction this case arises, has held to "establish disparate treatment a plaintiff must demonstrate that a **"similarly situated"** employee under **"nearly identical"** circumstances was treated differently. Wheeler v. BL Dev. Corp., 415 F.3d 399, 406 (5th Cir. 2005) (quoting Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995) (emphasis added). The Court further explained that to be a proper comparator the employee must have **"held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially similar violation histories."** Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009) (emphasis added). The Court noted that of **most importance**, the employee's conduct that elicited the adverse personnel action must be "nearly identical to that of the proffered comparator who allegedly drew a dissimilar employment decision." Id.; see Wyvill v. United Life Cos. Life Ins. Co., 212 F.3d 296, 304-05 (5th Cir. 2000) (finding that when "striking differences" exist between the plaintiff and comparator it more than accounts for the different treatment each person received. The Court noted that the **"most**

important" difference between the plaintiff and comparator was that **different decision-makers determined each employee's fate**); see also Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir. 1991) (finding that the plaintiff had not proffered a nearly identical comparator because the two employees did not share the same supervisor).

Given the clear guidelines espoused by the Fifth Circuit, I find that Daniel Guido, Brian Pike, Danny Cook, and Benito Aceves are not proper comparators. With respect to Mr. Guido, the record evidence demonstrates at the time of Mr. Guido's May 6, 2010 report of injury, he was an "assistant chief engineer," while Complainant was hired as a "brakeman/conductor trainee." In addition, Mr. Guido's supervisor at the time he reported his injury was Ron Preuss. On the other hand, Mr. Steinkamp was Complainant's supervisor, and the ultimate decision-maker who determined to terminate Complainant.²¹ The record also demonstrates that initially Mr. Guido did not have pain, but later began to feel stiff and sore at 10:30 p.m., and not until 2:30 a.m. while sleeping at home did Mr. Guido experience pain. Mr. Guido immediately called Respondent at 2:48 a.m. to report his pain/injury. (JX-20, pp. 11-13). Conversely, Complainant testified that one week prior to August 29, 2017, when he bumped his knee climbing up on a locomotive he immediately felt pain, but he did not report the incident until August 29, 2017. (Tr. 65). Based on the foregoing, Mr. Guido is not a proper comparator to that of Complainant because Mr. Guido is not **similarly situated** to that of Complainant, nor were the circumstances in which Mr. Guido reported his injury **nearly identical** to Complainant's circumstances. Wheeler, supra at 406. Mr. Guido did not hold a similar job to that of Complainant, he had a different supervisor to that of Mr. Guido, and Mr. Guido immediately reported his injury upon feeling pain, while Complainant did not do so. See Lee, supra at 260; see also Wyvill, supra at 304-05; Little, supra at 97.

Like Complainant, comparator Brian Pike was a "brakeman/train conductor" when he reported his insect bite on August 19, 2010.²² Brian Pike reported his injury to Mr. Steinkamp, however, Mr. Steinkamp testified he was not the decision-maker concerning Mr. Pike's report of injury, but if he was the decision-maker Mr. Steinkamp stated he would have terminated Mr. Pike's employment. Mr. Pike's report of injury states he recalled something biting his leg, but he "did not think anything of it until the next day when his leg was itching and became irritated." (JX-20, p. 22). Notwithstanding Mr. Pike and Complainant having similar jobs, I do not find Mr. Pike is a proper comparator to Complainant because Mr. Steinkamp was not the decision-maker in Mr. Pike's case, instead the decision-maker was Larry Hopkins, who is no longer employed with Respondent. (Tr. 217).

²¹ See supra note 19.

²² The undersigned notes that Complainant was still in training to be a "brakeman/conductor" at the time of his September 13, 2017 termination. (JX-7; JX-15; JX-17).

Furthermore, while it appears Mr. Pike reported his injury two days after his insect bite, Mr. Pike's report stated he did not comprehend any irritation or redness until this time, which is not comparable to Complainant who testified he felt pain immediately, but did not report his knee pain until one week later. Consequently, I find Mr. Pike is not a proper comparator to that of Complainant. See Lee, supra at 260; see also Wyvill, supra at 304-05; Little, supra at 97.

Similarly, I find Mr. Danny Cook is not a proper comparator in the instant case. Although Mr. Cook worked as a conductor during his 2010 and 2011 ankle injuries, he immediately reported his injuries when he felt pain. On November 30, 2010, Mr. Cook reported to Mr. Steinkamp that he rolled his ankle, but he did not believe this was the cause of the "intense pain" in his right foot. Nevertheless, Mr. Cook could not identify any other cause for his ankle pain. On March 3, 2011, Mr. Cook immediately reported to his manager David Dominguez that he hyperextended his ankle when he stepped off of a boxcar. Notably, Mr. Cook was not disciplined because he immediately reported his injuries, and as a result, Mr. Steinkamp was not involved in any decision-making concerning Mr. Cook. Given the foregoing, I find there is a **striking difference** between Complainant and Mr. Cook, namely, Mr. Cook immediately reported his injuries to Respondent, while Complainant failed to do so, which more than accounts for the different treatment of each employee. Wyvill, supra at 304-05. Thus, I find the circumstances surrounding Mr. Cook's reports of injury were not **nearly identical** to Complainant's circumstances, and therefore does not show Complainant was treated disparately. Wheeler, supra at 406.

Not unlike the other comparators, I also find Mr. Aceves is not a proper comparator to that of Complainant. The record evidence demonstrates Mr. Aceves was a conductor, and that on September 30, 2014, Respondent terminated Mr. Aceves for allegedly failing to promptly report a personal injury pursuant to GCOR 1.1.3 Accidents, Injuries, and Defects. (JX-3, p. 1). The record demonstrates that Mr. Aceves did not call to report that he suffered a work-related injury, but he instead informed Respondent he had to take time off of work due to a back injury that the VA Hospital nurse/doctor suspected was a work-injury. (JX-3, p. 2). Respondent's CEO terminated Mr. Aceves for violating GCOR 1.1.3, when the CEO assumed Mr. Aceves' failed to promptly report a personal injury.²³ However, Mr. Steinkamp testified Mr. Aceves explained that the VA Hospital did not want to treat Mr. Aceves because the nurse believed his back injury was a work injury; Mr. Aceves never reported to Mr. Steinkamp that he believed

²³ The undersigned finds Respondent's reaction to Mr. Aceves' alleged late report of a work-related back injury to be of great significance in the present matter. Although Respondent's CEO failed to comprehend Mr. Aceves was not reporting a work-injury, I find that the CEO terminating Mr. Aceves, albeit under a false premise, to be persuasive evidence that arguably Respondent uniformly applies its rule concerning accurate and prompt reporting of all accidents, injuries, and/or incidents.

his injury was work-related, but instead he stated he was "trying to get his back fixed." Furthermore, Mr. Steinkamp testified Respondent's CEO was the decision-maker who terminated Mr. Aceves' employment, and not Mr. Steinkamp. Therefore, I find there are **striking differences** between Complainant and Mr. Aceves, namely, Mr. Aceves did not report a work injury, while Complainant not only reported a work injury, but he failed to promptly report it, which more than accounts for the different treatment of each employee. In addition, while Mr. Steinkamp was the decision-maker in Complainant's case, he did not make the decision to terminate Mr. Aceves' employment. See Wyvill, supra at 304-05; Little, supra at 97. Thus, I find the circumstances surrounding Mr. Aceves' report of injury were not **nearly identical** to Complainant's circumstances, and therefore does not show Complainant was treated disparately. Wheeler, supra at 406.

In sum, I find Complainant's proffered comparators, Daniel Guido, Brian Pike, Danny Cook, and Benito Aceves, collectively, present factual scenarios which constitute insufficient evidence of disparate treatment. Significantly, each comparator identified by Complainant, with exception of Mr. Aceves, timely and promptly reported work injuries (upon feeling pain or realizing an injury occurred), received medical treatment, and were not terminated from their employment with Respondent. Therefore, I find and conclude the lack of preponderant evidence demonstrating disparate treatment does not support a finding that Complainant's protected activity was a contributing factor to his termination.

5) Inconsistent Application of Respondent's Policies

Circumstantial evidence 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 the complainant after he or she engages in protected activity. Brucker, supra, slip op. at 11.

Here, Complainant asserts Respondent has inconsistently applied its policies concerning discipline. Specifically, Complainant avers Respondent's employee handbook contains a section titled "Discipline," which provides varying options for discipline when rules are violated including a progressive discipline policy and a GCOR Assessment Table. Complainant contends that under the GCOR Assessment Table, his alleged rule violation (i.e., not promptly reporting an injury) would result in a Level 1 discipline classification, which only requires an employee coaching and/or letter of reprimand. (JX-2, pp. 44-49). However, Complainant avers that Mr. Gibson and Mr. Steinkamp testified that the discipline policies in the Respondent's employee handbook are only guidelines, and therefore Respondent does not have to follow them. As such, Complainant argues Respondent's apparent and actual

policy regarding late reporting of an injury is completely contrary to what is contained in its employee handbook.

Respondent avers that its GCOR Disciplinary Assessment Table is a reference, but Respondent is not required to follow the GCOR Table in every circumstance. In particular, Respondent avers its employee handbook states "FWWR may, in appropriate cases, elect to follow the GCOR Disciplinary Assessment Table," which states the following:

Progressive discipline is not appropriate in all circumstances, and progressive discipline steps may be disregarded when management, in consultation with Human Resources Department, deems this appropriate. In other words, FWWR may at its discretion proceed directly to discharge . . . without prior notice or warning and regardless of past practice.

(JX-2, p. 44).

Respondent further avers that the June 1, 2017 employee handbook provides the following:

Work and Safety Rules, Reporting of Accidents
/Incident/Impacts

FWWR desires to have a safe and healthy workplace . . . FWWR is committed to complete, accurate, and timely reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. Employees are to . . . accurately and in a prompt manner, report ALL accidents/incidents (including fatalities, injuries . . .).

(JX-9, p. 4).²⁴ Respondent asserts the employee handbook provides that violation of any of its policies is a disciplinary violation. (JX-9, pp. 2-3).

Given the foregoing, I find and conclude Respondent has not inconsistently applied its discipline policy. Although Respondent's employee handbook allows for progressive discipline and provides the GCOR Assessment Table which sets forth various levels of discipline

²⁴ Respondent's May 1, 2012 employee handbook required that employees do the following:

Accurately and in a prompt manner, report ALL accidents/incidents (including fatalities, injuries, and illnesses; collisions, derailments and similar accidents involving the operation of on-track equipment; and impacts between railroad on-track equipment and highway users) immediately, no matter how small, to the supervisor. Supervisors will provide you with necessary form(s) that must be promptly completed.

(JX-2, p. 27) (emphasis added).

for rule violations, it also clearly states Respondent may, in appropriate cases, forego progressive discipline "when management, in consultation with Human Resources Department, deems this appropriate." Further, Respondent explicitly states it may proceed to discharging an employee without prior warning and regardless of past practice. (JX-2, p. 44). Mr. Steinkamp testified that whether Respondent's progressive discipline system is applied, or another form of discipline, is something he decides on a case-by-case basis. Mr. Steinkamp explained termination of Complainant's employment, rather than a lesser disciplinary action, was proper because Respondent was not given an opportunity to address any potential safety hazard or defective equipment that posed a danger to Complainant and other employees due to Complainant failing to promptly report his knee injury. (Tr. 285-86). Therefore, Mr. Steinkamp believed Complainant left Respondent at a disadvantage to properly mitigate any type of risk and find the root cause of Complainant's injury. Mr. Steinkamp further testified he consulted with Respondent's CEO, President, and the Human Resources Department, all of whom agreed Complainant's failure to promptly report his knee injury required termination of Complainant's employment. (Tr. 240-41).

Likewise, Mr. Gibson confirmed the GCOR Assessment Table in Respondent's employee handbook reflects that failing to promptly report an injury results in a Level 1 violation, which requires a coaching session and/or a letter of reprimand. However, according to the Respondent's employee handbook, a supervisor can choose the discipline to impose, which Mr. Gibson believed was fair for employees. (Tr. 118-20). Moreover, Mr. Gibson testified that he communicated to Complainant, as well as other new employees, that if they do not immediately report an injury or a safety violation, Mr. Gibson would personally walk the employee off of Respondent's property. (Tr. 122-23). Upon learning Complainant failed to promptly report his knee injury, Mr. Gibson recommended to Mr. Steinkamp that Complainant be terminated because Complainant alleged he suffered a personal injury, but Complainant failed to report it, which made it unsafe for other employees. (Tr. 165).

Accordingly, notwithstanding Respondent's progressive disciplinary policy, I find and conclude Respondent did not inconsistently apply its policies.²⁵ Rather, Mr. Steinkamp, along with Respondent's CEO, President, and Human Resources Department acted within Respondent's policies, which provide for deviation from its discipline policy when Respondent deems appropriate, and in doing so, they agreed Complainant's employment should be terminated for failing to promptly report his knee injury. (JX-2, p. 44).

6) The Legitimacy Reasons for Employer's Actions

The Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the

²⁵ See supra note 23.

course of concluding whether the complainant has demonstrated by a preponderance of the evidence that protected activity contributed to the alleged adverse action. Palmer, supra, slip op. at 29, 55; Brune, supra at 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. See Florek v. E. Air Cent., Inc., ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147-48 (2000)). The complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 11 (ARB Sept. 30, 2009). Furthermore, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employe[r] taking the alleged prohibited personnel action in order to establish that his [or her] disclosure was a contributing factor to the personnel actions." Marano, supra.

Respondent has presented ample evidence regarding the legitimacy of the decision to terminate Complainant. Complainant admitted that one week before August 29, 2017, sometime between August 21, 2017 and August 23, 2017, Complainant bumped his knee climbing up on a locomotive and felt pain, but did not report the incident. (Tr. 65). Further, when Complainant bumped his knee it may have resulted in swelling and he wore a knee brace, but he still did not report the incident. (Tr. 67). In Complainant's first written statement dated August 29, 2017, Complainant stated "my knee was injured about a week ago in Everman the first part of last week between August 21st - [August] 23rd. The crew was Paul Kendall and Aron McGrady. Nothing was said on my part as I was hoping to work through it, and it would get better. I did not report my injury to any of my coworkers or supervisors." (JX-11). Similarly, in Complainant's second written statement also dated August 29, 2017, Complainant admitted he injured his right knee the week of August 21, 2017 or August 23, 2017, but he did not report his injury to his "coworkers or other authorities." (JX-12).

As discussed above, Respondent clearly set forth in its employee handbook that an employee must **accurately and promptly** report **all** injuries to his or her supervisor. In the instant case, Complainant violated Respondent's policy and did not promptly report his right knee injury, occurring sometime between August 21, 2017 and August 23, 2017. Though Complainant testified he experienced pain immediately and wore a knee brace, it was not until August 29, 2017, when Complainant allegedly re-aggravated his knee injury, that he informed Respondent of his initial right knee injury. (JX-9, p. 4; JX-11; JX-12). Furthermore, Respondent explicitly stated in its employee handbook that while it may apply progressive discipline, it is not appropriate in all circumstances and may be disregarded when management, in consultation with Human Resources Department, deems

this appropriate. Thus, Respondent's employees may be discharged without prior notice and regardless of past practices.²⁶ (JX-2, p. 44). Mr. Steinkamp testified that whether Respondent's progressive discipline system is applied, or another form of discipline, is something he decides on a case-by-case basis. Mr. Steinkamp explained termination of Complainant's employment, rather than a lesser disciplinary action, was proper because Respondent was not given an opportunity to address any potential safety hazard or defective equipment that posed a danger to Complainant and other employees due to Complainant failing to promptly report his knee injury. Therefore, Mr. Steinkamp believed Complainant left Respondent at a disadvantage to properly mitigate any type of risk and find the root cause of Complainant's injury. Additionally, Mr. Gibson, who trained Complainant, recommended to Mr. Steinkamp that Complainant be terminated because Complainant alleged he suffered a personal injury, but he failed to report it, which made it unsafe for other employees.

Considering the totality of the evidence, I find the direct evidence, that being, Complainant was terminated for failing to promptly report his work injury, **inextricably intertwines** Complainant's protected activity and adverse employment action, and as such, has created a **presumptive inference of causation** without need for any circumstantial evidence. See Benjamin, supra, slip op. at 12. However, I also find that circumstantial evidence of temporal proximity and Respondent's knowledge of Complainant's protected activity bolster the causal relationship established by the direct evidence. Indeed, Complainant reported his work-related knee injury on August 29, 2017, and completed his medical treatment on September 11, 2017, just fifteen and two days, respectively, before Respondent discharged Complainant on September 13, 2017. Further, it is undisputed that Respondent had knowledge of Complainant's protected activity as Mr. Steinkamp, and Respondent's CEO, President, and Human Resources Department discussed and agreed Complainant should be terminated for failing to promptly report his work-injury. While Complainant failed to demonstrate through the remaining circumstantial evidence such as indications of pretext, disparate treatment, or inconsistent application of Respondent's policies, that his protected activity caused adverse employment action, I find and conclude Complainant's direct evidence alone is sufficient to establish a presumptive inference of causation. See Williams, supra, slip op. at 6. Accordingly, I find and conclude Complainant has demonstrated through direct evidence, as well as temporal proximity and Respondent's knowledge of Complainant's protected activity that his protected activity contributed to Respondent's decision to terminate his employment on September 13, 2017.

That notwithstanding, Respondent may still prevail by affirmatively demonstrating it would have taken the same adverse

²⁶ On May 30, 2017, Complainant signed a document, confirming receipt of Respondent's employee handbook. (JX-8; Tr. 53).

action even in the absence of Complainant's protected activity. Consequently, I will address below whether Respondent has established its affirmative defense.

E. Same Action Defense

Where the complainant, as is the case here, demonstrates his protected activity contributed to his dismissal, the respondent may show by clear and convincing evidence it would have **taken the same action** absent the complainant's protected activity. Palmer, supra, slip op. at 22. A respondent's burden to prove this step by **clear and convincing** evidence is a purposely high burden, as opposed to complainant's relatively low burden to establish a **prima facie** case. Id. Clear and convincing evidence that an employer would have disciplined the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. Id. (stating that step-two asks whether the non-retaliatory reasons, **by themselves**, would have been enough that the respondent would have taken the same adverse action absent the protected activity); see DeFrancesco, supra, slip op. at 8; Fricka, supra, slip op. at 5.

The "clear and convincing evidence" standard is the intermediate burden of proof, in between "a preponderance of the evidence" and "proof beyond a reasonable doubt." Araujo, supra, at 159. To meet the burden, Respondent must show that "the truth of its factual contentions is **highly probable**." Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (emphasis added); see Speegle, supra, slip op. at 11. Additionally, Respondent must present evidence of "unambiguous explanations" for the adverse actions in question. Brucker, supra, slip op. at 14.

In brief, Respondent asserts it has shown "the truth of its factual contentions are highly probable." In particular, Respondent contends it is undisputed that Complainant failed to promptly and accurately report a workplace injury sustained between August 21, 2017 and August 23, 2017, which Complainant admitted to Mr. Steinkamp and set forth in two separate written statements dated August 29, 2017. Moreover, Respondent argues it established that Complainant was discharged for failing to comply with its written policy requiring prompt and accurate reporting of workplace injuries. On this basis, Respondent avers Complainant testified he received Respondent's employee handbook that contains Respondent's injury reporting rule, requiring immediate reporting of injuries. Respondent further avers Mr. Gibson, who conducted employee training with Complainant, discussed the contents of the employee handbook and specifically told Complainant about the injury reporting rule. Indeed, Mr. Gibson communicated to Complainant and other trainees that he would personally walk them off Respondent's property if they did not follow Respondent's injury reporting rule.

Additionally, Respondent asserts it offered direct evidence of its reason for discharging Complainant, namely that Mr. Gibson and Mr. Steinkamp expressed concern about Complainant's late report of injury, and any effect it could have on safe working conditions for all of Respondent's employees. Specifically, Respondent notes Mr. Gibson recommended Complainant be terminated because he had concern over the accuracy and lateness of Complainant's injury report, and that it violated Respondent's work and safety rules, which requires accurate and prompt reporting of injuries. Mr. Gibson expressed concern there could be a piece of equipment or area in the workplace that was unsafe, but could not be investigated due to Complainant's late report of injury. Similarly, Respondent avers Mr. Steinkamp decided to discharge Complainant because he did not promptly report his work-related injury. Mr. Steinkamp discussed Respondent's desire to maintain a safe work environment, and that Complainant's actions, or failure to act, hindered management in conducting a proper investigation.

As discussed above, the direct evidence, demonstrably shows Complainant was terminated for the sole reason that he reported his work-related knee injury on August 29, 2017, one week after it occurred and as a result, Respondent terminated Complainant for violating its employee handbook work and safety rule, which requires an injury to be accurately and promptly reported to a supervisor. Nevertheless, I find that Respondent has failed to show by **clear and convincing evidence** that it would have terminated Complainant on September 13, 2017, if Complainant had not reported his injury on August 29, 2017. Mr. Steinkamp, the ultimate decision-maker, even testified that had not Complainant reported his injury, albeit late, he would not have terminated Complainant because there would have been no violation.²⁷ (Tr. 212). Mr. Steinkamp testified that prior to Complainant's late report of his injury, Mr. Steinkamp had no plans to terminate Complainant. (Tr. 249). Thus, **arguably**, Respondent cannot demonstrate it would have terminated Complainant absent his late report of injury because without his report of injury Mr. Steinkamp would not have terminated Complainant. See DeFrancesco, supra, slip op. at 8; see also Fricka, supra, slip op. at 5.

²⁷ In DeFrancesco, supra, the Board focused on whether the same discipline to which the complainant was subjected would have occurred were the respondent aware of identical conduct (failure to make slow and deliberate steps) in the absence of an injury report. DeFrancesco, supra, slip op. at 11-12. However, unlike DeFrancesco, in the present matter, it is not possible to consider whether the same discipline to which Complainant was subjected would have occurred were Respondent aware of identical conduct (a late report of his knee injury) in the absence of an injury report, because as noted by Mr. Steinkamp, without Complainant's (late) report of injury there would be no violation. Therefore, in the instant case, the undersigned finds Respondent cannot demonstrate how it would treat an employee who engaged in conduct similar to that of Complainant, which did not result in an injury. See id., slip op. at 13.

Accordingly, I find and conclude Respondent has failed to demonstrate by **clear and convincing** evidence that it would have taken the same adverse actions absent Complainant's protected activities.

VII. REMEDIES

A successful complainant under the FRSA is entitled to all relief necessary to make the employee whole including reinstatement with back pay, compensatory damages and punitive damages. Specifically, the FRSA provides that:

(e) Remedies.-

(1) In general.-An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.

(2) Damages.-Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include-

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) any backpay, with interest; and

(C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(3) Possible relief.-Relief in any action under subsection (d) may include punitive damages in an amount not to exceed \$250,000.

49 U.S.C. § 20109(e)(1)-(3).

A. Reinstatement and Back Pay

Reinstatement for a prevailing complainant is not discretionary irrespective of the complainant's preference regarding reinstatement, rather it is the presumptive remedy in a whistleblower case to make the complainant whole. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); see Hobby v. Georgia Power Co., ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-030, 2001 DOL Ad. Rev. Bd. LEXIS 10 *7 (ARB Feb. 9, 2001); see also Dale v. Step 1 Stairworks, Inc., ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4 (ARB Mar. 31, 2005). The purpose for reinstatement is to restore the complainant to a position equivalent to that which he "would have occupied but for the illegal action of the employer." Hobby, supra at *6; see Dale, supra, slip op. at 4. The Administrative Review Board ("ARB") has held that an employer is

obligated to make a bona fide offer of reinstatement and any waiver of reinstatement by the complainant will be invalid when made prior to an employer's bona fide reinstatement offer. Cook v. Guardian Lubricants, Inc., ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 3 (ARB May 30, 1997); see Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 150 (2d Cir. 1968) (remarks by a complainant indicating a disinterest in reinstatement are "of little value" when made before an employer has made an offer of reinstatement).

The complainant or employer may demonstrate "the impossibility of a productive and amicable working relationship or where reinstatement is otherwise not possible or impractical," but reinstatement should not be denied "merely because friction may continue between the complainant and his employer (or its employees)," nor should reinstatement be denied due to any inconvenience on behalf of the employer. Dale, supra, slip op. at 5. Factors such as the source of alleged hostility or friction, its severity, and whether it would be impossible for the complainant and employer to reestablish a productive working relationship should be considered when determining if reinstatement is possible. Hobby, supra, slip op. at 9. However, reinstatement may not be possible when the employer no longer employs workers in the job classification held by the complainant, the employer has no positions for which the complainant is qualified, or where accepting a position with the employer would be economically impractical for the complainant. Dale, supra, slip op. at 5; Hobby, supra, slip op. at 8-13; Kalkunte v. DVI Fin. Servs., Inc., 2004-SOX-056 (July 18, 2005) (it may be appropriate to award front pay in lieu of reinstatement where the employer has closed or restructured its business such that it cannot offer the complainant a comparable position).

Turning to the issue of reinstatement, Complainant requests immediate reinstatement to his prior position of "brakeman/conductor trainee" with the same seniority status he had absent Respondent's September 13, 2017 termination of his employment. Conversely, Respondent argues Complainant should not be reinstated because Complainant "repeatedly jeopardized safety with his changing and shifting stories about where, when, and how his alleged on-the-job injuries have occurred." Thus, Respondent argues it would violate public policy to require Respondent to re-employ Complainant on the railroad where Complainant could jeopardize the safety of his co-workers or the public by failing to accurately and promptly report injuries. See Ga. Power Co. v. IBEW, 707 F. Supp. 531 (N.D. Ga. 1989) (the district court held it was appropriate to decline reinstatement of an employee due to public policy safety considerations where the employee worked for a public utility company, but he was a chronic drug abuser); NLRB v. Big Three Indus. Gas & Equip. Co., 405 F.2d 1140, 1143 (5th Cir. 1969) (the court held where the employee held a safety sensitive position of truck driver, and there was evidence that the employee had five traffic violations, the employee should not be reinstated because it would be incompatible with safety).

Here, though Complainant failed to promptly report his right knee injury, I do not find his failure to do so necessarily implies his reinstatement should be denied due to public policy concerns. Admittedly, when an employee fails to report an injury it may pose a risk to an employer's other employees and to the public. That notwithstanding, Respondent has presented no evidence that Complainant's failure to timely report his right knee injury actually caused any injury to other employees or the public. Further, Complainant has no other history with Respondent of violating its work and safety rules, or engaging in any other kind of activity that would harm its employees or the public.

Accordingly, the undersigned finds that because Complainant has been wrongfully terminated, reinstatement is the presumptive remedy. Therefore, the undersigned finds and concludes that Respondent must present a bona fide offer of reinstatement to Complainant. Nonetheless, at the time of his September 13, 2017 termination Complainant was a probationary employee in training to be a "brakeman/conductor." Therefore, Complainant may only be reinstated to the probationary status he occupied at the time of his discharge. See NLRB v. Big Three Indus. Gas & Equip. Co., 405 F.2d 1140, 1143 (5th Cir. 1969).

With respect to back pay, the employer's liability begins when the complainant is wrongfully discharged, and ends when the complainant is reinstated or declines the employer's bona fide, unconditional offer of reinstatement. Michaud v. BSP Transp., Inc., ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 (Oct. 9, 1997) (reasonable refusal of an offer of reinstatement ends employer's back pay liability, but it may subject the employer to front pay liability); Palmer v. Triple R. Trucking, ARB No. 06-072, ALJ No. 2003-STA-028, slip op. at 4 (Aug. 30, 2006). Back pay may include interest, overtime, shift differentials, as well as fringe benefits such as vacation pay, sick pay, pension benefits and other items the complainant would have received but for Respondent's illegal conduct, but the complainant may not be compensated "for more than he lost as a result of the employer's illegal discrimination." Hobby, supra, slip op. at 34; Jackson v. Butler Co., ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026, 2004 DOL Ad. Rev. Bd. LEXIS 196, *16-17 (ARB Aug. 31, 2004) (noting whistleblower back pay awards are calculated to ensure the complainant is "restored to the economic position he would have occupied but for [respondent's] discriminatory act" and the "make whole" remedy is limited to "reimbursement for costs incurred as a result of the loss of benefits.")

Notwithstanding the foregoing, the complainant is required to mitigate his damages by engaging in reasonably diligent efforts to find alternative employment, and the respondent is entitled to offset any income earned so as to avoid double recovery. See Williams v. Grand Trunk W. R.R. Co., ARB Nos. 14-092, 15-008, ALJ No. 2013-FRS-033, slip op. at 6 (ARB Dec. 5, 2016); see also Coates v. Grand Trunk

W. R.R. Co., ARB No. 12-019, ALJ No. 2013-FRS-003, slip op. at 5 (ARB July 17, 2015); Hobby, supra at *49-53; Roberts v. Marshall Durbin Co., ALJ No. 2002-STA-35, slip op. at 17 (ARB Aug. 6, 2004). Thus, Respondent bears the burden of demonstrating that the complainant did not properly mitigate back pay damages, and in doing so, the employer must establish "that **comparable jobs were available** and that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment." Douglas, supra, slip op. at 20; Hobby, supra, slip op. at 50. If, however, Respondent presents evidence that Complainant did not mitigate damages by **establishing that comparable jobs were available**, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment, Complainant has the burden of going forward with evidence that he exercised due diligence. Johnson v. Roadway Express, Inc., ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000).

In the instant case, Respondent asserts Complainant failed to mitigate his damages, and to any extent Complainant recovers backpay, it should cease to accumulate at the latter part of 2017, when Complainant voluntarily "quit" a seasonal position he acquired with UPS as a delivery driver, earning between \$17.00 and \$22.00 per hour. Respondent avers Complainant is a forty year old man, who has a GED, and for the past twenty-six years Complainant only held four professional jobs (including his job with Respondent), three of which he voluntarily resigned and was employed for only a total of two years. Respondent further avers the only job Complainant has held throughout his adult life is performing as "The Ultimate Elvis."

Complainant offered no evidence of searching for any comparable jobs to that of his employment with Respondent. Rather, Complainant testified Respondent paid him \$21.62 per hour and he worked 40 hours per week. Complainant testified he obtained a seasonal job with UPS paying between \$17.00 and \$22.00 per hour, but he "quit" after attending the first day of orientation because he did not "care for the culture" of the job with UPS. The record is devoid of any evidence of the beginning date of employment or the expected end of the UPS seasonal employment. Thus, this job is not considered a suitable alternative of employment. Complainant also offered no testimony about any income he may earn working as "The Ultimate Elvis," nor did Complainant testify about any other efforts to secure comparable employment.

Apart from its direct questioning of Complainant, Respondent has provided no evidence that "**comparable jobs were available.**" Simply noting that Complainant only held professional jobs for a total of two years of his adult life, worked as "The Ultimate Elvis," and quit his UPS seasonal job after one day of orientation is not tantamount, or even approaching, the provision of evidence that comparable jobs are available. Assuming, **arguendo**, that Respondent has shown Complainant has failed "to make reasonable efforts to find substantially equivalent or otherwise suitable employment," Respondent would still

fall short of showing that Complainant has failed to mitigate backpay damages. It must **affirmatively show**, in addition, that comparable jobs were available in order to satisfy its burden. Coates, supra, slip op. at 5 (affirming the ALJ's finding that respondent failed to introduce any evidence of available comparable positions, and thus, respondent did not show Complainant failed to exercise reasonable diligence in attempting to secure such positions); Douglas, supra, slip op. at 20; Hobby, supra, slip op. at 50. As a result, I find Respondent has not shown that Complainant has failed to mitigate backpay damages. Complainant is therefore entitled to backpay under FRSA.

According to Complainant, he worked 40 hours per week and was paid an hourly rate of \$21.62, which amounts to a bi-weekly rate of \$1,730.39. Therefore, based on a full calendar year, Complainant's earnings are: \$1,730.39/bi-weekly (26 weeks) = \$44,990.14/year ÷ 365 days = \$123.26/calendar day. Consequently, Complainant seeks ongoing backpay from September 13, 2017, the day he was terminated until such time as he is reinstated, along with prejudgment interest. Respondent put forth no objections, arguments, or any assertions regarding the appropriate calculation of Complainant's lost wages in either its Post-Hearing Brief or its Response to Complainant's Closing Brief.

I find that Complainant is owed back pay at a rate of \$123.26/per calendar day from September 13, 2017, and continuing until such time as he is extended a bona fide offer of unconditional reinstatement, plus interest.

B. Compensatory Damages

Pursuant to the FRSA, compensatory damages may be awarded. 29 C.F.R. § 1982.109(d)(1); Bailey v. Consolidated Rail Corp., ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Compensatory damages include damages for emotional distress. Baratti v. Metro-North R.R. Commuter R.R. Co., 939 F. Supp. 2d 143, 152 (D. Conn. 2013). The complainant must prove compensatory damages by a preponderance of the evidence. Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011); Gutierrez v. Univ. of Cal., ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002); see Harte v. Metro. Transp. Auth. N.Y. Transit Auth. & Ruggiero, ALJ No. 2015-NTS-00002, slip op. at 34-35 (Sept. 27, 2016). "Awards generally require that a plaintiff demonstrate both (1) **objective manifestation of distress**, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) **a causal connection between the violation and the distress.**" Martin v. Dep't of the Army, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999); Creekmore v. ABB Power Sys. Energy Servs., Inc., 93-ERA-24, slip op. at 24-25 (Dep. Sec'y Feb. 14, 1996) (compensatory damages were awarded based upon complainant's testimony concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts). The complainant's credible testimony

alone is sufficient to establish emotional distress. Martin, supra, slip op. at 17; see Jackson, supra at *22-23 (the Board approved compensatory damages (\$40,000.00) for emotional distress based upon the complainant's testimony, despite his testimony not being supported by medical evidence or testimony from a professional counselor); see also Simon v. Sancken Trucking Co., ARB Nos. 06-039, 06-088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). An award is "warranted only when a sufficient **causal connection** exists between the statutory violation and the alleged injury." Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938 (5th Cir. 1996).

In the present matter, Complainant requests \$25,000.00 for pain and suffering due to his termination from employment with Respondent. Complainant offered no evidence or testimony in support of his request for compensatory damages. See Complainant's Brief, p. 22. At the formal hearing, Complainant simply testified he felt "horrible" after he was terminated, with no further explanation. Given the foregoing, I find Complainant has failed to set forth any testimony or evidence demonstrating he suffered emotional distress as a result of his unlawful termination. Martin, supra, slip op. at 17; Creekmore, supra, slip op. at 24-25. Accordingly, I find and conclude Complainant has failed to demonstrate by a preponderance of the evidence entitlement to compensatory damages for emotional distress. Therefore, Complainant's request for compensatory damages in the amount of \$25,000.00 is hereby **denied**.

C. Punitive Damages

Punitive damages may be awarded under FRSA where there has been a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law" Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 8-9 (Aug. 31, 2011) (quoting Smith v. Wade, 461 U.S. 30, 51 (1983)). The Smith court explained that the purpose of punitive damages is to punish the defendant for outrageous conduct and to deter future violations. Id., slip op. at 8. It further explained that "[t]he focus is on the character of the tortfeasor's conduct - i.e., whether it is of the sort that calls for deterrence and punishment over and above that produced by compensatory awards." Id.; see White v. The Osage Tribal Council, ARB No. 96-137, ALJ No. 95-SDW-001, slip op. at 8 (Aug. 8, 1997) (overturning ALJ award of \$60,000 in punitive damages because Board fully expected future compliance).

Complainant requests the maximum allowable amount of \$250,000.00 in punitive damages, asserting that Respondent showed a complete lack of understanding, or regard for employee's protections under the law. Complainant asserts Respondent's policy regarding the prompt reporting of injuries has only one objective, which is to deter employees from reporting injuries. Finally, Complainant argues a maximum award of punitive damages is warranted in this case in order to deter Respondent from continuing with its egregious conduct and policy.

Conversely, Respondent asserts Complainant has failed to show punitive damages are warranted as he has not provided any evidence Respondent acted with malice, knowledge that its actions violated federal law, or with reckless disregard or callous indifference to Complainant's rights under the law.

While I find that Respondent did not prove by clear and convincing evidence that it would have terminated Complainant in the absence of his report of injury, I find Respondent had ample reason for enforcing its policy concerning the **prompt and accurate** reporting of injuries. Mr. Steinkamp and Mr. Gibson testified that Respondent requires accurate and prompt reporting of any injury in order to mitigate any injury or danger to other employees and to the public. Further, Mr. Steinkamp and Mr. Gibson did not intimidate or harass Complainant for reporting his injury, but instead I find they acted with patience when trying to determine where and how Complainant allegedly injured his right knee. Moreover, on August 29, 2017, Mr. Steinkamp offered Complainant medical care after he re-aggravated his knee injury. Contrary to Complainant's assertion, nothing in this case reflects Respondent acted callously or intentionally to violate federal law, rather it was scrupulously applying its work and safety policy that requires employees report their injuries accurately and promptly, which it believed would help to mitigate potential danger or hazards.

Accordingly, I find and conclude an award of punitive damages is not warranted in this matter. Therefore, Complainant's request for punitive damages in the amount of \$250,000.00 is hereby **denied**.

D. Other Relief

Under 49 U.S.C. § 20109(e)(1), an employee prevailing in any action under subsection (d) shall be entitled to **all relief necessary** to make the employee whole. As such, Complainant, a prevailing employee, is entitled to the expungement of any negative references concerning the matter which forms the basis of this complaint from his personnel file.

E. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted thirty (30) days from the date of this Decision and Order within which to file and serve a fully supported and verified application for fees, costs and expenses with the undersigned and served upon the Respondent. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent unlawfully discriminated against Jeff Yowell because of his alleged protected activity and, accordingly, Jeff Yowell's complaint is hereby **GRANTED**. Accordingly,

IT IS HEREBY ORDERED that:

1. Respondent, Fort Worth & Western Railroad Company, shall immediately proffer to Complainant a **bona fide** and unconditional offer of reinstatement to his former position as a probationary employee with benefits.
2. Respondent, Fort Worth & Western Railroad Company, shall pay Complainant, Jeff Yowell, back pay at a rate of \$123.26 per calendar day from September 13, 2017 and continuing, plus interest, until such time when Complainant is reinstated. Pre-judgment interest on back pay must also be paid by Respondent from the date such wages were lost until the date of payment in accordance with 26 U.S.C. § 6621.
3. Respondent, Fort Worth & Western Railroad Company, shall expunge Complainant's personnel file of any negative record or reference related to the September 13, 2017 charges and all other references to the matter which formed the basis of this complaint.
4. Respondent, Fort Worth & Western Railroad Company, shall pay Complainant's litigation costs and reasonable attorney's fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days from the date of the instant Decision and Order. Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

ORDERED this 20th day of February, 2019, at Covington, Louisiana.

LEE J. ROMERO, JR.
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, 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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).