

**U.S. Department of Labor**

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**Issue Date: 15 January 2021**

**CASE NO.: 2019-FRS-00074**

**OSHA NO.: 5-1260-17-189**

*In the Matter of:*

**Christopher Dean**  
*Complainant*

v.

**Illinois Central Railroad Company**  
*Respondent*

Appearances:

Christopher Dean  
Glendale, Illinois  
*Self-Represented*

Noah Lipschultz, Esquire  
Jessica Bradley, Esquire  
Littler Mendelson, PC  
Minneapolis, Minnesota  
*For the Respondent*

**Before: Honorable Francine L. Applewhite**

**DECISION AND ORDER DENYING COMPLAINT**

This proceeding arises under the employee protection provisions of the Federal Railroad Safety Act of 2007 (“FRSA”), 49 U.S.C. § 20109 and its implementing regulations at 29 C.F.R. § 1982. Christopher Dean (“Complainant”) filed a complaint with the Secretary of Labor on or about October 16, 2017 alleging that Illinois Central Railroad Company (“Respondent”) discharged him in retaliation for engaging in activity protected under the FRSA.<sup>1</sup>

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<sup>1</sup> The Complainant did not date his complaint to the Occupational Safety and Health Administration (“OSHA”). On October 16, 2017, he sent an email constituting his signature to an OSHA employee. Though OSHA stated that the complaint was received on September 22, 2017, I do not believe it was signed until October 16, 2017 and will use that date for timeliness issues.

## I. PROCEDURAL HISTORY

On October 16, 2017, the Complainant filed a complaint (“OSHA Complaint”) with the Occupational Safety and Health Administration of the U.S. Department of Labor (“OSHA”). The Complainant asserted that on July 13, 2017, the Respondent unlawfully terminated him for a June 12, 2017 locomotive accident, which occurred in part due to the lighting in the area. (OSHA Complaint at pg. 1-2; *See* RX-21).<sup>2</sup> The Complainant asserted that the Respondent used him as “scapegoat for [the Respondent] not fixing the lighting” and stated that he had reported the lighting as a safety issue, “but [the Respondent] decided to put off making repairs.” (*Id.*).

OSHA initiated an investigation into the Complainant’s allegations. On May 1, 2019, the Regional Supervisory Investigator wrote a letter to the Complainant, advising him that OSHA had completed its investigation into the complaint (“OSHA Letter”). (OSHA letter at pg. 1; *See* RX-22). As OSHA did not have reasonable cause to believe that the Complainant’s protected activity was a factor in the Respondent’s decision to terminate the Complainant’s employment, OSHA dismissed the complaint. (*Id.*).

On May 20, 2019, the Complainant filed a timely appeal with the Office of Administrative Law Judges (“OALJ”). (RX-23). On June 26, 2019, I issued a Notice of Hearing and Prehearing Order, informing the parties of my assignment to the case and setting the matter for a formal hearing.<sup>3</sup> Subsequently, on January 31, 2020, the Respondent filed a Motion for Summary Decision, which I denied.

On March 3, 2020 through March 4, 2020, I held a formal hearing in Chicago, Illinois. The parties were afforded a full opportunity to present evidence and argument. The Complainant and four other witnesses testified. Admitted into evidence were CX-11 to CX-29,<sup>4</sup> CX-31 to CX-35; RX-1 to RX-4, RX-13 to RX-24. (Tr. pg. 11-45). CX-36 and CX-37, two photographs of railroad areas with lighting, were not authenticated at the hearing and are therefore, not admitted. In addition, CX-30, which I stated I would review and issue a ruling, is not admitted as it consists of a disciplinary policy instituted after the Complainant’s termination and is therefore, not relevant. (*See* Tr. pg. 309-10). Following the formal hearing, the parties submitted closing briefs.

The findings and conclusions that follow are based upon full consideration of the record, arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

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<sup>2</sup> The Complainant’s exhibits and the Respondent’s exhibits were not clearly identified as “CX” and “RX,” but rather were marked “EX” or referred to as “Exhibit.” For the sake of clarity, throughout this decision “CX” refers to the Complainant’s exhibits and “RX” refers to the Respondent’s exhibits. “Tr.” refers to the March 3, 2020 and March 4, 2020 formal hearing transcript. In addition, “Comp. Br.” refers to the Complainant’s Closing Brief, and “Resp. Br.” refers to the Respondent’s Closing Brief.

<sup>3</sup> Subsequently, I continued the formal hearing to March 3, 2020.

<sup>4</sup> CX-12 to CX-29 are excerpts from the June 12, 2017 accident hearing. The full transcript may be found at RX-17.

## **II. STIPULATIONS**

During the formal hearing, the parties stipulated that the Complainant suffered an adverse employment action. (Tr. pg.10). As this stipulation is supported by the record, I find that the Complainant suffered an adverse employment action.

## **III. ISSUES IN DISPUTE**

The parties agreed that I will determine whether or not the Complainant engaged in protected activity. (Tr. pg. 10). In addition, in its prehearing statement, the Respondent identified the following issues to be decided:

1. Did the [Complainant] engage in protected conduct under the Federal Rail Safety Act?
2. If [Complainant] engaged in protected conduct, did [Respondent], particularly the decision-maker in this case, have knowledge of [Complainant's] alleged protected conduct?
3. If [Complainant] engaged in protected conduct, was his protected conduct a contributing factor in [Respondent's] decision to terminate [Complainant's] employment?
4. Has [Respondent] established by clear and convincing evidence that it would have taken the same action regardless of [Complainant's] alleged protected activity?
5. Has [Complainant] proven that he suffered any damages resulting from his alleged FRSA claim; and
6. Has [Complainant] appropriately mitigated any damages he claims to have suffered?

(Respondent's Prehearing Statement pg. 1).

Accordingly, the primary issues that remain contested are: (1) whether the FRSA applies to the Respondent as a railroad carrier (2) whether the FRSA applies to the Complainant as an employee; (3) whether the complaint was timely filed; (4) whether the Complainant engaged in protected activity; (5) whether the Complainant's protected activity was a contributing factor to the Respondent's adverse employment action against the Complainant; (6) whether the Respondent can demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the Complainant's protected activity; and (7) damages.

## **IV. SUMMARY OF EVIDENCE**

### **A. The Complainant's History with the Respondent**

#### *The Complainant's Background and Training*

The Complainant began working with the Respondent in 2004. (Tr. pg. 69). His main position was as a laborer. Specifically, he worked as a laborer/hostler with the Mechanical Department. (See e.g. RX-14; CX-34; CX-35). Upon his hiring with the Respondent, he received training and was tested on the Respondent's safety regulations. In discussing these

safety regulations, the Complainant noted that these regulations require immediate reporting of an accident. The rules required prompt reporting of accidents to a foreman or whoever is in charge. Regarding reporting, the Complainant acknowledged that there are multiple ways of reporting a safety issue, to include verbally telling his foreman and calling a safety hotline. (Tr. pg. 69; 70-71; 74-75).

#### *The Complainant's Reinstatement on a "Last Chance" Basis*

On July 4, 2015, the Complainant was terminated for absenteeism. (RX-13). The Complainant's union appealed to the Public Law Board. The Public Law Board reinstated the Complainant with one "Last Chance." (*Id.*). The Complainant understood such a basis to mean "if anything were to happen, they would terminate [him]." (Tr. pg. 87). The Complainant resumed working for the Respondent.<sup>5</sup>

#### *The Complainant's Use of Hostler Slips for Safety Concerns*

In 2017, the Complainant began writing safety concerns on his hostler slips.<sup>6</sup> Prior to 2017, the Complainant had told his foreman verbally about safety issues. The Complainant stated that he would use the note section on the hostler slip to let the foreman know of any issues he had out on the yard. He elaborated that he was told he could report issues in the notes section. Specifically, the Complainant stated that he wrote on a hostler slip that the dispatch lights were broken.<sup>7</sup> He also recorded on a hostler slip that the handrails were bent to the turntable and could hurt someone. (*Id.* pg. 59; 61; 68-69; 74-76).

When asked about the primary use for hostler slips, the Complainant agreed that hostler slips are utilized for recording an employee's time. Regarding the process for submitting hostler slips, he stated that they are stapled to his time sheet and then left on a table for the foreman to pick up. The Complainant acknowledged that he has never seen a foreman pick up the timesheets. However, he asserted that the foreman takes the time sheets, reviews them, and delivers them to the clerk. (*Id.* at 76-77; 80-82).

#### *June 12, 2017 Accident and the Complainant's Subsequent Termination*

On June 12, 2017, the Complainant arrived for his night shift at the Respondent's facility. The Complainant was paired to work with Mr. Shamus O'Brien and the men were ordered to spin two locomotive engines. The Complainant acted as the engineer while Mr. O'Brien acted as the ground man. The Complainant relied on Mr. O'Brien as the ground man to direct him in moving the locomotives. The Complainant and Mr. O'Brien then returned to a building together. The Complainant stated that at this point in their shift, Mr. O'Brien said to him "[h]ey, I think we

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<sup>5</sup> The Complainant had another absence constituting an attendance violation after his reinstatement. (Tr. pg. 87-89). He received a suspension of 5 days deferred for one year. (RX-15).

<sup>6</sup> Hostler slips are the recording for the federal government for an employee's hours of service for being a hostler. (Tr. pg. 130). They include space for an employee's time for being a hostler, a notes section, and a signature section for the employee. (*See Id.* at 58-61; *see also* CX-34 to CX-35; RX-14). There is not a space for the foreman to sign.

<sup>7</sup> In his OSHA complaint, the Complainant stated that he wrote several times that the lighting in the table area was "out on the hostler slips." (RX-21). He also stated that "according to procedures once, [he] wrote up the lighting for the table area" and stated that the tracks should be put out of service. (*Id.*).

had an accident. I think we hit handrails.” (*Id.* at 91). The Complainant then asserted that he replied to Mr. O’Brien “if you feel you had an accident, you should report it... [w]e didn’t have an accident...I can’t report something I didn’t see.” (*Id.*). The Complainant stated that he did not know about the accident at the time and did not stop to check if there was an accident. The Complainant did not report an accident and both he and Mr. O’Brien went home after the shift. (*Id.* at 56-57; 89-91; 98).

The following day, the Complainant provided a statement to Mr. Ed Polacek about what happened during the overnight shift with Mr. O’Brien. The Complainant neither reported the accident to Mr. Polacek nor discussed his conversation with Mr. O’Brien regarding a potential accident. The Complainant was then pulled from service. He also received a Notice of Investigation, which, *inter alia*, informed him that his personnel record would be reviewed in connection with the investigation. (RX-16). The Complainant was interviewed on two additional occasions by Mr. Jeffrey Grady and on both occasions, neither reported the accident nor discussed his conversation with Mr. O’Brien about a potential accident. The investigation proceeded to a hearing where the Complainant was represented and again asserted that he did not see any accident. The Complainant asserted that throughout the course of the investigation, Mr. O’Brien provided several statements, taking responsibility for the accident, but ultimately stating that the Complainant had told him not to report the accident. Ultimately, on July 13, 2017, the Respondent terminated the Complainant from his position for violating two regulations. (RX-18). Upon his appeal of the termination, the Public Law Board found no proper basis for disturbing the Respondent’s disciplinary decision and denied the Complainant’s claim. (RX-19). (Tr. pg. 98; 100-106; 108-109; 121-122).

## **B. The Complainant’s Allegations of Protected Activity**

On October 16, 2017, the Complainant filed a complaint with the Occupational Safety and Health Administration. (RX-21). He asserted that he had been terminated after the June 12, 2017 accident and was “scapegoat for [the Respondent] not fixing the lighting and it being a factor in the railing being hit. (*Id.*). In his complaint, he explained that he had written up lighting issues on the hostler slips several times from February through June 2017. He also wrote “according to procedures once, [he] wrote up the lighting for the table area [sic] they should have put the tracks in that area out of service, but they didn’t.” (*Id.*).

At the formal hearing, the Complainant reiterated that he had written up issues about the lighting on his hostler slips. (Tr. pg. 68). Specifically, he noted that the dispatch lights were broken. The Complainant also asserted that he was terminated because he was a “whistleblower” in another employee’s case. (*Id.* at 55). He stated that his testimony in the other employee’s case occurred in February 2017. (*Id.* at 61; 64).

## **C. Other Witnesses’ Testimony**

### **1. Edward Polacek**

In 2017, Ed Polacek was the general foreman at the Respondent’s facility. The Complainant was one of Mr. Polacek’s hostlers. Mr. Polacek stated that the Complainant had

never brought a safety concern to him personally. Furthermore, Mr. Polacek asserted that he did not know of the Complainant bringing a safety concern to anyone else. (Tr. pgs. 132; 139).

Mr. Polacek identified three ways that employees can inform the Respondent of safety issues: 1) directly to a supervisor; 2) call a safety hotline; or 3) utilize an anonymous dropbox. He stated that yearly each employee is required to read and sign off on the Respondent's Code of Conduct. Mr. Polacek also noted that the mechanical general rules require prompt reporting of accidents. (*Id.* at 134; 136; 138).

In reference to the hostler slips, Mr. Polacek defined hostler slips as a "recording for the federal government for their hours of service for being a hostler." (*Id.* at 140). Specifically regarding the "Notes" section of the hostler slips, Mr. Polacek stated "[a]t that time, it was normally used for if they didn't hostle the whole time, they would put on there the other duties that they did." (*Id.* at 141). Mr. Polacek also stated that he did not review the hostler slips and did not know of anyone who reviewed the hostler slips after the slips were turned into the clerk. The hostler slips are turned into the shift supervisor and taken to the clerk who reviews them. However, the shift supervisor would look over the slips and if he/she saw something in the note, the supervisor should address it. (*Id.* at 141, 167-68, 181-82).

Concerning the June 12, 2017 accident, Mr. Polacek learned about it the following morning. He noted that the "table" where the locomotives had been turned was torn up, which would have taken a significant strike. (*Id.* at 145-149). Mr. Polacek interviewed both Mr. O'Brien and the Complainant, as they were the last team to move a locomotive on the table. He stated that although Mr. O'Brien changed his story several times he eventually admitted that he believed he hit the table. Whereas, the Complainant stated that he had no recollection that there was anything wrong with the table. Mr. Polacek forwarded his findings to Jeffrey Grady. Mr. Polacek stated that he was not involved in the decision to terminate the Complainant. (*Id.* 144-165).

## 2. Ricardo Galvan

In 2017, Ricardo Galvan was the Respondent's Chief Mechanical Officer. He had final authority over termination decisions for laborers/hostlers. Regarding the Complainant, Mr. Galvan testified that he had never met the Complainant and was not familiar with the Complainant prior to the June 12, 2017 incident. In addition, Mr. Galvan stated that he had never received a safety complaint from the Complainant. He was also not aware of the Complainant reporting safety complaints to anyone else. Concerning the Complainant's termination, Mr. Galvan stated he made the decision to terminate the Complainant for "being dishonest" about the "damage to the locomotive," in that there was no way to "miss this type of damage on a locomotive or a railing." (*Id.* at 189-90).<sup>8</sup>

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<sup>8</sup> Mr. Galvan also testified that though the Complainant's termination letter was written under Mr. Bryan Thompson's letterhead and contained his name, Mr. Thompson was not involved in Mr. Galvan's decision to terminate the Complainant. (Tr. pg. 188-90).

3. Jeffrey Grady

In June 2017, Jeffrey Grady was the manager of the Respondent's Locomotive Reliability Center. The Complainant and Mr. Grady met approximately two weeks before the June 12, 2017 accident. Mr. Grady stated that at no point did the Complainant report any safety issues to him and he was not aware of the Complainant reporting safety issues to anyone else. (Tr. pgs. 212-213; 222; 233).

On June 13, 2017, Mr. Grady received notice of damage to the turntable. Describing the damage, he stated that "this one truly concerned me because [sic] of there is no way...that they would not have known this happened." (*Id.* at 241). He initiated the formal investigation of the accident. He also testified at the investigation hearing. He stated that the Complainant had violated a safety rule by not promptly reporting of the accident. (*Id.* at 235; 275-279; 287-88).<sup>9</sup>

In reference to safety issues, Mr. Grady highlighted that at the beginning of each shift there were safety briefings for employees. In addition, employees could report safety issues to their immediate supervisor, place reports in the safety suggestion box, and/or could call him. Concerning hostler slips, Mr. Grady asserted that he had never personally seen a hostler slip. (*Id.* at 223-224; 228-229; 233-34).

4. Bryan Thompson

In June 2017, Bryan Thompson was the Senior Manager in the Respondent's Mechanical Department. Mr. Thompson was the hearing officer for Complainant/Respondent's investigation hearing. Prior to presiding over the Complainant's hearing, Mr. Thompson had not previously met the Complainant, received any safety complaints from the Complainant and/or knew of any safety complaints made by the Complainant to anyone else.

On July 13, 2017, issued a letter which notified the Complainant that "in consideration of the incident, the proven rule violations, and [the Complainant's] past discipline record," the Complainant was dismissed from his position with the Respondent. (RX-18).<sup>10</sup>

**D. Additional Documentary Evidence**

The Parties submitted numerous other documents including the Complainant's statements and testimony from the investigation hearing (RX-17; CX-12 to CX-29); the Complainant's termination letter (CX-31; RX-18); examples of hostler slips (CX-34 to CX-35); the Respondent's Code of Conduct (RX-1); and the dispositions of the Complainant's appeals to the Public Law Board (RX-13; RX-19). All exhibits were reviewed and considered.

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<sup>9</sup> Mr. Grady also testified that Respondent switched light bulbs following the June 12, 2017 accident for purposes of efficiency and electricity. He stated this switch was the only change made to the lighting in the area where the accident took place. (Tr. pgs. 88-89).

<sup>10</sup> Mr. Thompson testified that he did not write the letter. He further stated that it is standard to use the manager's name and use a manager's letterhead. He also testified that other than making a recommendation about whether he thought a rule had been violated, he was not involved in any other disciplinary decision making process. (Tr. pgs. 301-06).

## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The FRSA contains three separate provisions under which a complainant may seek relief against a covered employer. 49 U.S.C. § 20109(a) provides a general anti-retaliation provision protecting complaints about violation of federal law or safety, participation in investigations, and, as relevant here, reports of work-related injuries. 49 U.S.C. § 20109(b) contains an anti-retaliation provision specifically addressed to hazardous safety or security conditions, protecting reports of such conditions, refusal to work in such conditions, or refusal to use equipment that creates such conditions. 49 U.S.C. § 20109(c) contains two provisions, one forbidding railroad interference in medical care, § 20109(c)(1), and another forbidding retaliation for requesting care, seeking care, or complying with medical instructions, § 20109(c)(2).

### **A. The Respondent as a Carrier within the meaning of the Act**

In order for the FRSA to apply, the Respondent must be a “railroad carrier” within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102. A “railroad carrier” is defined as “a person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary determines is operating within the United States as a single, integrated rail system.” (49 U.S.C. § 20102). FRSA employee protections apply to railroad carriers engaged in interstate or foreign commerce. (49 U.S.C. § 20109).

The record as a whole supports that the Respondent is a railroad carrier engaged in interstate commerce.<sup>11</sup> The Respondent has referred to itself as a “railroad carrier.” (Resp. Br. at pg. 3). Additionally, the Respondent has not disputed that it is a railroad carrier engaged in interstate commerce. Accordingly, I find that the Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and 49 U.S.C. § 20102.

### **B. The Complainant as an Employee within the meaning of the Act**

In order to invoke protections under 49 U.S.C. §20109, a complainant must be an employee of the railroad carrier engaged in interstate or foreign commerce. (*See* 49 U.S.C. §20109). The Respondent has not disputed that the Complainant is an employee within the definition of 49 U.S.C. § 20109. The record supports that the Complainant is an employee within the meaning of 49 U.S.C. § 20109 and was treated as an employee by the Respondent. (*See e.g.* RX-3, RX-4; RX-14; RX-21). Accordingly, I find that the Complainant is an employee under 49 U.S.C. § 20109.

### **C. Timeliness of Complaint**

The FRSA, 49 USC § 20901(d)(2)(A)(ii), and its implementing regulation, 29 C.F.R § 1982.103(d), provide that an allegation of impermissible discrimination under Act and request for relief “shall be commenced” within 180 days after the date on which the alleged FRSA violation occurred.

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<sup>11</sup> I also note that OSHA found that both the Complainant and the Respondent were covered under the FRSA. (RX-22).

On July 13, 2017, the Respondent terminated the Complainant. (RX-18). The Complainant filed his complaint on October 16, 2017, within 180 days of the adverse employment action. (RX-21). Accordingly, I find that the Complainant filed a timely complaint pursuant to 29 C.F.R. § 1982.103(d).

#### **D. Complainant's Case**

The FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. (49 U.S.C. § 20109(a)). Protected activity under the FRSA includes “reporting, in good faith, a hazardous safety or security condition.” (49 U.S.C. § 20109(b)). The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. (*See* 49 U.S.C. § 20109(d)(2)(A)(i)). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21. (*Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

To succeed in a FRSA whistleblower claim, a complainant must demonstrate by a preponderance of the evidence that his or her protected activity under the Act was a contributing factor in the adverse action alleged in the complaint. (49 U.S.C. § 42121(b)(2)(B)(iii); *see also* 29 C.F.R. § 1982.109(a)). Specifically, a complainant must establish: (1) he or she engaged in protected activity as set forth in the statute; (2) the employer took an adverse action against the employee; and (3) the protected activity was a contributing factor in the adverse action. (*Araujo* 708 F.3d at 157; *Samson v. Soo Line R.R. Co.*, ARB No. 15-065, ALJ No. 2014-FRS-091, slip op. at 3 (ARB July 11, 2017); *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-00154, at 15-16 (ARB Sept. 30, 2016), reissued Jan. 4, 2017 (en banc)).

If a complainant proves that his or her protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity].” (49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.109(b)). If the employer does so, no relief may be awarded to the complainant. (42 U.S.C. § 42121(b)(2)(B)(iv)). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” (*Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011)).

Accordingly, I must first determine whether or not the Complainant has established that he engaged in a protected activity and whether or not the protected activity was a contributing factor in the Respondent's adverse employment action against him. If the Complainant establishes these elements, I will turn to whether or not the Respondent has established by clear and convincing evidence that it would have taken the same adverse employment action against the Complainant, even in the absence of his engagement of a protected activity.

## 1. Protected Activity

To establish the first element of a case for retaliation, the Complainant must prove by a preponderance of the evidence that he engaged in statutorily defined “protected activity.” The relevant subsection to this matter defines protected activity as “reporting, in good faith, a hazardous safety or security condition.” 49 U.S.C. § 20109(b).

The Complainant asserted two bases as his protected activity. First, the Complainant alleged that he wrote a safety concern regarding the dispatch lights or lighting issues on the notes section of one or more hostler slips. (Tr. pg. 61; *see also* RX-21). Specifically, he alleged that he reported that the lighting was a safety issue in the area where the June 12, 2017 accident occurred. (RX-21). While the lighting in that area may have been a safety hazard, the issue lies with his method of reporting such a hazard. Hostler slips are documents that allow laborers to record their hostler hours. (*See* Tr. pg. 140). As multiple witnesses testified, the primary use of a hostler slip is as an addendum to the timesheet for pay differentials. While there is a “notes” section contained on the hostler slips, there is no testimony to support the proposition that supervisors reviewed the notes sections specifically for safety hazards. Therefore, even if the hostler slips were examined by a supervisor, who “should” address the notes section, a note on a hostler slip did not constitute a report of a safety concern. Moreover, there is no hostler slip in evidence to support the Complainant’s assertions regarding the lighting or containing his specific wording. Although the Complainant testified that he was told that he would be able to record safety issues in the notes section of the hostler slip, such is inconsistent with the reporting practices of the Respondent.

In addition, the Complainant did not use what appears to be the established procedures for reporting a safety concern. He clearly knew of such practices in that he testified that an employee could verbally tell a foreman, or use the safety hotline to report safety concerns, and that he had previously told his foreman about safety issues. (*See* Tr. pgs. 74-75). He. (*See Id.* at 74-75).

In addition to the Complainant’s assertion that he reported a hazardous safety or security issue, the Complainant alleged that his second protected activity was acting as a “whistleblower” by testifying in another employee’s February 2017 case. (*See* Tr. pg. 55). However, the Complainant did not identify any specific testimony that would constitute protected activity under the FRSA.

It appears that the Complainant had a concern about the lighting or the dispatch lights. However, despite being aware of the proper procedures to communicate/report this concern, the Complainant did not do so. Instead he testified that he reported his concern on a hostler slip. I find that this action does not constitute reporting of a hazardous safety condition. Thus, I find that the Complainant did not engage in a protected activity within the meaning of the FRSA. Similarly, I do not find that the Complainant’s February 2017 testimony in another employee’s case is protected activity.

## 2. Adverse Action

A complainant must also establish that he suffered an adverse employment action. (*Palmer*, ARB No. 16-035 at 15-16). The Complainant and the Respondent stipulated that the Complainant suffered an adverse employment action. (Tr. pg. 10). This stipulation is supported by the record. Thus, I find that the Complainant suffered an adverse employment action.

## 3. Contributing Factor to the Adverse Action

Even if the Complainant had established his engagement in protected activity, the Complainant must also prove that his protected activity was a contributing factor to the adverse employment action. (49 U.S.C. §§ 20109(a), (b); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013)).

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” (*Id.* at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011))). Accordingly, a complainant-employee need only show that the protected activity played some role in the employer’s decision to take adverse action; any amount of causation will satisfy this standard. (*Palmer*, ARB No. 16-035, at 15-16). An ALJ may consider all evidence relevant to this issue, including the employer’s proffered reasons for the adverse action. (*Id.*). As the Board in *Palmer* explained, in a case of retaliatory dismissal under the Act, the administrative law judge must first answer the following question: “did the employee’s protected activity play a role, *any* role, whatsoever, in the adverse action?” (*Id.* at 21). On that question, the Board specified that the Complainant has the burden of proof, by a preponderance of the evidence, to show “based on a review of all the relevant, admissible evidence, that it is more likely than not that” the Complainant’s “protected activity was a contributing factor in the employer’s adverse action.” (*Id.* at 52). This is a very low standard for the Complainant to meet; the factor need not be significant, motivating, substantial, or predominant, it just needs to be a factor. (*Id.* at 53).

The Complainant may meet his burden with direct or circumstantial evidence. Direct evidence is evidence that conclusively links the protected activity and the adverse action. (*Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5 (ARB Jan. 30, 2008)). The Complainant may provide circumstantial evidence, proving by a preponderance of the evidence that retaliation was the true reason for his termination. For example, the Complainant may show that the Respondent’s proffered reason for termination was not the true reason, but instead “pretext.” (*Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010)). If the Complainant proves pretext, it may be inferred that his protected activity contributed to the termination. (*Id.*). Temporal proximity may also support an inference of causality. (*See Palmer*, ARB No. 16-035, at 56).

Pursuant to *Palmer*, “the *evidence* of the employer’s nonretaliatory reasons must be *considered* alongside the employee’s evidence” in making the determination of whether the protected activity was a contributing factor; for if the employer claims that its nonretaliatory

reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. (*Palmer*, ARB No. 16-035 at 55)(emphasis in original).<sup>12</sup>

By formal letter, dated July 13, 2017, the Respondent terminated the Complainant. (RX-18). Assuming, *arguendo*, that the Complainant established that he engaged in a protected activity by recording the lighting concern on his hostler slip, he is unable to demonstrate that this activity contributed to his adverse employment action. It is unclear when the Complainant recorded the lighting issue on his hostler slip or how many times he recorded it. Without additional information, I cannot make an inference regarding the temporal proximity.

In addition, the evidence of record supports that Mr. Galvan, the manager who ultimately made the decision to terminate the Complainant, had no knowledge of any hostler slip, was not engaged in the day to day operations of hostlers/laborers, and did not know the Complainant personally. (*See* Tr. pg. 184-211)). Mr. Galvan testified that he reviewed the investigation and determined that the Complainant had been dishonest. (*Id.* at 188-92).

Further, the Complainant has produced no evidence upon which I may adduce that Mr. Galvan had knowledge of the lighting concerns contained in the hostler slips.<sup>13</sup> The evidence does not support proof of animus from any supervisor regarding the lighting concerns contained in the hostler slips. Instead, it is unclear if any supervisor had any knowledge regarding the concerns notated in the hostler slips. Thus, such a protected activity could not have contributed to the Respondent's adverse employment action taken against the Complainant.

Rather, after learning of the June 12, 2017 accident, supervisors conducted a month-long investigation into the actions of the Complainant and Mr. O'Brien. They ultimately concluded that the Complainant knew of the June 12, 2017 accident and did not report it. Based on this conclusion, the Complainant was terminated. The Complainant had previously been reinstated with one "Last Chance" and had received an additional suspension for an attendance violation. (Tr. pgs. 87-89)). The evidence does not support that the Complainant's alleged reporting of safety concerns on hostler slips containing played any role in his termination.

Under the FRSA, my inquiry is solely based on whether or not the Complainant's protected activity was a contributing factor to the Complainant's adverse employment action. Even assuming the Complainant did engage in protected activity, the evidence does not show that such activity was a contributing factor to the adverse employment action that the Complainant suffered. As the Complainant stated when asked if he had evidence that his termination was related to a safety concern contained in his hostler slips, "it wasn't related." (Tr.

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<sup>12</sup> I note that the Board in *Palmer* emphasized that this determination does not include a weighing of the nonretaliatory reasons against the employee's evidence regarding the relative importance of each reason. (*Palmer*, ARB No. 16-035 at 55.)

<sup>13</sup> A complainant may also show contribution a cat's paw theory, which is applicable in cases under the FRSA. (*See Kudak v. BNSF Ry. Co.*, 768 F. 3d 786, 790-91 (8th Cir. 2014)). This theory of liability applies when the impermissible consideration, here the protected activity, has no bearing on the decision-maker, suggesting no discrimination, but does bear on the actions of a lower-level (or just other) supervisor who in turns acts to bring about the ultimate adverse action in some way. (*See Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011)). As none of the managers below Mr. Galvan had knowledge of the Complainant's alleged protected activity, I do not find that the Complainant may use the cat's paw theory to attach impermissible considerations to Mr. Galvan.

pg. 114-115). Accordingly, even assuming that the Complainant engaged in protected activity, I find that such activity was not a contributing factor to the adverse employment action that the Complainant suffered.

**E. The Respondent's Burden**

If the Complainant had established that his protected activity was a contributing factor to the Respondent's adverse employment action against him, the burden would have then shifted to the Respondent to prove by clear and convincing evidence that it would have taken the same adverse employment action even in the absence of the protected activity. (*See* 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Araujo*, 708 F.3d at 157). However, I find that the Complainant neither engaged in a protected activity, nor that such alleged activity was a contributing factor to the adverse employment action. Thus, I do not need to address the Respondent's burden.

**CONCLUSION**

The Complainant has not demonstrated by a preponderance of the evidence that he engaged in a protected activity, or, assuming so, that his engagement in the protected activity contributed to his termination. Consequently, I find that the Respondent did not violate the employee protection provisions of the Federal Railway Safety Act.

**ORDER**

**IT IS HEREBY ORDERED** that the complaint of Christopher Dean against Illinois Central Railroad Company is hereby **DENIED**.

**SO ORDERED.**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge  
Washington, D.C.

**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 the administrative law judge’s decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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).

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**The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system (“EFS”) which is available at <https://efile.dol.gov/>.** If you use the Board’s prior website link, [dol-appeals.entellitrak.com](http://dol-appeals.entellitrak.com) (“EFSR”), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

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Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at [login.gov](http://login.gov) (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their [login.gov](http://login.gov) username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for [login.gov](http://login.gov) and EFS at <https://efile.dol.gov/contact>.

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You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor  
Administrative Review Board  
ATTN: Office of the Clerk of the Appellate Boards (OCAB)  
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Washington, DC 20210-0001

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Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, on or after December 7, 2020, at 8:30 a.m., you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.