



Issue Date: 25 February 2021

CASE NO.: 2019-FRS-00104

IN THE MATTER OF

**CHEYENNE DORRIS,
Complainant**

v.

**UNION PACIFIC RAILROAD COMPANY,
Respondent**

Appearances:

For the Complainant: Marc A. Zito, Esq.

**For the Respondent: Elizabeth A. Graham, Esq.
Ronnie Turner, Jr., Esq.**

**BEFORE: ANGELA F. DONALDSON
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 the Act), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission act of 2007, Pub. 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. *See* 49 U.S.C. § 20109; 29 C.F.R. Part 1982.

On October 3, 2019, this matter was reassigned to Administrative Law Judge Angela F. Donaldson. The formal hearing occurred on August 18 and 25, 2020, at which the parties presented the testimony of witnesses Scott Bybee, Ben Bailey, Mark Zirkelbach, and Complainant Cheyenne Dorris. The parties presented Joint Exhibits 1 through 15 at the hearing, which were admitted.¹

¹ The transcripts of the depositions of Ben Bailey, Danny Torres, Katie Novak, Scott Bybee, and Complainant Dorris were submitted electronically on August 4, 2020, and but not yet marked as hearing exhibits. At the hearing, the exhibits were identified as follows and admitted: JX-11 (Bailey), JX-12 (Torres), JX-13 (Novak), JX-14 (Bybee), and JX-15 (Dorris). (Tr. at 9-11). On February 18, 2021, Claimant filed the properly marked depositions as JX 11 through 15.

JX-1 is the Complainant's HR Report. The Report contains Complainant's work history, training history, skills exam history, and discipline history. JX-2 is the witness statement provided by Codi Hamilton on March 13, 2019. JX-3 is the witness statement provided by Crystal Bowen on March 13, 2019. JX-4 is Mr. Bybee's report from the Union Pacific Railroad Police Department. The report details Mr. Bybee's criminal investigation. JX-5 is Complainant's detailed complaint as ordered in the Notice of Hearing and Pre-Hearing Order. JX-6 is the definition of Rule 1.6. JX-7 is the notice of investigation sent to Complainant on May 5, 2019. JX-8 is the notice of postponement sent to Complainant on May 13, 2019. JX-9 is a list of advances paid to Complainant. Complainant has received \$27, 500.00 in advances. JX-10 is Union Pacific Railroad's Report of Personal Injury or Occupational Illness completed by Complainant on August 21, 2018. In the Report, Complainant provides the details of the August 30, 2018, work accident. JX-11 is the deposition of Ben Bailey. JX-12 is the deposition of Danny Torres. JX-13 is the deposition of Katie Novak. JX-14 is the deposition of Scott Bybee. JX-15 is the deposition of Complainant, Cheyenne Dorris.

In general, Complainant contends that an employee misconduct investigation initiated on or about May 7, 2019, was in retaliation for Complainant engaging in protected activity because he reported a work injury on August 31, 2018, and thus in violation of the FRSA.² Respondent denies engaging in any retaliation.

I. RELEVANT EVIDENCE

A. Stipulations

In their Joint Pre-Hearing Statement filed on August 3, 2020, the parties presented the following stipulated facts:

1. On August 31, 2018, Complainant filed a report of personal injury, which is a protected activity under 49 C.F.R § 20109.
2. On March 9, 2019, [Crystal] Bowen called Union Pacific's Risk Management Communications Center ("RMCC")³ and made a complaint alleging that Complainant had asked [Codi] Hamilton to strike his injured elbow with a sledgehammer, in return for monetary compensation.
3. On March 11, 2019, [Scott] Bybee was assigned to investigate whether Complainant had committed the crime of insurance fraud.
4. On March 13, 2019, Bowen and Hamilton filled out handwritten statements detailing their allegations against Complainant.
5. Bybee closed his "criminal" investigation on April 26, 2019.
6. Complainant was issued notice of investigation on May 7, 2019, for dishonesty and immoral conduct.

² The record references two investigations, an initial "criminal investigation" and a subsequent "disciplinary investigation" into employee misconduct (dishonesty). *See* JX-13 at 6:1-6. Also, the terms disciplinary investigation and disciplinary hearing were referred to as interchangeable. Tr. at 138-39. As discussed herein, Complainant alleges that the disciplinary investigation was discriminatory or retaliatory.

³ The RMCC is Respondent's 911 Center or switchboard. Tr. at 313.

7. The investigation hearing into the alleged rule violations was set for May 15, 2019, and postponed to June 19, 2019. The parties ultimately appeared on August 7, 2019.
8. On August 7, 2019, [Ben] Bailey was notified by local chairman, Mark Zirkelbach, that Hamilton called RMCC a second time and recanted her story.
9. Bailey cancelled the discipline investigation hearing that was set for August 7, 2019.
10. Complainant returned to work in a full-duty capacity on October 23, 2019, and has since been working in his job without incident.
11. Complainant's discipline record has been expunged.

B. Documentary Evidence

Union Pacific Railroad Report of Personal Injury (JX-10)

On August 31, 2018, Complainant completed a Report of Personal Injury or Occupational Illness for Respondent. In the report, Complainant described the accident that occurred on August 30, 2018, when he was hand pumping due to a track switch that was not working. Complainant reported having to use a bar that was located near the switch to get the switch to work. The report also included a description of Complainant's injury and treatment plan. Complainant indicated on the report that he had a right elbow contusion as well as swelling.

Union Pacific Railroad Police Department Report (JX-4)

On March 9, 2019, a citizen reported an employee had another citizen strike his elbow with a sledgehammer or bat to aggravate an injury the employee had sustained while working. The report includes information reported chronologically by Special Agent Scott Bybee from the time of his assignment until the close of the investigation and the later cancellation of the disciplinary hearing. At the start of the investigation, Mr. Bybee confirmed Complainant had reported an injury and had not worked since.

On March 11, 2019, Mr. Bybee contacted Respondent's Director of Safety Reporting, Jennifer Gdanov, who stated only that Complainant was on unpaid leave and referred Mr. Bybee to Wesley Shipley, Director of Railroad Operations. Mr. Shipley was aware of Complainant's accident and injury and described them to Mr. Bybee. He also confirmed Complainant had been on short-term disability as a result of the injury. Mr. Bybee then spoke to an investigator, Kyle Pisula, with the Texas Department of Insurance. Mr. Pisula explained the elements necessary to make the incident at issue criminal, including an injury that occurred and documentation of the worsening of the injury, for no apparent reason, between doctor visits.

On March 12, 2019, Mr. Bybee spoke with Crystal Bowen by phone; she said she knew Complainant and was present when he was struck by a sledgehammer. Mr. Bybee also spoke with Ms. Hamilton by phone, who explained that Complainant asked her to hit him with a sledgehammer, in late August 2018, to facilitate getting a better settlement from his employer. Ms. Hamilton claimed to have text messages to support her statement. On March 13, 2019, Mr. Bybee met with Ms. Bowen and Ms. Hamilton in person, and they completed written statements.

On April 26, 2019, Mr. Bybee noted that it was determined the alleged crime occurred off of Respondent's property therefore, he spoke with the Sherman, Texas, Police Department. Sherman Officer Rhoades informed Mr. Bybee the police department would not be pursuing the case.

On August 7, 2019, Mr. Bybee noted that he appeared at a termination hearing regarding Complainant for a 1.6 violation. Mr. Bybee's role during the hearing would be as a company witness to relay information provided to him by Ms. Bowen and Ms. Hamilton. However, prior to the hearing, Mark Zirkelbach indicated that Ms. Hamilton had recanted her statement. There was some confusion over if and when a call was received by Ms. Hamilton, and ultimately it was confirmed she had, indeed, rescinded her accusations by calling the RMCC on July 24, 2019. The hearing was cancelled.

Statements of Codi Hamilton (JX-2) and Crystal Bowen (JX-3)

Ms. Hamilton gave a written statement on March 13, 2019. In her statement, Ms. Hamilton stated that she was at Complainant's house to pick up Ms. Bowen. Complainant called Ms. Hamilton outside to hit his arm with a sledgehammer while he was holding onto a broken tree branch. Ms. Hamilton stated that she hit his arm from the bottom and two times from the side. Ms. Hamilton continued by stating that Complainant informed her she would get a "chunk of money" once he settled with Respondents.

Ms. Bowen also gave a written statement on March 13, 2019. In her statement, Ms. Bowen stated that she was at Complainant's house when he called Ms. Hamilton outside to hit his arm with a sledgehammer. Ms. Bowen stated that Ms. Hamilton hit Complainant's arm multiple times. Complainant told the women that "he could get paid" and that he would give Ms. Hamilton money from his settlement for doing this. Ms. Bowen also stated that a few days after Ms. Hamilton hit him, Complainant went to "Clint B's" home and had Clint hit him with a bat. Ms. Bowen did not know if he promised Clint money. Ms. Bowen also stated that Complainant had told her that he was checking himself into a behavioral center so "he could get more money" from the employer.

Notice of Investigation (05/07/2019) (JX-6, JX-7, JX-8)

A Notice of Investigation issued May 7, 2019, advising Complainant to report for a hearing on May 15, 2019, "to develop the facts and determine your responsibility, if any," in connection with the charge of a violation of Rule 1.6 for dishonest and immoral conduct "after August 30, 2018 when you took actions to exacerbate the nature and severity of a previously reported on-duty injury." JX-7. It was signed by Ben Bailey, "Dir Road Operations." The notice informed Complainant that under the MAPS policy, this violation was a dismissal event, and the investigation would be conducted in accordance with the applicable collective bargaining agreement. On May 13, 2019, Complainant was notified that the hearing was postponed until June 19, 2019. JX-8. It was later postponed to August 7, 2019. *Joint Stipulation No. 7.*

According to Rule 1.6 ("Conduct"), employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent.

3. Insubordinate.
4. Dishonest.
5. Immoral.
6. Quarrelsome.
- or
7. Discourteous.

JX-6. The Rule further states, “Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.” (*Id.*).

C. Hearing Testimony of Complainant Cheyenne Dorris

Complainant testified that in the late evening of August 30, 2018, he was injured while working on the transfer of locomotives (“sand cars”) that arrived from Denison, Texas, and were destined to run north up through McAlester, Oklahoma. Transcript (“Tr.”) at 218:4-14. The work involved switching tracks, and he had either radio control switches or push button switches. *Id.* at lns. 12-17. Complainant stated that he pulled the power north of the signal and it did not work, so he had to disable it and hand pump the switch with a steel bar. *Id.* at lns. 22-23; 219:1-5. The steel bar had a bend in it; it swiveled around and threw Complainant on the ground where he hit his right elbow on a steel pipe plate “and some other stuff.” *Id.* at lns. 6-9. He described his elbow being “wedged in” and “crushed.” *Id.* Complainant testified that he reported the injury to Respondent and sought medical treatment; he eventually treated with an orthopedic specialist. *Id.* at lns. 11-20.

Complainant testified that he knows Ms. Hamilton but does not know Ms. Bowen. *Id.* at lns. 19-25. When Complainant was asked to describe his relationship with Ms. Hamilton, he stated she was one of his daughter’s “very best friends,” but he had no “relationship” with Ms. Hamilton. *Id.* at 224:2-3. Complainant stated that Ms. Hamilton had been kicked out of her mother’s house so he allowed her to stay at his house from December 2018 to March 2019; at some point, he says he discovered Ms. Hamilton had stolen from him. *Id.* at lns. 3-8.

Complainant testified that he was only given an opportunity to address the charges (arising from the claims that Complainant asked Ms. Hamilton to strike his injured elbow with a sledgehammer in return for money) through his local chairman but not through the company. *Id.* at 228:2-6. When Complainant initially received the Notice of Investigation, he testified that he did not know the nature of the “dishonest act” that was the subject of the charge. *Id.* at 229:1-3. Mr. Zirkelbach then informed Complainant about the statements by Ms. Hamilton and Ms. Bowen. *Id.* at 229:5.

Complainant testified that the accusations have affected his mental and psychological well-being “in multiple ways.” *Id.* at 231:1. Complainant testified that he attends counseling and sees both a psychologist and psychiatrist. *Id.* at lns. 5-6. Complainant stated that he was not “really aware” of suffering from depression before. *Id.* Although Complainant was initially depressed that he could not work because of his injury, he testified that the charges intensified what he was feeling. *Id.* at 232: 7-10. Complainant stated that he had trouble sleeping, and his anxiety worsened. *Id.* at lns. 1-18. On cross-examination, Complainant admitted that he was treated for anxiety prior to the injury. *Id.* at 284:14-19. Complainant testified that he could not recall the exact dates, but

he has been prescribed anxiety medication on and off for approximately 10 years. *Id.* at 4-12. Further, Complainant testified that he has also been treated for depression at different points in his life, as well as sleep issues. *Id.* at 284:20-24.

Complainant testified that the charges against him caused strain in his marriage and played a role in his divorce. *Id.* at 232:19-23; 234:5-7. However, Complainant later testified that the problems in his marriage began after August 30, 2018 (his date of injury), and that he had been separated from his wife since December 2018. *Id.* at 286:18-19, 23. Complainant further testified that he still feels depressed, uncomfortable and uneasy around people, and he wonders if his co-workers have heard about the charges about his conduct. *Id.* at 235:9-15.

Complainant testified that Mr. Zirkelbach had informed him that both of Complainant's doctors said there was "no way that this happened [presumably, Complainant's elbow condition] from a two or three-pound sledgehammer or a baseball bat." *Id.* at 239:10-12.

Complainant testified that he felt Respondent retaliated against him because they "harassed" him and went ahead with the second investigation even after the first investigation was closed. *Id.* at 252:10-18. Complainant agreed that the first time he felt retaliated against by Respondent was nine months after the alleged injury, around May 10 or 11, 2019, when he received the charge letter for the second, disciplinary investigation. *Id.* at 287:9-12. Complainant agreed that nothing about the investigation or the charges is included in his work history. *Id.* at 281:4-7. Further, Complainant agreed with the statement that at the time of the disciplinary hearing, he was still unable to work because of his injury and had not been medically cleared. *Id.* at 282:1-4.

D. Hearing Testimony of Scott Bybee

Mr. Bybee is a peace officer certified in Oklahoma by the Council on Law Enforcement and Education Training. *Id.* at 34:3-6, 15-16. At the time of his testimony in this matter, Mr. Bybee was a Senior Special Agent and had been employed by Respondent for almost eight years. *Id.* at 79:11-12. Mr. Bybee became involved in the investigation of Complainant after a phone call was received from Ms. Bowen. *Id.* at 34:18-23. Mr. Bybee began an investigation into whether Complainant may have committed insurance fraud by verifying whether Complainant had initially been injured in August 2018. *Id.* at 36:8-9. Mr. Bybee testified that he contacted Wes Shipley, Respondent's Director of Operations, who explained to him that Complainant injured his arm while trying to operate the pump switch. *Id.* at 36:17-25. Mr. Bybee was asked if he had learned anything in his investigation that caused him to question whether Complainant was injured in August 2018, and Mr. Bybee responded that he took what he was told about the injury "at face value." *Id.* at 38: 19-24.

Mr. Bybee testified that he spoke with Pauline Weatherford, an employee of Respondent who could review Complainant's medical records associated with his work injury, and either Ms. Weatherford or another individual told Mr. Bybee that there appeared to be some worsening of the Complainant's injury according to his records. *Id.* at 41:12-25. When asked if any part of his investigation involved obtaining evidence about Complainant's physical and medical condition, Mr. Bybee testified only that he "was trying to obtain information that would match the elements of the crime." *Id.* at 42:19-25.

Mr. Bybee explained that one element of the type of insurance fraud he was investigating is that an injury had to occur. *Id.* at 44:23. He confirmed with Respondent's Risk Management

unit that Complainant did sustain an injury. *Id.* at 45:3-5. Mr. Bybee further explained that he was investigating whether the injury at issue worsened between doctor's visits for "no apparent reason." *Id.* at Ins. 7-9. In Complainant's case, Mr. Bybee testified that the doctors could not say that the injury had worsened between visits. *Id.* at 43:3-5. Mr. Bybee ultimately concluded that he "could not develop enough evidence to prove in a court of law that the crime had occurred." *Id.* at 44:15-16.

When asked why he did not contact Complainant during his investigation, Mr. Bybee responded that he took investigations seriously, and his creed was to "protect the rights of the railroad, the property of the railroad, and the employees" and "part of protecting an employee during one of my investigations...is I want to be as discrete as possible." *Id.* at 46:11-16. Mr. Bybee testified that he was working first to corroborate the accusations against Complainant, and he would not speak to Complainant until he had "all my other ducks in a row." *Id.* at ln. 17-20.

Mr. Bybee obtained statements from the two witnesses (Ms. Hamilton and Ms. Bowen) on March 13, 2019. *Id.* at 48:21-25. After obtaining the statements, Mr. Bybee waited "a few days" to see if the two witnesses could produce the text messages that they claimed to have. *Id.* at 49:12-14. The text messages were never produced. *Id.* at ln. 15-16. Mr. Bybee testified that the two written and recorded statements of witnesses Hamilton and Bowen were the only physical evidence he obtained, and he could not "find anything to corroborate their statements." *Id.* at 50:11-18.

Mr. Bybee was then asked if the witnesses' statements indicated that an individual, Clint Buttrail, had struck Complainant's arm with a hammer or sledgehammer. *Id.* at 50:19-20, 22-25. He testified that one witness verbally told Mr. Bybee that Mr. Buttrail had hit Complainant with "a baseball bat or something," but both witnesses stated that they were not present when that occurred. *Id.* at 51:4-9. Mr. Bybee testified that his supervisor "decided it wasn't a good idea" for Mr. Bybee to talk to Mr. Buttrail. *Id.* at ln. 15-18. When asked further about his reason for not interviewing Mr. Buttrail, Mr. Bybee testified:

Initially, when I'm trying to build the case, by all account, Mr. Buttrail is Mr. Dorris' best friend. I did not want Mr. Dorris to know I was investigating him so I was logically not going to speak to his best friend and tip them off.

Id. at 52: 2-8. Mr. Bybee testified that after meeting with the two witnesses, whose statements were not corroborated, the case was closed. *Id.* at 54:15-17.

Mr. Bybee was then asked about receiving a notice to appear as a witness for the subsequent misconduct investigation. Mr. Bybee testified that he "assumed it was to testify" regarding what the two witnesses told him during his investigation. *Id.* at 56:22-24. When asked what evidence Mr. Bybee found during his investigation that was credible, Mr. Bybee indicated that some "specific details" in the statements contributed to its credibility. *Id.* at 57:5-7. Ms. Hamilton had included some details about how and where she claimed to have struck the Complainant, including the weight of the sledgehammer she says she used, how Complainant purportedly held onto a "broken tree branch," and that Complainant planned to "check himself [into a] mental health facility for seven days" to increase his settlement, he expected to obtain a settlement in April, and he would compensate Ms. Hamilton out of his settlement proceeds. *Id.* at 57:16-25; 58:1. Mr. Bybee testified that "those are all pretty specific details for someone who's making up a story." *Id.* at 58:3-4. He noted that Ms. Bowen's statement appeared, however, to consist of mainly secondhand information. *Id.* at 57:13-16.

Mr. Bybee was also asked the following about Ms. Hamilton's relationship with Complainant:

Q. Did you ask her what her relationship was with [Complainant]?

A. I did.

Q. And what did she tell you?

A. She was friends with his daughter.

...

Q. Did she tell you that [Complainant] had allowed her to live with him and his daughter because she had been kicked out of her house?

A. I don't remember that coming up, no.

Q. Did she tell you that [Complainant] had kicked her out of his house because she had stolen some things from him?

A. No, I don't remember her telling me that she stole from him, no.

Id. at 58:6-21.

When asked what corroborating evidence he was looking for after speaking with the two witnesses, Mr. Bybee testified that he was waiting to obtain text messages that both witnesses referenced in their statements. *Id.* at 90:16-24. Ms. Hamilton had informed him that she had given her phone to someone else but she would try to recover the messages. *Id.* at 90:24-25. Mr. Bybee was asked if it would have been irresponsible for him to proceed with the investigation and charge for a crime without corroborating evidence, and Mr. Bybee agreed it would be irresponsible. *Id.* at 104:16-20.

Mr. Bybee testified that he was not notified that one of the witnesses recanted her statement. *Id.* at 63:19-20. When asked what his testimony would have been at the August 7, 2019, hearing, Mr. Bybee stated that he was prepared to testify what was in the witness statements he prepared for Mr. Bailey. *Id.* at 64:12-17. Mr. Bybee also stated that he was prepared to say "there wasn't enough evidence to support the criminal charge which to [his] knowledge is much different than the charges in a company hearing." *Id.* at 65:7-10. Mr. Bybee testified that he could not recall ever being told that the charge of dishonesty against Complainant may be changed to conspiracy to commit acts of dishonesty. *Id.* at 70:19-25; 71:1-3.

When a case is closed out, like his investigation of Complainant, Mr. Bybee testified that he notifies the employee's manager that he had conducted an investigation but did not find anything criminal and at that point, the matter would be turned over to the company for a rule violation investigation. *Id.* at 82:1-7. Mr. Bybee believed his investigation into potential criminal conduct was thorough and consistent with his duties as a police officer. *Id.* at 100:7. He described the investigation he conducted as discrete and thorough, and at its conclusion, it could not be proven in court that Complainant had committed a crime. *Id.* at 100:9-12. Mr. Bybee did not feel that his own investigation was intended to "drag [Complainant] through the mud." *Id.* at 100:7-8.

As for the disciplinary investigation that followed, Mr. Bybee testified that his role was limited to that of a witness—he does not investigate rule violations. *Id.* at 100:16-23. Mr. Bybee testified that no one told him to conduct the investigation differently because Complainant had reported a personal injury. *Id.* at 105:4-7.

E. Hearing Testimony of Ben Bailey

At the time of the hearing in this proceeding, Ben Bailey was employed by Respondent as the Director of Operating Optimization, with the Texoma Service Unit. *Id.* at 109:12-13. Mr. Bailey described his job duties as optimizing different facets of Respondent’s operation, including transportation and some safety aspects. *Id.* at 109:14-17. He supervises the entire service unit that includes Complainant. *Id.* at 112:9-11. Mr. Bailey has been in that role since October of 2018 or 2019 and has worked for Respondent for 15 years; he started as a switchman/brakeman engineer and yard master. *Id.* at 133:9-13. In 2017 and 2018, Mr. Bailey was the Director of Road Operations in Louisiana and Texas. *Id.* at 134:14-20. In that role, he was “in charge of all safety.” *Id.*

When there is an employee misconduct investigation, Mr. Bailey assumes the role of charging manager, i.e., the individual who investigates and presents the case. *Id.* at 135:11-20. Mr. Bailey testified that he became aware of the alleged dishonesty of Complainant on May 1, 2019, when it was brought to his attention by Special Agent Bybee, who presented the two witness statements of Ms. Hamilton and Ms. Bowen. *Id.* at 113:9-23 to 114:1, 143:7-9. Mr. Bailey testified that he read both witness statements and the audio transcript of the witness interviews. *Id.* at 115:17-19. According to Mr. Bailey, Mr. Bybee informed him that the criminal investigation was complete but Mr. Bailey was not told that Mr. Bybee was unable to obtain evidence corroborating the statements. *Id.* at 116:11-17. Mr. Bailey testified that he typically receives a misconduct case from a special agent. *Id.* at 136:24-25. If a criminal element is involved, special agents will handle that investigation because they are trained for it. *Id.* at 137:12-14. Mr. Bailey himself is not a part of criminal investigations and that included the investigation conducted by Mr. Bybee here. *Id.* at lns. 19-21.

Mr. Bailey testified that he and Director of Labor Relations, Katie Novak, were the sole individuals responsible for bringing the charges against Complainant. *Id.* at 117:19-22; JX-13 at 9:24-25 to 10:1. Mr. Bailey explained that it is common to speak with Ms. Novak or somebody in her position to go through information received from the Special Agent, to help write the caption on the Notice of Investigation, and to review the time frames for the default in the CBA or the disciplinary agreement. *Tr.* at 143:19-22. Mr. Bailey testified that based on the review of the statements and transcript, he thought it was “unbelievable that somebody would want to be hit in the elbow with a sledgehammer.” *Id.* at 144:17-18. Mr. Bailey admitted that he had testified during his deposition in this case that he found the witnesses’ claims—that Complainant had asked to be hit in the elbow with a sledgehammer—to be “incredible” and had even laughed at the notion. *Id.* at 124:8-22.

When was asked why he would insist on pursuing a charge that he found incredible, Mr. Bailey responded that there were parts of the statements that were “very real and very worth investigating.” *Id.* at 124:24-25; 125:1-2. Mr. Bailey testified that he found some aspects of the statements believable, including the following from Ms. Hamilton’s statement: (1) that Ms. Hamilton had been over at Complainant’s house; (2) that Complainant would get money after a settlement with Employer; and (3) that Complainant told Ms. Hamilton that he would get in

trouble. *Id.* at 147:14-21. Mr. Bailey also testified that he found the following believable from Ms. Bowen's statement: (1) Ms. Bowen describes Ms. Hamilton being asked to hit Complainant with a sledgehammer; (2) Ms. Bowen talked about the settlement and receiving money; and (3) Ms. Bowen talked about being at Complainant's house. *Id.* at 149:17-25.

Mr. Bailey proceeded with charging Complainant with employee misconduct to "get the facts during the investigation." *Id.* at 117:6-8. Mr. Bailey testified that a charge for a violation of Rule 1.6 was identified because it is the only rule that deals with dishonest and immorality. *Id.* at 150:11-13. He described a Rule 1.6 violation as "very serious" because it involved deceit that "could affect the company in different ways." *Id.* at 151:7-9. When asked in what way Mr. Bailey thought Complainant had been dishonest, Mr. Bailey responded that Respondent had two statements by two witnesses given under oath that Complainant was going to pay them with money from a work injury settlement if the witnesses struck Complainant's elbow. *Id.* at 117:9-14.

Mr. Bailey testified that prior to issuing the notice, he knew nothing about Complainant's personal injury because he was not on the Texoma Service Unit when Complainant was injured. *Id.* at 118:10-17. Mr. Bailey clarified that he knew of the statistic of the injury, which helps him develop a safety plan.⁴ *Id.* at 119:7-9. Mr. Bailey was then asked whether Mr. Bybee had reported to him that he was able to verify and confirm that Complainant sustained an injury at work:

Q. So, he didn't tell you that he had verified that [Complainant] was injured in August 2018?

A. No, sir.

Q. He didn't tell you that he had verified that [Complainant] was under medical care?

A. I don't remember him telling me about medical care.

Id. at 120:1-7. Mr. Bailey also testified that he did not know about Complainant's work injury other than that it was a "switch injury." *Id.* at lns. 10-11.

Mr. Bailey testified that the two witness statements and the audio transcript of the interviews pointed to Complainant's culpability with respect to Rule 1.6 being violated. *Id.* at 121:12-13. Mr. Bailey did not conduct his own investigation and he did not know of any investigation other than the one Mr. Bybee conducted. *Id.* at lns. 17-21. Mr. Bailey did not know at the August 7, 2019, investigation hearing that the witness statements had been recanted. *Id.* at 122:7-9. Mr. Bailey testified that the two witnesses were not called to the hearing because he planned to present Mr. Bybee's testimony. *Id.* at 125:3-5.

Mr. Bailey testified that he has discretion on whether or not to bring an employee misconduct charge and has exercised that discretion not to pursue a charge when the facts do not support it. *Id.* at 125:11-12,16-19. Mr. Bailey testified that he was not aware that the potential criminal charges were not pursued by the Grayson County District Attorney or the City of Sherman, Oklahoma. *Id.* at lns. 23-24. He was aware that the criminal case was closed but did not know the exact nature of those charges. *Id.* at 127:11-13. Mr. Bailey further denied any awareness of whether the potential criminal charges being investigated involved dishonesty. *Id.* at lns. 21-

⁴ Mr. Bailey attempted to clarify that he does not know the name of an injured person rather just how many people suffered a particular injury. TR at 119:14-19.

22. Though he had spoken to Mr. Bybee “several times,” the discussions focused only on the witness statements and audio interviews conducted by Mr. Bybee. *Id.* at 128:12-15.

Mr. Bailey testified that once the charges go “on record,” the matter goes to the General Manager who has the authority to dismiss or fire the employee. *Id.* at 156:1-5. Complainant’s General Manager was Mr. Torres. *Id.* Mr. Bailey did not have authority to fire Complainant. *Id.* at lns. 8-11. Mr. Bailey testified that approximately two percent of investigations end in termination. *Id.* at 131:8-9. He has also been a part of investigative hearings that resulted in no charges being filed. *Id.* at 142:24-25, 143:2.

Mr. Bailey further testified that there had been no discussion about changing the charge from dishonesty and immorality to another work rule violation. *Id.* at 132:4-10. Mr. Bailey was asked about the rights of the employees in the investigative hearing, and he explained:

It is well outlined in the CBA disciplinary agreement between the carrier and the organization, but [the employee has] the right to have their local chairman present somewhat like a lawyer and then they can object in the investigation to anything that’s said much like a lawyer can and they both get closing statements....

Id. at 139:11-18.

Mr. Bailey further explained that the company has to provide the names of the witnesses it will be presenting, but the employee does not have to provide his witness list. *Id.* at 139:21-23; 140:2.

Mr. Bailey testified that the Complainant’s disciplinary hearing did not occur because Mr. Zirkelbach informed him the morning of the hearing that the two witnesses had recanted their statements. *Id.* at 140:8-11. It was Mr. Bailey’s decision to cancel the investigation. *Id.* He stated that he could have gone forward with the investigation, but he felt that “morally” it was not the right thing to do after “finding out the girls lied.” *Id.* at 141:2-3. Mr. Bailey did not deem this investigation to be different from other investigations, apart from the cancellation after the witnesses recanted. *Id.* at 142:3-7.

Mr. Bailey was asked whether he intentionally retaliated against Complainant because Complainant had reported a work-related injury, and Mr. Bailey responded “No, sir.” *Id.* at 154:19-21. Mr. Bailey was asked if he changed any part of the policy or procedure because Complainant had reported an injury, and Mr. Bailey again stated, “No, sir.” *Id.* at lns. 22-24. Mr. Bailey testified that, even if Complainant had not reported a personal injury but the same allegations were still made, he would have pursued the disciplinary investigation. *Id.* at 155:1-4.

F. Hearing Testimony of Mark Zirkelbach

Mr. Zirkelbach is a Conductor or Trainman for Respondent, which is the same job as Complainant. Tr. at 159:20-23. He is also the Local Chairman of the bargaining unit for conductors and trainmen, Local 243 of the Smart Transportation Division. *Id.* at 160:2-7. Mr. Zirkelbach explained that as the Local Chairman, he represents the conductors whenever they are in trouble under the agreement or any policy or rule violations with the Company. *Id.* at lns. 9-12. At the time of the hearing in this case, Mr. Zirkelbach had been the Local Chairman for almost 11 years. *Id.* at lns. 16-17. Mr. Zirkelbach explained that a rule violation investigation is “an agreement procedure between the carrier...and the organization which is Smart Transportation . . . to examine the facts connected with the accident. It protects the employee from any discipline or

wrongdoing that was without just cause.” *Id.* at 161:7-12. Mr. Zirkelbach testified that he had attended a minimum of 200, and perhaps more than 300, investigations. *Id.* at 163:13. Mr. Zirkelbach further testified that he had handled about 30 or 40 investigations relating to a charge of dishonest or immoral conduct under Rule 1.6. *Id.* at lns. 14-19. He described the charge of dishonesty and immoral conduct as a “very severe charge” because such conduct results in termination of employment. *Id.* at 163:21-24. Mr. Zirkelbach testified that approximately 75% of the Rule 1.6 charges he handled resulted in termination. *Id.* at 164:6-8.

Mr. Zirkelbach first learned about the potential rule violation charges against Complainant in March of 2019 after Mr. Bailey called him make him aware of the possibility of criminal charges against Complainant, which could lead to a dishonesty charge. *Id.* at 164:17-25.

Mr. Zirkelbach testified that after receiving the call, he contacted the General Chairman of the bargaining unit and made him aware of possible criminal charges against Complainant. *Id.* at 165:5-9. Mr. Zirkelbach and the General Chairman agreed to withhold the information from Complainant until it was certain that the charges would be levied. *Id.* at 166:1-3.

Mr. Zirkelbach testified that Mr. Bailey has always been upfront and honest. *Id.* at 166:21-23. Mr. Zirkelbach further testified that in previous investigations, Mr. Bailey had been forthcoming with information and followed the rules. *Id.* at 199:20-24. Mr. Zirkelbach testified that he and Mr. Bailey discussed “the charges and the statements” by the witnesses, and Mr. Zirkelbach asked Mr. Bailey his opinion regarding the credibility of the statements. *Id.* at 167:1-4. Mr. Bailey indicated that credibility was not “up to him,” but statements had been made and he needed to “take it to an investigation to get the facts out.” *Id.* at 167:3-8. Though Mr. Zirkelbach asked Mr. Bailey several times if the conduct charges could be dropped, Mr. Bailey indicated there would have to be “very good cause” to drop charges of a Rule 1.6 violation. *Id.* at lns. 18-25.

Mr. Zirkelbach further testified that he contacted Complainant’s doctors—the one who saw Complainant on the day of the incident and the one who was actively treating Complainant—and received statements from both. *Id.* at 168:11-15. The doctors both stated that this type of injury did not come from a blunt force object or there would have been bone fractures. *Id.* at 169:7-9. He stated that he presented the information he obtained from the doctors to Mr. Bailey in an effort to get the charges dropped, but Mr. Bailey reiterated that he needed a very good reason to drop the charges or he was “going to answer to the powers at be above him.” *Id.* at 168:17-24; 204:3-7. He believed that Mr. Bailey was aware of Complainant’s injury to his arm because Mr. Zirkelbach mentioned it during conversation. *Id.* at 170:12-15.

Mr. Zirkelbach testified that he became aware that the witnesses had recanted their statements on August 6, 2019, one day before the hearing. *Id.* at 175:8. He received a call from Complainant who stated he received secondhand information that the mother of Ms. Hamilton had made Ms. Hamilton call the police to admit to the falsity of her statement. *Id.* at 176:1-6. Mr. Zirkelbach testified that he had not told anyone that the witnesses had recanted their statements before the August 7, 2019, hearing because he was not certain that they would be able to make it to the hearing to confirm the withdrawal of their statements. *Id.* at 178:1-2. At his arrival to the investigatory hearing on August 7, 2019, Mr. Zirkelbach learned that Mr. Bybee’s supervisor was attempting to confirm whether Ms. Hamilton and Ms. Bowen had formally called Respondent’s call center to recant their statements. *Id.* at 183:1-4. While waiting, he also learned that Mr. Bybee had determined by April 26, 2019, that there was insufficient evidence to pursue criminal charges, so Mr. Zirkelbach turned to Mr. Bailey and asked “Then what are we doing here?” *Id.* at 183:21-

25 to 184:1-2. According to Mr. Zirkelbach, Mr. Bailey replied that the hearing was about “conspiracy to commit the fraudulent act, not the fraudulent act itself.” *Id.* at 184:4-7. He also testified that Mr. Bailey suggested charging Ms. Hamilton with “obstruction or filing a false statement.” *Id.* at 178:10-24.

Mr. Zirkelbach testified that he had known Complainant for more than sixteen years. *Id.* at 184:21. Complainant had once served as Mr. Zirkelbach’s Vice Local Chairman for two to three years. *Id.* at 187:16-23. Mr. Zirkelbach testified that Complainant attended approximately six to eight investigations during his tenure as vice local chairman. *Id.* at 188:10-11.

Mr. Zirkelbach testified that Complainant called him “probably every day” during this disciplinary investigation process. *Id.* at 185:1-3. Mr. Zirkelbach testified that Complainant was highly upset and depressed, and he thought Complainant’s emotional state was “pretty desperate.” *Id.* at lns. 3-5. In fact, he expressed his concern to Complainant regarding his mental state. *Id.* To Mr. Zirkelbach’s knowledge, Complainant began suffering with depression and anxiety only recently. *Id.* at 213:7-9.

G. Rebuttal Testimony

Mr. Bybee was recalled as a witness to testify in more detail about the events on the morning of August 7, 2019, particularly when he was notified that Ms. Hamilton had called the RMCC and recanted her statement. Tr. at 312:5-15, 315-17. He did not recall the disciplinary hearing being opened or being sworn in as a witness that morning. *Id.* at 313:4-15.

Mr. Bailey was also recalled, and he testified that he did not give any prior notice to Mr. Zirkelbach of a possible criminal investigation leading to a possible disciplinary hearing. Tr. at 325:1-5. He explained his awareness of the 10-day time limitation under the collective bargaining agreement for sending out a Notice of Investigation after having knowledge of the conduct at issue. *Id.* at 325:11 to 326:16. Mr. Bailey testified that he would have expected a union representative like Mr. Zirkelbach to raise the 10-day rule if given any advanced notice of a disciplinary investigation. *Id.* at 327:9-22. Mr. Bailey also did not recall receiving any information from Mr. Zirkelbach about statements from Complainant’s doctors. *Id.* at 327:23 to 328:7. Mr. Bailey confirmed that it was his own decision to terminate the disciplinary investigation on August 7, 2019, after the rescission of the witnesses’ accusations. *Id.* at 329:23 to 330:1. He also denied ever suggesting he would charge Ms. Hamilton or Ms. Bowen with perjury or providing a false statement, stating that he did not have that authority, or amending the charge against Complainant to conspiracy. *Id.* at 330:2-17; 331:1-6. Mr. Bailey stated that Respondent does not have a charge relating to conspiracy. *Id.* at 331:5-6, 15-17. Further, the union agreement would not allow changing the subject of the investigation or rules that apply. *Id.* at 332:11 to 333:3. Mr. Bailey and Mr. Zirkelbach also disagreed as to whether the hearing on August 7, 2019, was ever actually opened or was terminated before opening. *Id.* at 335:14 to 336:2. Mr. Bailey did not change his testimony that he was not aware of the details of the criminal investigation despite Mr. Bybee’s testimony that Mr. Bybee spoke with several individuals employed by Respondent including an individual who worked under Mr. Bailey (Mr. Shipley). *Id.* at 340:7-14; 341:4-15. He also did not change his testimony that he did not anticipate charging Complainant with dishonesty before May 1, 2019. *Id.* at 341:18-20.

H. Deposition Testimony of Katie Novak

Ms. Novak is the Director of Labor Relations for Employer. She has the responsibility to oversee arbitrations, negotiations, and case handling of claims that would progress through the collective bargaining agreement process, which includes both rule claims and disciplinary matters. JX-13 at 22:6-11. Ms. Novak testified that Labor Relations is often consulted by operating managers with questions of how to perform work, in terms of work rules and also disciplinary matters for individuals under the discipline policy. *Id.*

Ms. Novak testified that Labor Relations provides consultation, while the General Manager would have had the authority to make the determination whether or not to pursue charge of misconduct. *Id.* at 10:10-12. Ms. Novak described her role as providing guidance of risk and probabilities of success of the case but only the General Manager would have had the authority to issue the charge. *Id.* at lns. 13-17.

Ms. Novak testified that the purpose of the investigation hearing is to allow both parties an opportunity to present facts and information. Ms. Novak further testified that Employer does not always discipline an employee after an investigation hearing. *Id.* at 27: 12-14. Ms. Novak stated that she deals with dishonesty charges “quite a bit.” *Id.* at 28:17. She testified that Employer takes dishonesty seriously because it is a core value. Specifically, Employer’s policy materials state that it expects employees to act with integrity and honesty when performing their duties. *Id.* at 29:5-9. According to Ms. Novak, the statements of Ms. Hamilton and Ms. Bowen alluded to serious matters that merited an investigation. *Id.* at 11:11-19.

I. Deposition Testimony of Danny Torres

Mr. Torres is the General Manager of the Texoma Service Unit. JX-12 at 23. As General Manager, Mr. Torres provides guidance for the management team and the employees and oversees the safety, service, efficiency, and the financial results for the Service. *Id.* Mr. Torres also deals with discipline and rule-violation charges as the General Manager. *Id.* at 24:5-8.

Mr. Torres testified that he has known Complainant for approximately three years. *Id.* at 5:12. Mr. Torres testified that the phone call made to RMCC, alleging that an individual had attempted to increase the severity of Complainant’s injury at Complainant’s invitation, led Mr. Torres to believe that Complainant had been dishonest. *Id.* at lns. 9-12. Mr. Torres testified that he was aware Complainant had sustained an elbow injury and that he had surgery. *Id.* at 7:1-8. Mr. Torres further testified that he was aware that Mr. Bybee had begun a criminal investigation into the matters described in the call. *Id.* at ln. 22. Mr. Torres testified that to him, “a criminal charge could be something that’s totally outside of the regulations, policies, [and] requirements of [Employer].” *Id.* at 29:25; 30:1-2.

Mr. Torres testified that once Mr. Bybee’s investigation was completed, he discussed with Mr. Bailey and Ms. Novak whether there was sufficient evidence to move forward with the disciplinary investigation. *Id.* at 9:16-20. When asked what evidence was determined to be sufficient enough to move forward with the investigation, Mr. Torres responded that the affidavit from the witness who had allegedly struck Complainant was sufficient evidence.

Mr. Torres testified that the decision to precede with the dishonesty charge was made by Ms. Novak, Mr. Bailey, and himself. *Id.* at 11:10-13. Mr. Torres further testified that he did not

have any doubts about pursuing the disciplinary investigation; he could not recall whether Mr. Bailey expressed any doubts. *Id.* at lns. 22-24.

When asked what he did to determine whether the charges were appropriate, Mr. Torres testified that the purpose behind the investigation process is to “determine facts and place blame...”*Id.* at 12:5-12. Mr. Torres explained that the disciplinary investigation and the criminal investigation were two separate events. He testified that Mr. Bybee’s investigation “was more of a criminal intent in nature” while his investigation “was whether or not [Complainant] was being honest with us.” *Id.* at 13:7-10. Mr. Torres testified that the determination of whether the dishonesty investigation should continue would be based on Mr. Bailey’s investigation and the affidavit from the witness who called into RMCC. *Id.* at lns. 20-25. Mr. Torres clarified that the “investigation” includes a hearing held with union representation. *Id.* at 27-29.

Mr. Torres testified that dishonesty is a firing offense if the investigation is upheld. *Id.* at 20:14-16. He recognized that facts could be developed here that weighed against Complainant’s termination, such as medical evidence. *Id.* at lns. 20-25.

II. FACTS AND ISSUES IN DISPUTE

In their Joint Pre-Hearing Statement filed on August 3, 2020, the parties presented the following matters in dispute:

- A. Whether Ben Bailey had sufficient evidence to proceed with the notice of investigation, prior to Crystal Bowen and Codi Hamilton recanting their statements.
- B. Whether Complainant’s report of personal injury was a contributing factor in Union Pacific’s decision to charge him with dishonesty.
- C. Whether Union Pacific retaliated against Complainant for engaging in a protected activity.
- D. Whether the dishonesty charge was related to Complainant’s protected activity.
- E. Whether Union Pacific would have proceeded with the notice of investigation, notwithstanding Complainant’s protected activity.
- F. Whether the disciplinary investigation for violation of Rule 1.6 dishonesty and immoral conduct was pretextual.
- G. Whether Complainant sustained any damages as a result of receiving a notice of investigation.

III. THE PARTIES’ POSITIONS

Complainant’s Post-Hearing Brief

Complainant avers that he is only required to prove the protected activity was a contributing factor not that there was discriminatory intent. *Complainant’s Post-Hearing Brief* at 8. Complainant cites to *Frost v. BNSF Ry. Co.*, to support this proposition. In *Frost*, BNSF argued that FRSA is a discrimination statute and that complainants must affirmatively prove that their employers acted with discriminatory intent in order to bring claims for unlawful retaliation. 914 F.3d 1189, 1194 (9th Cir. 2019). However, the Ninth Circuit found that BNSF missed that the only proof of discriminatory intent that a complainant is required to show is that his or her protected

activity was a “contributing factor” in the resulting adverse employment action, not the sole discriminatory intent or purpose. *Id.*

Complainant argues that Employer knowingly took adverse action by initiating a disciplinary investigation into Complainant’s potential dishonesty. Complainant relies on *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 790-91 (8th Cir 2014), to support this argument. In *Kuduk*, the Eighth Circuit held that the “FRSA knowledge requirement may be satisfied by circumstantial evidence that employer had actual or constructive knowledge of protected activity...But the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” Complainant argues that “intentional retaliation” means the managers who took the adverse action must have had some knowledge of the employee’s protected activity, not anything more. Complainant also submits that in *Riley v. Dakota, Minnesota & Eastern Railroad*, ARB Nos.16-010, 16-052, ALJ No. 2014-FRS-044, slip op. at 6 (ARB Jul. 6, 2018), the ARB “spelled out why intentional retaliation does not apply to the FRSA’s contributing factor standard,” by noting Title VII’s motivating factor standard does not apply and an employee does not have to demonstrate the employer’s “retaliatory motive.” Complainant thus argues that the phrase “intentional retaliation” means only that “one or more of the managers involved in the adverse action must have had some knowledge of the employee’s protected activity.” *Complainant’s Post-Hearing Brief* at 9.

Complainant avers that the supervisors initiating the disciplinary investigation here, specifically Mr. Bailey, knew about the protected activity. Complainant notes that Mr. Bailey, by virtue of his role as Director of Road Operations, admitted to being aware that Complainant was injured at work even though Mr. Bailey did not know the specific details of the injury. *Complainant’s Post-Hearing Brief* at 10. According to Complainant, Mr. Bailey attempted later to change his testimony or deny his awareness of Complainant’s injury. *Id.*

Complainant also argues that the “protected activity and the disciplinary investigation are inextricably intertwined” because if there had been no injury, Respondent would not have had the “grounds for starting the disciplinary investigation because the concern the same subject.” *Id.* at 10. Thus, Mr. Bailey and the other Respondent supervisors could not have headed the disciplinary action without knowing about the protected activity, and therefore, they knowingly acted against Complainant. *Id.*

Complainant further argues that Employer took adverse action against him. Complainant cites to *Williams v. American Airlines* for the proposition that the prohibited activities list should be used broadly to include reprimands (written and verbal) and counseling sessions with reference to potential discipline. See ARB No. 09-018, ALJ No. 2007-AIR-00004, Slip op. at 6 (ARB Dec. 29, 2010). The Board in *Williams* further clarified that “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged, and claims brought under whistleblower statutes, an adverse action is any action that “would dissuade a reasonable employee from engaging in protected activity. *Id.* at 5.

Complainant submits that the Board’s decision in *Vernace v. Port Authority Trans-Hudson Corp.*, confirms that threatened discipline, like the threat of discipline here, may qualify as an adverse action. *Complainant’s Post-Hearing Brief* at 11. In *Vernace*, the complainant was an employee who was injured while sitting in a defective chair. See ALJ No. 2010-FRS-00018, Slip

op. at 23 (ALJ Sept. 23, 2011)⁵. The complainant filed an injury report and was subsequently notified of charges of a safety violation for not properly inspecting the chair; the disciplinary investigation lasted a year. *Id.* at 26. The ALJ held that “the filing of charges against [c]omplainant which carried the potential for future discipline was an unfavorable personnel action.” *Id.* at 27.

Complainant avers that shortly after he filed a personal injury report with Employer, it began a criminal investigation to determine whether Complainant was doing anything to worsen the extent of his injuries or lie in any way. *Complainant’s Post-Hearing Brief* at 12. According to Complainant, Respondent never followed up regarding the results of the criminal investigation before notifying Complainant of the initiation of a disciplinary investigation. *Id.* Complainant argues that he was retaliated against “the day he received and knew about the 1.6 charge” even after the criminal investigation ended due to the absence of corroborating evidence⁶. *Id.* Complainant continues by stating that the disciplinary investigation by Respondent would have led to unfavorable personnel action. *Id.* The disciplinary investigation notice was an attempt to “threaten and intimidate” Complainant which is prohibited under the FRSA. *Id.*

Complainant also asserts that Respondent “made no attempts to hold a genuine investigation to determine the truth of the allegations, the company simply wanted to come to a result” against Complainant. *Id.* at 13. Respondent did not “even bring proper witnesses” to the disciplinary hearing. *Id.* Further, Complainant contends that Respondent had “no intention” of presenting either one of the accusers “to bring all the facts on the table.” *Id.*

Complainant further argues that his injury was a contributing factor to the adverse action. *Id.* at 14. Complainant avers that the initial criminal investigation and disciplinary investigation “were limited and pretextual.” *Id.* at 15. He challenges the adequacy of the criminal investigation, asserting that the investigation was “cursory” and leads to only one conclusion, i.e., that the “fix was in” and “Union Pacific was not after the truth.” *Id.* at 14-16. Complainant asserts that Mr. Bybee was “instructed to perform a cursory criminal investigation devoid of any proper police investigatory techniques.” *Id.* at 15. Complainant claims that Union Pacific had a “goal in mind to terminate” him regardless of the outcome of the criminal investigation. *Id.* at 17. Complainant further argues that due to the close proximity of the protected activity and the unfavorable personnel action, as well as the disparate treatment of Complainant, the Company’s deviation from normal procedures, and the discriminatory attitude shown by supervisors (reflected by the purported limited investigations), Complainant can prove the injury report was a contributing factor to the adverse action he suffered. *Id.* at 17-18.

Complainant avers that Respondent would not have taken the same action regardless of Complainant filing a report for personal injuries and thus, have failed to meet its burden of proof. *Id.* at 18. Complainant asserts that “the only reason” Respondent began the investigation was “to see if there was something” it could gain. *Id.* Despite the criminal investigation beginning cancelled, Complainant argues that Respondent “continued on its blitzkrieg to scorch the earth and continue the disciplinary investigation.” *Id.* at 19. Complainant contends that Respondent did not

⁵ Complainant only cites to the 2011 ALJ decision, which was appealed to the ARB. *See Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-00018 (ARB Feb. 26, 2013).

⁶ Claimant asserts that the retaliation occurred when Claimant received the charge letter, which was dated May 7, 2019.

and could not have taken the adverse action without Complainant engaging in the protected activity because the adverse action involved the protected activity directly. *Id.*

Complainant further argues that he has suffered severe damages and mental anguish as a result of Respondents “punitive conduct.” *Id.* at 20. Complainant asserts FRSA entitles him to all relief necessary to make him whole again including both compensatory and punitive damages. *Id.* Complainant continues by stating that “[t]his case began with a lie” and Respondent acted with ill will towards Complainant by “prolonging a bogus investigation with no evidence.” *Id.* Complainant asserts that there was no evidence offered that he had ever received money from any insurance companies while the investigation was underway. *Id.* at 21.

Complainant contends that he had become “highly upset and depressed based on the looming investigation that he believed would lead to his termination and lack of insurance benefits for the injury he had suffered.” *Id.* Complainant states that the accusations against him affected his mental and psychological well-being and caused him to seek additional counseling for depression. *Id.*

In his Reply Brief, Complainant repeats many of the same arguments that Respondent was aware of his protected activity, the disciplinary investigation and protected activity are “inextricably intertwined,” and threats of future discipline qualify as an unfavorable personnel action. *Complainant’s Brief* at 1-5. He also argues that Mr. Bybee was limited by his supervisor in a way that prevented Mr. Bybee from conducting a fair criminal investigation. *Id.* at 7. Further, Complainant asserts that Respondent would not have taken the same unfavorable action had Complainant not been injured and reported that injury. *Id.* at 9.

Respondent’s Post-Hearing Brief

Respondent argues that Complainant’s protected activity was not a contributing factor in Respondent’s decision to charge Complainant with dishonesty. *Respondent’s Post-Hearing Brief* at 12. Respondent argues that it followed the procedures set out by the collective bargaining agreement during the disciplinary investigation, and that it took “the reasonable step” to cancel the investigation once the statements were recanted. *Id.* When Complainant was able to return to work, he did so in the same position and at the same pay rate. *Id.*

Respondent argues that Complainant presented no evidence of causation. *Id.* at 13. Respondent argues that the reports received from Ms. Hamilton and Ms. Bowen are an intervening event that led to Respondent’s investigation, and notice of investigation was proximately caused by these reports not by Complainant’s report of injury. *Id.* Prior to receiving statements from Ms. Hamilton and Ms. Bowen, Respondent asserts that it had taken no steps to charge Complainant with any rule violation. *Id.* Respondent thus argues that Complainant was not charged with dishonesty and immorality for reporting his injury, or any action that he took specifically related to the injury he alleges. *Id.* at 14. Rather, Respondent submits that it charged Complainant with dishonesty solely for actions that occurred approximately nine months after reporting the injury, which were actions are “separate and distinct from the original injury, and if true, are sufficient for Union Pacific to charge with dishonesty and proceed to an investigatory hearing on the charge.” *Id.*

Respondent cites to Complainant’s hearing testimony to support its argument that the disciplinary investigation was reasonable under the circumstances and not retaliatory:

Q. And that what I am pushing (sic). If a person actually asks a person to help aggravate or exacerbate an injury, that person should be terminated. Is that fair?

A. I don't know. I think they should absolutely be—I think they should absolutely be questioned about it. I think they should be asked if they did ask somebody to do this or that. I don't know about terminating them immediately. That's for where you all's investigating comes in to play, but I believe I would investigate them before I'd terminate them, investigate things.

Id. (citing Tr. at 248; 8-17).

Respondent avers that its actions to investigate Complainant's conduct were "objectively and subjectively reasonable." *Id.* Respondent asserts FRSA is not intended to leave an Employer without recourse or remedy with regard to potentially bad employees; therefore, it is not a violation to investigate statements alleging fraud and dishonesty towards an employer. *Id.*

Respondent further argues that Complainant's testimony is not reliable. *Id.* Respondent states that "[f]rom the very beginning of [Complainant's] cross-examination, he was evasive and erratic." Respondent submits that Complainant contradicted his sworn deposition statement and own pleadings several times throughout the cross examination. *Id.* 15-16. Respondent described six instances of contradictory statements that are analyzed in more detail below.

Respondent also asserts that the evidence establishes it would have charged Complainant with dishonesty after receiving the two witness statements, regardless of whether Complainant had reported an injury. *Id.* Respondent argues that the two statements provided support for the charges and were sufficient evidence upon which to base a charge. *Id.* Respondent relies on Mr. Zirkelbach's testimony that approximately 10 to 20 percent of all investigations he participated in involved dishonesty. *Id.*

Respondent further argues that if this Court finds that Complainant has not met his burden, the Court should award no damages. *Id.* at 18. Respondent argues Complainant is not entitled to back pay because when Complainant was first charged with the rule violation, he was out on medical leave and at no point during the disciplinary investigation was Complainant medically cleared to return to work. *Id.* Respondent contends that Complainant is not entitled to compensatory damages because he did not present evidence that his reputation was damaged by Respondent's actions, and that Complainant failed to present evidence that his alleged emotional distress was the result of Respondent's actions versus a continuation of his preexisting mental health condition. *Id.* at 19.

Respondent cites to *Hobby v. Ga. Power Co.*, ARB Nos. 98-166,-169, ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001), aff'd sub nom. *Hobby v. Dep't of Labor*, No. 01-10916 (11th Cir. Sept. 30, 2002)(unpublished), for the argument that a "key step in determining the amount of compensatory damages is a comparison with awards made in similar cases." Employer also relies on *Riley v. Dakota, Minn & Easter R.R. Corp.*, ALJ No.2014-FRS-0004, PDF at 17 (Oct. 16, 2015), in which the ALJ refused to award damages for mental anguish where the complainant complained that the "specter of losing his job" caused him mental anguish and that he was "angry beyond relief" when he was notified of the investigation. *Id.* The judge found that the complainant was not entitled to compensatory damages for emotional distress, because any "mental anguish suffered by Complainant and his family as a consequence of the investigation

itself is not compensable as an employer is entitled to reasonably investigate potential rule violations without subjecting it to compensatory damages for emotional distress.” *Id.* Respondent urges this Court to reach the same conclusion in this case because Complainant admits that “nothing about this investigation or the charges is included” in Complainant’s work history records, nor has Complainant been able to identify any instances of being treated differently as a result of the investigation. *Respondent’s Post-Hearing Brief* at 20 (citing Tr. at 281:4-7; 285: 5-9).

Further, Respondent argues that Complainant presented no evidence that its actions caused him harm. *Id.* at 21. Respondent notes that Complainant “makes almost no effort” to distinguish between the damage by the accusation of the two employees and the damage he claims to suffer as a result of the conduct investigation. *Id.* Respondent asserts that it is Complainant’s burden to prove a causal connection between his alleged harm and the Respondent’s actions, distinct from the actions of the two witnesses, distinct from the mental anguish Complainant asserts was caused by his injury and distinct from other pre-existing mental health issues. *Id.* Respondent avers that it should not be held responsible for damages caused by other individuals or other events. *Id.*

Respondent further argues that Complainant failed to present any evidence of the degree to which his emotional distress was increased specifically by receiving the notice of investigation. *Id.* at 22. Complainant testified that other issues were causing him emotional distress including “being unable to work” because of his injury. *Id.* (citing Tr. at 232:4-6). According to Respondent, the only evidence of aggravation of Complainant’s distress was Complainant’s own testimony. *Id.* (citing 232:7-18). However, Respondent cites evidence that Complainant had treated for anxiety, depression, and sleeping issues throughout his life even before he received notice of the disciplinary investigation. *Id.* (citing Tr. at 284:20-285:3).⁷ Respondent also argues that Complainant did not present evidence of any physical manifestation of such emotional distress, such as ulcers, gastrointestinal disorders, headaches, or panic attacks. *Id.* Respondent relies on *Raymond v. Union Pacific RR Co.*, ALJ No. 2011-FRS-11, slip op. at 24 (ALJ Jan. 31, 2013), where the judge found that “[w]ithout [such physical manifestations], there is inadequate evidence of specific discernible injury to the Complainant’s emotional state.”

Respondent also argues that Complainant is not entitled to punitive damages. *Respondent’s Post-Hearing Brief* at 23. Respondent asserts that punitive damages are inappropriate because it took the reasonable steps to investigate whether Complainant had engaged in dishonest behavior. *Id.* Further, Respondent’s actions were triggered by, and based upon, the unsolicited complaints and sworn statements of the two witnesses. *Id.* When Respondent learned that the two witnesses had recanted their statements, Respondent submits that it acted reasonably by cancelling the hearing and expunging all records of the charges against Complainant and Complainant was not terminated or disciplined in any way. *Id.* (citing Tr. 280:9-20; 281:8-10). Respondent contends that an award for punitive damages here does not support the goal of FRSA, to deter retaliatory behavior. *Id.* at 24-25.

In its Reply Brief, Respondent again argues that Complainant failed to present circumstantial evidence that his protected activity was a contributing factor in the charge. *Respondent’s Reply Brief* at 3. Respondent avers that the evidence establishes that Respondent acted as a reasonable company, consistent with its own principles and past practices. *Id.* at 4.

⁷ Claimant testified that he had been “on and off” anxiety medications prior to receiving notice of the investigation. Tr. at 285:8-12.

Specifically, Respondent emphasizes that Complainant reported his injury in August of 2018 and does not claim retaliatory actions prior to Respondent receiving the witness statements. *Id.*

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity. 49 U.S.C. § 2109(a). FRSA protects employees who report work-related injuries to the railroad carrier or to the secretary of Transportation. *Id.*

To prevail, a FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets this burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the complaint's protected activity. 49 U.S.C. § 2109(d)(2)(A)(i).

Preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air. Indus., Inc.*, ARB No. 04-037, ALJ, No. 2002-AIR-8, slip op. at 13 (ARB Jan. 31, 2006) (citing BLACK'S LAW DICTIONARY at 1209 (7th ed. 1999)). To prove a fact by a preponderance of the evidence "means to show that that fact is more likely than not; and to determine whether a party has proven a fact by a preponderance necessarily means to consider all the relevant, admissible evidence and, on that basis, determine whether the party with the burden has proven that the fact is more likely than not." *Palmer v. Canadian Nat'l Ry*, ARB 16-035, ALJ No. 2014-FRS-154, slip op at 18 (ARB Jan. 4, 2017) (reissued with dissent).

The evidence need not be "overwhelming" to satisfy the requirements set forth in 49 U.S.C. § 42121 (b)(2)(B)(iii). Circumstantial evidence is sufficient to meet this burden. *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, 708 F.3d 152 (3d Cir. Feb. 19, 2013).

In *Palmer*, the Board referred to Complainant's burden as step one of the analysis. *Palmer*, ARB No. 16-035, slip op. at 5, 16, 86. The Board stated that "if a retaliatory reason is a factor at all, the employee prevails at step one." *Id.*, slip op. at 86. Step two of the analysis shifts the burden of proof to Respondent when Complainant establishes that Respondent violated the FRSA. *Id.*, slip op. at 31, 52. At this step, 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. *Id.*

Step One

A. Credibility

I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supported or detracted from the other record evidence. In doing so, I have taken into account all relevant, probative, and available

evidence to assess whether any evidence should be accepted or rejected. *See Frady v. Tenn. Valley Auth.*, Case No. 1992-ERA-19, slip op. at 4 (Sec’y Oct. 23, 1995).

The credibility of witnesses is “that quality in a witness which renders his/her evidence worth of belief.” *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). As the Court observed in *Indiana Metal Products*:

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 probably 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 (stating that differentiating between “credibility based upon demeanor and credibility based upon analysis of the evidence could well be a semantical exercise in conceptualism of gossamer calibre”).

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of witness’s testimony, but may choose to believe only certain portions of the testimony. *Altomose Constr. Co. v. NLRB*, 514 F.2d 8, 16 and n.5 (3d Cir. 1975). 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.

Overall, here, the parties did not present much factual dispute over several material details of the events at issue and the timeline of same. Instead, they have presented their respective arguments over whether those facts indicate that Complainant’s report of injury in August 2018 was a contributing factor to the unfavorable personnel action taken by Respondent.

Complainant’s burden of persuasion rests in part on his testimony. There are portions of Complainant’s testimony that I found to be generally credible, such as the timeline of events. Complainant’s demeanor was less cooperative on cross-examination. The undersigned has considered Respondent’s citation of six instances of contradictory testimony by Complainant in urging the Court to find Claimant not credible. *Respondent’s Brief* at 15-16. However, in most of the instances, Complainant did not directly contradict his prior testimony. The undersigned finds that Complainant contradicted himself about any history of treating for depression before the unfavorable personnel action in May of 2019, and thus his credibility was somewhat diminished on the question of emotional damages. Tr. at 231, 284-85. Also, Complainant was initially reluctant to agree on cross-examination that he understood a disciplinary investigation does not automatically conclude with discipline, and that charges could be overturned. When presented with his deposition testimony that he was personally aware of a prior instance of an employee being investigation for absenteeism when the charge was not sustained, Complainant agreed his deposition testimony was accurate, and he ultimately agreed that not every employment investigation will not result in discipline. *Id.* at 273:17-24, 275:9-24, 276:4 to 277:5. Claimant’s testimony thus demonstrated some evasiveness on cross-examination.

Complainant was also reluctant to admit on cross-examination that he had not been disciplined “in any way,” though he admitted that no discipline resulted from the disciplinary investigation. Tr. at 279-80. Overall, I found that Claimant’s explanation was credible, that he was negatively affected by others “thinking that I did something that I didn’t do because I was

charged with these things.” *See id.* Likewise, I did not find Complainant to provide contradictory testimony by stating he did not have opportunity to “address” the disciplinary charges with anyone and his later testimony that he “talked with someone with Union Pacific about the charges,” as in both instances Complainant described being unable to obtain specific information about the allegations underlying the charges. Tr. at 230:5-7 and 243:3-15. Despite some evasiveness and lack of cooperation in some instances on cross-examination, the undersigned found overall that Complainant was credible.

Further, Mr. Bybee, Mr. Bailey, and Mr. Zirkelbach—the other witnesses at the hearing—came across as unbiased, sincere, and credible witnesses, despite some variances in their testimonies. Mr. Bybee came across as a sincere, truthful, cooperative witness who testified to matters within his personal knowledge. Overall, he was credible.

I found Mr. Bailey to be credible when he testified that Respondent’s disciplinary investigation of Complainant’s conduct, for a possible Rule 1.6 violation, was prompted solely by the accusations of Ms. Hamilton and Ms. Bowen. He explained that their statements had plausible elements despite some incredible aspects of their statements. He was likewise credible when testifying that if Complainant had never reported a personal injury, Respondent would have conducted an investigation into the allegations of Ms. Hamilton and Ms. Bowen. Mr. Bailey’s testimony is consistent with the timing (both the start and end) of the disciplinary investigation, and with all witnesses’ observations of the seriousness of a potential Rule 1.6 violation. Mr. Bailey reiterated numerous times during his testimony that dishonesty and fraud were very serious offenses that Respondent had a duty to investigate, which was consistent with the testimony of Mr. Zirkelbach, Ms. Novak, and Mr. Torres. Further, I found Mr. Bailey to be credible and testifying with his personal knowledge when he testified about Respondent’s policies and procedures and how they were followed here.

Mr. Zirkelbach was able to provide in-depth knowledge about disciplinary investigation procedures. I found that Mr. Zirkelbach’s testimony concerning his involvement with prior dishonesty and immorality investigations was insightful. Most instances of contradictory testimony in the record appeared when comparing the testimonies of Mr. Zirkelbach and Mr. Bailey. For example, Mr. Zirkelbach testified that he believed Mr. Bailey was aware of Complainant’s injury to his arm at the time of the disciplinary investigation, because Mr. Zirkelbach had mentioned it to Mr. Bailey during a conversation. Tr. at 170:12-15. However, Mr. Bailey testified that prior to issuing the notice of investigation, he knew nothing about Complainant’s personal injury because he was not on the Texoma Service Unit when Complainant was injured. *Id.* at 118:10-17. Mr. Bailey testified that he knew about the injury only generally as a statistical piece of information, because he used such information for safety plans, but not which employee suffered the injury. *Id.* Mr. Bailey’s testimony is corroborated in part by Mr. Torres’ deposition testimony that Mr. Torres was aware that Complainant suffered an injury in August 2018, because he was the General Manager of the Texoma Service Unit at the time. JX-12 at 6:24-25 to 7:1-8. Overall, Mr. Bailey’s lack of actual knowledge of Complainant’s specific injury at the time of the disciplinary charge letter in May 2019, is supported by his credible testimony that he was not part of the Texoma Service Unit at the time of the injury, he did not personally know Complainant, and he would have had awareness of only injury statistics in his role over safety plans. The undersigned does not agree with Complainant’s contention that Mr. Bailey’s testimony in this regard was shifting or contradictory. Even so, the undersigned finds that Mr. Bailey had constructive knowledge of the injury report by virtue of the allegations of Ms. Hamilton and Ms.

Bowen that Complainant was purportedly seeking to exacerbate his injury in order to increase a settlement with Union Pacific.

Mr. Zirkelbach also testified that he discussed “the charges and the statements” by the witnesses with Mr. Bailey and asked Mr. Bailey about his opinion regarding the credibility of the statements. Tr. at 167:1-4. According to Mr. Zirkelbach, Mr. Bailey also told him that he had to conduct an investigation “to get the facts out.” *Id.* at lns. 5-8. Mr. Bailey indicated in his testimony that he received the statements from Mr. Bybee and discussed them with Ms. Novak, and he felt the statements were enough to proceed with the investigation “to get the facts on the record to find out what happened.” *Id.* at 143:11-22. Mr. Bailey does not mention having the conversations described by Mr. Zirkelbach, but both witnesses testified that Mr. Bailey’s stated purpose was to get the facts out at a hearing instead of judging the credibility of the witness statements on their own. Although Mr. Zirkelbach also stated he talked with Mr. Bailey about information he obtained from Complainant’s doctors, Mr. Bailey did not recall this. Overall, these differences in their testimony do not detract significantly from the witnesses’ credibility. Ultimately, both witnesses testified consistently that Mr. Bailey felt the statements should be investigated to “get the facts.”

Mr. Zirkelbach and Mr. Bailey also differed in their recollection of some events on the morning of the August 7, 2019, disciplinary hearing. Mr. Zirkelbach recalled that the hearing was opened, but Mr. Bailey did not, and Mr. Bailey’s recollection was more consistent with that of Mr. Bybee who was also present. Although Mr. Zirkelbach believed Mr. Bailey mentioned charging any witness who recanted her statement with a charge of making a false statement, Mr. Bailey denied making the statement, and he plausibly explained that his scope of authority did not extend to non-employees. Also, Mr. Zirkelbach stated a change in the Rule 1.6 charge to conspiracy was mentioned that morning, but again Mr. Bailey plausibly denied making the statement and explained that amending a charge in that fashion was not only impermissible under the union agreement, he was not aware of a Company rule that would apply to such a charge. The undersigned did not deem Mr. Zirkelbach to be purposefully misleading or untruthful because of these differences in his testimony from that of Mr. Bailey, but overall, Mr. Bailey’s testimony was more plausible and consistent with other evidence and thus given more weight.

The undersigned did not have opportunity to observe the demeanor of Ms. Novak and Mr. Torres, whose testimonies were submitted by deposition transcript. Ms. Novak responded to several questions by stating that she did not have the information or did not recall. As a higher level labor relations supervisor, the undersigned did not fault Ms. Novak for not recalling details of Complainant’s case. To the extent that she described her role as Director of Labor Relations, which provides consultation on disciplinary matters, and the seriousness of a dishonesty charge, Ms. Novak’s testimony was consistent with that of other witnesses. Mr. Torres’ testimony that the disciplinary investigation was based on the accusations of Ms. Hamilton and Ms. Bowen and was separate from, and conducted independently of, the criminal investigation was consistent with other credible evidence of record. Therefore, these witnesses’ testimonies were deemed credible.

B. Protected Activity

By its terms, FRSA defines protected activities as including acts done “to provide information regarding any conduct which the employee reasonably believes constitutes a violation of any federal law, rule or regulation relating to railroad safety...to a person with supervisory authority over the employee” or “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.” 49

U.S.C. § 2109(a)(1) and (4). The parties stipulated that on or about August 31, 2018, Complainant filed a report of personal injury, which is a protected activity under the FRSA. The stipulation is supported by the evidence of record. Based on the foregoing, I find and conclude that Complainant engaged in protected activity by reporting his injury. The undersigned has also concluded that Respondent's charging officer in the disciplinary inquiry, Mr. Bailey, had constructive knowledge of the protected activity.

C. 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 in part, to the employer's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying Respondent of a work-related illness, or denying, delaying, or interfering with Complainant's request for medical treatment of care. *See* 49 U.S.C. § 20109.

The Board has indicated that whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application." *Mendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). Employer actions must be considered in the aggregate to determine if they rise to the level of an applicable adverse action. *Id.* at 20-21. Based on similar language in the statutes, the Board has applied the same broad definition of an adverse action under FRSA as it previously articulated under AIR-21 and Sarbanes-Oxley; a railroad engages in adverse action if it engages in "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp. (AMTRAK)*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015).

An adverse action may include an employment action that would "dissuade a reasonable employee from engaging in protected activity." *Menendez v. Halliburton*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-2005 (ARB Sept. 13 2011). Commenting on its language in *Menendez*, the Board noted in *Vernace*, "Where termination, discipline, and/or *threatened discipline* are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees." ARB. No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012) (emphasis added).

Here, the parties stipulated that Complainant received a notice of investigation dated May 7, 2019, for dishonest and immoral conduct. The notice charged Complainant with a possible violation of the Company's Rule 1.6, citing an allegation of dishonest or immoral activity after August 30, 2018, when Complainant allegedly "took actions to exacerbate the nature and severity of a previously reported on-duty injury, discovered by the Service Unit on May 1, 2019." JX-7. The notice advised that dismissal may result from the investigation. *Id.* Mr. Bailey, the charging officer, described a Rule 1.6 violation as "very serious." Tr. at 151:7-9. Local Chairman Zirkelbach similarly described the charge of dishonesty and immoral conduct as a "very severe charge" that results in termination of employment in the vast majority of cases (approximately 75 percent of the time). Tr. at 163:21-24; 164:6-8. Mr. Torres and Ms. Novak also testified to the seriousness of the charge.

The evidence reflects that Complainant was threatened with discipline, which constitutes an unfavorable personnel action, or adverse action, under the Act, notwithstanding that Complainant was ultimately cleared of the charges and did not sustain a permanent record of the disciplinary charge.

D. Contributing Factor

Complainant must also establish under FRSA that the protected activity was a contributing factor to the unfavorable personnel action. 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. ARB*, 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting *Allen v. Admin Rev. Bd.*, 514 F.3d 468 (5th Cir. 2008)).

The Board observed in *Rudolph v. Nat’l RR Passenger Corp.* (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-15, slip op. at 16 (ARB Mar. 29, 2013), that “proof of causation or ‘contributing factor’ is not a demanding standard.” To establish that the protected activity was a contributing factor to the adverse action at issue, the claimant need not prove that his protected activity was the only, or the most significant, reason for the unfavorable personnel action. Indeed, the contributing factor need not be “significant, motivating, substantial or predominant,” rather it need only play “some” role. *Palmer*, ARB No. 16-035, slip op. at 53, n.218. The claimant must 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 Tech.*, 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 had a “wrongful motive” to prove the protected activity contributed to respondent’s adverse personnel action. *See Halliburton*, 771 F.3d at 263 (“Regardless of the official’s motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing.”) (quoting *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993)).

The contributing factor element may be established by direct evidence or indirectly by 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) (citing *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014)). Whether considering direct or circumstantial evidence, an administrative law judge must be persuaded that it is more likely than not that the claimant’s protected activity played some role in the adverse action.

Under the FRSA, “the causation question is not whether a respondent had good reasons for the adverse action,” since the “contributing factor” standard requires only “that the protected activity play some role in the adverse action.” *See Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051, slip op. at 24-25 n. 46 (citing *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 11-12 (ARB May 31, 2014)); *Palmer*, ARB No. 16-035, slip op. at 55. Nevertheless, if the respondent claims the protected activity played *no role whatsoever* in the adverse action, the evidence of the respondent’s non-retaliatory reasons for termination must be considered alongside the complainant’s evidence in making such a

determination. *Palmer*, ARB No. 16-035, slip op. at 29, 55 (“[I]f 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.”). As part of this analysis, 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.*, slip op. at 55. This is because the contributing factor standard requires only that the protected activity played “some role”; as such, nonretaliatory reasons are not “weighed against” the protected activity to determine which factor(s) have the more weight. *Id.* In the event that the fact-finder determines that the protected activity played some role, the inquiry at step one ends. *Id.*

As noted above, a complainant may refer to the temporal proximity between the protected activity and the adverse action to support Complainant’s burden at step one. “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 contributing factor to the adverse employment action.” *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1357, 1362 (Fed. Cir. 1998).

The Board recently observed the following in *Hukman v. U.S. Airways, Inc.*:

Ascertaining the significance of temporal proximity in a case “involves more than determining the length of the temporal gap and comparing it to other cases. Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters.”

See ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 16 (ARB Jan. 16, 2020) (citing *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10-11 (ARB Sept. 26, 2012)). For this reason, the Board noted that it had previously affirmed findings that close temporal proximity had raised an inference of causation but ultimately causation was not proven by substantial evidence in the record, and, similarly, had also affirmed findings that causation was established even in cases of “weak or no” temporal proximity.⁸ *Hukman*, ARB No. 2018-0048, slip op. at 16-17.

Although temporal proximity can support an inference of retaliation, the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). The temporal inference alone may be insufficient to meet the employee’s burden to show that the protected activity was a contributing factor “where an employer has established one or more legitimate reasons for the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6 (ARB Apr. 28, 2006). Also, “inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused

⁸ In *Hukman*, ARB No. 2018-0048, slip op. at 16 n. 67, the Board noted the following decisions addressing temporal proximity of various lengths: *Weuers u. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (affirming as supported by substantial evidence an ALJ finding that four months between his injury report and the adverse action lacked a strong temporal connection where intervening events diminished any causal inference from temporal proximity with the report of an injury); *Zurcher v. S. Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (affirming the ALJ’s conclusion that there was no causation even though temporal proximity was less than two months); *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB Nos. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (affirming an ALI decision dismissing the complaint even though complainant claimed temporal proximity of only “weeks”).

the adverse action.” *Id.* (emphasis in original); *see also Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037, slip op. at 6 (ARB Oct. 17, 2012) (“The ALJ’s determination that Abbs’s falsification of his log book and payroll records broke any inference of causation based on temporal proximity is supported by the record and consistent with applicable law.”).

Here, Complainant argues that “shortly after” he filed a personal injury report with Respondent, the Company began a criminal investigation to determine whether Complainant was doing anything to worsen the extent of his injuries or lie in any way. *Complainant’s Post-Hearing Brief* at 12. The undersigned notes that several months passed between these events of August 2018 and the March 2019 opening of the criminal investigation. Moreover, Complainant argues that Respondent’s retaliation against him *did not begin* until his receipt of the May 7, 2019, letter charging a violation of Rule 1.6. *Id.* It is stipulated that Complainant reported his injury on August 31, 2018, and that the notice of investigation for dishonesty and immoral conduct was issued May 7, 2019. Accordingly, the events are separated by a period of almost nine months. Standing alone, the undersigned finds that temporal proximity is weaker in these circumstances, but, as the Board has noted, even weak temporal proximity may not prevent a finding of causation if supported by the evidence.

The undersigned concludes that Complainant has not presented preponderant evidence, i.e., that it is more likely than not, that his protected activity in August 2018 was a contributing factor to the adverse action initiated nine months later. Importantly, Respondent undertook the disciplinary investigation after Mr. Bailey received and reviewed the witness statements of Ms. Hamilton and Ms. Bowen in early May 2019, alleging that Complainant asked for help increasing the severity of his elbow injury in order to increase his monetary settlement, and promising financial reward for their help. The accusations of Ms. Hamilton and Ms. Bowen serve as independent, intervening events that resulted in the adverse action. *See Barber*, ARB No. 04-056, slip op. at 7 (concluding that intervening events independently caused the termination of the employee).

The timing of the charging letter is consistent with the testimony of Mr. Bailey that he became aware of the alleged dishonesty of Complainant on May 1, 2019, when it was brought to his attention by either Ms. Novak or Special Agent Bybee. Tr. at 113:9-23 to 114:1. This is consistent with Mr. Bybee’s testimony, based on his personal knowledge, that after the closure of the criminal investigation in late April 2019, the Service Unit would be notified of the closed criminal case and the matter would be turned over to the “rule violation side.” Tr. at 54:20-23; 82:1-7, 13-17. Mr. Bybee did not recall conveying to Mr. Bailey any of his own opinions about the truth or falsity of the accusers’ statements, or whether there was any corroboration. *Id.* at 61:2-4, 23-25. The undersigned considered Mr. Zirkelbach’s testimony that he and Mr. Bailey had an earlier conversation, he believed around mid-March 2019, in which Mr. Bailey mentioned the possibility of criminal charges and subsequent dishonesty charge under Rule 1.6, though in Mr. Zirkelbach’s words, Mr. Bailey “didn’t know the specifics of the case at the time.” Tr. at 164:19-23. While Mr. Zirkelbach’s testimony may indicate that Mr. Bailey foresaw a possible rule violation issue before May 2019, this testimony does not aid Complainant’s burden of proving that his protected activity was a contributing factor to the unfavorable personnel action. Further, in assessing credibility, the undersigned found Mr. Bailey’s testimony more credible that he learned of the accusations against Complainant on May 1, 2019, and thus initiated the disciplinary investigation within the applicable 10-day window under the union agreement.

The timeline of events described by Mr. Bailey is also consistent with Mr. Bybee's testimony that after he closes a criminal investigation, which he did here on April 26, 2019, the matter is typically turned over to the company for a rule violation investigation. The undersigned found Mr. Bailey's testimony regarding the reasons for initiating the disciplinary investigation to be credible, because it is consistent with other evidence of record that Mr. Bailey was not a part of criminal investigations, and that included the criminal investigation conducted by Mr. Bybee here, and that Mr. Bailey was aware that the criminal investigation of Complainant's activity was closed but he did not know the exact nature of the criminal charge at issue in that investigation or whether those charges involved dishonesty. Mr. Zirkelbach's testimony, like that of Mr. Bybee and Mr. Bailey, confirmed that Mr. Bailey did not know any "specifics of the case" concerning the criminal investigation of Complainant. Tr. at 164:19-23. The evidence also reflects that Respondent followed the procedures set out by the collective bargaining agreement regarding the issuance of the notice of investigation. Tr. at 139:6-18; 149:17-25; 325:19-326:9; Ex. 1; Ex. 2. Notably, once Respondent confirmed that Ms. Bowen and Ms. Hamilton recanted their statements, the investigation hearing was terminated, thus closing the inquiry into the possible Rule 1.6 violation, and Respondent expunged Complainant's record of any discipline charge. *Joint Stipulation* Nos. 8, 9, 11. Upon the medical determination that Complainant was able to return to full-duty work, he returned to work for Respondent on October 23, 2019. *Joint Stipulation* No. 10; Tr. at 281:7-10.

Accordingly, although Complainant engaged in protected activity on August 31, 2018, many months passed of no comment or conduct by Respondent that Complainant contends is retaliatory. Rather, the Respondent's investigatory actions and threatened discipline, which began in May 2019, all flowed from its receipt of Ms. Hamilton's and Ms. Bowen's statements suggesting possible misconduct by Complainant. The documentary and testimonial evidence, and timeline of the disciplinary investigation from its inception to termination, all indicate that the claims of Ms. Hamilton and Ms. Bowen were the catalyst for the Rule 1.6 charges and investigation, not the Complainant's protected activity. The undersigned also did not detect inconsistent application of the employer's policies, shifting explanations for its actions, hostility toward Complainant's report of injury, or a change in attitude toward Complainant because of his protected activity. To the extent that Complainant challenges the adequacy of Mr. Bybee's criminal investigation, suggesting that it was not thorough because he did not interview Complainant or his friend Clint Buttrill or obtain medical records, the undersigned credits Mr. Bybee's plausible testimony that he agreed with the opinion of his supervisor that the investigation did not yet require these steps. Moreover, Complainant does not contend that any retaliation occurred until after the closure of Mr. Bybee's criminal investigation.

Complainant refers to the "unfounded and incredulous" allegations of Ms. Hamilton and Ms. Bowen, suggesting that Respondent's proffered reasons for charging Complainant with dishonest and immoral conduct, based on these individuals' statements, should not be believed. The undersigned, however, credited the testimony of Mr. Bailey that, before the statements were known to be recanted in August 2019, there were aspects of the statements of Ms. Hamilton and Ms. Bowen that contained believable details that warranted further investigation. Tr. at 57:5-7, 16-25; 58:1-4; 147:14-21; 149:17-25. The undersigned notes that Mr. Bybee, who has many years of law enforcement experience, held a similar opinion.

Complainant also challenges the fact that a disciplinary investigation was initiated even after the criminal investigation was closed. Complainant testified at the hearing that he felt

Respondent retaliated against him because they went ahead with the second investigation even after the first investigation was closed. Tr. at 252:10-18. However, he also candidly admitted that, if someone did actually ask for help aggravating or exacerbating an injury, he did not oppose an investigation of such conduct but in fact testified that “they should absolutely be questioned about it.” Tr. at 248:8-17. This is consistent with Mr. Zirkelbach’s testimony. *Id.* at 193:15-20.

Though the statements of Ms. Hamilton and Ms. Bowen were deemed by Mr. Bybee and local law enforcement authorities to be uncorroborated and not to warrant criminal charges of insurance fraud, the undersigned credits Mr. Bailey’s testimony that he was not aware of the specific decision-making involved in the closure of the criminal investigation, or the exact nature of the criminal charges considered, including whether those charges involved dishonesty. The undersigned has considered that there may be dishonest or immoral conduct in the employment context, which does not rise to the level of criminal misconduct, or insurance fraud in particular, and thus the closure of the criminal investigation did not necessarily signal to Respondent that the statements of Ms. Hamilton and Ms. Bowen were an invalid basis for charging a possible violation of Rule 1.6. Mr. Zirkelbach, who had participated in about 200 to 300 disciplinary investigations, stated that up to 20 percent of the investigations involved charges of dishonesty. Accordingly, the undersigned noted that Respondent did not identify an unusual charge under the circumstances.

Complainant alleges in conclusory fashion that evidence of “disparate treatment” supports his claim, *Complainant’s Post-Hearing Brief* at 18, but he did not establish that he was treated differently than similarly situated employees; no evidence of comparators was presented. *See, e.g., DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, AU No. 2009-FRS-009 (ARB Sept. 30, 2015). Complainant also argues that Respondent’s “deviation from normal procedures” supports his claim. Complainant did not establish that Mr. Bybee’s investigation deviated from normal procedures or, more importantly, that the conduct of criminal investigation is relevant to his claim of retaliation that he alleges began after the closure of the criminal investigation. The evidence also reflects that the investigations were conducted independently. Complainant also takes issue with the fact that Mr. Bailey planned only to present Mr. Bybee as a witness at the disciplinary hearing but does not show that the investigation, from the written notice on May 7, 2019, until the hearing cancellation on August 7, 2019, deviated from normal procedures or that any deviations are so significant to suggest pretext. Further, Complainant contends a “discriminatory attitude” was shown by supervisors who allegedly forced Mr. Bybee to limit his criminal investigation. *Complainant’s Post-Hearing Brief* at 18. The undersigned finds that Mr. Bybee credibly testified he was not so limited, that he in fact agreed with the input of his supervisor, and he conducted the interviews and investigation that he deemed necessary without unduly involving Complainant or Complainant’s friend (Mr. Buttrail) or doctors. In fact, Mr. Bybee concluded that the statements of Ms. Hamilton and Ms. Bowen could not be corroborated and thus the criminal case should be terminated without further interviews. If “the fix was in” from the criminal investigation forward, as Complainant alleges, the closure of the criminal investigation is not consistent with his argument. The undersigned did not otherwise detect from the testimony of the witnesses or from the documentary evidence any indications of “discriminatory attitude” or animus toward Complainant.

Also, Complainant’s argument that “intentional retaliation” means only that “one or more of the managers involved in the adverse action must have had some knowledge of the employee’s protected activity,” improperly removes any actual component of causation from the analysis. *See Complainant’s Post-Hearing Brief* at 9. Complainant accurately cites precedent that the employee

does not need to conclusively demonstrate “retaliatory motive.” *See Riley*, ARB Nos. 16-010, 16-052, slip op. at 6, n. 13 (“We have long held that ‘retaliatory motive’ is not required to show causation under the whistleblower statutes, like FRSA, containing the ‘contributing factor’ standard.”). However, more than protected activity and knowledge of the activity is required to establish even the less demanding standard of “contributing factor” causation. It is well-established that the “contributing factor” standard requires a showing that the protected activity “played some role” in the adverse action and “tended to affect” in some way, either alone or in combination with other factors, the employer’s decision to take the unfavorable personnel action. *See Fordham, Palmer, Halliburton, Klopfenstein, supra*. The undersigned concludes that Complainant did not make this showing by a preponderance of the evidence.

More importantly, even if it were not prudent or justified for Respondent to initiate the disciplinary investigation after closure of the criminal investigation, the undersigned has considered the evidence of record for any indication that doing so evinced retaliation in response to Complainant’s protected activity and found none. “The FRSA is not a wrongful termination statute,” and the Board has stated on many occasions that the ALJ should not sit as a super-personnel advocate when examining the employer’s decisions for an adverse action. *See Acosta v. Union Pacific Railroad Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 11 (ARB Jan. 22, 2020) (citing cases). “An employer’s actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for FRSA whistleblowing activity.” *Id.* When considering the reasons that an employer offers for its actions, the inquiry of the ALJ is focused on whether the employer “genuinely or honestly believed” that the employee violated the rule in question, and if so, whether “that belief and not protected activity accounted for its disciplinary actions.” *Id.*, slip op. at 11-12. *See also Redweik v. Shell Exploration & Prod. Co.*, ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 9 (ARB Dec. 21, 2007). Thus, the relevant question is not the complainant’s guilt or innocence, rather it is whether the respondent believed in good faith that the complainant had violated its policies (i.e. theft, fraud, or violated a safety policy). *See Villegas v. Albertsons, LLC*, 96 F. Supp. 3d 624, 636 (W.D. Tex. 2015). An employer’s proffered reasons may also be considered pretextual if the employer’s reasons “were so unbelievable as to be unworthy of credence,” or where disparate treatment is demonstrated with similarly situated comparators or a history of retaliation against individuals who engage in protected activity. *See Acosta*, ARB No. 2018-0020, slip op. at 12.

The undersigned has deemed the testimony of the charging officer, Mr. Bailey, credible regarding the reasons he gave for charging Complainant with a possible violation of Rule 1.6. Even though parts of the witness statements about striking Complainant with a sledgehammer at Complainant’s request were “incredible,” Mr. Bailey plausibly explained that other details were believable enough to indicate misconduct worthy of further investigation. As noted herein, his testimony was consistent with that of Mr. Bybee, Complainant also recognized the propriety of an investigation into this kind of conduct, and Mr. Zirkelbach testified that if such misconduct were proven, termination would be proper. The undersigned finds that Respondent believed in good faith that Complainant had potentially committed the rule violation, and was not prompted, even in part, to take adverse action against Complainant for his protected activity.

To the extent that Complainant argues that his protected activity and the disciplinary investigation are “inextricably intertwined,” the undersigned notes that this analysis is no longer required for resolving questions of causation, and a distinction should be made between causation and proximate causation. *See Thorstenson v. BNSF Ry. Co.*, ARB Nos. 18-059, -060, ALJ No.

2015-FRS-052, slip op. at 10-11 (ARB Nov. 25, 2019). *See also Yowell v. Fort Worth & Western Railroad*, ARB No. 2019-39, ALJ No. 2018-FRS-9, slip op. at 6-7 (ARB Feb. 5, 2020) (finding ALJ erred in his contributing factor analysis by applying “inextricably intertwined” rule that ARB no longer requires since *Thorstenson*).⁹ In *Thorstenson*, the Board observed, “This is not to say that an ALJ may not find that an adverse action and protected activity are intertwined such that contributing factor causation is factually established. For these cases, the ALJ must explain how the protected activity is a proximate cause of the adverse action, not merely an initiating event.” *Thorstenson*, Nos. 18-059, -060, slip op. at 10.

In his Brief, Complainant argues that the protected activity and the disciplinary investigation are inextricably intertwined “because if the injury had not occurred” there would not have been “grounds for starting the disciplinary investigation because they concern the same subject.” *Complainant’s Post-Hearing Brief* at 10. However, the type of causation central to Complainant’s argument is not proximate causation that has legal significance, but, rather, is the type of causation that merely points to the protected activity as an initiating event in a chain of events. *See Thorstenson*, Nos. 18-059, -060, slip op. at 10. Further, Complainant’s argument is overly general in asserting that the “grounds for starting the disciplinary investigation” was the protected activity. Rather, the credible evidence reflects that the accusations in the statements of Ms. Hamilton and Ms. Bowen prompted the disciplinary investigation. When the statements were recanted, the investigation also ended.

Here, Complainant may have referenced that his protected activity and the adverse action were intertwined to demonstrate that Respondent’s actual or constructive knowledge of Complainant’s protected activity, rather than attempting to establish causation in this way. The undersigned finds and concludes, however, that Respondent’s charging officer, Mr. Bailey, was aware of Complainant’s injury even if unaware of the specific details of the injury. An inference of injury is apparent on the face of the statements of Ms. Bowen and Ms. Hamilton. JX-2; JX-3. On the question of causation, however, the more recent guidance announced in *Thorstenson* will apply. As such, this argument does not succeed in establishing the “contributing factor” element of Complainant’s case.

After considering and weighing the totality of the evidence, Complainant has failed to demonstrate by the preponderance of the evidence that his protected activity contributed to, in any way, the adverse personnel action. There exists a significant, legitimate intervening basis for the disciplinary investigation, namely the unsolicited statements of Ms. Hamilton and Ms. Bowen implicating Complainant in potential criminal activity and/or misconduct that violated his employer’s rules. Once the statements were recanted, Respondent discontinued the disciplinary inquiry, lending further support to the non-retaliatory nature of the adverse action.

Therefore, I conclude that Complainant failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his adverse action, and, as such, he failed to establish an essential element of his claim.

⁹ Complainant also relies on *Riley*, in which the ARB stated that because it was “impossible to separate the cause of [the employee’s] discipline-for filing his injury report late-from his protected activity of filing the injury report, the two are inextricably intertwined and causation is presumptively established as a matter of law.” *See* ARB No. 16-010, ALJ No. 2014-FRS-44, slip op. at 5-6. Such a conclusion appears to be at odds now with the ARB’s more recent holding in *Thorstenson*, which also involved discipline due to an untimely report of injury.

Step Two

The undersigned concluded above that Complainant did not establish by preponderant evidence that his protected activity was a contributing factor to the adverse action. In the alternative, the undersigned has also considered whether Respondent is able to meet its burden at step two, if Complainant were deemed to meet his burden of proof.

“The second determination [step two] involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?” *Palmer*, ARB No. 16-035, slip op. at 52. “For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.” *Id.*, slip op. at 52-53.

The undersigned finds and concludes that, even if Complainant proved that his protected activity played some role in the adverse action, and thus was a contributing factor, Respondent nonetheless established by clear and convincing evidence that it would have taken the same action even in the absence of protected activity, as the evidence reflects that Respondent initiated and pursued the disciplinary investigation of Complainant for reasons directly related to the accusations of Ms. Bowen and Ms. Hamilton and his protected activity did not play a role. This is supported by the timeline of events and the credible testimony of Mr. Bailey regarding the reasons for starting and ending the inquiry into the potential rule violation, which was not contradicted in any material way by other evidence. The undersigned finds based on the evidence that it is highly probable that Respondent would have taken the same adverse action without any protected activity by Complainant and thus Respondent met its burden at step two.

V. CONCLUSION AND ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate or retaliate against Complainant because of his protected activity, and, accordingly, the complaint is hereby **DISMISSED**.

ORDERED this 25th day of February, 2021, at Covington, Louisiana.

ANGELA F. DONALDSON
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 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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

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 (“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/>.

Filing Your Appeal Online

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 (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 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/newappeal-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 and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

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)
200 Constitution Ave. NW
Washington, DC 20210-0001

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If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at: <https://efile.dol.gov/support/boards/request-access-an-appeal>

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After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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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.