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Office of Administrative Law Judges
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Issue Date: 02 September 2020

Case No.: 2019-FRS-00036

In the Matter of:

SCOTT HALCOMB,
Complainant,

v.

CSX TRANSPORTATION,
Respondent.

Appearances:

Daniel Abraham, Esq.
Brian Powell, Esq.
Michael Rapier, Esq.
Colley Shroyer Abraham
For the Complainant

Joseph Devine, Esq.
Amanda Godzinski, Esq.
Baker & Hosteler, LLP
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This claim arises under the employee-protection provision of the Federal Railroad Safety Act of 1982 (FRSA), 49 U.S.C. § 20109. Complainant Scott Halcomb claims that Respondent CSX Transportation, Inc. (CSX) terminated his employment in violation of the FRSA because he engaged in numerous protected activities. CSX denies the claim and asserts that it terminated Halcomb's employment for violating its workplace violence policy by threatening a co-worker and challenging him to a fight.

This tribunal conducted a formal hearing of this claim in Indianapolis, Indiana on January 29-31, 2020, and an on-the-record final prehearing telephone conference on January 22, 2020. The parties were afforded a full opportunity to present evidence and argument as provided in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.¹ The tribunal admitted in evidence, without objection, Joint Exhibits (JX) 1-17; Complainant's Exhibits (CX) 1, 4-7, 8 (pages 005-008 only), 9, 11, 14, 15, 20,² 24-28, and 31; and Respondent's Exhibits (RX) 1, 2, 4, 5, 14, and 16. (Hearing Transcript (Tr.) 616-617, 720, 722-723; Final Prehearing Conference Transcript (FCTr. 7).³ The tribunal also admitted in evidence, over various objections, CX 13 and RX 8, 10, and 15. (Tr. 714, 716, 717, 724-725). Other exhibits are included in the administrative record for appellate purposes, but were not admitted in evidence. The following witnesses testified under oath at the hearing: Scott Halcomb, Dwayne Hutchinson, Rainer Warpenburg, Matthew Hooker, Adam Gerth, Christopher Williams, David Bales, Jason Hess, Marcus Campione, Toni Eady, and Macon Jones. (Tr. 3, 333, 622). The parties submitted closing briefs on June 26, 2020. The record is closed.

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

I. PROCEDURAL HISTORY

On August 16, 2018, Halcomb filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that CSX terminated his employment in retaliation for protected activities under the FRSA. On December 13, 2018, OSHA dismissed the complaint. On January 11, 2019, Halcomb timely filed a request for a hearing before the Office of Administrative Law Judges.

II. THE FEDERAL RAIL SAFETY ACT

The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."⁴ The FRSA prohibits a covered railroad carrier "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."⁵ 49 U.S.C. § 20109 provides:

¹ 29 C.F.R. Part 18, subpart A.

² On January 28, 2020, I issued an Order on Respondent's Objection to Claimant's Exhibit 20, which was medical records for treatment Halcomb received on November 10, 2016. The CX 20 that I admitted at the hearing is a copy of a letter dated June 13, 2014 to R L Eads purportedly signed by Roadmaster Justus advising Eads to attend a formal investigation.

³ In the record, Complainant's Exhibits are identified with a "C;" Respondent's Exhibits are identified with a "R;" and Joint Exhibits are identified with a "J."

⁴ 49 U.S.C. § 20101.

⁵ *Williams v. Nat'l RR Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, PDF at 4 (Dec. 19, 2013) (citing 49 U.S.C.A. § 20109(a), (b)).

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

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

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

* * *

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

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(b) Hazardous Safety or Security Conditions.- (1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for-

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

“The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21).”⁶ For a complainant to prevail under Section 20109, he “must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; (3)

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

and the protected activity was a contributing factor in the unfavorable personnel action.[⁷] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[⁸]"⁹

Federal appellate jurisdiction of FRSA cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation.¹⁰ Because the factual circumstances giving rise to the claim occurred within Indiana, I will apply the law of the United States Court of Appeals for the Seventh Circuit.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background Findings

CSX is a railroad carrier engaged in interstate commerce within the meaning of the FRSA. (Resp. Brf. 2.) As stipulated by the parties, at all times relevant, CSX employed Halcomb as a Track Inspector in the Engineering Department at CSX's Hawthorne Yard in Indianapolis, Indiana. I find that CSX and Halcomb were covered by the FRSA at all relevant times.

A union represented Halcomb and a collective bargaining agreement governed his employment. CSX required Halcomb (like all track inspectors) to inspect the railroad tracks on his territory to make sure that they were safe and satisfied all Federal Railroad Administration (FRA) standards. (FCTr. 5-6.)

Until October or November 2017, there were four track inspectors at the Hawthorne Yard: a main line inspector, a secondary main inspector, a yard inspector, and a private industry inspector. Halcomb was the secondary main inspector. (Tr. 130). Halcomb reported to Roadmaster Marcus Campione at CSX until approximately October 2017. (Tr. 46, 129-130, 225). From the end of October or early November 2018, onward, Halcomb reported to Roadmaster David Bales. Campione and Bales reported to Assistant Division Engineer Rainer Warpenburg, who reported to Division Engineer Jason Hess. (Tr. 46, 54, 221-222, 224).

CSX took Halcomb out of service without pay on January 25, 2018. (Tr. 38; *see* JX 6). CSX dismissed Halcomb from service on March 8, 2018. (FCTr. 5-6; JX 9).

CSX's *purported* reason for terminating Halcomb's employment was that he violated CSX's CSX workplace violence policy. (JX 9). The notification of formal investigation dated February 2, 2018, and the letter of dismissal dated March 8, 2018, which CSX provided

⁷ 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121 (b)(2)(B)(iii)(iv); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006). Whether the employer had knowledge of the protected activity is part of the causation analysis in this test. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015).

⁸ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

⁹ *Riley v. Dakota, Minnesota & E. R.R. Corp.*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *2 (ARB Jul. 6, 2019).

¹⁰ 29 C.F.R. § 1982.112.

Halcomb refer to an incident that occurred on January 25, 2018, as the basis for CSX's formal investigation and the finding that Halcomb violated CSX's workplace violence policy. (*See* JX 6, 9). However, it is clear from the transcript of CSX's formal investigation and the testimony before me that the *purported* basis for CSX's formal investigation and its finding that Halcomb violated its workplace violence policy was an incident between Halcomb and CSX employee Christopher Williams that occurred on January 9, 2018.

B. Protected Activity

Halcomb claims that he engaged in the following activities protected under the FRSA, for which CSX retaliated against him:

(1) On September 9, 2016, Halcomb noticed an inspection truck in the shop, which appeared to have a damaged bumper and reported to Campione and Warpenburg that he thought someone was trying to cover up a vehicle accident. (Clmt. Brf. 2, 12-16; Tr. 43-45, 225-226).

(2) On September 29, 2016, Halcomb reported that he had been stung by a bee to Campione. (Clmt. Brf. 2-3, 12-16; Tr. 45-46).

(3) On September 29, 2016, Halcomb reported tie defects on the Shelbyville track to CSX. On November 3, 2016, Halcomb noticed that some of the defects continued to exist even though Campione had removed the defects from the computer system as re-inspected and meet FRA standards. On November 13, 2016, Halcomb reported this situation as well as the bee sting and his belief that Campione and Warpenburg were retaliating against him to CSX's ethics hotline. The same day, he also reported the situation with the Shelbyville track to the FRA. (Clmt. Brf. 3-5, 12-16; Tr. 45-49, 51-54; CX 9). (Collectively referred to herein as the Shelbyville Incident).

(4) On September 12 and 15, 2017, while on his way to work, Halcomb observed the same CSX truck being driven at an unsafe speed and anonymously reported it to the 1-800 number on the back of the truck. (Clmt. Brf. 7-8, 12-16; Tr. 62-65).

(5) On September 14, 2017, Halcomb witnessed Campione cross a live track, during day light hours, while on his cell phone, without looking before crossing, and without any personal protective equipment (PPE), and reported this to Warpenburg (Clmt. Brf. 7, 12-16; Tr. 62-63, 122).

CSX has stipulated that Halcomb's report of a bee sting (item no. 2), and his activity in the Shelbyville Incident (item no. 3) are protected activity. (Tr. 732-733). Based on CSX's stipulations and the entire record before me, I find that Halcomb's report of a bee sting on September 29, 2016, report to CSX of defective ties on September 29, 2016, ethics complaint to CSX on November 13, 2016, and report to and cooperation with the FRA in November 2016 were protected activity under the FRSA.

Although I could spend significant time analyzing and deciding whether item nos. 1, 4, and 5 above were protected activity under the FRSA, a determination that each such item was protected activity would make no difference in my ultimate determination. Hence, for further purposes of this Decision, I assume that item nos. 1, 4, and 5 are protected activity under the FRSA without finding or concluding the same.

C. Adverse Action

An adverse action under the FRSA is an unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions.¹¹ Pulling a railroad employee out of service and terminating his employment are both adverse employment actions.¹² I find that CSX's actions of taking Halcomb out of service and terminating his employment were adverse actions under the FRSA.

D. Contributing Factor Causation

To prevail, Halcomb must demonstrate, “by a preponderance of the evidence, that his protected activity was a contributing factor in the unfavorable personnel action.”¹³ “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.’ . . . ‘[I]t just needs to be a factor;’ the ‘protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial role suffices.’ ‘[I]f the ALJ believes that the protected activity and the employer’s nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.’”¹⁴ In making this determination, the judge must, and in this case has, considered “all the relevant, admissible evidence.”¹⁵

¹¹ *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, PDF at 7-8 (Nov. 24, 2015) (citing *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (Dec. 29, 2010)).

¹² *Rathburn*, ARB No. 16-036, PDF at 4; 49 U.S.C. § 20109(a).

¹³ *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, PDF at 30 (ARB Sept. 30, 2016) (*en banc*). “This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ factor in a personnel action in order to overturn that action.” *Id.*, PDF at 53 (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

¹⁴ *Powers*, 2017 WL 262014, at *10 (internal citations omitted).

¹⁵ With regard to the evidence an administrative law judge is to consider and how to weigh such evidence when determining whether protected activity is a contributing factor, the Board has stated:

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

When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, ‘in general, employees are likely to be at a severe disadvantage in access to relevant evidence.’ Thus, an employee ‘may’ meet his burden with circumstantial evidence.’ So an ALJ *could* believe, based on evidence that the relevant decision maker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The

CSX asserts that it terminated Halcomb for violating its policy on workplace violence for threatening Halcomb with physical violence on January 9, 2018, and not in retaliation for his alleged protected activity. (Resp. Brf. 1-6, 9-12). CSX Code of Ethics states that:

Violence of any kind has no place at CSX. We will not tolerate:

- Intimidating, threatening or hostile behavior.
- Causing physical injury to another.
- Acts of vandalism, arson, sabotage or other criminal activities.

(RX 4 at 334). Further, CSX's Individual Development and Personal Accountability Policy for Operating Craft Employees (IDPAP) lists "Violations of the Violence in the Workplace, Harassment, Code of Ethics or Social Media Policies" as a major offense warranting removal from service pending an formal investigation (a/k/a internal hearing) and possible dismissal from service for a single occurrence. (JX 13 at 9, 10; Tr. 537-538).

Additionally, the parties stipulated that terminating employees for workplace violence is common in the railroad industry, but there are exceptions when employees are not terminated for workplace violence. (Tr. 693-695). Indeed, CSX presented six examples of terminating other employees for charges of workplace violence; one example where an employee received a time served suspension for a charge of workplace violence; and another example where an employee was not terminated. (*See* RX 8). Based on the foregoing, I find that CSX has a policy against workplace violence, employees such as Halcomb may be dismissed for violating such policy after only one violation, and CSX does terminate employees for violating its workplace violence policy.

1. No Alleged Disparate Treatment of Halcomb

Halcomb argues that CSX's stated reason for terminating him, for a violation of CSX's workplace violence policy, is pretextual and raises an inference of retaliatory motive. Halcomb argues that such stated reason is pretextual because CSX failed to enforce its own policy on timely reporting workplace violence and treated Halcomb differently than other employees accused of workplace violence. (Clmt. Brf. 21-29.)

As discussed in more detail below, CSX employees Christopher Williams and Matthew Hooker did not give written statements of the alleged January 9, 2018 workplace violence against Williams until January 25, 2018. And, CSX Track Inspector Dwayne Hutchinson did not make a statement regarding the January 9 incident or another incident that allegedly occurred on January 23, 2018, until February 12, 2018. (*See* JX 1-3). There was testimony from Hutchinson, Hooker, and Williams that CSX requires the reporting of workplace violence. (*See* Tr. 137-140,

ALJ is thus *permitted to* infer a causal connection from decision maker knowledge of the protected activity and reasonable temporal proximity. But, . . . the AL[J] must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

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

179, 299). There was other testimony that employees are required to immediately report dangerous situations and should immediately report workplace violence. (*See* Tr. 293, 519, 711-712). I could infer from this testimony that CSX requires reports of workplace violence to be made immediately.

However, even if Williams', Hooker's, and Hutchinson's delays in making reports violated CSX's rules, CSX's failure to discipline them for late reporting of workplace violence does not demonstrate disparate treatment of Halcomb by CSX. Halcomb's argument is like comparing apples to oranges. Assuming that timely reporting of workplace violence is a CSX rule, engaging in workplace violence and not timely reporting workplace violence are two different rules. Punishing alleged victims of workplace violence for not timely reporting their own victimization is not even remotely similar to committing workplace violence. Just because they both relate to workplace violence does not make them comparable.

With respect to CSX's treatment of other employees accused of workplace violence, Halcomb argues that CSX treated him differently than other employees. Halcomb points to two instances where disparate treatment allegedly occurred. First, Halcomb alleges that he reported to Bales that Hutchinson was aggressive towards him on January 23, 2018, but CSX did nothing. (Clmt. Brf. 25-30). Second, Halcomb testified that he observed Richard Eads write "any time anywhere" on Fowler's tag on a switch stand and Eads and Fowler having words in the office, but Eads was only suspended for 30 days. (Tr. 69). To compare these examples to how CSX treated Halcomb, a discussion of the January 9, 2018 incident between Halcomb and Williams and how CSX responded is necessary.

a. Alleged Workplace Violence by Halcomb on January 9, 2018

CSX employee Christopher Williams testified that on January 9, 2018, he entered the Hawthorne Yard break room and jokingly made a comment to Halcomb about the way Halcomb had parked his car. (Tr. 379-380, 408, 410). Williams testified that Halcomb verbally and somewhat physically threatened him; Halcomb "jumped up and started pointing to the door telling [Williams] to come outside . . . ; [h]e walked towards the table . . . looking at [Williams], hollering at [Williams];" Halcomb said "[d]o you want a piece of me?" (Tr. 394, 412). Williams remained seated and kept his head down. (Tr. 413). He was embarrassed and scared. (Tr. 414, 438). Nothing like this had happened to him before. (Tr. 415). Williams perceived Halcomb's actions as a threat to "whoop [his] ass. [He] even went home that evening . . . because [he] was sick that [Halcomb] was going to try to do something after work because of his actions." (Tr. 395; *see* Tr. 415).

According to Halcomb, Williams was giving him a hard time about how he parked his vehicle and seemed to have a real issue about it. Halcomb testified that he then merely went to the door and asked Williams to come outside and show Halcomb how he should have parked. Halcomb denied any intent to cause Williams visible harm. Halcomb also denied having any other incidents with Williams before January 25. (Tr. 65-67). Halcomb's written statement to CSX dated January 25, 2018, was consistent with this testimony. (*See* JX 4). Further, Halcomb testified that he has no reason why Williams and Hooker would have lied. (Tr. 93). But, could understand why Hutchinson would lie given their interactions on January 23-25. (Tr. 94). On

cross examination, Halcomb admitted that he was getting upset during the January 9 incident and may have used a couple of curse words, but denied being loud. (Tr. 94).

b. CSX's Initial Response to Williams' Report of Workplace Violence by Halcomb

Roadmaster David Bales testified that he first became aware of the January 9 incident the day that Williams called him and reported it. Bales recalls that:

[Williams] said that they had -- he had come in that morning, the morning of the incident, that he had made a joke to Mr. Halcomb about how he was parked. And when he did that, that Mr. Halcomb flew into a rage and basically challenged him to go outside to fight. And he said, 'No, no, no, I was just kidding, just joking.' And then he said again, that he had told him, 'You want to go outside and take care of it?' So that was the -- that was the rundown of his version of the story. So I asked him, you know, was he reporting an incident or was he just -- you know, just telling me something? If he was -- if there was some issue there that he felt like, you know, he was threatened or something like that, I said, 'There are policies that CSX has to deal with that. Is that what you're telling me, is that you want to report this?' And he said, 'Yes, that's what I'm saying. I want to report it.'

(Tr. 452-453). Bales also recalls that Williams said that Hooker witnessed the incident. (Tr. 454). Bales testified that based on this call, he concluded that there was a possible rule violation because Williams was reporting an incident that was categorized as workplace violence. Bales told Williams that he would have to call his supervisor, Rainer Warpenburg, and report the incident, which he did. (Tr. 453-454).

According to Bales, Warpenburg told him to obtain statements from Williams and Hooker, which Bales did on January 25, 2018; he had them write their statements out in separate areas the same day that Williams had called him. (Tr. 454-455; *see* JX 1-2). After reading Williams' statement, Bales asked Williams why he delayed reporting the incident. According to Bales, Williams responded that he was not sure what Halcomb would do. (Tr. 457).

That afternoon Bales had Halcomb complete a written statement. (Tr. 80, 457-458; *see* JX 4). Bales testified that he then called Warpenburg and read all three statements to him. And, Warpenburg then called him back and said that he needed to put in an assessment for Halcomb, which means that a charge letter would be generated and an investigation would occur. (Tr. 459-460; *see* RX 2; JX 6).

Subsequently, at Warpenburg's instruction, Bales obtained a written statement from Hutchinson on February 12, 2018; Williams had mentioned that Hutchinson had knowledge of the January 9 incident. (Tr. 464-465; JX 1; *see* JX 3).

Warpenburg testified consistently with Bales regarding the foregoing. Warpenburg testified that he concluded this was a workplace violence situation because Williams had

reported to Bales that he was threatened and felt threatened. Warpenburg testified that he read the statements Bales obtained and passed information along to Division Engineer Jason Hess. (Tr. 247-251, 254). Warpenburg testified that “Bales did the investigation. [Warpenburg] assisted somewhat, but [he] did not participate in the interviews.” (Tr. 295).

c. Hutchinson’s Argument with Halcomb on January 23, 2018

Halcomb testified as follows:

On January 23, 2018, Halcomb was inspecting track with Hutchinson. They were in an inspection truck. The Sperry car, which is used to check the track for imperfections using ultrasound, was behind them. A defect was found. Hutchinson went back to check what the defect was. When Hutchinson returned to the inspection truck, Halcomb asked him what the defect was so he could determine the remedial action needed. Hutchinson responded that it was not bad enough to worry about. Halcomb again asked him what the size of the defect was and Hutchinson became irritated, came across the console between the two front seats, and told Halcomb to ask the folks using the Sperry car if Halcomb did not believe him. Hutchinson probably came to within an inch or two from Halcomb’s face. Halcomb stated that he was just trying to find out what the remedial action was. Hutchinson became more irritated and Halcomb stopped. Hutchinson asked Halcomb to take him back to the office. When they finished their inspection, Halcomb took Hutchinson back to the office. That day, after returning to the office, Halcomb reported the incident with Hutchinson to Bales. (Tr. 75-76, 132). Halcomb reported:

what had transpired about the defect. I was trying to find remedial action. Mr. Hutchinson getting upset, coming across the console at me, getting in my face. Told him I brought him back to the office.

(Tr. 76-77). As far as Halcomb knows, Bales took no action on his report. (Tr. 77). Halcomb was intimidated by Hutchinson after this incident. (Tr. 80).

The next day, in the morning meeting, Bales directed a maintenance team to fix the track defect found by the Sperry car the day before, which Halcomb and Hutchinson argued over. After that meeting, Hutchinson was even more irritated and started calling Halcomb names; Hutchinson called Halcomb a rat and said nobody wanted to work with him. Hutchinson then spilled Halcomb’s coffee over Halcomb’s things. Bales and Warpenburg observed this. Halcomb told Bales that something needed to be done. And, Warpenburg asked Halcomb if he needed to go home. (Tr. 77-79).

Hutchinson testified that Halcomb was asking him what the defect was. Hutchinson did not tell him. He did not want to get into an argument with him, so he remained pretty silent and asked Halcomb to take him back to the office. According to Hutchinson, they did not have an argument. Hutchinson testified that when he got back to the office he asked Bales to separate them because he did not like Halcomb’s attitude and did not want things to escalate. (Tr. 162-163, 175-176).

According to Hutchinson, the next day, when he knocked over Halcomb's coffee, it was an accident and he apologized and cleaned it up. Further, Hutchinson testified that they did not argue at that time. (Tr. 168, 176).

d. CSX's Response to the Argument Between Hutchinson and Halcomb

Bales testified regarding the January 23 incident as follows:

Hutchinson and Halcomb came back to the office and did not want to work with each other anymore, so Bales had them work separately. (Tr. 466-467). Halcomb reported that Hutchinson had acted aggressively towards him, but they were both acting aggressively. Halcomb also reported that Hutchinson got in his face while yelling at him. Neither Halcomb nor Hutchinson reported feeling threatened, afraid, or bullied. Bales did not ask Halcomb whether he felt threatened. Further, Bales did not ask Halcomb whether he wanted to make an official report. (Tr. 494-496, 498-500).

Bales reported the situation to Warpenburg and Warpenburg agreed with how Bales handled it. (Tr. 466-467, 495, 272-273).

Bales did not consider what Halcomb reported to be workplace violence because "[n]either one of them said . . . that the other one threatened to do something to them or afraid [sic] of the other guy or, you know, I don't think either one of them were intimidated by each other. I mean, they're both pretty decent sized guys. I don't think they were worried about the other guy doing something physically to them. The way I understood it, it was an argument over track work in the truck. So to me it didn't meet the threshold of workplace violence." (Tr. 467-468). Bales did not charge anyone because there was nothing to charge someone for. "You know, they had an argument. You know, it was a heated argument, but it was just an argument." (Tr. 468).

The next day, Bales witnessed Hutchinson and Halcomb conversing about the same subject they had argued over the day before, and it "got a little bit heated again, not to the level of the day before." (Tr. 469; *see* Tr. 471). As Hutchinson was going to his locker he knocked Hutchinson's coffee over. Halcomb accused Hutchinson of doing it on purpose. Hutchinson said it was an accident and offered to buy Halcomb another cup, got his stuff, and left. Bales did not consider this workplace violence. (Tr. 469-470). It appeared to Bales that Hutchinson had accidentally spilled Halcomb's coffee. (Tr. 505).

Halcomb testified that on January 25, Bales had a meeting with Halcomb, Hutchinson, union representative Rapiere, and another union representative. According to Halcomb, Bales said that what happened the day before could not happen again. They also talked about the track defect. Hutchinson became agitated and walked out of the meeting. (Tr. 79-80). Bales testified that he wanted the union representatives to meet with him, Halcomb, and Hutchinson to try to help calm down the situation between them. (Tr. 507).

e. Further Discussion and Findings Regarding Alleged Disparate Treatment

There is a difference between aggressive arguing and the threat of physical violence. Williams told Bales that Halcomb challenged him to a fight. Challenging someone to a fight is a threat of physical violence. With this information in hand, it was reasonable for Bales to inquire further. And, when Williams said he wanted to report the incident, it was reasonable for Bales to treat Halcomb's alleged conduct towards Williams as an allegation of workplace violence.

Conversely, Halcomb merely described a heated argument with Hutchinson while they were in close physical proximity. Halcomb did not report feeling threatened, afraid, bullied, or intimidated. It was reasonable for Bales to treat Halcomb's description of the incident he had with Hutchinson on January 23 as merely a heated argument, and not an allegation of workplace violence. Under such circumstances, the fact that Bales did not ask Halcomb whether he was intimidated by Hutchinson is understandable. Further, Bales handled the complaints by Halcomb and Hutchinson towards one another consistently with how one might try to de-escalate a damaged working relationship between co-workers.

Based on the foregoing, I credit Bales' testimony that he considered Williams' complaint to be a complaint of workplace violence and did not consider Halcomb's complaint to be one of workplace violence. Williams' and Halcomb's complaints to CSX were different enough to justify CSX treating them differently, the former as a violation of its workplace violence policy and the latter as not a violation of such policy. Thus, the way CSX treated Halcomb's complaint about Hutchinson does not demonstrate disparate treatment of Halcomb.

Further, the examples of the two CSX employees that were not terminated for workplace violence also do not evince disparate treatment of Halcomb. (*See* Tr. 689-691, RX 16). Macon Jones testified that in one of these cases, CSX did not terminate the employee because of the quality of the evidence – the alleged victim and accused both testified that nothing happened. (Tr. 690; *see* RX 16). Jones testified that in the other case, Eads and the other CSX employee were involved in a mutual confrontation. And, Eads' case was not comparable to Halcomb's case because Halcomb's case was not mutual. (Tr. 691). Hess testified that he recommended termination of Eads, but he was overruled by the Administration Group and/or Labor Relations and the discipline became a time-served suspension. (Tr. 545-548). I find that CSX's differentiation of Halcomb's case from these two other cases reasonable and credible. Moreover, CSX did terminate six other employees for violations of its workplace violence policy from October 14, 2016 through December 23, 2017. (*See* RX 8 at 1).¹⁶ Hence, Halcomb has failed to demonstrate that CSX treated him differently than other employees with respect to disciplining him and the manner in which it disciplined him for violating its workplace violence policy.

2. Temporal Relationship

CSX argues that Halcomb's alleged protected activities are too remote in time to be a contributing factor to his dismissal. It argues that the 6-month gap between Halcomb's termination and his protected activities in September 2017, and before, do not suggest that

¹⁶ Halcomb submitted CX 24, which shows 7 engineering department employees who made threats of violence were dismissed for incidents occurring from July 21, 2015 through December 8, 2017, and two such employees resigned in lieu of dismissal. I have not considered this exhibit against Halcomb. However, it does not assist him.

Halcomb was retaliated against because of his alleged protected activity. (Resp. Brf. 20-22). Halcomb responds that the lack of temporal proximity does not preclude an inference of retaliation because it ignores the pattern of antagonism Halcomb faced immediately following each instance of protected activity. (Clmt. Brf. 18-21).

The Administrative Review Board has stated that:

Determining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a “fact-intensive” analysis. It 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. Before granting summary decision on the issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.¹⁷

The latest alleged protected activities in this case occurred on September 12, 14, and 15, 2017, which are Halcomb’s reports of a speeding CSX vehicle and Campione crossing a live track. This activity occurred slightly more than four months before CSX took Halcomb out of service on January 25, 2018, and almost six months before CSX terminated his employment on March 8, 2018. The other remaining protected or alleged protected activities occurred almost a year and a half before CSX dismissed Halcomb. CSX cites to various decisions from the Seventh Circuit finding that three and four months in between protected activity and an adverse action is too long to establish causation. (Resp. Brf. 21). I agree. There is a lack of a temporal relationship between Halcomb’s protected and alleged protected activities and the adverse actions taken against him. This weighs against a finding that Halcomb’s protected and alleged protected activities were a contributing factor in CSX taking him out of service and terminating his employment.

There is conflicting testimony, which will be discussed later, pertaining to Halcomb’s argument that a pattern of antagonism towards him by CSX’s management raises an inference of retaliation despite the lack of a temporal relationship between his protected activities and the adverse actions taken against him. Thus, to adequately consider Halcomb’s argument, I need to assess his credibility and that of other witnesses.

3. Credibility of the Witnesses

a. Christopher Williams

I carefully observed all of the witnesses testify to be able to opine regarding their credibility. I noticed no physical mannerisms or demeanors that would cause me to discredit any

¹⁷ *Brucker v. BNSF Ry. Co.*, ARB No. 14-071, ALJ No. 2013-FRS-070, 2016 WL 4184206, *8 (ARB July 29, 2016) (quoting or citing *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012)).

of the witnesses who testified. However, the demeanor of at least one witness, Christopher Williams, along with the substance of his testimony leads me to credit his testimony over that of other witnesses, including Halcomb.

Williams was the most credible witness to testify. I was initially interested in the fact that he waited until January 25, 2018, or 16 days, to report Halcomb's January 9, 2018 threat of physical violence. However, Williams' explanation for his late reporting was satisfactory and credible. Williams explained that he reported the January 9 incident to CSX because of a subsequent incident he heard on January 24, in which Halcomb acted similarly towards Hutchinson. (Tr. 379, 381-384). Williams testified that he reported the January 9 incident on January 25:

Because I had had enough of the problems with him and him threatening people and him being boisterous and demanding. I'd had enough of it, because I had thought about this whole situation for that whole time. That's the reason that I bid out of Hawthorne, to get away from him. And then they ended up holding me, and I had to deal with all of this the whole time.

He played games with me, parking spot games, started doing little things here and there. And I just – I'd had enough of it. And when I came in that morning and he started that again with Mr. Hutchinson, I'd had enough. I couldn't take it anymore.

* * *

I was just upset when I did all of this. All I knew is I wanted to report the incident of him threatening me. I was tired of this. I was tired of coming to work and being badgered. That's why I bid to a job that I was 40 minutes away from my house to where I was seven minutes away from work. I bid a job where I was 40 minutes away -- . . . to get away from him.

(Tr. 392-394; *see* Tr. 400, 421). According to Williams, he waited to report the January 9 incident “[b]ecause, like [he] had mentioned to the other party, [he] was just so overwhelmed with this that [he] waited. And then after this incident, and then the incident in the office, just everything weighed on [him]. And after the incident in the office, [he] just couldn't take it no more. And, like [he] said, [he]'d already bid out. [he]'d tried to get away, everything just kept piling up on [him]. [His] nerves were a wreck.” (Tr. 425). Williams further testified that he was embarrassed and scared. He was embarrassed “because of being a man, backing down from somebody and being that much afraid of somebody, if just affected [him].” (Tr. 414).

Williams also testified that he went to the doctor after leaving work early to receive treatment for his sinuses. However, he “could have went after work easily. The reason that [he] left early was to get away from [Halcomb], and [he] used [his sickness] as an excuse to go home early.” (Tr. 398; *see* Tr. 415-416). The next day he bid to take another position at Avon Yard,

which is about 40 minutes further from his home than the Hawthorn Yard, because of Halcomb. (Tr. 417-420).

An issue that initially concerned me with Williams' report of the January 9 incident was that Williams testified that Halcomb tried to run him off the road on January 23, but Williams did not include this information in his report on January 25. Williams testified that he felt endangered and feared for his safety by the running-off-the-road event. However, he waited until February 21, during Halcomb's disciplinary investigation, to report it. (Tr. 385-391, 422). Williams' explanation was that he did not report being run off the road at the same time as he reported the January 9 incident "because [he] considered [Halcomb] somewhat of a friend. And [he] didn't understand why he did it and then the extent that he went to everything. And it just weighed on [him] and then with the added stuff with the parking and then the road incident, [he'd] just had enough with the office incident, with [Halcomb] yelling." (Tr. 433). Observing Williams testify, I found this explanation satisfactory and credible.

Williams further testified that he spoke with Hutchinson about the January 9 incident before he reported Halcomb on January 25; he spoke to Hutchinson that morning. (Tr. 395-396, 415). According to Williams, during that conversation, Hutchinson stated that Halcomb had admitted to threatening Williams "and was going to kick [Williams'] ass that day," and stated that he was in the truck when Halcomb ran Williams off the road. (Tr. 396, 427). Halcomb denied talking to Hutchinson about the January 9 incident and running Williams off the road. (Tr. 82-83, 99). Halcomb did acknowledge that he passed Halcomb on the morning of January 23, as he and Hutchinson were off to inspect a track. (Tr. 99-100).

Hutchinson's written statement of February 12, 2018, describes both Hutchinson's conversation with Halcomb about the January 9 incident and Halcomb running Williams off the road. (*See* JX 3). Hutchinson also described these events in his testimony. (*See* Tr. 196-200). But, Hutchinson did not recall talking to Williams about these events. (Tr. 183-185). Hutchinson testified that he did not report Halcomb running Williams off the road or the January 9 incident because he did not want to be involved. (Tr. 187).

Halcomb has argued or at least implied that Williams' and Hutchinson's testimony are not credible because they spoke with one another on the morning that Williams reported the January 9 incident. However, I do not find the fact that Williams spoke with Hutchinson about the January 9 incident before reporting it to CSX diminishes Williams' credibility in any way. It was conceivable and reasonable for Williams to talk with Hutchinson after overhearing the encounter between Halcomb and Hutchinson and before reporting the January 9 threat to CSX. There is no evidence that they colluded to falsely report Halcomb during that conversation or at any other time.

Williams was soft spoken and his voice appeared somewhat shaky during the parts of his testimony dealing with the January 9 threat and Halcomb's treatment of him. He appeared visibly emotional. My impression from Williams' demeanor on the stand is that Williams' was sincerely ashamed and embarrassed of having been victimized by Halcomb. Further, Williams' testimony about leaving work early on January 9 because of the incident with Halcomb and, more so, bidding on a new job substantially farther away from his home than the Hawthorn Yard

to get away from Halcomb bolster his overall credibility. The corroboration of Williams' version of the January 9 incident by the testimony and statements of Hooker and Hutchinson likewise bolster Williams' credibility.

b. Matthew Hooker

CSX Track Inspector Matthew Hooker testified that CSX trained him on the "three Rs," recognize, record, and report, which applies to workplace violence. He was trained to notify supervisors if he witnessed workplace violence. (Tr. 298, 299). He witnessed the incident between Halcomb and Williams on January 9, 2018. He observed Williams put his head down and try to avoid eye contact. (Tr. 300). Hooker testified that Williams did not do anything to escalate the situation. (Tr. 317). Hooker also testified that had Halcomb done the same thing to him, he would have felt threatened because of Halcomb's tone and demeanor; Halcomb was not joking around. (Tr. 317). Hooker testified that Williams acted differently after the incident; he was quiet and seemed distant. (Tr. 320-321).

Hooker did not report the January 9 incident to anyone. (Tr. 302). He did complete a written statement on January 25, 2018, after Bales told him to do so. (Tr. 303; *see* JX 2). In his statement, Hooker reported that Williams joked about the way Halcomb had parked and Halcomb "immediately started yelling and cussing at [Williams], then [Halcomb] got up out of his seat and asked [Williams] do you want a peice [sic] of me, lets [sic] outside and take care of it." (JX 2). Hooker described the January 9 incident in his testimony before me fairly consistently with his written statement. (*See* Tr. 314-316). Hooker testified that he did not report the incident because Halcomb's behavior was not directed towards him and he figured that he would let Williams deal with it the way he saw fit. (Tr. 319). He further testified that if he witnessed violence, he would have reported it. (Tr. 327). I infer that Hooker was referring to physical violence.

I find that Hooker was a credible witness. Despite Complainant's counsel's questions of Hooker regarding his ability to promote with Halcomb being terminated, I find that Hooker had no motivation or reason to lie with respect to his testimony about the January 9 encounter between Halcomb and Williams.¹⁸ And, Hooker's version of the January 9 incident was consistent with the testimony and statements of Williams and Hutchinson. Moreover, the fact that he did not report the January 9 incident of his own volition until after Williams came forward lends credibility to his testimony rather than detracting from it.

c. Dwayne Hutchinson

My impression of Dwayne Hutchinson is that he was a rather reluctant witness. This was demonstrated by him not coming forward to report what he knew about the January 9 incident or

¹⁸ Hooker testified that after Halcomb was terminated, Hooker bid on and obtained Halcomb's position as a track inspector, which pays more than a welder. (Tr. 304).

Halcomb running Williams off the road on January 23, until Bales asked him for a statement on February 12, 2018.¹⁹

Further, there is an arguable inconsistency between Williams' and Hutchinson's description of Hutchinson's encounter with Halcomb in the break room on January 24. Williams cites what he heard during that encounter as the impetus for coming forward and reporting the January 9 incident. However, Hutchinson testified that he and Halcomb did not argue at that time. (Tr. 168, 176). I believe that Hutchinson was downplaying or understating what happened because Bales confirmed that Hutchinson and Halcomb were conversing about the same subject they had argued over the day before, and it "got a little bit heated again, not to the level of the day before." (Tr. 469; *see* Tr. 471). And, Halcomb testified that Hutchinson was irritated and started calling him names. Warpenburg ended up asking Halcomb if he needed to go home. (Tr. 77-79, 243). Warpenburg explained that he said this to Halcomb because Halcomb would not calm down, and that he did not say anything to Hutchinson because Hutchinson was calm. (Tr. 243). This leads me to conclude that Halcomb and Hutchinson were arguing in the break room on January 24, despite Hutchinson's testimony and possible perception to the contrary. Hence, I accord less weight to Hutchinson's testimony, except where it is corroborated by that of Williams, Hooker, or other credible witnesses.

d. Scott Halcomb

When Scott Halcomb testified, he was very even-keeled, calm, and unemotional. The tone and volume of his voice were consistent throughout his testimony. Although some might question how Halcomb could remain so calm and unemotional when being accused with making a threat that he believed he did not make, such a question would be speculative at best. Thus, I have not considered Halcomb's calmness and lack of emotion on the witness stand against or in favor of his credibility. It is enough that the quality and quantity, i.e. 2 witnesses to 1, of the testimony by Williams and Hooker regarding the January 9 threat are superior to Halcomb's testimony. And, the testimony of Hutchinson corroborated the testimony of Williams and Hooker. Because the testimony of Williams and Hooker contradict Halcomb's testimony that he did not threaten Williams with physical violence, I generally give Halcomb's testimony little weight.

e. Other Witnesses

As stated above, I noticed no physical mannerisms or demeanors that would cause me to discredit any of the witnesses who testified. Additionally, CSX hearing officer Adam Gerth, who was not employed by CSX at the time of the hearing before me, was articulate and seemingly reflective in answering questions in a non-evasive way. Roadmaster Marcus Campione, who was not employed by CSX at the time of the hearing, had difficulty recalling various alleged events. His entire demeanor suggested that he had not been upset by any of Halcomb's protected activity or alleged protected activity. CSX Manager of Field Administration Toni Eady was articulate, spoke quickly, and had good eye contact. Macon Jones, CSX Director of Labor Relations and

¹⁹ Hutchinson testified that he was aware of CSX's policy on violence and that after Halcomb told him about the January 9 incident, knew that it could potentially constitute workplace violence. But, Hutchinson did not report his conversation to management at the time. (Tr. 139, 157).

formerly a manager of Labor Relations, was articulate, respectful, and composed while testifying. I find that Warpenburg, Gerth, Bales, Hess, Campione, Eady, and Jones were generally credible witnesses.

4. Alleged Pattern of Antagonism Towards Halcomb

Halcomb described the relationship of a track inspector to management as “kind of a hard relationship, because you’re actually being a watchdog over the tracks. When you report things, sometimes management don’t [sic] want to fix the things or don’t want to have to do the repairs . . .” (Tr. 39). Halcomb testified that as a track inspector he is required to report defects and that if a member of management asked him to work with them, as opposed to reporting a defect in the ITIS computer system, that could be considered a violation of CSX’s rules. (Tr. 41). By contrast, Warpenburg testified that if a track inspector had an issue with crossties and Warpenburg disagreed with him about whether the issue was a defect, Warpenburg would walk the track with the inspector and maybe turn the disagreement into a training moment – that is just being a manager and managing operations. (Tr. 286-289).

a. Halcomb’s Report of a Bee Sting

Halcomb testified that when Warpenburg and Campione investigated his report of a bee sting it seemed like they were upset that Halcomb reported it and were trying to find something for which they could write him up. (Tr. 45-46; *see* Tr. 226). Warpenburg testified that he and Campione investigated Halcomb’s report of a bee sting. Warpenburg was with Campione because they were going on a trip. Anytime an employee complains of an injury, a report is required. Other employees, including Track Inspector Matt Johnson had reported being stung by bees before. Warpenburg did not handle Halcomb’s injury report any differently than any other non-critical injury report. (Tr. 262-263). And, Campione testified he was not upset or annoyed that Halcomb had reported a bee sting and handled the situation no differently than any other bee sting that had been reported to him in the past. (Tr. 587-589).

b. The Shelbyville Incident and Halcomb’s Report That Someone Was Trying to Cover Up a Vehicle Accident

Halcomb testified as follows:

On November 3, 2016, when Halcomb re-inspected the Shelbyville track, he found that tie defects he had reported on September 29 continued to exist despite Campione having taken the reported defects out of the computer as re-inspected and meets FRA standards. He reported this to Campione, who stated that the track had been changed to excepted track status. But, when Halcomb requested a CSX bulletin documenting the new status, Campione failed to produce one. Halcomb told Campione he was going to take the track out of service as required and Campione ordered him not to. (Tr. 48-49).

Five days later, on November 8, Campione advised Halcomb that he would no longer be permitted to take his company truck home for call-outs because Halcomb was

not getting the required amount of call-outs needed to take a truck home. A call-out is when a track inspector is called after hours by the trouble desk in Jacksonville to address an issue on the railroad. A call-out is paid at time and a half. All the other track inspectors were allowed to continue taking their company vehicles home. (Tr. 49-51).

On November 13, Halcomb contacted CSX's ethics hotline and reported Campione and Warpenburg, and reported the Shelbyville track tie defects to the FRA. (Tr. 51-54; CX 9).

Four days later, on November 17, 2016, Halcomb met with Division Engineer Hess as instructed. Hess wanted to know about the Shelbyville situation and Halcomb told him. Halcomb also told Hess about having to park his company truck because he was not receiving enough call-outs and Halcomb thought the call-out system was being manipulated. (Tr. 54-56). Hess called the trouble desk during their meeting and told the trouble desk that "nobody is to be calling to set up their call-out arrangements." (Tr. 56). Halcomb interpreted that to mean that someone had been manipulating the call-out system. Hess stated that the reason Halcomb had to park his truck was not because of the call-outs. Halcomb believes that the meeting with Hess was meant to intimidate him because neither he nor anyone else ever has meetings with the Division Engineer. (Tr. 56-57).

On cross examination, Halcomb acknowledged that after he was no longer able to take his company truck home, the only inspector that continued to be allowed to do so was main line inspector Matt Johnson. (Tr. 120).

Campione testified that after Halcomb reported tie defects on the Shelbyville track, Campione had maintenance teams repair enough crossties so that Campione believed the track met FRA standards. At the same time, management was working to change that track to an excepted status. (Tr. 584-587). Warpenburg testified that at some point, CSX changed the Shelbyville track to an excepted status, which means a lower level of maintenance is required on the track. (Tr. 259) Campione further testified that at times, he disagreed with one of the track inspectors about whether a track issue was a defect. (Tr. 579). Additionally, Campione was aware that an FRA inspector inspected the track and issued some violations. Campione testified that as far as he is aware, those violations did not impact him in any way. (Tr. 587).

Halcomb initially testified that Campione and Warpenburg started treating him differently after he reported to them that he thought someone was trying to cover up a vehicle accident, his bee sting, and the tie defects on the Shelbyville track. According to Halcomb, Campione and Warpenburg seemed upset that he did not talk to them before writing up the defect, started not answering his phone calls, and started treating him differently and Campione hung up on him several times. Halcomb felt ostracized. (Tr. 45-47). However, on cross examination, Halcomb testified that they began treating him differently after he reported the damaged truck. (Tr. 106-107).

Campione testified that he spoke with Halcomb on the phone and did not take steps to actively avoid speaking with him. (Tr. 581-582). Williams testified that he observed Halcomb

interacting with Roadmasters and Warpenburg and never observed the Roadmasters treating Halcomb differently than other employees or Warpenburg treat Halcomb badly. (Tr. 403-406). Hooker testified that he observed Halcomb interacting with Roadmasters and never observed them treat Halcomb differently than other employees. (Tr. 309). Hutchinson testified similarly to Williams and Hooker in this regard. (Tr. 207-209, 215-217).

With respect to Halcomb's report of someone trying to cover up a vehicle accident, Warpenburg testified that every time Warpenburg received a report about Matt Johnson he investigated it, including Halcomb's report that someone was trying to cover up a vehicle accident. All the complaints against Johnson were determined to be unfounded. (Tr. 263-264).

I give some weight to the testimony of Williams, Hooker, and Hutchinson regarding Roadmasters and Warpenburg not treating Halcomb differently than other employees because I find those three witnesses credible on the issue. But, I do not give their testimony significant weight because they did not witness all of Halcomb's interactions with Roadmasters and Warpenburg.

Campione advised Halcomb that he could no longer take his company truck home a mere five days after Halcomb approached him about Halcomb's re-inspection of the Shelbyville track, and the reason he was allegedly given for this by Campione was allegedly contradicted by Hess. Although this may appear to be retaliation for Halcomb's report of defect ties on the Shelbyville track to CSX and his disagreement with Campione regarding same, that notion is diminished by Halcomb's own contradictory testimony that the only track inspector that continued to be allowed to take his truck home was mainline Track Inspector Johnson. Further, there is no apparent reason why Johnson would have waited over a month from Halcomb's first report regarding the tie defects followed by Halcomb's compliance with Campione's order not to take the track out of service for Campione to suddenly make Halcomb park his work truck. Under the circumstances, the temporal connection is weak.

Further, I find nothing unusual about Hess meeting with Halcomb about the Shelbyville track situation four days after Halcomb made his ethics complaint and contacted the FRA. There is no evidentiary support that this was an attempt by Hess or CSX to intimidate Halcomb. Rather, it makes sense that the Division Engineer would want to speak with Halcomb about a situation serious enough to merit FRA attention.

Based on my discussion of the witnesses' credibility above, I credit Campione's and Warpenburg's testimony over that of Halcomb regarding how they responded to Halcomb's reports of the alleged vehicle accident cover up, bee sting, and Shelbyville track incident, including Halcomb's reports to CSX, ethics hotline complaint, and report and cooperation with the FRA. Moreover, Halcomb's inconsistent testimony regarding when Campione and Warpenburg started treating him differently further undercuts his credibility.

I did consider the fact that Halcomb reported being treated differently in his November 6 and 13, 2016 complaints to CSX's ethics hotline, the first by phone and the second in writing. (*See* CX 9, 26). This fact could be seen as corroborating his testimony that at some point he believed he was being treated differently. It could also be viewed as an unjustified response by

an aggrieved employee to being told five days earlier that he could no longer take his company truck home while one of the three other track inspectors, one who was senior to him, was allowed to continue taking his truck home. Regardless of the inferences that could be drawn from such facts, in light of my credibility findings, Halcomb's report to the ethics hotline is not persuasive that he was actually being treated differently.

There was testimony that part of the compensation of Roadmasters and Assistant Division Engineers is a bonus based upon factors such as budgeting and safety. (Tr. 223-224, 446-447, 273-276). However, Halcomb failed to establish that Campione's or Warpenburg's bonuses were or would be affected by his reports regarding the vehicle, bee sting, and/or Shelbyville track, or that they had any concern of a possible effect on their bonuses. I find that Campione and Warpenburg did not ostracize Halcomb and generally did not treat him differently than other employees.

c. Halcomb's Reports Regarding a Speeding CSX Truck

With respect to Halcomb's anonymous reports of the speeding CSX vehicle on September 12 and 15, 2017, Halcomb testified that after he told Warpenburg that he had made the reports, Warpenburg said that Halcomb could be brought up on charges for reporting the incident. (Tr. 62-65). Halcomb testified that he could not confirm that it was Johnson driving the CSX truck because it was dark outside. (Tr. 120).²⁰

²⁰ However, on cross examination, Halcomb testified:

Q. That's interesting, because earlier in your testimony, you mentioned that one of the reasons you knew that Mr. Johnson was up to no good in the summer of '17 is because his truck was parked. And that was one of the reasons you knew that he was on vacation, because his truck was parked. Do you remember testifying about that?

A. Yes.

Q. So that is one of the reasons you knew he wasn't there, is because his truck was parked; right?

A. Yes. He drove his truck home every day.

Q. Right, drove his truck home every day. And you actually live within a handful of miles of Mr. Johnson; correct?

A. Probably 5 or 6, yes.

Q. And at this time, he was the only inspector allowed to drive his truck home; right?

A. When was this time?

Q. You mentioned the speeding was in September of 2017.

A. Okay. Yes.

Q. So I'm right?

A. Yeah, he was the only one at Hawthorne, yes, taking a truck home.

Q. And the speeding, just to be clear for the record, your observation of the speeding was on your way to work before the work started for the day; correct?

A. Yes.

Q. And you know that all the track inspectors report to work at the same time; correct?

Warpenburg testified that he became aware of two reports of a CSX vehicle speeding on September 12 and 15, 2017. He took steps to determine who made the complaints because it was unusual to receive two such complaints in such a short period of time when such complaints are rare. Warpenburg discovered that Halcomb had made the complaints. A few days later, Warpenburg met with Halcomb and had him complete a statement. (Tr. 235-238). Warpenburg's intent "was to sit down with him and figure out what was going on to see if we could remedy the issue." (Tr. 238). Further, Warpenburg investigated the complaints and determined they were untrue. (Tr. 239). This is one of the reasons he met with Halcomb. Warpenburg denies threatening to charge Halcomb, but did acknowledge he told Halcomb that the complaints could be considered harassing Johnson. (Tr. 239-240).

Warpenburg did not elaborate on why he thought that Halcomb's complaints could be considered harassing Johnson. Warpenburg did earlier investigate Halcomb's report of Johnson allegedly trying to cover up a vehicle accident and found that report unfounded. But, I will not speculate. It is enough that Warpenburg took no disciplinary action or unfavorable employment action against Halcomb for these complaints.

d. Halcomb's Report of Campione Crossing a Live Track Without Personal Protective Equipment

Halcomb testified that when he told Campione he was going to report him after observing him cross a live track without PPE, without looking in both directions, and while talking on his cell phone, Campione said "okay." (Tr. 63). Halcomb also testified that when he did report Campione to Warpenburg, Warpenburg laughed and brushed it off. (Tr. 63).²¹

A. At Hawthorne?

Q. At Hawthorne.

A. Yes.

Q. Okay. And you observed one of these speeding events on the interstate and the other one on State Route 109; is that right?

A. Yes.

* * *

Q. Is it safe to say you got a better look at it sitting in the yard than you did driving down the road?

A. It was a different truck. He got a different truck.

(Tr. 121-122, 133).

²¹ Hutchinson testified that he does not consider this crossing area where Halcomb witnessed Campione cross the tracks to be a hazardous safety condition because there is only one train that runs on that track once per day, at 5 mph or less, usually after the workers go home, and there is plenty of visibility in both directions. (Tr. 211-212). Hooker testified that employees cross the walkway outside the office, across the 310 track without wearing safety vests. He does not consider that to be a hazard, unsafe, or safety condition because there is a walkway there so you are not stepping over the tracks, the track is used only once a day, and there is ample line of sight in either direction. (Tr. 321-323). Hooker acknowledged that the failure to follow a safety rule is a safety hazard. (*See* Tr. 326).

According to Warpenburg, members of management are required to wear PPE while in work areas and no one is to cross a live track while talking on a cell phone. Both actions violate CSX safety rules. (Tr. 240-241). Warpenburg investigated Halcomb's complaint about Campione crossing a live track without PPE while on his cell phone. Campione did not deny doing so. The substance of Warpenburg's conversation with Campione on the subject was about managers needing to lead by example and set the gold standard. Warpenburg has witnessed other employees cross the same area of track without PPE and talked to them instead of charging them with a rule violation. (Tr. 240-242).

Campione testified that Halcomb discussed Campione not wearing his vest at work with him, and Warpenburg later discussed the same issue with Campione. Campione was not disciplined for this. This was not a significant event for him and did not impact him in any way. (Tr. 594-595).

In denying CSX's Motion for Summary Decision, I stated:

Campione was a Roadmaster; one of the individuals holding the position that supervised Halcomb. Thus, the nature of Halcomb's protected activity towards Campione was more substantial than his reports of a speeding CSX vehicle(s) and some more remote activities. . . . Drawing all reasonable inferences in favor of Halcomb, it is difficult to believe that the disciplinary decisions of CSX's management were not negatively colored by Halcomb's report of Campione. The substantial nature of Halcomb's protected activity towards Campione in conjunction with management's change in behavior towards Halcomb after his alleged protected activities in 2016 support the existence of a genuine issue of material fact regarding whether Halcomb's protected activities were a contributing factor in CSX's decision to take adverse action against him.²²

Having now heard the witnesses testify and reviewed the evidence, and not needing to draw inferences in favor of non-moving party Halcomb, I find that Campione did not view Halcomb's report of him significant enough to have any motive to retaliate against Halcomb. Further, Warpenburg treated the report seriously, despite believing it a minor incident; he counseled Campione about it and setting a better example. There is no credible evidence that Halcomb's report of Campione led to either Campione or Warpenburg wanting to retaliate against Halcomb.

e. Further Discussion and Findings Regarding Halcomb's Allegation of a Pattern of Antagonism

Halcomb raised one or more other issues as examples of how he was treated differently from others. For instance, Matt Johnson was permitted to go on vacation at a time when employees were required to work overtime and Halcomb was not permitted vacation. I do not find these examples persuasive on the issue that Halcomb was treated differently to similarly situated employees. An example of allowing one employee to take vacation but not another is

²² Dec. 16, 2019 Order on Respondent's Motion for Summary Decision, PDF at 10.

fraught with too many variables to lead to any sound conclusion regarding discrimination or retaliation.

Further, on at least three occasions while Campione was allegedly ostracizing Halcomb, Campione singled Halcomb out for special positive recognition or otherwise provided him with assistance. Campione testified that there is a cash value of between \$25 and \$500 associated with a Thanks! Award. And, Campione chose to give Halcomb a Thanks! Award on October 18, 2016, with a value of \$150, and a Thanks! Award on December 16, 2016, with a value of \$100. (Tr. 589-594; JX 17). Warpenburg explained that “Thanks! Awards” are given to employees for outstanding achievement, for going above and beyond regular work performance. Warpenburg probably was involved in the approval of Halcomb’s “Thanks! Awards.” (Tr. 256-257; see Tr. 114-115).

Further, according to Halcomb, in June or early July 2017, Warpenburg gave Halcomb a letter documenting the need for him to work overtime because Halcomb was going through a divorce and wanted to document that this was not his normal income. (Tr. 60-61, 255-256; see JX 15). Warpenburg testified that he wrote the letter because he wanted to help Halcomb out. (Tr. 256). These actions by Campione and Warpenburg are inconsistent with and further rebut the pattern of antagonism alleged by Halcomb.

Halcomb acknowledged that he never received any charges or discipline as a result of reporting the CSX truck being wrecked, the bee sting, the Shelbyville Incident, the speeding CSX truck, or Campione not wearing a vest while crossing the track. (Tr. 124-125).

I credit the aforementioned testimony by Campione and Warpenburg. Based on the entire record before me, I find that there was no pattern of antagonism towards Halcomb by Campione, Warpenburg, or other management at CSX. Further, even if Halcomb were treated differently on one or two occasions; for instance, by not being allowed to take his company truck home or being denied a single request for vacation. This does demonstrate a pattern of antagonism sufficient enough to overcome the lack of a temporal connection between Halcomb’s protected or allegedly protected activity and the adverse actions taken against him.

5. The Honest Belief Rule

CSX relies on the honest belief rule in its defense. Stated another way, CSX argues that “the evidence proves that CSX[] terminated Halcomb solely because it believed, after a good faith and reasonable investigation, that he threatened and intimidated a co-worker in violation of CSX[] rules and policies. (Resp. Brf. 15).

In *Powers*, the complainant claimed that the respondent terminated him for reporting a work-related injury in violation of the FRSA. The respondent claimed that it terminated the complainant for dishonesty relating to his post-injury activities. The Board affirmed an administrative law judge’s decision to deny the claim even though respondent’s managers turned out to be wrong in their belief that the complainant had been dishonest about his medical

restrictions, where the judge thought they had been “correct in believing that [the complainant] was dishonest during the . . . conversation.”²³ The Board stated that:

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

The ‘relevant causal connection’ is thus not between ‘a legitimate business reason and an adverse action.’ Rather, the ‘relevant causal connection’ is between *the protected activity*’ and an adverse action.²⁴

Consistent with the Board’s description of the relevant causal connection in *Powers*, the Board recently affirmed an administrative law judge’s denial of a FRSA claim in *Austin v. BNSF Railway Co.*²⁵ In *Austin*, the complainant reported a hazard and work-related injury and was allegedly terminated for dishonesty/theft. In affirming the judge’s decision, the Board noted that:

The ALJ . . . found that ‘McConaughey[, Respondent’s decision-maker,] had a good faith belief that Complainant had taken Elledge’s personal property without consent, and thus, he genuinely believed Complainant violated GCOR Rule 1.6. McConaughey’s belief that Complainant engaged in theft was supported by the surveillance video and Elledge’s testimony that Complainant did not have consent to enter her purse while she was not present. **The ALJ correctly stated that** even if Complainant had sincerely believed she was not stealing, it would not change the effect of [Employer’s] belief that Complainant was stealing in making his decision to terminate her employment. The ALJ found that there was no pretext in the Respondent’s reasons for making its decision to fire Complainant.’²⁶

In another case, *Fricka*, a railroad classified its employee’s injury as not work-related and refused to pay his medical bills. The employee alleged that the railroad retaliated against him for reporting the injury by not paying his medical bills and giving him unfavorable performance appraisals. The Board remanded the case after finding adverse personnel actions as a matter of law, contrary to the administrative law judge’s findings. In a concurring opinion, Administrative Appeals Judge Luis Corchado noted that:

The thorny causation issue the ALJ will face as to the refusal to pay medical bills, among others, will be deciding (1) whether Amtrak **truly believed** that Fricka’s injury was nonwork related and, if so, (2) how such belief plays into the question of contributing factor. In the end, the ALJ must be convinced that Fricka’s act of *reporting* his work-related injury (as defined by FRSA) was in fact a reason that

²³ *Powers*, 2017 WL 262014, at *14.

²⁴ *Id.* at *15 (internal citations omitted).

²⁵ ARB No. 2017-0024, ALJ No. 2016-FRS-13, PDF at 9 (ARB Mar. 11, 2019).

²⁶ *Id.* (emphasis added).

Amtrak refused to pay his medical bills. Stated differently, despite the fact that Amtrak's decision for medical benefits could only have occurred because of Fricka's reporting, can the ALJ find that a **good faith belief** that the injury was not work related was the sole cause of the refusal to pay medical benefits?²⁷

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

The foregoing takeaways are consistent with the "honest belief rule" utilized by the United States Court of Appeals for the Seventh Circuit and in other federal Circuits in certain types of discrimination cases.²⁸ "The Seventh Circuit is clear that 'it is not the court's concern that an employer may be wrong about its employee's performance, or be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie.'"²⁹

Applying Board precedent and the law of the Seventh Circuit, whether CSX was correct in believing that Halcomb violated its workplace violence policy is irrelevant. Rather, whether CSX's belief was honest and in good faith is the inquiry pertinent to my determination of whether there are any indications of pretext.

To evaluate whether a stated reason for discipline was honest and in good faith, at least one federal Circuit, the Sixth, has examined whether the employer made a reasonably informed and considered decision.³⁰ Towards this end, the Sixth Circuit has examined whether the employer conducted a reasonable investigation before making its decision.³¹ The court does "not require that the decisional process used by the employer be optimal or that it left no stone unturned."³² But, it must be reasonable.³³

I will use the honest belief rule and examine the reasonableness of CSX's investigation into the charge that Halcomb violated its workplace violence policy to further evaluate whether

²⁷ *Fricka*, ARB No. 14-047, PDF at 11 (Corchado, J., concurring).

²⁸ See, e.g., *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018); *Tibbs v. Calvary United Methodist Church*, No. 11-5238, 505 Fed. Appx. 508 (6th Cir. Nov. 20, 2012) (unpub.); *Cash v. Lockhead Martin Corp.*, No. CIV 15-506 JAP/LF, 2016 WL 8919403, *7-10 (D.N.M. July 1, 2016) ("the court's inquiry is limited to whether the defendant honestly believed the reasons it offered to explain its decision and whether it acted in good faith as to those beliefs").

²⁹ *In re UAL Corp.*, No. 02-B-48191, 2008 WL 450457, *20 (Bankr. N.D. Ill. Feb. 15, 2008) (quoting *Imeichen v. Ameritech*, 410 F.3d 956, 961 (7th Cir.2005); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 696 (7th Cir.2006) (pretext inquiry must focus on whether the employer's stated reason is honest, not well-reasoned, wise, or accurate).

³⁰ See *Tibbs*, 505 Fed. Appx. at 513-14; *Chen v. Dow Chemical Co.*, 580 F.3d 394, 401 (6th Cir. 2009); *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 598-600 (6th Cir. 2007) ("The key inquiry in assessing whether an employer holds such an honest belief is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action") (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998); *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001).

³¹ See, e.g., *Michael*, 496 F.3d at 598-600.

³² *Id.* at 599.

³³ *Id.* at 598-600.

CSX's stated reason for terminating Halcomb is pretextual. I have already examined Halcomb's claim of disparate treatment and a pattern of antagonism by CSX management, as well as the lack of a temporal relationship between Halcomb's protected and allegedly protected activity and the adverse actions taken against him. A finding of pretext would discredit CSX and likely also result in a finding that Halcomb's protected activity contributed to CSX's decision to terminate him.³⁴

a. The Reasonableness of CSX's Investigation

The initial phase of CSX's investigation of Halcomb is described above in Section III.D.1.b.

CSX provided Halcomb with written notification dated February 2, 2018, that he was to attend a formal investigation on February 21, 2018, "to determine the facts and place [Halcomb's] responsibility, if any, in connection with information received that on January 25, 2018, at approximately 1530 hours, in the vicinity of Hawthorne Yard, it was reported that [Halcomb] displayed aggressive and violent behavior towards an employee when [Halcomb] challenged him to a fight" (JX 6; Tr. 80-81). Halcomb testified that given the language of the notification, he was not aware that the investigation was about the January 9 incident until the formal investigation. (Tr. 80-81). Halcomb further complained that the witnesses at the formal investigation were not sequestered. (Tr. 87).

The formal investigation (hearing) occurred on February 21, 2018. (JX7 at 29). CSX manager Adam Gerth presided over CSX's formal investigation of Halcomb. (Tr. 339). A transcript of the formal investigation is found at JX 7. JX 8 is Gerth's notice of findings from the formal investigation. (Tr. 339-340). Gerth testified that at the time of the formal investigation, he did not know Halcomb, anything about his report of a bee sting, about any problems with the tie conditions at Shelby or the FRA's involvement, or about Halcomb reporting Johnson for speeding, an accident or bumper problem, or Campione. (Tr. 342-343, 351-352, 360-362, 366-369). Gerth explained how he completed JX 8 and what he considered in making his findings, including that the testimony of Williams, Hooker, and Hutchinson was consistent and contradicted that of Halcomb. (See Tr. 340, 342-347).³⁵ After Gerth submitted his notice of findings, it would have gone to Jacksonville and Gerth had no further role in the discipline or discharge of Halcomb. (Tr. 347).

On cross examination, Gerth testified that he would not permit Bales to testify at the formal investigation about some tension in the office and if Bales had intervened to alleviate such tension because that was getting into other incidents. (Tr. 353-354). Gerth further testified:

³⁴ The honest belief rule has been used in the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See, e.g., *Tibbs*, 505 Fed. Appx. at 512-513. To be clear, this court is not using the burden-shifting framework set forth in *McDonnell*.

³⁵ Gerth testified that his notice of findings indicates rule 104.3c was proven, but this was an input error. A violation of rule 104.3 was not presented at the formal investigation and this error did not impact Gerth's findings. (Tr. 347).

Q. And, in fact, there wasn't any testimony that was permitted in that case that was issues or brought up about the credibility of Mr. Williams, Mr. Hooker, or Mr. Hutchinson; true?

A. That's correct. And Mr. Rapier, in the process of the examination, never brought anything up to that effect either that I can recall.

* * *

Q. In fact, you didn't allow any evidence, you yourself didn't ask any questions that concerned anything about any of the credibility of any of the witnesses testifying against Mr. Halcomb; true?

A. Yes.

(Tr. 355, 358). And, Gerth testified that he did not consider the late reporting of the January 9 incident by the witnesses or Williams' failure to report the running-off-the-road incident in making his findings. It did not cross his mind to or he does not know why he did not. (Tr. 367-369).

Division Engineer Jason Hess testified that he had the final say as far as the outcome of discipline, but his decisions could be overruled by CSX's Field Administration and Labor Relations groups. In making such decision or recommendation, Hess uses the transcript from the formal investigation and the hearing officer's notice of findings. He also uses CSX's Field Administration and Labor Relations groups as resources. The Field Administration group helps insure that discipline is fair and consistent across the network and writes the charge letters. The Labor Relations group ensures that CSX is in compliance with the collective bargaining agreement. (Tr. 536-539, 554-555; *see* JX 9; Tr. 648, 666, 682).

Hess testified that he decided to terminate Halcomb based on the facts presented at the formal investigation and the notice of findings. (Tr. 539, 542-544; JX 9). Further, he testified regarding the significance of various facts in making his decision. Hess decided to terminate Halcomb for workplace violence. (*See* Tr.540-544, 572).³⁶ He testified that he was protecting his employee. (Tr. 570-572).

Hess was aware of the Shelbyville track tie condition reported by Halcomb and that the FRA investigated and issued violations. Hess was aware that Halcomb had reported a bee sting. Hess was aware that Halcomb had reported Johnson speeding twice in September 2017. Hess testified that these activities by Halcomb did not factor into his decision to terminate Halcomb's employment. Hess testified that he was not aware of Halcomb's allegation of a vehicle cover up, is not sure whether he was aware that Halcomb had filed an ethics complaint, does not recall Halcomb reporting Campione, and was not aware of an argument between Halcomb and Hutchinson in January 2018. (Tr. 550-552).

CSX's Manager of Field Administration, Toni Eady, testified that CSX has zero tolerance for workplace violence. The severity of the rule violation with which Halcomb was charged was

³⁶ Hess testified that he did not know what rules 104.3c and 2000.1 are. (Tr. 543). They are listed as proven in the hearing officer's notice of findings. (JX 8).

major. Discipline up to dismissal is appropriate for such a charge. To ensure the fair and consistent application of discipline to Halcomb, Field Administration ran a comparison of other cases over an 18-month period, which involved workplace violence, but not physical altercations. That comparison is found at RX 8. (Tr. 642, 649-652, 660-661).

Eady further testified that she expects a hearing officer to examine the credibility of witnesses. She further expects the hearing officer to take testimony and delve into issues that may affect whether an event took place. If a hearing officer does not, the hearing would not be fair. (Tr. 660).

Labor Relations Manager Macon Jones testified that Labor Relations looks at a case to ensure that the requirements of the collective bargaining agreement, including procedure, burden of proof, and discipline being consistent with internal policies are satisfied and that the employee is being treated fairly and consistently with how CSX operates. Jones testified that CSX terminated Halcomb for several rule violations,³⁷ but the primary violation was workplace violence. Labor Relations reviewed Halcomb's case prior to his termination and provided a recommendation. It supported discipline and recommended termination. Labor Relations' analysis of the case is contained within RX 14. (Tr. 678, 680, 685-689).

Jones testified that he considered the dates that Hutchinson gave his statement and Williams reported the January 9 incident. He testified that he accepted Williams' testimony as truthful:

Q. Did it raise any concerns in your mind with respect to credibility of witnesses that Mr. Williams had waited 16 days before he made an allegation that this event occurred between him and Mr. Halcomb?

A. Sure. So that was . . . one of the things that we considered. But as a review of the transcript -- and, like I said, being someone who has prosecuted, I mean, there's a variety of reasons why someone may have delayed reporting of a violent incident. I mean, that's not uncommon for there to be a delay in reporting. So I was pretty particular about what was Mr. Williams' explanation for that delay. And he testified that he was scared and that really he thought he could get away from it. He thought he could bid out and he wouldn't have to deal with it. He was held over, I believe, on the assignment an extra week. And he said that he observed another startling incident that caused him to report. And that explanation, again, that was cross-examined and tested by the organization's rep in the hearing I thought was a satisfactory explanation. And I did not find it to be -
- I did not find there to be a problem with his credibility.

³⁷ Based on Jones' testimony, I infer that Jones was referring to Gerth's notice of findings, which referenced multiple proven charges. But, other than the testimony about a violation of rule 104.3c being in error, there was no explanation of other rule violations. Nonetheless, I do not discount Jones' testimony for this reason as it does not detract from the remainder of his testimony or the other evidence in this case that CSX terminated Halcomb for workplace violence.

(Tr. 700-701). Jones discussed other issues raised by Claimant's counsel regarding witness credibility and pointed out that there were three different witnesses against Halcomb, so minor inconsistencies "wouldn't necessarily sink the ship" (Tr. 704; *see* Tr. 701-703, 705-708).

CSX took Williams' complaint of workplace violence by Halcomb. CSX's charging officer Bales obtained written statements from the pertinent witnesses: complainant Williams; eyewitness Hooker; the accused, Halcomb; and corroborating witness Hutchinson. CSX referred the matter to a formal investigation conducted by manager Gerth. Bales, Williams, Hooker, Hutchinson, and Halcomb all testified at the formal investigation. (*See* JX 7). Gerth completed a notice of findings after the investigation in which he found that the charge of workplace violence against Halcomb had been proven. Hess reviewed the notice of findings and transcript from the hearing and decided that Halcomb should be terminated for workplace violence. CSX's Field Administration and Labor Relations groups reviewed the case and concurred. And, CSX terminated Halcomb.

There is no evidence that there was any witness or document available to CSX and crucial to a fair and reasonable determination of Halcomb's case that CSX ignored or otherwise failed to consider. Although there were attacks on Gerth's and CSX's failure to consider certain points relevant to the credibility of witnesses (discussed above), I find that Gerth's failure and that of any other CSX employee was insubstantial. Moreover, Jones did consider one or more of the issues that Gerth did not, e.g., the late reporting of the January 9 incident. In light of my determinations of the credibility of the witnesses in this case, any errors by Gerth and others at CSX in the investigation of this matter were harmless error at best for Halcomb. And, irrespective of my findings of credibility, the standard for a good faith decision by CSX requires that its investigation be reasonable, not perfect. I find that CSX's investigation of the workplace violence charge against Halcomb was reasonable. Accordingly, I find that CSX had a honest and good faith belief that Halcomb committed workplace violence and should be terminated for such act. This supports a finding that CSX's reason for terminating Halcomb was not pretextual.³⁸

6. CSX's Knowledge of Halcomb's Protected Activity

With respect to CSX's knowledge of Halcomb's protected and allegedly protected activities before taking adverse action against him, it is undisputed that Halcomb reported that he thought someone was covering up a vehicle accident to Campione and Warpenburg; Campione and Warpenburg investigated Halcomb's report of a bee sting, (Tr. 45-46), and Hess was aware of the report; Warpenburg was aware that Halcomb had made an ethics complaint against him, (Tr. 229, 232); Campione and Hess were aware that Halcomb reported tie defects to CSX; Campione was aware of Halcomb's cooperation with the FRA and Hess was aware that the FRA investigated and issued violations; and Warpenburg and Hess were aware of Halcomb twice reporting a speeding CSX truck, (*see* Tr. 62-65).

Based on the foregoing and the entire record before me, I find that CSX, including Hess, the manager who decided to terminate Halcomb, were aware of Halcomb's report of a bee sting,

³⁸ Further, I find that it was not unreasonable for CSX to take Halcomb out of service pending the conclusion of its formal investigation of Halcomb. There is no evidence to indicate that such action was inappropriate or different from how CSX handles other allegations of workplace violence.

report of tie defects on the Shelbyville track to CSX and Halcomb's cooperation with the FRA, and reports of a speeding CSX truck. Further, I find that CSX, including Warpenburg who participated in the investigation of Halcomb to a minimum extent, were aware of Halcomb reporting that he thought someone was covering up a vehicle accident, Halcomb's ethics complaint, and Halcomb reporting Campione for crossing a live track. It is logical that without such knowledge by CSX, Halcomb could not prove contributing factor causation. However, such findings do not establish contributing factor causation either.

7. Conclusion Regarding No Contributing Factor Causation

Based on the entire record before me, I find that Halcomb has failed to demonstrate contributing factor causation between any of his protected or allegedly protected activities and the adverse actions taken against him. My rationale for this finding is that there was no disparate treatment of Halcomb by CSX, no temporal relationship between Halcomb's protected and allegedly protected activities and the adverse actions taken against him, no pattern of antagonism by CSX towards Halcomb, and CSX had a honest and good faith belief that Halcomb committed workplace violence and should be terminated for that act.

E. No Discriminatory Motive or Animus

According to the Board, “[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.”³⁹ However, in satisfying this standard, the Board has held that “an employee need not prove retaliatory animus, or motivation or intent, to prove that this protected activity contributed to the adverse employment action at issue.”⁴⁰ Conversely, the Seventh Circuit has held that a showing of discriminatory animus is required by the FRSA, and it “necessarily includes some proof of retaliatory motive.”⁴¹ Also, the Seventh Circuit has stated that:

The analysis of whether the employer possessed an improper (i.e., retaliatory) motive is separate from the analysis of whether, and to what extent, that motive influenced the employer's actions.

Based on the entire record before me, I find that Halcomb has failed to demonstrate any retaliatory animus or motive by CSX in taking Halcomb out of service and terminating his employment. I further find that CSX did not engage in intentional discrimination against

³⁹ *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, 2018-0060, ALJ No. 2015-FRS-00052, slip op. at 8 (Nov. 25, 2019) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)).

⁴⁰ *Rathburn*, ARB No. 16-036, PDF at 8 (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012)); *Riley v. Dakota, Minnesota & E. R.R. Corp.*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *4 (ARB Jul. 6, 2019) (declining to follow *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014), which required a complainant to prove intentional retaliation); see *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) (“the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a ‘contributing factor’ in the resulting adverse employment action”); but see *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (“while a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was a motivating factor”).

⁴¹ *Armstrong*, 880 F.3d at 382.

Halcomb. My rationale for these findings is the same as that in my discussion and findings above regarding a lack of disparate treatment of Halcomb, no temporal relationship between Halcomb's protected and allegedly protected activities and the adverse actions taken against him, no pattern of antagonism by CSX against Halcomb, and CSX's honest and good faith belief that Halcomb committed workplace violence and should be terminated for that act. My finding regarding a lack of intentional retaliation by CSX would remain the same even if retaliatory motive or animus was not required by the Seventh Circuit for a finding of intentional retaliation.

Lastly, for all the same reasons I have found that CSX did not engage in intentional retaliation against Halcomb, I further find that CSX has demonstrated by clear and convincing evidence that it would have taken Halcomb out of service and terminated his employment absent any of the protected or allegedly protected activity by Halcomb. Workplace violence is just too serious a situation to be taken lightly. CSX rightly takes allegations of workplace violence seriously, both in its policies (i.e. making workplace violence a major offense punishable by up to termination) and in its practices (i.e. dismissing 6 employees for workplace violence prior to Halcomb). CSX fairly and reasonably investigated the allegation of workplace violence against Halcomb. And, CSX demonstrated that it followed its own policies, procedures, and practices in taking Halcomb out of service and terminating his employment.

IV. ORDER

Based on the foregoing, it is ORDERED that Complainant Scott Halcomb's claim is DENIED.

SO ORDERED.

Jason A. Golden
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status

of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

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

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within

such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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