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Office of Administrative Law Judges
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Issue Date: 27 January 2020

Case No.: 2019-FRS-10

In the Matter of:

JOSHUA JACOBS,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

Appearances:

Brian Reddy, Esq.
The Reddy Law Firm
Maumee, Ohio
For Complainant, Joshua Jacobs

Barry L. Loftus, Esq.
Tyler L. Jones, Esq.
Stuart & Branigin, LLP
Lafayette, Indiana
For Respondent, Norfolk Southern Railway Co.

Before: STEVEN D. BELL
 ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act (“Act”), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, codified at 49 U.S.C. §20109 (2008)(the “Act”), and the implementing regulations found in 29 C.F.R. Part 1982. Joshua Jacobs (“Complainant”), is a locomotive engineer employed by Norfolk Southern Railway Company (“Respondent”). Complainant alleges that Respondent violated the Act when a supervisor made oral statements considered by Complainant to be threats when Complainant was returning to work following an on-duty injury.

PROCEDURAL HISTORY

Complainant alleges the unlawful oral statements were made to him on April 12, 2018. On September 20, 2018, Complainant submitted a complaint about these alleged oral statements to the Department of Labor's Occupational Safety and Health Administration ("OSHA"). Complainant submitted an amended complaint to OSHA on September 21, 2018. In his submission to OSHA, Complainant alleged that Respondent had violated the whistleblower protection provisions of the Act. OSHA dismissed the complaint on October 9, 2018. Complainant submitted his Objections to the Secretary's Findings and Request for Hearing on November 7, 2018. The case was assigned to me on December 20, 2018. At the request of the parties, I issued an Order staying the case for several months so the parties could explore settlement.

On March 27, 2018, I issued an Order opening discovery and setting the matter for hearing. Respondent filed a Motion for Summary Decision on June 28, 2019. Complainant filed his Brief in Opposition on July 22, 2019. I issued an Order Denying the Summary Decision Motion on August 8, 2019.

The hearing in this matter was held in the James M. and Thomas W.L. Ashley United States Courthouse in Toledo on October 22, 2019. Post-Hearing briefs were submitted by the parties on January 10, 2020.

THE HEARING

The hearing lasted one day. Four witnesses (including Complainant) testified. At the conclusion of the hearing, I admitted Joint Exhibits ("JX") 1 through 4,¹ Complainant's Exhibit ("CX") 1,² and Respondent's Exhibits ("RX") 2, 4 through 16, and 18 through 20.³ I have reviewed the exhibits as part of my preparation of this Decision and Order.

WHISTLEBLOWER PROTECTION UNDER THE ACT

There are two statutory employee protection provisions which I believe must be examined in my consideration of Complainant's claims. There is also a Department of Labor Regulation which I believe needs to be reviewed when deciding this case.

The first statutory provision is the employee protection provision most commonly seen in FRS whistleblower cases, and is found in 49 U.S.C. § 20109(a):

In General.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a

¹ Tr. at 158.

² *Id.*

³ *Id.* at 159.

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;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(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;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.

The second statutory employee protection provision which may apply to the facts of the case is found in 49 U.S.C. § 20109(c)(2).⁴ That section provides:

A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

I denied Respondent’s Motion for Summary Decision in part because of my explicit recognition that a claim under § 20109(c) may be presented by the facts of the case.⁵ The Joint Pre-Hearing Statement of the parties was filed after I had denied the Summary Decision motion. That Pre-Hearing Statement contained no mention of a possible claim arising under § 20109(c). As it did not appear that the parties were going to consider the application of § 20109(c) to the facts of the case, I wanted to be certain that counsel were aware that I considered a possible claim under § 20109(c) to be before me. Accordingly, I conducted a conference call with counsel before the commencement of the hearing for the explicit purpose of notifying counsel that I believed a claim arising under § 20109(c) may be presented by the facts of the case, and I then notified counsel that I was going to consider such a claim.⁶ During that same conference call, I invited counsel to admit evidence and make argument on any such § 20109(c) claim. At the outset of the formal hearing, I again told counsel that “I would hear evidence which might show a violation under either 49 U.S.C. 20109(a) or 20109(c). Based on what I know of the

⁴ Complainant has not consistently argued that his claim arises under § 20109(c). At the time he filed with OSHA, Complainant asserted only a claim under the statutory provisions of § 20109(a)(4). Complainant’s Post-Hearing Brief argues only a violation of § 20109(a)(4). I believe I have an obligation to protect the Complainant from any unlawful retaliation which may have taken against him by Respondent if that retaliation has been proven by the evidence admitted at the hearing. I repeatedly informed counsel before the hearing that I was amenable to hearing evidence and argument about any § 20109(c) claim. I gave repeated, and explicit, notice of my intention to consider whether a § 20109(c) claim was presented by the facts of the case. One week before the commencement of the hearing, I conducted a conference call with counsel to make it clear that I would hear evidence of any § 20109(c) claim. *See* Transcript of October 16, 2019 Conference Call. I do not believe there is any due process violation which attaches to my evaluation of any possible § 20109(c) claim despite the fact that Complainant never asserted such a claim, and despite the fact that neither party has chosen to discuss such a claim in detail at any time during the course of this case.

⁵ August 8, 2019 Order denying Summary Decision at 2.

⁶ I told counsel: “I wanted to make it clear that at the hearing next week, I’ll accept evidence going to violations of either 20109(a) or 20109(c).” Transcript of October 16, 2019 telephone conference at 6.

evidence in this case, I believe the evidence that will be introduced here today would be amenable to either of those two statutory subsections.”⁷

As it applies to this case, there are significant difference between the statutory language contained in 49 U.S.C. § 20109(a) and the language of the Regulations which implement that section of the Act. I place the two provisions side-by-side in order to illuminate the differences – which I believe may be significant in my consideration of this case:

Statutory Language 49 U.S.C. §20109(a)(4)	Regulatory Language 29 C.F.R. §1982.102(b)
<p>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 <i>discriminate</i> 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-</p> <p>(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.⁸</p>	<p>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 <i>retaliate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining</i>, an employee if such retaliation 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 –</p> <p>(iv) 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.⁹</p>

The Act was amended in 2008. Among the amendments was the addition of the language now codified as 49 U.S.C. § 20109(c) – which (in very general terms) prohibits a railroad from threatening to discipline an employee who has suffered an on-duty illness or injury.¹⁰ Interim rules incorporating the 2008 amendments into 29 C.F.R. Part 1982, and a request for public comment on the interim rules, were published in the Federal Register on August 31, 2010. The final rules (from which the quotation above has been taken) were effective on November 9, 2016 (80 Fed. Reg. 69115-01), and are thus applicable to the facts of this case which occurred in 2017 and 2018. The Regulations clarify the ambiguous phrase of the statute “or in any other was discriminate against an employee” by making clear that threats or acts of intimidation will be

⁷ Tr. 6.

⁸ 49 U.S.C. § 20109(a)(emphasis added).

⁹ 29 C.F.R. § 1982.102(b) (emphasis added).

¹⁰ The ARB’s decision in *Santiago v. Metro-North Commuter Railroad Company, Inc.* (ALJ Case No. 2009-FRS-11), (ARB Case No. 2010-147) (ARB July 25, 2012), 2012 WL 3164360, provides a detailed description of the amendment of the Act.

considered adverse employment actions under the statute. As the Supreme Court has recently noted: “When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that ‘relatively formal administrative procedure’ is a ‘very good indicator’ that Congress intended the regulation to carry the force of law.”¹¹ I conclude that the Regulation quoted above was enacted to give full meaning to an ambiguous phrase used in the statute. I conclude the regulation was subject to notice-and-comment rulemaking processes. I conclude the Regulation has the force and effect of law. Under the explicit language of the Regulation, threats or acts of intimidation directed towards a railroad employee who has notified a railroad carrier of a work-related personal injury are prohibited – and thus unlawful – acts.

When considering a whistleblower complaint brought under 49 U.S.C. § 20109 and the Regulations, I must review the *en banc* decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016). That decision describes the burdens of proof that will be applicable in cases subject to the AIR-21 architecture. Congress has amended the Act to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century (“AIR-21”), 49 U.S.C. §42121(b).¹²

In order to prove a violation of 49 U.S.C. § 20109 or 29 C.F.R. § 1982.102(b), Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; and (2) that Respondent took an adverse employment action against him, and (3) that his protected activity was a contributing factor in the adverse action. Protected activity is a contributing factor if “the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision.” 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) If the employee does not prove one of these elements, the entire complaint fails. *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

If Complainant proves by a preponderance of evidence that he engaged in protected activity, and that he suffered an adverse employment action, and if he also proves that his protected activity was a contributing factor in the decision to discriminate against him, then Complainant will have satisfied his burden of proof of unlawful discrimination. At that point, the burden of proof will shift to Respondent. Respondent may avoid liability if it proves by clear and convincing evidence that the 40-day suspension imposed on Complainant was the result of events or decisions independent of Complainant’s participation in protected activity.¹³

STATEMENT OF FACTS

Complainant has worked for Respondent since 2004.¹⁴ In November 2017 he was a federally-certified locomotive engineer.¹⁵ On November 28, 2017, Complainant was a passenger

¹¹ *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2123 (2016).

¹² Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.

¹³ The ARB’s decision in *Santiago* (at page 12 of the slip opinion) discusses how the affirmative defense might actually be applied in a case arising under 49 U.S.C. § 20109(c).

¹⁴ Tr. 17.

¹⁵ *Id.*

in a motor vehicle being used by Respondent to transport Complainant and his conductor from Bellevue, Ohio to Toledo.¹⁶ At approximately 5:45 am on that date, while nearing Toledo on the Ohio Turnpike, the driver of the transport vehicle apparently fell asleep. The vehicle veered off the highway.¹⁷ Complainant suffered an injury to his shoulder. He initially returned to work, but the pain forced him to stop working.¹⁸ Complainant made a report of his injury within a few hours after the accident.¹⁹ Complainant returned to work immediately after the accident, but he was not able to perform his job because of the injury sustained in the automobile accident.²⁰ Complainant then stopped working. Complainant underwent surgery on his shoulder in February 2018.²¹

In March 2018, Complainant's physician cleared Complainant to return to work.²² On April 10, 2018, Respondent concluded that Complainant was "medically qualified . . . to return to work without restriction."²³ Respondent has a defined process for such returns-to-work, which was referred to during the hearing as "the 12-step process." One step in this process was for Complainant to have a "one-on-one conference"²⁴ with a supervisor. On April 12, 2018, Complainant met with John Turpie, who was then the Terminal Superintendent of Respondent's Toledo yard in order to complete this step.²⁵

Complainant was asked to recount what was said to him by Turpie during the April 12, 2018 meeting:

Q. Can you tell us what occurred during that meeting? What is it that Mr. Turpie said to you?

A. We sat down and were discussing coming back to work. At that point he explained to me that even though it wasn't my fault for getting injured, it was my fault because I filed a non-duty injury report. I was a bad employee. And he told me that when you return to work prepare to be harassed. We don't call it harassment. We call it rules checks.

JUDGE BELL: Okay. It would be helpful for me, because it seems like your answer to that question was in part a summary, and in part you put your fingers in the air to draw quotation marks around things that you said. It would be helpful for me if you could recall as specifically as you can the words that Mr. Turpie said to

¹⁶ *Id.* at 18.

¹⁷ *Id.* JX 4.

¹⁸ *Id.* at 43.

¹⁹ JX 4.

²⁰ Tr. 43.

²¹ *Id.*

²² *Id.* at 20.

²³ RX 6.

²⁴ JX 3.

²⁵ Tr. at 90.

you during this meeting so that I know what you think was said versus what your impression is of what was said.

WITNESS: I was told that when I return to work, I will be harassed, but we don't call it harassment. That's when he did the air quotations stating that it's called rules checks.²⁶

Turpie was asked to describe his recollection of the meeting:

Q. Now, thinking back about this meeting on April 12th, 2018, you and Mr. Jacobs for 15 minutes, what do you remember specifically telling him?

A. Again, I go over the 12 steps. First, I welcome him back. I say, you are medically qualified to return. I make sure that documentation is there from the medical department, which it was. I go over any rules changes, major rules changes that may have taken place. If he has any questions about that after he reviews any notices later on in the day or bulletins. And a big part of the meeting is I tell him what to expect on his first day back. We are required to get safety contacts on the employee the first time he steps on the property on his first trip, which would have been the next day if he was lined up on that EQ run like I thought he was. So he would have seen somebody for safety contact, and possibly some rules checks. I also tell them to expect to see officers quite frequently over the next couple of trips that you make in order to meet the exception report requirements.²⁷

Turpie later testified:

Q. In the meeting with Mr. Jacobs, did you use the word harass?

A. No, sir.

Q. Did you say you were going to harass him?

A. No, sir.

Q. Did you say anybody else at Norfolk Southern was going to harass him?

²⁶ *Id.* 22.

²⁷ *Id.* 106-7.

A. No, sir.

Q. Did you warn him in any way about future harassment?

A. No, sir.

Q. Did you use the word target?

A. No, sir.

Q. Did you target him?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Did you tell him that he would be targeted by anybody at Norfolk Southern?

A. No, sir.

Q. Did you call him a bad employee?

A. No, sir.

Q. Did you use the words "bad employee" in this interview?

A. No, sir.

Q. Did you warn him that he would be considered a bad employee by people at Norfolk Southern?

A. No, sir.

Q. Did you tell Mr. Jacobs that he was at fault for the November PTI accident?

A. I don't recall having a discussion about at fault, but I would have no reason to say why he was. He was a passenger in a vehicle. I would have no reason to say why he would be at fault.

Q. But do you have any recollection of accusing him of being at fault?

A. No, sir. I don't remember any discussion about at fault about anything.

Q. Okay. Did you tell Mr. Jacobs in this meeting that he would be watched very closely?

A. No, sir. What I told him was to expect to see more supervisors in the field over his next first few trips back than what he would normally be used to seeing.²⁸

Complainant has remained employed as a locomotive engineer since returning to work on April 12, 2018. He has received no discipline since his return to work. Complainant testified:

Q. Now, since the April 12th meeting with Mr. Turpie, no one at Norfolk Southern has harassed you, correct?

A. No.

Q. Is that correct?

A. That is correct.

Q. Since the April 12th meeting with Mr. Turpie, no one at Norfolk Southern has threatened you, correct?

A. No, they haven't.

Q. And you haven't been terminated since the April 12th meeting with Mr. Turpie?

A. No.

Q. And you haven't lost any time since the meeting with Mr. Turpie, correct?

A. No.

Q. I'm sorry. I'm asking double negatives. I'm sorry. I'm going to back up.

A. No, I haven't lost any time.

Q. I'm going to ask you about termination. I just wanted to be sure. Isn't it true you have not been terminated?

²⁸ *Id.* at 110-11.

A. I have not been terminated.

Q. Okay. Thank you. As a result of the April 12th meeting, you were never issued anything in writing, a letter of any kind related to your report of injury or anything correcting your behavior as a result of your meeting with Mr. Turpie, correct?

A. Can you be more specific on that? I'm not understanding.

Q. Sorry. Since the April 12th meeting, you haven't been issued a letter criticizing you for reporting your injury, correct?

A. No, I haven't received a letter criticizing me for reporting an injury.²⁹

MY DECISION-MAKING FRAMEWORK

In general terms, 49 U.S.C. § 20109(c) prohibits a railroad from “threatening an employee with discipline” where that employee has requested first aid or medical treatment, or where the employee is being treated by a physician for a work-related injury. The statute then defines the word “discipline” as follows: “to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.”

The language of 29 C.F.R. § 1982.102(b) is significantly more broad – the Regulation makes it unlawful for a railroad to threaten or intimidate an employee who is notifying (or attempting to notify) the railroad of a work-related injury.

Complainant has not been discharged or suspended or otherwise discriminated against since he returned to work in April 2018. He has not been harassed. Given the unusual facts of the case, I must develop an approach to deciding whether Complainant has suffered an adverse employment action. In developing that approach, I note that in a Title VII case, the Supreme Court considered what type of conduct would constitute actionable discrimination. After finding “that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment,”³⁰ the Court concluded:

In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it well might have “dissuaded a reasonable worker from making or supporting a charge of discrimination.”’³¹

²⁹ *Id.* 36-38.

³⁰ *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

³¹ *Id.* at 67-68.

The ARB has noted the *Burlington Northern* standard in a number of cases, beginning with *Melton v. Yellow Transp., Inc.*³² In *Williams v. American Airlines, Inc.*,³³ the ARB wrote:

While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment actions as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee.³⁴

In *Menendez v. Haliburton, Inc.*³⁵ the ARB made it clear that that adverse employment actions were not limited to those with “economic” or “tangible” consequences. The ARB found “the degree of actionable harm [is] . . . that which would deter a reasonable employee from engaging in protected activity.”³⁶

By his own admission, Complainant has suffered no “economic” or “tangible” adverse employment consequence since he returned to his job as a locomotive engineer on April 13, 2018. Despite Complainant’s inability to demonstrate that he has suffered such an “economic” or “tangible” consequence, I find that an oral statement proven to have been made to Complainant by Turpie, even if unaccompanied by any discharge, suspension, reprimand, poor performance evaluation, denial of bonus, exclusion from promotional consideration or other “economic” or “tangible” consequences, would be actionable under the Act and Regulations if the oral statement would deter a reasonable locomotive engineer³⁷ from engaging in future protected activity, and if the oral statement is proven to be related in any way to Complainant’s past participation in protected activity. I intentionally intend to apply in this case a standard that provides an expansive construction of what constitutes an actionable “adverse employment action.”

I have quoted above Complainant’s description of the conversation he had with Turpie on April 12, 2018. I have also quoted Turpie’s recollection of that same conversation. The two versions of the conversation are different. No recording or contemporaneous writing about this conversation exists. As part of my decisionmaking, (1) I must decide what Complainant has proven to be the words actually said by Turpie during the April 12, 2018 conversation.

³² ARB Case No. 06-052, ALJ No. 2005-STA 002 (ARB September 30, 2008).

³³ ARB Case No. 09-018, ALJ Case No. 2007-AIR-004 (ARB December 29, 2010).

³⁴ *Id.* at slip opinion page 15.

³⁵ ARB Case Nos. 09-002 and 09-003, ALJ Case No. 2007-SOX-005 (ARB September 13, 2011)

³⁶ *Id.* at slip opinion page 18.

³⁷ I use a “reasonable locomotive engineer” standard instead of a “reasonable railroad worker” or “reasonable man” standard because locomotive engineers are federally licensed and are subject to frequent testing and assessment of their ability to perform their jobs. Tr. 34. They are subject to “a vast array of rules governing the operation of a locomotive.” Tr. 36. As a result of the responsibility and complexity of their jobs, I believe locomotive engineers are used to dealing with supervisors more frequently than would be a “reasonable railroad worker” or a “reasonable man.”

Once I determine what Turpie actually said to Complainant, (2) I must decide whether what was said constitutes the type of “threat” that would be considered an adverse employment action under the Act or its implementing Regulations. In making that assessment, I will use the standard discussed above, which focuses on whether the words actually said are of a type that “would dissuade a reasonable employee from engaging in protected activity.”³⁸ This “reasonable employee” test eliminates the requirement for me to determine Turpie’s intent when he spoke words to Complainant on April 12, 2018. It also eliminates the need to determine the subjective impact these words may have had on Complainant when he heard Turpie speak.

MY ASSESSMENT OF COMPLAINANT’S CREDIBILITY

I had the opportunity to observe Complainant during his testimony, and I believe I am in a good position to evaluate his credibility. I believe Complainant was generally credible as he testified in the hearing. However, identification of the specific words said by Turpie during the April 12, 2018 meeting is critical to reaching an appropriate decision in the case.³⁹ Complainant apparently made no contemporaneous notes of the conversation. It does not appear that Complainant described this meeting to anyone for several months. While I find Complainant’s hearing testimony to be generally credible, I find Complainant’s recollection and description of the specific words said during the April 12, 2018 meeting to be questionable. Complainant bears the burden to prove by a preponderance of evidence (1) what was said by Turpie during the meeting, and then (2) to prove that the words spoken by Turpie constitute an actionable adverse employment action. The lack of anything resembling a contemporaneous note about the exact words used raises questions about the trustworthiness of Complainant’s recollections. Given how concerned Complainant claims to have been about what happened during his meeting with Turpie, one might reasonably expect Complainant to have made some contemporaneous note or other contemporaneous written statement about what happened during the meeting.

As discussed below, Complainant contradicted himself when describing the subjective effect of Turpie’s words on him. I take this contradiction into account when I evaluate the credibility of Complainant’s testimony.

MY ASSESSMENT OF JOHN TURPIE’S CREDIBILITY

Turpie was generally credible. Turpie admitted that he told Complainant that Complainant should expect to “see more supervisors” after Complainant returned to work. This admission positively affects my assessment of Turpie’s credibility. The cross-examination of Turpie did not cause me to doubt whether Turpie was doing his best to accurately recall a conversation which was of little apparent consequence to Turpie at the time it occurred. As is the case with Complainant, Turpie did not have access to any contemporaneous notes concerning

³⁸ *Menendez*, ARB 09-002 and 09-003, at slip opinion page 20.

³⁹ In most FRS whistleblower cases, we examine a concrete disciplinary action – a suspension or a discharge – when determining whether a claimant has satisfied his burden to prove that he suffered an adverse employment action. Here, the adverse employment action alleged is comprised of words said during a conversation that occurred 21 months ago. It is incumbent on me as the factfinder to have an accurate understanding of the exact words spoken during that meeting.

the words used during the April 12, 2018 meeting. I note that Turpie does not bear the burden of proof as to the words used during the meeting.

DISCUSSION

PROTECTED ACTIVITY

Under any of the statutory or regulatory schemes described above, Complainant must prove by a preponderance of evidence that he engaged in protected activity. When examining whether a Complainant has engaged in protected activity, my focus is on the actions which were taken by Complainant.

Complainant's Post-Hearing Brief contains only a cursory discussion of the question whether Complainant engaged in protected activity: "It is clear from the plain language of the FRSA that by reporting his work-related personal injury, Complainant engaged in protected activity under that statute."⁴⁰ Complainant offers no other analysis of this element of his case.

The Act provides protection against retaliation for railroad workers when they "notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness."⁴¹ Complainant was injured in an automobile accident on November 28, 2017. Complainant immediately notified his supervisor that he had been involved in an accident, and his supervisor responded to the scene of the accident.⁴² Complainant's supervisor then went to the hospital where Complainant had been taken for evaluation.⁴³ JX 4 is the report of injury made by Complainant on the day of the accident. No allegation has been made in this case that Complainant was discouraged from, or interfered with, reporting the injuries sustained by him in the automobile accident at the time Complainant created JX 4.⁴⁴ No claim has been made that Complainant was punished or otherwise discriminated against at the time he reported his injuries caused by the November 2017 automobile accident.

After an unsuccessful attempt to return to work immediately after the accident, Complainant took time off to treat the injuries sustained in that accident. Complainant eventually underwent surgery on his shoulder. Complainant then underwent post-surgical treatment under the direction of his physician.⁴⁵ In March 2018, Complainant was cleared to return to work by his physician.⁴⁶ No claim has been made in this case that Complainant was disciplined, threatened with discipline, or was otherwise discriminated against during the time he was away from work under the supervision of his physician.

At the time Complainant met with Turpie on April 12, 2018 Complainant's physician had opined that Complainant's medical recovery from the injuries sustained in the November 28,

⁴⁰ Complainant's Post-Hearing Brief at 4.

⁴¹ 49 U.S.C. § 20109(a)(4).

⁴² Tr. 56.

⁴³ *Id.* 58-9.

⁴⁴ When asked whether he was ever criticized for reporting his injury, Complainant answered "No." Tr. 34.

⁴⁵ RX 4 at page 2 is a progress note from Complainant's physician dated March 21, 2018, which shows that Complainant was then still under the care of a physician for his shoulder injury.

⁴⁶ *Id.*

2017 automobile accident was complete.⁴⁷ According to the testimony of Complainant and Turpie, Complainant made no attempt during the April 12, 2018 meeting to notify Turpie or anyone else of a recent “work-related personal injury or work-related illness.” Instead, according to the testimony, Complainant met with Turpie as part of the process by which Complainant would be able to return to work after fully and successfully recovering from the injury he had sustained months before. Complainant was returned to work immediately after the April 12, 2018 meeting with Turpie.⁴⁸

Based on my review of all of the evidence, I conclude that Complainant was engaged in protected activity when he notified his supervisor on November 28, 2017 that he had suffered an injury as a result of the automobile accident that had happened earlier that morning.⁴⁹ I also believe Complainant engaged in protected activity when, after his unsuccessful attempt to return to work, he notified Respondent in late-November or early-December 2017 that he would need to step away from his job duties to have surgery on his shoulder. The language in 49 U.S.C. § 20109(c) makes clear that Complainant could not be disciplined (or threatened with discipline) so long as he was recovering from his injury under the supervision of his physician.

I conclude that Complainant was not involved in protected activity during his April 12, 2018 meeting with Turpie. During that meeting, Complainant was not reporting or attempting to report a work-related injury or illness. Rather, Complainant was arranging to return to work from an injury that had already been reported by him months before and from which he had fully recovered by April 12, 2018. It does not appear that Complainant was under the care of a physician for his shoulder injury at the time he met with Turpie on April 12, 2018.⁵⁰

In order to prevail on his claim, Complainant will need to prove a relationship between the activities I have found to be protected and any adverse employment action(s) which may have been taken against him.

ADVERSE EMPLOYMENT ACTION

It has now been 21-plus months since Complainant returned to work following the injury he suffered in the November 2017 automobile accident. In the 21-plus months since returning to work, Complainant has not been discharged, suspended, demoted or suffered any loss of pay or benefits as a consequence of reporting his job-related injury in November or December of 2017. He cannot point to any harassment, intimidation or other discrimination which has affected him in those 21-plus months.

⁴⁷ RX 4-2.

⁴⁸ JX 2 shows that Complainant was scheduled to make his engineer qualifying (“EQ”) trip the day following his meeting with Turpie.

⁴⁹ JX 4 (“the vehicle went down . . . the right side of the road [unknown word] grass and gravel which caused me to be injured from being tossed when vehicle left the paved roadway.”)

⁵⁰ RX 6 indicates that Complainant was cleared to return to work “without restriction” as of April 10, 2018. I do not believe Respondent would have allowed Complainant to return to work if he was still under the care of his doctor. RX 4 indicates Complainant had been prescribed Percocet “as needed” as part of the treatment plan put in place by his physician.

In his Post-Hearing Brief, Complainant describes his adverse employment action as follows:

Complainant testified that he is constantly looking over his shoulder, waiting to be disciplined, because, he was told that was a bad employee for being injured at . . . work and therefore, he should expect to be harassed. Although, there was no ‘tangible’ discipline he can point to, the fact that he was made to believe he was going to be singled-out cannot reasonably be interpreted as not being an adverse action.⁵¹

I find that Complainant has proven by a preponderance of the evidence that Turpie said words to this effect to Complainant during the April 12, 2018 meeting:

1. “You should expect to see more supervisors than you are used to seeing after you return to work.”

I find Complainant has sustained his burden of proof as to the foregoing statement because Turpie admitted to making this statement. Turpie’s admission corroborates that this statement was made.⁵²

I find that Complainant has failed to prove by a preponderance of evidence that Turpie said words to this effect during the April 12, 2018 meeting:

1. “You are a bad employee.”
2. “You are going to be harassed.”
3. “Norfolk Southern considers you to be at fault for your accident.”

As the trier of fact, I conclude that Complainant failed to sustain his burden of proving that Turpie made the foregoing 3 statements because Complainant has produced no corroboration that these 3 statements were said by Turpie. Turpie denies making these statements.⁵³ As noted above, I have little confidence in Complainant’s ability to accurately describe the specific words used by Turpie during the meeting. The evidence as to whether these 3 statements were actually made by Turpie is, at best, in equipoise. Complainant has failed to carry his burden of proving that Turpie made any of the 3 statements listed above.

The question now is whether Turpie’s statement made to Complainant that “you should expect to see more supervisors than you are used to seeing after you return to work” is the type of statement that “would deter a reasonable locomotive engineer from engaging in protected activity.” If not, Turpie’s statement is not an adverse employment action.

⁵¹ Complainant’s Post-Hearing Brief at 6-7.

⁵² Turpie’s exact testimony was: “What I told [Complainant] was to expect to see more supervisors in the field over his next first few trips back than what he would normally be used to seeing.” Tr. 111.

⁵³ Tr. 110-11.

At the hearing, Complainant presented evidence only of his *subjective* reaction to the statements he alleges were made by Turpie during the meeting of April 12, 2018. Complainant testified as follows:

Q. How do you feel -- well, let me put it this way. Has the fact that you had this conversation were Mr. Turpie, the one we just discussed, has that affected your outlook of work at all about how you feel about working at Norfolk Southern?

A. Yes.

Q. Can you tell us how?

A. I mean, when I go to work, I'm always constantly doubling-checking myself. I don't mark off sick for anything. Unfortunately, my family has suffered for that. Countless birthdays and holidays and stuff not being able to be home, just because I'm afraid of retaliation. 'Hey, you marked off too much,' or 'You made this mistake,' or 'Why did you make that mistake,' or 'You're just being careless.' It's just constantly always watching over your shoulder, like, where are they going to be at? What are they going to come up and say? It's always been, hey, you did a great job, but that's when they want to put it on you that, hey, you are a great employee, but you broke all of these rules.

Q. Do you believe you broke any rules?

A. No.

Q. How do you feel about in the future if something occurs, God forbid, but if you have another on-duty injury, are you going to report **it**?

A. Most definitely.

Q. Did you feel in any way that the conversation with Mr. Turpie was an attempt to dissuade you from reporting **it** in the future?

MR. LOFTUS: Object to the form. Calls for speculation.

JUDGE BELL: Overruled. He can answer.

THE WITNESS: Yes.⁵⁴

⁵⁴ Tr. 25-6 (emphasis added).

Under the standard for proving adverse employment action that I have discussed above, such *subjective* evidence – taken alone – is not sufficient to prove whether a reasonable locomotive engineer would be dissuaded from engaging in protected activity after hearing Turpie say “you should expect to see more supervisors than you are used to seeing after you return to work.” Complainant has not satisfied his burden of proof to demonstrate that a reasonable locomotive engineer would be deterred from engaging in protected activity because of Turpie’s statement.⁵⁵ The testimony of Complainant cited above does not address the legal question before me in this case.

Even were I to determine that Complainant’s *subjective* reaction to Turpie’s statement is the appropriate measure of whether that statement represents an adverse employment action, I would be unable to accept Complainant’s self-contradicting testimony as credible evidence supporting his claim. Within the space of two questions, Complainant first said that he will “most definitely” report a future on-duty injury, but then he immediately testifies that he would be dissuaded from making that exact same report⁵⁶ because of “the conversation with Mr. Turpie.”⁵⁷ Complainant’s testimony that he would be dissuaded from making a future injury report because of the statements made to him by Turpie is not credible because that answer is contradicted by his answer to the immediately preceding question.

As the trier of fact, and after taking into consideration all of the evidence and arguments of counsel, I do not believe that a reasonable locomotive engineer would feel that he was being deterred from reporting a future injury, or deterred from otherwise engaging in protected activity, if, during his return to work from a previous injury, that reasonable locomotive engineer’s supervisor said “you should expect to see more supervisors after you return to work than you are used to seeing.” Locomotive engineers are federally licensed, and must conform the movement of trains under their control to a thick set of operating rules, timetables and federal regulations. I believe a reasonable locomotive engineer understands that his job actions are frequently subject to close scrutiny from supervisors. That appears to be a part of the job of locomotive engineer. As the trier of fact, I do not believe Complainant has proven by a preponderance of evidence that a reasonable locomotive engineer returning to work after a 4-month absence would understand a statement of the type made by Turpie to dissuade that locomotive engineer from reporting a future injury or otherwise engaging in protected activity. I believe a reasonable locomotive engineer would understand Turpie’s statement to be a non-threatening statement that an engineer returning from a long absence will be closely scrutinized by his supervisors for a while.

⁵⁵ Complainant likely was competent to offer an opinion as to whether a “reasonable locomotive engineer” would have heard Turpie’s statements as a threat not to engage in protected activity. Any experienced locomotive engineer would have been competent to offer an opinion on this subject. None of that opinion evidence was presented at the hearing.

⁵⁶ The second appearance of the bolded word “it” in the quotation immediately above appears to refer to a reported injury.

⁵⁷ Tr. 25-6. Complainant has not presented evidence as to his subjective reaction to the specific statement made by Turpie that “you should expect to see more supervisors than you are used to seeing after you return to work.” Complainant has described only his subjective reaction to “the conversation with Mr. Turpie.” As noted earlier, Complainant failed to satisfy his burden of proving that some of these alleged statements were actually made.

I find that Complainant has failed to prove by a preponderance of the evidence that he suffered an adverse employment action because of the statement he has proven to have been said by John Turpie in the April 12, 2018 return-to-work conference. Complainant has failed to prove that he has suffered any other adverse employment action since he returned to work in April 2018.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁵⁸

This matter has been assigned to me for approximately one year. During that time, I have ruled on Respondent's Motion for Summary Decision. I believe I was fully conversant with this matter before the hearing began. I believe the transcript of the hearing accurately reflects that I was engaged and involved in the hearing itself. During the hearing, I observed the demeanor of the witnesses carefully, and I listened carefully to the testimony of those witnesses. I have re-read the entire transcript of the hearing as part of my preparation of this Decision and Order. I have carefully reviewed all of the exhibits admitted into the record during the hearing. I have carefully considered all of the arguments made by counsel in their respective post-hearing briefs. My long engagement in this case has put me in a good position to evaluate all of the evidence, and to resolve conflicts in that evidence. I believe I am in a good position to evaluate the credibility of the witnesses who testified during the hearing.

I make the following Findings of Fact and Conclusions of Law:

1. Respondent is subject to the Act.
2. On November 28, 2017, Complainant reported to Respondent that he had suffered an on-duty injury.
3. Complainant engaged in activity protected under the Act and the Act's implementing Regulations when he made his report of an on-duty injury on November 28, 2017.
4. At some point in November or December 2017, Complainant advised Respondent that he would need to have surgery on his shoulder.
5. Complainant engaged in protected activity when he advised Respondent that he would need to undergo surgery.
6. Complainant underwent surgery for his injury. Until approximately March 21, 2018, Complainant was recovering from surgery under a treatment plan developed by Complainant's physician.

⁵⁸ The ARB has recently expressed a preference for ALJs including a "tightly focused findings of fact section" in our decisions. *Austin v. BNSF Railway Company*, ALJ No. 2016-FRS-13, ARB Case 2017-24 (ARB March 11, 2019) slip op. at 2, n3.

7. On or about March 21, 2018, Complainant's physician determined that he was able to return to work.
8. On or about April 10, 2018, Respondent determined that Complainant was cleared to return to work.
9. On April 12, 2018, Complainant met with a supervisor, John Turpie.
10. During the April 12, 2018 meeting with Turpie, Complainant did not report or attempt to report a work-related injury or a work-related illness.
11. Complainant did not engage in protected activity during the April 12, 2018 meeting with Turpie.
12. During the meeting on April 12, 2018, Turpie told Complainant that Complainant "should expect to see more supervisors after you return to work than you are used to seeing."
13. During the meeting on April 12, 2018, Turpie did not say to Complainant "you are a bad employee."
14. During the meeting on April 12, 2018, Turpie did not tell Complainant that Complainant was at fault for Complainant's November 28, 2017 injury.
15. During the meeting on April 12, 2018, Turpie did not tell Complainant that Complainant was going to be harassed after his return to work.
16. Viewed objectively, Turpie's statement that Complainant "should expect to see more supervisors than you are used to seeing" would not dissuade a reasonable locomotive engineer from engaging in protected activity.
17. Viewed subjectively, Complainant testified that Turpie's words would not dissuade Complainant from filing a future claim for a work-related injury.
18. Under any theory of liability possible in this case (claims arising under 49 U.S.C. § 20109(a), or 49 U.S.C. § 20109(c), or under 29 C.F.R. § 1982.102(b)), Complainant must demonstrate that he has suffered an adverse employment action.
19. Viewed objectively, Turpie's statement that Complainant "should expect to see more supervisors than you are used to seeing" is not a "threat" as that word is used in 29

C.F.R. § 1982.102(b). Nor is it a “threat of discipline” as that phrase is defined in 49 U.S.C. § 20109(c).

20. Turpie’s statement to Complainant that Complainant “should expect to see more supervisors after you return to work than you are used to seeing.” is not an adverse employment action.
21. Complainant has failed to prove an essential element of his case by a preponderance of the evidence.

ORDER

Complainant’s claim is **DENIED**.

STEVEN D. BELL
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).