

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 27 December 2019

Case Nos.: 2019-FRS-00018
2019-FRS-00019

In the Matter of:

GERALD CORBIN AND
CHRISTOPHER KOPF,
Complainants,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

Appearances:

Brian Reddy, Esq.
The Reddy Law Firm
Maumee, Ohio
For Complainants, Gerald Corbin and Christopher Kopf

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

Before: STEVEN D. BELL
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

These cases arise under the whistleblower 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), and the implementing regulations found in 29 C.F.R. Part 1982. Gerald Corbin and Christopher Kopf (“Complainants”) were employees of Norfolk Southern Railway Company (“Respondent”). Complainants allege that Respondent violated the Act’s whistleblower protection provisions when Respondent disciplined them in 2017 and 2018.

PROCEDURAL HISTORY

Complainant Kopf was hired by Respondent in 1996. Kopf was terminated from his employment with Respondent on January 18, 2018.¹ At the time of his termination from employment, Kopf was a locomotive engineer based in Toledo, Ohio. On April 2, 2018, Kopf submitted a complaint to the Department of Labor's Occupational Safety and Health Administration ("OSHA").² In his submission to OSHA, Kopf alleged that Respondent had violated the whistleblower protection provisions of the Act. Following an investigation, OSHA dismissed Kopf's complaint on November 8, 2018. Kopf submitted his Objections to the Secretary's Findings and Request for Hearing on November 28, 2018.³ Kopf's case⁴ was assigned to me on December 20, 2018.

Complainant Corbin was hired by Respondent in 1998. Corbin was terminated from his employment with Respondent on October 4, 2017.⁵ At the time of his termination from employment, Corbin was a conductor based in Toledo, Ohio. On April 2, 2018, Corbin submitted a complaint to OSHA.⁶ In his submission to OSHA, Kopf alleged that Respondent had violated the whistleblower protection provisions of the Act. Following an investigation, OSHA dismissed Corbin's complaint on November 8, 2018. Corbin submitted his Objections to the Secretary's Findings and Request for Hearing on November 28, 2018.⁷ Corbin's case⁸ was assigned to me on December 20, 2018.

On January 8, 2019, I conducted a pre-hearing conference with all counsel. Counsel agreed that the cases of Kopf and Corbin should be consolidated for pre-hearing development, and for the hearing itself. On that same day, I issued an Order consolidating the cases, scheduling the hearing date and opening discovery.

Respondent filed a Motion for Summary Decision on June 21, 2019. Complainants filed their Brief in Opposition on July 12, 2019. I issued an Order Denying the Summary Decision Motion on July 15, 2019.

The hearing in this matter was held in the Barbara and Frank Cubbon Courtroom at the University of Toledo College of Law on September 10 and 11, 2019. Post-Hearing briefs were submitted by the parties on December 6, 2019.

¹ This is the date on which Kopf was sent a letter formally terminating his employment. Kopf had been held out of service without pay since December 14, 2017.

² CX 23.

³ JX O.

⁴ 2019-FRS-19.

⁵ This is the date on which Corbin was sent a letter formally terminating his employment. Corbin had been held out of service without pay since August 3, 2017.

⁶ CX 23.

⁷ JX O.

⁸ 2019-FRS-18.

THE HEARING

Prior to the commencement of the hearing, the parties entered into the following Stipulations, which I hereby adopt:⁹

Complainants, Christopher Kopf and Gerald Corbin, were hired by Norfolk Southern on August 19, 1996, and September 8, 1998, respectively. During all relevant times to this litigation, Kopf and Corbin served as a federally certified engineer and conductor, respectively. Both employees were based in Toledo, Ohio, and were a part of Norfolk Southern's Dearborn Division. Engineers and conductors are also part of Norfolk Southern's Transportation Department, which is responsible for moving its trains throughout Norfolk Southern's rail system.

On August 4, 2017, Norfolk Southern issued notices of an Investigation charging Complainants with failing to abide by Norfolk Southern Operating Rules, specifically by failing to follow the instructions of Trainmaster Simon to call the Dispatcher's Office before marking off duty before the end of their shift. The Complainants were pulled from service pending the Investigation.

The Investigation was held on September 20, 2017. Trainmaster Courtney Siffre was the Charging Officer, and Detroit Terminal Superintendent Stephen Myrick was the Hearing Officer. Complainants appeared with their union representatives. On October 3, 2017, Hearing Officer Myrick issued his decision. Corbin was dismissed from all service and Kopf received an actual suspension for time served -- approximately 49 days. Kopf returned to work shortly thereafter.

On December 7, 2017, Kopf was scheduled to work at a Detroit Edison ("DTE") facility pursuant to his duties with Norfolk Southern. Upon being requested to surrender his license by DTE personnel, at the entrance to the facility, he declined. Sometime thereafter, Trainmaster Matt Myers contacted Kopf and talked to him about his compliance with DTE rules. Later that same evening, Kopf sent an email to Norfolk Southern General Manager Greg Comstock concerning his objection to DTE's rule. He received an email response from Dearborn Division Assistant Superintendent Shannon Elston, on December 8, 2017.

On December 13, 2017, Norfolk Southern issued Superintendent's Notice #66, stating the need to present a valid driver's license when

⁹ These Stipulations are found in Respondent's August 21, 2019 Prehearing Statement at pages 3 to 5.

working a job at the DTE facility. On the same day, Kopf again attempted to enter the DTE facility, along with his fellow crewmember Thomas Jones. Upon request, Jones and the taxi driver gave their licenses. Kopf did not give his license; instead, he put his license against the window of the taxi and stated that he would permit the guard to inspect his license. The DTE guard would not permit Kopf or to enter the facility, and Kopf and his conductor waited at the DTE gates until being asked to leave.

On December 18, 2017, Kopf received a notice of Investigation into allegedly committing conduct unbecoming of an employee by failing to follow the instructions of Trainmaster Myers. The Investigation was held on January 4, 2018. Terminal Superintendent John Turpie was the Charging Officer and Steve Myrick was the Hearing Officer. Kopf appeared with his union representatives. On January 12, 2018, Hearing Officer Myrick issued his discipline and dismissed Kopf from all service with Norfolk Southern.

The hearing lasted two full days. A total of 9 witnesses (including Complainants) testified. At the conclusion of the hearing, I admitted Joint Exhibits (“JX”) 1 through 10,¹⁰ Complainants’ Exhibits (“CX”) 10, 11, 31, 32, 33, 34 and 35¹¹ and Respondent’s Exhibits (“RX”) 2, 4, 5, 7 through 17, 19 through 21 and 25.¹² The rest of the exhibits marked prior to the hearing were withdrawn.¹³ I have reviewed the exhibits as part of my preparation of this Decision and Order.

WHISTLEBLOWER PROTECTION UNDER THE ACT

The relevant employee protection provisions of the Act are these:

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

¹⁰ Tr. 39.

¹¹ *Id.* 519.

¹² *Id.* 520.

¹³ *Id.* 519, 520.

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 211.¹⁴

¹⁴ 49 U.S.C. § 20109(a).

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).¹⁵

The decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016) describes the burdens of proof that will be applicable in cases subject to the AIR-21 architecture. In order to prove a violation of the Act, each 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). Complainants must also show that those imposing discipline on them were aware of the protected activity.¹⁶ 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 either Complainant proves by a preponderance of evidence that he suffered an adverse employment action, and if that Complainant proves that he engaged in protected activity, and if he also proves that those in the disciplinary chain were aware of his participation in protected activity, and if he proves that his participation in protected activity was a contributing factor in the decision to discipline 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 discipline imposed on Complainant was the result of events or decisions independent of Complainant’s participation in protected activity. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013).

As the ARB explained in *Palmer*:

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the

¹⁵ Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.

¹⁶ *Luckie v. United Parcel Service, Inc.*, ARB Case Nos. 05-026 and 05-054 (ARB June 29, 2007), slip opinion at 15 (“[Claimant] must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity.”). The ARB’s decision in *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011) notes the Supreme Court’s acceptance of a “cat’s paw” claim in *Straub v. Proctor*, 562 U.S. 411 (2011). Such claims have been accepted in the Sixth Circuit (in which this case arises) since at least *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998). In general, a “cat’s paw” claim is one in which the trier of fact must account for whether those who actually imposed discipline but did not act with discriminatory animus were improperly influenced in their disciplinary decision-making by others who possessed an impermissible bias. *Ercegovich* at 604, n. 13.

employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.¹⁷

STATEMENT OF RELEVANT FACTS

Complainants testified that sometime in the “early summer” of 2017, each of them had a conversation with Trainmaster Courtney Siffre about the operation of a specific locomotive.¹⁸ Complainants had been told to move this specific locomotive approximately 50 miles from Detroit to Toledo.

At the hearing, Complainants said they had been instructed to operate this locomotive in “long hood forward” mode. In order to explain what is meant by the phrase “long hood forward,” I refer to the photograph of a locomotive in the record as CX 34. The cab occupied by the train’s crew is depicted on the far right of CX 34, just above the numerals 9728. Ordinarily, the locomotive is operated in such a manner that the crew cab is in the front of the locomotive as it travels (left to right as the locomotive is depicted in CX 34). However, the locomotive may also be operated such that the crew cab is at the rear of the locomotive as it travels (right to left in CX 34). When operated in such a manner that the crew cab is to the rear, the train is being operated in “long hood forward” mode.¹⁹

At the hearing, it seemed Complainants were asserting that their safety complaints about operating this specific locomotive were these: (1) operation of the locomotive in “long hood forward” mode was dangerous *per se* because in that mode the train crew has decreased vision of the road forward;²⁰ (2) this specific locomotive emitted excessive amounts of diesel exhaust,

¹⁷ *Palmer*, slip opinion at 32.

¹⁸ Tr. 68-69. The actual date of the conversations between Complainants and Siffre about this locomotive is unknown.

¹⁹ See Tr. 56-58 for a general discussion of “long hood forward” operation.

²⁰ Tr. 57.

which posed a danger because exhaust fumes might get into the cab of the locomotive and cause the eyes of the train crew to water;²¹ (3) the diesel exhaust compounded the difficulty of the crew seeing the road ahead.²²

Based upon my review of Complainant's Post-Hearing Brief,²³ it does not appear that Complainants are still arguing that that operating the locomotive in "long hood forward" mode is a *per se* safety violation, or that they engaged in protected activity because they argued against operating the locomotive in that manner.²⁴

Complainant Corbin testified that he complained to Siffre about operating the locomotive in "long hood forward" mode and about the "excessive smoke" coming from the locomotive.²⁵ Siffre agrees that "sometime in 2017" Corbin complained about operating a locomotive in "long hood forward" mode.²⁶ He does not recall Complainant Kopf making such a complaint.²⁷ Siffre does not recall either Complainant raising an issue about excessive exhaust.²⁸ No evidence was admitted at the hearing which might substantiate the fact of these conversations, or which might indicate the date on which these conversations occurred.

On August 1-2, 2017, Complainants were alleged to have left work without first obtaining the permission of their supervisor. Courtney Siffre conducted an investigation, and on August 4, 2017, Siffre charged each of the Complainants with a violation of Respondent's work rules.²⁹ Complainants were taken out of service without pay as of that date.

Pursuant to Respondent's disciplinary process, a hearing was scheduled on these alleged violations. The hearing took place on September 20, 2017 in Toledo.³⁰ Stephen Myrick, Superintendent of the Detroit Terminal, was the Hearing Officer. On October 3, 2017, Myrick announced his decisions: Complainant Corbin was discharged from his employment; Complainant Kopf was given a time-served suspension.³¹

Kopf returned to his job. On December 13, 2017, Kopf was a passenger in a taxi that was attempting to enter a Detroit and Toledo Edison ("DTE") power plant to pick up a train.³² Kopf

²¹ *Id.* 62. As is shown in CX 34, the locomotive's exhaust stack is located "behind" the crew cab when the locomotive is operated in its ordinary mode, and the crew cab thus does not pass through the stream of emitted exhaust when the locomotive is in forward motion. The exhaust stack is "in front of" the crew cab when the locomotive is operated "long hood forward," and the crew cab thus passes through the stream of emitted exhaust when the locomotive is in forward motion. It is thus possible that more diesel exhaust would enter the crew cab when the locomotive was being operated in "long hood forward" mode.

²² *Id.* 53.

²³ See Complainants' Post Hearing Brief at 2.

²⁴ Respondent disputes any safety issues arise when a locomotive is operated "long hood forward." See Respondent's Post Hearing Brief at 4-5.

²⁵ Tr. 187.

²⁶ *Id.* 269.

²⁷ *Id.*

²⁸ *Id.* 266.

²⁹ JX 5.

³⁰ The transcript of the hearing is JX 3.

³¹ JX 6.

³² Tr. 429.

refused to hand over his driver's license to the security guard at the gate. On December 19, 2017, Terminal Superintendent John Turpie issued a charge letter to Kopf, alleging that he had acted in a manner unbecoming of an employee. An investigation hearing was conducted.³³ Myrick again served as the Hearing Officer. On January 12, 2018, Myrick notified Kopf that Kopf's employment was terminated.³⁴

MY DECISION-MAKING FRAMEWORK

The Act provides that “a railroad carrier engaged in interstate . . . commerce . . . may not . . . suspend . . . 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 . . . to refuse to violate . . . any Federal law, rule, or regulation relating to railroad safety or security.”³⁵

I have cited to *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016) earlier in this Decision and Order when discussing the general burden-shifting approach I am required to follow in this case. I now cite to the very specific instructions given by the ARB to ALJs in *Palmer* which I am to employ when I evaluate the existence of any causal relationship between a Complainant's alleged protected activity and the alleged adverse employment action suffered by him. My decisional framework includes fidelity to the ARB's causation analysis:

We have said it many a time before, but we cannot say it enough: ‘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.’ We want to reemphasize how low the standard is for the employee to meet, how ‘broad and forgiving’ it is. ‘Any’ factor really means *any* factor. It need not be ‘significant, motivating, substantial or predominant’—it just needs to be *a* factor. The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.

Importantly, if 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. Thus, consideration of the employer's nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee

³³ The transcript is JX 4.

³⁴ JX 10.

³⁵ 49 U.S.C. § 20109(a)(2).

necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.³⁶

The ARB has recently re-affirmed that there is a “low burden of proof commonly deemed to be sufficient to meet Complainant’s burden of proof concerning the causal relationship between her protected activity and adverse action: a contributing factor is ‘any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.’ *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008).”³⁷

I have not considered the wisdom or propriety of the work rules of Respondent which were cited by Respondent in disciplining Complainants. My role is not to act as a reviewer of such personnel practices. I do not find that any of Respondent’s work rules were adopted or implemented with the intention of discriminating against Complainants.

MY ASSESSMENT OF COMPLAINANTS’ CREDIBILITY

It is my decided preference to make evaluations of credibility based upon my personal observations of the witnesses and my knowledge of the evidence. I presided over the formal hearing in this matter, which lasted two days. I was able to observe Complainants as they testified, and I believe I am in an excellent position to evaluate the credibility of Complainants based upon those observations. There are few (if any) places in the record where the testimony of Complainants’ witnesses is directly contradicted by the testimony of Respondent’s witnesses. I find Complainants’ testimony to be generally consistent with the testimony of the other witnesses, and to be generally in line with the documentary evidence of record. Their truthfulness of their testimony was largely unimpeached by cross-examination.

However, there are facts in the record which have a negative impact on my assessment of the Complainants’ credibility.

Kopf made an extensive oral statement to Myrick at the conclusion of the September 20, 2017 disciplinary hearing regarding the August 2017 disciplinary charges.³⁸ Nothing in Kopf’s September 20, 2017 oral statement suggests that Kopf then believed his discipline had been motivated in any way by a desire of Siffre or anyone else to retaliate against him for making the complaint about the “smoky” locomotive. Kopf’s failure during the disciplinary hearing to raise the prospect that his discipline was motivated by discriminatory animus undercuts the credibility of the testimony offered by Kopf during these FRS whistleblower proceedings.

Corbin made an oral statement to Myrick at the conclusion of the September 20, 2017 disciplinary hearing regarding the August 2017 disciplinary charges.³⁹ Nothing in Corbin’s September 20, 2017 oral statement suggests that Corbin then believed his discipline had been motivated in any way by a desire of Siffre or anyone else to retaliate against him for making the

³⁶ *Palmer*, slip op. at 53 (internal citations omitted).

³⁷ *Austin v. BNSF Railway Company*, ALJ No. 2016-FRS-13, ARB No. 2017-24 (ARB March 11, 2019).

³⁸ This statement appears in JX 3 at 46-7.

³⁹ *Id.* at 48.

complaint about the “smoky” locomotive. Corbin’s failure during the disciplinary hearing to raise the prospect that his discipline was motivated by discriminatory animus undercuts the credibility of the testimony offered by Corbin during these FRS whistleblower proceedings.

Kopf did not personally make an oral statement at the conclusion of the January 4, 2018 disciplinary hearing regarding the DTE driver’s license disciplinary charges. However, Kopf’s union representative made an extensive statement summarizing Kopf’s defense to the disciplinary charge.⁴⁰ Nothing in the September 20, 2017 oral statement made by Kopf’s representative suggests that Kopf then believed his discipline had been motivated in any way by a desire of Turpie or anyone else to retaliate against him for making the complaint about the “smoky” locomotive. The failure of Kopf’s representative to raise the prospect that Kopf’s discipline was motivated by discriminatory animus undercuts the credibility of the testimony offered by Kopf during these FRS whistleblower proceedings.

MY ASSESSMENT OF THE CREDIBILITY OF RESPONDENT’S WITNESSES

I was able to observe Respondent’s witnesses as they testified, and I believe I am able to evaluate the credibility of those witnesses. I find the testimony of Courtney Siffre, Stephen Myrick and John Turpie⁴¹ to be consistent with the documentary evidence. Their testimony was largely unimpeached by cross-examination. I find these witnesses to be generally credible.

My decision in this case has not been controlled by my assessment of the credibility of any witness. As will be seen below, I find that Complainants’ engaged in protected activity, and I find they each suffered more than one adverse employment action. It is a lack of evidence – not a lack of credibility – which causes me to conclude that Complainants’ participation in protected activity played no role whatsoever in the discipline imposed by Respondent.

DISCUSSION

Complainants allege that they complained about operating a specific locomotive in the spring or early summer of 2017 because that locomotive was emitting excessive diesel exhaust.⁴² Siffre acknowledges that at least one of the Complainants expressed concern about operating the locomotive in “long hood forward” mode.⁴³ I find that Complainants did express safety concerns to Siffre about operating a specific locomotive on an unknown date in the spring or early summer of 2017. It is unclear whether Complainants expressed safety concerns about operating this locomotive in “long hood forward” mode, or whether they expressed safety concerns about the diesel exhaust being emitted by the locomotive, or whether they complained to Siffre about both things. I find that Complainants engaged in protected activity when they expressed safety concerns about the “smoky” locomotive to Siffre.

⁴⁰ This statement appears in JX 4 at 40 to 41.

⁴¹ These were the only witnesses called by Respondent whose testimony was of importance to me in reaching a decision in this case.

⁴² I adopt the nomenclature used during the hearing, and I will occasionally refer to this specific locomotive as “the ‘smoky’ locomotive” simply for identification purposes.

⁴³ Tr. 187.

It was Siffre who initially imposed discipline on Complainants in August of 2017 when Complainants were alleged to have left work without first obtaining the permission of their supervisor. I find that at the time he charged Complainants with leaving work without the consent of their supervisor, Siffre was aware Complainants had previously engaged in protected activity by reporting their concern about operating the “smoky” locomotive. The best evidence is that approximately two months separated Complainants’ complaint to Siffre about the “smoky” locomotive and Siffre signing the disciplinary charges against Complainants.

Siffre denies that he signed the disciplinary charges in August 2017 to retaliate against Complainants for raising the “smoky” locomotive issue two months earlier.⁴⁴ As previously noted, I find Siffre to be credible. No documentary evidence contradicts Siffre’s testimony in this regard. No other evidence introduced during the hearing causes me to doubt the truthfulness of Siffre’s testimony. The cross-examination of Siffre did not cause me to have doubts whether Siffre was being truthful when Siffre said that he did not sign the disciplinary charges against Complainants to retaliate against them for their protected activity.

The temporal relationship between the Complainants’ report to Siffre of the “smoky” locomotive and Siffre’s decision to take disciplinary action against Complainants does not, by itself, or in conjunction with the other facts of this case, support an inference that Siffre was motivated to retaliate against Complainants. At least two months separates the “smoky” locomotive report made by Complainants and Siffre’s disciplinary action taken against them. There is no evidence that Siffre spent those two months looking for an opportunity to take disciplinary action against Complainants. I find no evidence in the record that permits a finding that Complainants’ report about the “smoky” locomotive contributed in any way to Siffre’s decision to discipline Complainants.

I find Myrick’s decision to discharge Corbin, but to return Kopf to service, following the August 2017 disciplinary charges, to significantly undercut Complainants’ argument that Respondent retaliated against them for their participation in protected activity. It seems to me that had Respondent been motivated by a desire to retaliate against the Complainants, then both Complainants would have been discharged following the August 2017 incident.

Myrick and Turpie were the other individuals involved in imposing discipline on Complainants. Myrick testified that he had no knowledge of Complainant’s protected activity prior to completing his service as Hearing Officer in both of the disciplinary cases.⁴⁵ There is no documentary evidence suggesting that Myrick was aware of Complainants’ protected activity. There is no evidence that Siffre informed Myrick of the protected activity of Complainants which had occurred in the spring or early summer of 2017. No evidence introduced during the hearing causes me to question the truthfulness of Myrick’s testimony that he knew nothing about the Complainants’ protected activity prior to completing his service as Hearing Officer. As noted above, I find Myrick to be credible as a witness. The cross-examination of Myrick did not cause me to doubt Myrick’s testimony. There is no evidence that Myrick retaliated against Complainants because of Complainants’ report of the “smoky” locomotive.

⁴⁴ *Id.* 270.

⁴⁵ Tr. 463-4.

Turpie testified that he had no knowledge of Complainant's protected activity prior to initiating the discipline against Complainant Kopf.⁴⁶ As noted above, I find Turpie to be credible as a witness. There is no documentary evidence suggesting that Turpie was aware of Kopf's protected activity. There is no evidence that Siffre informed Myrick of the protected activity of Complainants which had occurred in the spring or early summer of 2017. No evidence introduced during the hearing causes me to question the truthfulness of Turpie's testimony that he knew nothing about the Kopf's protected activity prior to signing the charge letter against Kopf for the DTE driver's license issue. The cross-examination of Turpie did not cause me to doubt Turpie's testimony. There is no evidence that Turpie retaliated against Kopf because of Kopf's report of the "smoky" locomotive.

Complainants engaged in protected activity. Complainants unquestionably suffered one or more adverse employment actions. In the case of the suspensions imposed by Siffre in August 2017, I find no evidence that Siffre imposed discipline in order to retaliate for the protected activity of Complainants. In the cases of the discipline imposed by Myrick or Turpie, I find no evidence that either Myrick or Turpie was aware of Complainants' protected activity prior to imposing the discipline. I further find no evidence that either Myrick or Turpie were motivated by a desire to retaliate against Complainants for their protected activity.

I have carefully reviewed the entire record, and I find no factual basis for the imposition of a "cat's paw" theory of liability.⁴⁷

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Complainants have failed to prove by a preponderance of evidence that their participation in protected activity was related in any way to the disciplinary actions taken against them by Siffre.

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Complainants have failed to prove by a preponderance of evidence that Myrick and Turpie were aware of Complainants' protected activity.

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Respondent has proven by clear and convincing evidence that Kopf was suspended without pay by Siffre only because Siffre believed Kopf had violated a work rule of Respondent. I find that Respondent has proven by clear and convincing evidence that the suspension imposed on Kopf by Siffre was the result of events or decisions wholly independent of Kopf's participation in protected activity.

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Respondent has proven by clear and convincing evidence that Corbin was suspended without pay by Siffre only because Siffre believed Corbin had violated a work rule of Respondent. I find that Respondent has proven by clear and convincing evidence that the suspension imposed on Corbin by Siffre was the result of events or decisions wholly independent of Corbin's participation in protected activity.

⁴⁶ *Id.* 434-5.

⁴⁷ See footnote 16, above, for a discussion of this theory of liability.

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Respondent has proven by clear and convincing evidence that Corbin was discharged from his employment only because Myrick concluded that Corbin had violated a work rule of Respondent. I find that Respondent has proven by clear and convincing evidence that the discharge of Corbin by Myrick was the result of events or decisions wholly independent of Corbin's participation in protected activity.

Having carefully assessed and weighed all of the testimony, and after reviewing all of the admitted exhibits, I find Respondent has proven by clear and convincing evidence that the discharge of Kopf occurred only because Myrick concluded that Kopf had violated a work rule of Respondent. I find that Respondent has proven by clear and convincing evidence that the discharge of Kopf by Myrick was the result of events or decisions wholly independent of Kopf's participation in protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW⁴⁸

This matter has been assigned to me for approximately one year. Prior to the commencement of the hearing, I conducted a number of pre-hearing conferences with counsel and 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 now make the following Findings of Fact and Conclusions of Law:

1. Complainants are each entitled to the protections afforded by the Federal Rail Safety Act, 49 U.S.C. § 20109.
2. At some point in the summer of 2017, Complainants were assigned to operate a specific Norfolk Southern locomotive on a run from Michigan to Ohio. Upon receipt of this assignment, Complainants informed one of their supervisors, Courtney Siffre, that they had safety concerns about operating this particular Norfolk Southern diesel locomotive.
3. Corbin has proven by a preponderance of evidence that when he made the safety complaint about the "smoky" locomotive to Siffre, he was engaged in activity protected by the Act.

⁴⁸ 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.

4. Kopf has proven by a preponderance of evidence that when he made the safety complaint about the “smoky” locomotive to Siffre, he was engaged in activity protected by the Act.
5. Respondent took disciplinary action against Corbin on August 4, 2017 (when he was held out of service without pay) and again on October 3, 2017 (when he was discharged from his employment).
6. Corbin has proven by a preponderance of evidence that he suffered adverse employment actions on August 4, 2017 and October 3, 2017.
7. The person who imposed the August 4, 2017 discipline on Corbin was Courtney Siffre.
8. At the time he imposed the August 4, 2017 discipline on Corbin, Siffre was aware of the safety complaint made by Corbin earlier in 2017 concerning the “smoky” locomotive.
9. Corbin has failed to prove by a preponderance of evidence that Siffre was motivated in any way to retaliate against Corbin because of the safety complaint made in the summer of 2017 by Corbin to Siffre about the “smoky” locomotive.
10. Corbin has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Siffre on August 4, 2017.
11. The person who imposed the October 3, 2017 discipline on Corbin was Stephen Myrick.
12. Corbin has failed to prove that on or before October 3, 2017, Myrick had any knowledge of the protected activity in which Corbin had participated with regard to Corbin’s safety complaint about the “smoky” locomotive.
13. At the time Myrick made the decision to terminate Corbin’s employment, Myrick was not aware that Corbin had made a safety complaint about a “smoky” locomotive, or that Corbin had otherwise engaged in protected activity.
14. Corbin has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Myrick on October 3, 2017.
15. Respondent took disciplinary action against Kopf on August 4, 2017 (when he was held out of service without pay), on October 3, 2017 (when he was given a time-served suspension), on December 18, 2017 (when he was held out of service without pay) and on January 12, 2018 (when he was discharged from his employment).
16. Kopf has proven by a preponderance of evidence that he suffered adverse employment actions on August 4, 2017, October 3, 2017, December 18, 2017 and January 12, 2018.

17. The person who imposed the August 4, 2017 discipline on Kopf was Courtney Siffre.
18. At the time he imposed the August 4, 2017 discipline on Kopf, Siffre was aware of the safety complaint made by Kopf earlier in 2017 concerning the “smoky” locomotive.
19. Kopf has failed to prove by a preponderance of evidence that Siffre was motivated in any way to retaliate against Kopf because of the safety complaint made in the summer of 2017 by Kopf to Siffre about the “smoky” locomotive.
20. Kopf has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Siffre on August 4, 2017.
21. The person who imposed the October 3, 2017 discipline on Kopf was Stephen Myrick.
22. Kopf has failed to prove that on or before October 3, 2017, Myrick had any knowledge of the protected activity in which Kopf had participated with regard to Kopf’s safety complaint about the “smoky” locomotive.
23. At the time Myrick made the decision to impose a time-served suspension on Kopf, Myrick was not aware that Kopf had made a safety complaint about a “smoky” locomotive, or that Kopf had otherwise engaged in protected activity.
24. With regard to the October 3, 2017 time-served suspension, Kopf has failed to prove by a preponderance of evidence that Myrick retaliated against Kopf because Kopf participated in protected activity.
25. Kopf has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Myrick on October 3, 2017.
26. The person who imposed the December 18, 2017 discipline on Kopf was John Turpie.
27. There is no evidence that Turpie was aware of the safety complaint made by Kopf earlier in 2017 concerning the “smoky” locomotive.
28. Kopf has failed to prove by a preponderance of evidence that Turpie was motivated in any way to retaliate against Kopf because of the safety complaint made in the summer of 2017 by Kopf to Siffre about the “smoky” locomotive.
29. Kopf has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Turpie on December 18, 2017.
30. The person who imposed the January 12, 2018 discipline on Kopf was Stephen Myrick.

31. Kopf has failed to prove that on or before January 12, 2018, Myrick had any knowledge of the protected activity in which Kopf had participated with regard to Kopf's safety complaint about the "smoky" locomotive.
32. At the time Myrick made the decision to terminate Kopf's, Myrick was not aware that Kopf had made a safety complaint about a "smoky" locomotive, or that Kopf had otherwise engaged in protected activity.
33. With regard to the January 12, 2018 termination of Kopf's employment, Kopf has failed to prove by a preponderance of evidence that Myrick retaliated against Kopf because Kopf participated in protected activity.
34. Kopf has failed to prove that his participation in the protected activity described above contributed in any way to the disciplinary action taken against him by Myrick on January 12, 2018.
35. Respondent has proven by clear and convincing evidence that the disciplinary actions taken against Corbin were taken only because Corbin had violated a work rule of Respondent. Respondent has proven by clear and convincing evidence that the disciplinary actions taken against Corbin were the result of events or decisions wholly unrelated to Corbin's participation in protected activity.
36. Respondent has proven by clear and convincing evidence that the disciplinary actions taken against Kopf were taken only because Kopf had violated work rules of Respondent. Respondent has proven by clear and convincing evidence that the disciplinary actions taken against Kopf were the result of events or decisions wholly unrelated to Kopf's participation in protected activity.

ORDER

For the reasons stated above, these cases are **DISMISSED**.

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).