In the Matter of:

ERIC REW,
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent.

Appearances: Robert B. Thompson, Esq.
Harrington, Thompson, Acker & Harrington, LTD
Chicago, Illinois
For the Complainant

Nikki McArthur, Esq.
Jacqueline Holmes, Esq.
Jones Day
Washington, D.C.
For the Respondent

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AWARDING CLAIM

This proceeding arises from a claim of whistleblower protection under the Federal Railroad Safety Act (“FRSA” or the “Act”), as amended.1 The FRSA and implementing regulations2 prohibit retaliatory or discriminatory actions by railroad carriers against their employees who engage in activity protected by the Act. The Complainant requested a hearing before the Office of Administrative Law Judges because he objects to a finding by the

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Occupational Safety and Health Administration ("OSHA") that it was unable to conclude that there was reasonable cause to believe that the Respondent violated the Act. Mr. Rew’s Complaint seeks the removal of all discipline from Mr. Rew’s files, lost wages, compensatory damages, punitive damages, and attorney fees and costs.

STATEMENT OF THE CASE

On November 12, 2018, Eric Rew ("Complainant") filed a complaint against CSX Transportation, Inc. ("Respondent," “CSX” or “CSXT”) with OSHA, alleging retaliation against him for reporting a work injury and following the treatment plan of his treating physician. OSHA issued its determination dismissing the Complaint on March 13, 2019. The Complainant objected to the determination and requested a hearing before the Office of Administrative Law Judges. A video hearing in this matter was held on December 9, 2020. The parties filed their Initial post-hearing briefs on March 11, 2021 and their Reply briefs on March 26, 2021. In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at the hearing, and the parties’ post-hearing briefs.

ISSUES

The issues in this case are whether Complainant engaged in protected activity within the meaning of the FRSA, whether the Respondent violated the FRSA by terminating his employment, and, if so, whether Respondent has established by clear and convincing evidence that it would have taken such action even absent the protected activity. If the Complainant prevails, I must consider the appropriate remedies. The Complainant alleges violations under 49 U.S.C. § 20109(a)(4) and 20109(c)(2).

APPLICABLE STANDARDS

49 U.S.C. § 20109 provides, in part, that a railroad carrier shall not discriminate against an employee for notifying the carrier of a work-related personal injury or work-related illness of an employee, and shall not discipline, or threaten to discipline, an employee, for following the orders or a treatment plan of a treating physician. In this case, the Complainant alleges he was discharged for reporting a work-related personal injury and for following the treatment plan of his treating physician. The Respondent contends he was not following a treatment plan and was discharged for engaging in roofing work instead of returning to work at CSXT.

3 29 C.F.R. § 1982.105 provides that the Assistant Secretary will issue within 60 days findings as to whether there is reasonable cause to believe that the Respondent violated the Act. After 60 days, the Complainant requested that OSHA terminate its investigation and issue a determination. OSHA’s findings were issued on May 13, 2019. The Complainant requested a hearing by letter dated May 16, 2019.

4 The parties’ briefs will be cited as Complainant’s or Respondent’s Initial Brief and Reply Brief.

5 The testimony in this case includes the testimony at the hearing and the depositions of the Complainant, Jeremy Carnes, Dr. Craig Heligman, Robert Sarver, Dr. Carmela Gonzales, Andrew Bamford, and Macon Jones, and transcripts of the August 21, 2018 Investigation Hearing, which were admitted as exhibits at the hearing.


The legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”) apply to FRSA whistleblower claims. Under the FRSA, Complainant must prove by a preponderance of the evidence that he engaged in protected activity; that Respondent took an adverse employment action against him; and that the protected activity was a contributing factor, in whole or in part, to the adverse personnel action. If the Complainant does not prove one of these elements, his claim fails. If Complainant proves that Respondent discriminated against him because of his protected activity, Respondent may nonetheless avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. CONTENTIONS OF THE PARTIES**

The Complainant contends he engaged in protective activity under 49 U.S.C. § 20109(c)(2) of the Act by following the orders or a treatment plan of a treating physician for his work-related injury, and under 49 U.S.C. §20109(a)(4) by reporting the work-related personal injury. The Complainant contends that he was subjected to an unfavorable personnel action, termination, because of the protected activity, and that the Respondent has not shown by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected activity.

The Respondent contends that while on medical leave for his work injury the Complainant engaged in dishonesty by performing other work, and that Respondent did not retaliate against him for following his physician’s treatment plan or for reporting a work injury. CSX contends that it discharged the Complainant because it had an honest belief that he had

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8 49 U.S.C. § 42121(b).
12 The Respondent also alleged at the investigation hearing that Mr. Rew had stolen ice from an ice machine at a CSX property. The hearing officer found that Rew had taken the ice. On appeal, the Public LAW Board (an arbitration panel) found that there was insufficient evidence to support this charge. The Complainant filed a motion in limine prior to the hearing to exclude evidence regarding this charge from the record because it was found unsupported on appeal. I denied the motion. Although the charge of taking CSX property (the ice) was ultimately found to be unsupported, it formed part of the basis for the discipline imposed, termination of the Complainant’s employment.
violated CSX rules and that it would have dismissed the Complainant absent the protected activity.

**B. SUMMARY OF THE EVIDENCE**

**STIPULATIONS**

Prior to the hearing, the parties agreed to Stipulated Facts as set forth at pages 7-8 in Respondent’s Prehearing Statement, as follows:13

1. CSXT is a freight railroad operating over 20,000 route miles of track in 23 states, the District of Columbia, and two Canadian provinces. As such, CSXT is a rail carrier subject to the provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109 (“FRSA”).

2. Complainant Eric Rew (“Rew”) was at all times relevant to this case an employee covered under 49 U.S.C. § 20109.

3. On January 23, 2018, Complainant Eric Rew reported an allegedly work-related injury to CSXT. A true and correct copy of Rew’s injury report has been marked by the parties as Joint Exhibit 6.

4. The terms and conditions of Rew’s employment with CSXT were at all times relevant to this case governed by a collective bargaining agreement between CSXT and the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”).

5. On August 9, 2018, CSXT issued a letter to Rew informing him of disciplinary charges against him.

6. On August 21, 2018, CSXT held a hearing regarding the August 9, 2018 charges. A true and correct copy of the transcript and exhibits from that hearing has been marked by the parties as Joint Exhibit 4.

7. On September 20, 2018, CSXT dismissed Rew from employment. A true and correct copy of the letter informing Rew of his dismissal has been marked by the parties as Joint Exhibit 5.

8. Rew’s dismissal constitutes an adverse action within the meaning of the FRSA.

9. Rew timely filed a complaint with OSHA alleging that CSXT violated the FRSA. A true and correct copy of Rew’s OSHA complaint has been marked by the parties as Joint Exhibit 1.

13 *See* hearing transcript (“Tr.”) at 9. I adopt the parties’ stipulations.
10. OSHA dismissed Rew’s complaint on May 13, 2019. A true and correct copy of the Secretary’s findings has been marked by the parties as Joint Exhibit 2.

11. Rew timely objected to the Secretary’s findings and requested a de novo hearing before an Administrative Law Judge on May 16, 2019. A true and correct copy of Rew’s objections has been marked by the parties as Joint Exhibit 3.

**EXHIBITS**

At the hearing, the following exhibits were offered and received in evidence: Joint Exhibits (“JX”) 1-20; Complainant’s Exhibits (“CX”) 1-8; Respondent’s Exhibits (“RX”) 1-29; ALJ Exhibits (“ALJX”) 1-5. All exhibits have been considered in arriving at a decision in this matter.

**SUMMARY OF TESTIMONY**

**Hearing Testimony** (in order of appearance)

**Complainant’s case**

**ROBERT SARVER** (direct examination at pages 29-82; cross examination at 81-101; redirect at pp. 101-112)

Direct Examination:

Mr. Sarver has been an employee of CSX since 2009 and has held a number of positions. In 2018 he was an assistant superintendent and in March 2018 he assumed his current position of superintendent. As superintendent he is responsible for overseeing the safety and efficiency of operations in the territory he’s responsible for. He was contacted about Mr. Rew by Nick Male, who told him that there was an employee who was off with an injury, that risk management had conducted an investigation and that he was to proceed with charges against the employee. Mr. Sarver was told to have a manager input an assessment, which generates a charge letter. Mr. Sarver was told that this was the result of surveillance done on Mr. Rew. Mr. Sarver had a role in determining who the charging officer, the person who would bring the rule violations to the hearing, would be. Mr. Sarver said that the surveillance was the evidence at the hearing that he relied on. He said that he was the sole decision-maker with respect to Mr. Rew’s guilt and the discipline to be administered but he had input from others. Mr. Rew was

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14 RXs 11 and 17 are missing from the Employer’s notebook of exhibits but were electronically filed along with the other exhibits. JX 20 is missing from the notebook of joint exhibits but was electronically filed.

15 Tr. at 9-15. The Claimant withdrew CX 9 at the hearing. ALJ 1 is the Notice of Hearing and Prehearing Order issued July 16, 2019; ALJ 2 is the Order Setting New Hearing Date issued May 12, 2020; ALJ 3 is the Order Regarding Scheduled Hearing issued June 18, 2020; ALJ 4 is the Complainant’s Prehearing Statement dated November 18, 2020 with attached witness list and exhibit list; and ALJ 5 is the Respondent’s Prehearing Statement dated November 18, 2020, including the witness list, Joint Exhibit List and Respondent’s Exhibit List.

16 Mr. Sarver also gave a deposition of October 23, 2020 (CX8).

17 In his deposition, Mr. Sarver identified Mr. Male as his general manager.

18 Referring to the investigation hearing.
charged with four different rule violations and was found to be guilty of all four. It was Mr. Sarver’s decision to terminate Mr. Rew. When the hearing notice was sent to Mr. Rew it did not indicate what rules would be involved. Mr. Rew therefore did not know what rules were involved in advance of the hearing. To Mr. Sarver’s knowledge, the union representative representing Mr. Rew at the hearing did not know either, and neither he nor Mr. Rew were provided with the surveillance evidence in advance of the hearing. Mr. Sarver confirmed that the sole source for his decision to dismiss the Complainant was the information in the transcript and the exhibits attached to the transcript. Mr. Sarver said that he did not know Mr. Rew. He said that Mr. Bamford was Mr. Rew’s immediate supervisor and that he did not talk to Mr. Bamford about the kind of employee Mr. Rew was. He said he did not question anyone about what type of employee Mr. Rew was. Tr. at 29-37.

Mr. Sarver said the Complainant was found guilty of violations of the code of ethics and Operating Rules 104.2, 104.11 and 103.3. Mr. Sarver testified that no employee under him has ever asked him if they could perform part-time work that did not involve CSX property. He said he would not expect Mr. Rew to inform anyone that he might be working part-time unless it conflicted with his employment at CSX. He said there was never any indication that Mr. Rew’s part-time work conflicted with his employment at CSX. He agreed that at the time of the surveillance Mr. Rew was on medical leave and wasn’t eligible to be called in to work. Mr. Sarver testified that he could not think of another employee who was disciplined for a conflict of interest under the code of ethics and that as far as he knew that had never happened before. Mr. Sarver said that if Mr. Bamford was aware that Mr. Rew had performed part-time work for his father in the roofing business that would not be a conflict of interest or a violation of the code of ethics and Mr. Rew shouldn’t have been charged with a code of ethics violation. Mr. Sarver agreed that if Mr. Bamford was aware of any part-time roofing work by Mr. Rew and didn’t take exception to it, he had a code of ethics obligation to let Mr. Sarver know. Mr. Sarver said that after he gave his deposition and was told that Mr. Bamford was aware of all of this he (Mr. Sarver) did not do anything to correct the situation. Mr. Sarver agreed that if Mr. Rew believed he was following the treatment plan of his treating physician by doing light work and being physically active, he should not have been disciplined.

Mr. Sarver was asked about Rule 103.3 with regard to the Complainant’s alleged taking of ice. Mr. Sarver said Mr. Rew was found to be guilty of that, but agreed that he would not have been dismissed just for that violation. Mr. Sarver agreed that there was no eyewitness to the

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19 The hearing notice is dated August 9, 2018 and is at page 68 of JX 4.
20 Andrew Bamford.
21 See JX 4 at pages 35-37 of the hearing transcript and pages 85-88 of the exhibits to JX 4. Rule 103.3 states: “The unauthorized possession, removal or disposal of any material from CSX property or from the property of customers is prohibited. Any article of value found on CSX property must be protected and turned in to a supervisor.” Rule 104.2 states: Employee behavior must be respectful and courteous. Employees must not be any of the following: “a. Dishonest, or b. Insubordinate, or c. Disloyal, or d. Quarrelsome.” Rule 104.11 states: An employee must not engage in any other type of work or business that: “a. Interferes with the employee’s ability to perform service with CSX, or b. Creates a conflict of interest with or is detrimental to CSX.” The Code of Ethics is at JX 10 and portions of the Code are at pages 89-91 of JX 4.
22 See JX 4, p. 93, an August 10, 2018 letter from Complainant’s neurologist, Dr. Carmela Gonzales stating that Mr. Rew “is being seen for a post-concussion syndrome. I highly encourage the patient to be physically active and do light work. This will aid in his recovery in my professional opinion. This was a discussion we had in the patients (sic) last appointment.”
alleged taking of ice and that the photographs used at the investigation hearing did not show evidence that Mr. Rew took any ice, and no one reported there was any ice missing. With respect to Rule 104.11, Mr. Sarver agreed that “work” refers to the employee being employed elsewhere. He agreed that he had no evidence that Mr. Rew had an employment relationship with anyone other than CSX or that he had his own business, and that without such evidence he should not have been charged with a code violation or found guilty of violating Rule 104.11. Mr. Sarver was asked about Rule 104.12, which indicates that an employee who has been off work for medical reasons must submit a completed MD-3 form before returning to work. Mr. Sarver agreed that there was no MD-3 form filled out by the treating physician indicating that Mr. Rew could return to work, and therefore he would not have been able to return to work on the days he was photographed or surveilled. He agreed that a railroad conductor has numerous safety critical duties. Tr. at 44-64.

Mr. Sarver testified about CSX’s attendance policy. He indicated that if an employee misses work he gets points and if he accumulates enough points he gets disciplined and it can lead to dismissal. Mr. Sarver was asked about the photographs used at the investigation hearing. He indicated that Mr. Rew was on the roofs of the houses in some of the photographs but he could not tell what he was doing. He agreed that if he were estimating the cost of a repair, Mr. Rew could be performing light work and that such work might take only 10 or 15 minutes. Tr. at 64-72. Mr. Sarver stated that if Mr. Rew’s physician told him to do physical activity, light work, he would have expected him to do that. He said he did not ask Dr. Heligman to contact Dr. Gonzales to get additional information about her note. Mr. Sarver stated that he never looked at the video surveillance. He said he did not see anything in Dr. Heligman’s testimony that disputes what Dr. Gonzales recommended as part of her treatment. Tr. at 73-80.

Cross Examination:

Mr. Sarver testified that based on the investigation hearing transcript he believed the testimony of Mr. Carnes that the Complainant took ice from the ice machine and that he had been performing work that conflicted with his employment at CSX. He testified about the discipline process at CSX. He said if a manager assesses a rule violation he writes up all the relevant information and the charge letter is submitted to the charging office who would send it to the employee. The charge letter includes the date for a disciplinary hearing, which is typically seven days from receipt of the charge letter. The hearing is held by a company officer, with the charging officer as the company witness and the employee and his representative. He said that Mr. Rew did not make any statement on his own behalf at the hearing. Mr. Sarver was referred to JX 15, a discipline recommendation from Macon Jones, the Director of Labor Relations, and JX 16, an email from Mr. Sarver stating that he agrees with Mr. Jones’ recommendation of dismissal. Mr. Sarver addressed RX 1, CSX’s IDAP policy, which lists discipline for non-major offenses and major offenses. He said that when an employee is found guilty of dishonesty, the employee is dismissed over 95% of the time. He said he has previously dismissed employees for

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23 See JX 4, pp. 70-84.
24 CSX’s Chief Medical Officer (see JX 4, p. 4.
25 Complainant’s treating physician.
26 Referring to the August 10, 2018 letter.
abusing leave. He said that Mr. Rew’s union official did not try to contact him to convey any mitigating circumstances with respect to the charge, and Mr. Rew did not mention any at the investigation hearing. He said he did not consider the letter from the Claimant’s physician\(^{27}\) to be a mitigating factor because based on the testimony at the investigation hearing he didn’t consider roofing to be light work or just trying to stay active. He said it wasn’t clear that he was only doing light work or just trying to be physically active. Mr. Sarver also referred to Mr. Rew’s physician stating that he had not been treated because he said he was too busy roofing. He said that Mr. Rew’s injury report did not play a role in his decision. He said he had never met Mr. Rew and Mr. Rew never reported to him. He said Mr. Rew was on medical leave for his injury before he began his job as superintendent of the Midwest region. He said an employee’s injury report does not affect his employment in any way. He receives annual training on how to handle employee injury reports. The witness was referred to JX 13 and RX 25 with reference to the training and RX 26 regarding protection of workers against retaliation. Tr. at 81-101.

Redirect Examination:

Mr. Sarver was questioned about his testimony that Mr. Carnes indicated he saw ice in Mr. Rew’s truck, referring to page 17 of JX 4. Mr. Sarver stated it was hard to tell from the photograph whether there was ice in the truck.\(^{28}\) He said his belief that Mr. Rew took ice was based on Mr. Carnes’ stating that Mr. Rew was backed up to the ice machine. He agreed that employees are supposed to back up to pull into that facility, and there would be nothing unusual about backing up into the facility. With reference to the bottom photograph at page 73 of JX 4, Mr. Sarver agreed that he could not see ice in the photo and that Mr. Carnes would not have been able to see ice either. Mr. Sarver agreed that he did not know why Mr. Rew did not get cognitive treatment right away, whether that delayed his recovery at all, or whether his doctor testified that working and saying physically active would help his cognitive recovery. Tr. at 101-112.

ERIC Rew (direct examination at pages. 114-171; cross examination at pp. 171-194)\(^{29}\)

Direct examination:

Mr. Rew testified that he is 44 years old and is a high school graduate with a couple of years of college before being hired on the railroad. He lives with Amy, who he has been with for 25 years, and they have four children. He began working for CSX in February of 2000. He began working as a trainman or conductor in Garrett, Indiana before going to Walbridge Yard in the Toledo, Ohio area, which is his home terminal. In 2018 he was working as a remote operator and before that as an engineer. He said he liked his job and would like to go back to work for CSX. As a conductor he had to walk all over the yard, find switches, and watch signals and movements. Some of the work is heavy and takes a lot of exertion, such as applying and removing brakes and aligning misaligned drawbars. He also had safety responsibilities as a

\(^{27}\) JX 4, p. 93.

\(^{28}\) At the investigation hearing, Mr. Carnes identified the photographs at pages 73 and 74 of JX 4 as the CSX Transflo facility, where the ice cooler was. JX 4 at pp. 12-13.

\(^{29}\) Mr. Rew also gave a deposition on January 23, 2020 (JX 28).
conductor and had to be aware of everything going on around him. He said he was expected to work twelve-hour days. He had to be medically qualified to work. He said there are no light duty jobs as a conductor or engineer. He said he never had any issues with absenteeism and he worked regularly. He said he sustained an injury in January 2018. He said before January 2018 he had helped his father in his father’s roofing business for 34 years, including while he worked as a conductor. He said he was seldom paid for that but his father would help out with his children. He said the fact that he helped his father in his roofing business was well-known on the railroad, and his father performed roofing services for many railroaders, including a couple of supervisors. He said Mr. Bamford knew of his father’s business and of the fact that Mr. Rew helped out. He said his cousin also helps his father out with the roofing business. He said people at work talked to him about his father’s roofing business almost every day and no one said it was inappropriate and no supervisor ever told him he shouldn’t be doing it. He said helping his father never interfered with his ability to work as a conductor or engineer for CSX. Tr. at 114-126.

Mr. Rew said his injury occurred on the morning of January 23, 2018. He was working a remote job where he was kicking cars. He was in the process of pulling the bleed rods to make sure the brakes were completely released. While he was pulling them and working his way up the cars, he encountered a bleed rod that didn’t stick out as far and when he reached in to grab it a beam on the side of the auto rack hit him on the top of the head. He hit the ground and flipped over and got out of the area of the moving cars and began bleeding badly. He identified JX 6 as his injury report. He identified CX 1 as a photo of his head injury, showing the cut, taken on the day of the injury. A supervisor took him to the emergency room. Mr. Rew testified that the first couple of days he just had a headache but after a few days he began to develop a terrible headache. His eyesight became blurry, he felt sick and nauseous and kept getting worse. Tr. at 126-31.

He saw a physician who was a general practitioner and was told he had a post-concussion syndrome. He was given pain medication and told he should get a MRI or CT scan. He said his condition was very bad for the next few months. He was referred to a specialist, Dr. Gonzales, in April. He said he had no recollection of talking about cognitive therapy at his first visit. He said he began to improve slightly after that visit but didn’t have his headaches completely under control. He barely left his house. He said his next visit with Dr. Gonzales was on June 15, 2018. He said she told him that since he was starting to get his headaches taken care of he needed to get out of the house and exert himself and do some physical activity. He told her his father had a roofing business and he had been helping him out since he was a kid and she thought it would be a good idea if he did a little bit here and there with him in addition to taking the medication. With respect to cognitive therapy, he said Dr. Gonzales told him that they needed to get the headaches under control better than they were before he would do any therapy. He said

30 Mr. Rew explained what “kicking cars” involves. Tr. at 126.
31 Dr. Gonzales is a neurologist with Mercy Toledo Neurological Associates. Her treatment records are at CX 2.
32 The Complainant’s first visit with Dr. Gonzales was on April 18, 2018. CX 2, pp.1-13. Dr. Gonzales assessed post-concussion syndrome, started the patient on medication, and indicated that she would start cognitive rehab for his memory through occupational therapy to accelerate his improvement. Id. at p.12.
33 CX 2, pp. 14-23. The treatment note indicates that Mr. Rew had not had any cognitive therapy yet. It says that the “[p]atient works as a roofer during the day, and has been very busy. He is planning to start treatment in the next few weeks.” Id. at p.19. Dr. Gonzales advised him to start cognitive rehab to help with his memory. Id. at p. 22.
he had not received a prescription for cognitive therapy at that point. He said he did not tell her he was busy roofing but did say his father was “busier than heck” and that prior to June he “didn’t lift a finger doing anything.” He said Dr. Gonzales did not recommend that he go back to work on the railroad. He said he would not have been able to perform his job duties as a conductor. He said it was never suggested that cognitive therapy was something he had to do or would stop him from getting back to work, it was all just based on the headaches. He said it was a few weeks after that visit before he was physically able to get out of the house to try to do any kind of physical work. He said that before July he hadn’t done anything other than go out in the yard for a little bit. He started feeling better and started helping his father out for a little bit. His father asked him to look at a couple of roofing jobs in order to give an estimate. He said that was the kind of thing he had done part-time before that. Mr. Rew said that before the injury, he did light work for his father “a lot.”

The Complainant said that when he received the investigation notice he did not know what it was about and did not get to see anything other than the charge letter. He did not see the photographs in advance of the hearing and did not know what anyone was going to say. Mr. Rew was asked about the photographs used at the investigation hearing. He identified the photo at page 70 as depicting the Complainant and his father on a roof. He said his father asked him to help determine where a leak was coming from. He said he was on the roof for about 10 minutes. In the two photos on page 71, he said he was kneeling on the roof in one picture and standing on a roof in the other. He said the photos on pages 70, 71 and 72 are all at the same location, a trailer home. The bottom picture on page 72 shows Mr. Rew, his father and the man living in the trailer. He said the picture on page 73 is at the Rossford Yard bunkhouse. Mr. Rew said there was a CSX mainframe computer there and he was checking his seniority. He said he hoped to get back to work very soon and the computer indicates what jobs you can hold and what your seniority looks like. He said this facility was close to where he grew up and where his father and other relatives live. He testified that the bottom picture shows his vehicle with the passenger door open. He said he had opened the door because he was going to brush his floor mat and carpet off. He said he had worked at this facility for years. He said there had been a broken broom by the ice machine that people used to brush their boots off or to brush their cars out, but he was unable to find it. He said he did not steal any ice. He said he was given a CSX key to the facility. He said the picture on page 74 shows him leaving the facility. The photo on page 75 shows Mr. Rew and his stepbrother at ABC Supply, where his father had an account and had authorized him to purchase supplies. His stepbrother was with him so he could meet the salesmen and be able to pick up orders or material without Mr. Rew. The photos on pages 76 and 77 show the same building. Mr. Rew said he was there for about 20 minutes. The photos on page 78 show his uncle’s house. His uncle thought he had a problem on the flat roof on the back of the house so Mr. Rew got on the ladder to look at it. The first photo on page 79 is of his uncle’s house. Mr. Rew did not know what the second photo was of. The photos on page 80 are of two different locations. He said he did not do anything at the house in the bottom photo. The house in the top photo had a roof leak and they wanted an estimate. The photo on page 81 shows a house where he did an estimate for either a roof repair or a new roof. He said he was

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34 Tr. at 136.
35 JX 4, pp. 70-84. The charge letter for the investigation hearing is at JX 4, pp. 68-69.
36 This facility is referred to in the investigation hearing as the Transflo facility.
there for about 10 to 15 minutes. Mr. Rew said the photos on pages 82 and 83 are of the same roof. The photo on page 84 is of the same house as on page 80. Tr. at 139-58.

The Complainant said that during this period he was never active outside the house for more than four hours a day. He said he thought he was doing what he was supposed to do to get better. He said that no one from management or Dr. Heligman or anyone in the medical department contacted him about what he was doing on the roof, the medical treatment advice from Dr. Gonzales, or cognitive therapy. He said he did not receive any money from CSX when he was off work in July and August. He believed his dismissal from CSX was unfair. He thought he was following the rules. He said the dismissal was devastating and he was upset and angry. He said he and Amy broke up for a while because she said he wasn’t the same person anymore. He said he felt ready to go back to work by no later than January 2019. He said he lost his health insurance when he was fired and has not gotten any type of treatment since then. He said he has experienced emotional issues related to his dismissal and not being able to work on the railroad. Tr. at 158-168.

The Complainant was referred to JX 8, his 2017 year-end earnings statement. He stated that he would have earned at least the amount reflected in the exhibit if he had not been fired. He said he did some roofing work in 2019 and made about $20,000. Tr. at 168-171.

Cross examination:

The Complainant agreed that no one discouraged him from reporting his injury. He also agreed that he did not know Mr. Sarver while he worked at CSX. The Complainant was asked about what Dr. Gonzales told him. He said she did not discuss cognitive therapy with him prior to June and told him that they had to get the headaches under control before any kind of therapy. Mr. Rew was directed to page 12 of Dr. Gonzales’ treating notes, a visit on April 18, 2018, in which Dr. Gonzales refers to starting cognitive therapy. Mr. Rew said he could barely listen to her at that visit because his head hurt so badly. He said he never got a prescription for therapy. He said the first time he remembers speaking about cognitive therapy was in June. He was referred to Dr. Gonzales’ June 15th treating note, which says that Dr. Gonzalez started cognitive rehab through occupational therapy at the last visit. Mr. Rew said she did not start any rehab, and he was told that there was an appointment that was cancelled because the person for it wasn’t there and that he should wait until he saw her in follow-up before she pushed any more for cognitive rehab. He said he made it clear to her that as of June 15th he had barely left the house to do anything. With respect to the portion of the note that says he had been working as a roofer, Mr. Rew said that she told him she knew he was not and that she had never said that. Mr. Rew stated that he had never told her that he was working as a roofer. Tr. at 171-181.

Mr. Rew identified JX 4, p. 68 as the charge letter he received. He agreed that he was represented at the investigation hearing by a union official and that he had the opportunity to offer exhibits. He agreed that he appears in all of the photographs at pages 70-84 of JX 4. He

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37 This exhibit is also in CX 3, which also includes W-2 forms.
38 CX 2.
39 CX 2, p. 19.
was asked if he backed up in front of the ice machine and said that was a normal parking space there. Mr. Rew was asked about his deposition testimony that he saw a bunch of garbage in the ice machine when he was looking for the broom.\textsuperscript{40} Mr. Rew was asked about prior counseling letters for absenteeism. He agreed that he did not seek any mental health treatment after his dismissal from CSX. He agreed that between 2019 and the date of the hearing he had applied for only one job and had been self-employed helping his father. Tr. at 181-94.

Redirect examination:

The Complainant testified that he told Dr. Gonzales at the June 15\textsuperscript{th} visit that he did not have problems with his balance or walking.\textsuperscript{41} He said that “almost the whole time has just been trying to get the headaches taken care of.”\textsuperscript{42} He said he would not have helped his father out if Dr. Gonzales had not told him to do light work. He believed he was doing what she wanted him to do when he helped his father. Tr. 194-96.

\textit{Respondent’s case}

\textbf{JEREMY CARNES} (direct examination at Tr. 199-218; cross examination at Tr. 218-229)\textsuperscript{43}

Direct examination:

Mr. Carnes testified that he had been in the risk management department of CSX since 2010 and that his current position is District Manager of Risk Management for the Western District. Mr. Carnes has a J.D. from the University of Toledo College of Law and was an assistant prosecutor in Lucas County for over three years. He does not work as a lawyer for CSX. He said that the risk management department handles claims against the railroad for personal injuries and property damage. He said Mr. Rew brought a negligence claim against CSX and he manages that case. He said he received an email from his supervisor containing a passage from a treatment note from Mr. Rew’s treating physician. He identified the following language in JX 11, page 2, as the language he was referring to: “Patient works as a roofer during the day, and has been very busy.” He said that based on that note he decided to initiate surveillance. He said CSX engaged an outside company, who conducted surveillance on July 27 and July 28. Mr. Carnes stated that they sent him the video, and it looked like he was working as a roofer. He was also sent a written report. He identified JX 12 as the company’s report. Counsel played a portion of the video and Mr. Carnes testified that it appears to show Mr. Rew on a roof. Counsel also played a portion of the video identified as RX 15. Mr. Carnes stated that it was his impression from that video that it showed Mr. Rew working as a roofer. Mr. Carnes identified Transflo as a CSX subsidiary. He was shown a video provided by the surveillance company (RX 16) and said that it appeared that Mr. Rew removed ice from the ice cooler and put it in his truck. He said he did not see ice anywhere during the course of this video but he saw the ice cooler and he saw the lid coming up and down twice and Mr. Rew went to his front passenger

\footnotesize{
\textsuperscript{40} RX 28, p. 61.
\textsuperscript{41} See CX 2, p. 20.
\textsuperscript{42} Tr. at 195.
\textsuperscript{43} Mr. Carnes also gave a deposition on February 5, 2020 (CX 6).
}
door and it looked to him like he was putting ice in there. He said he took pictures of the Transflo facility, which he identified as RX 11. Tr. 199-210.

Mr. Carnes testified that also retained another surveillance company, whose photographs are in JX 12. One of the videos showed Mr. Rew at a roofing and siding company and they had a video of him on a ladder on Taylor Street in Oregon, Ohio. He identified RX 12 as a video from August 5th at the Joseph Road residence. He said that after seeing the videos and photos he concluded that Mr. Rew was working as a roofer and told his supervisor what he found. Mr. Carnes said he was a witness at Mr. Rew’s disciplinary hearing but was not involved in the decision to issue charges or the decision to terminate him. He said the videos were not introduced at the investigation hearing but the photographs were. Tr. 211-218.

Cross examination

Mr. Carnes confirmed that he was not at the Transflo facility on July 28th or present at any of the locations in the photos or the surveillance video. He said he took the Transflo photographs on August 8th, 10 or 11 days after the video on July 28th, and didn’t know what the inside of the ice machine looked like on July 28th. He agreed that his investigation never determined whether or how much ice was in the ice cooler on July 28th or how much was used by anyone on July 28th. He agreed he never saw any ice in Mr. Rew’s hands or in the truck. Referring to JX 12, Mr. Carnes confirmed that on July 27th Mr. Rew was under surveillance for a little over nine hours and was never on a roof, and that the most he did all day was to put items in the back of a trailer for about 15 minutes. He also agreed that on July 28th Mr. Rew was under surveillance for nine and one-half hours and was on a roof for only 15 minutes. He also agreed that on August 2nd, the Complainant was again under surveillance for nine and one-half hours and no activity was observed. Mr. Carnes further agreed that on August 3rd Mr. Rew was surveilled for ten hours and no activity was seen. With respect to the surveillance on August 4th and August 5th showing Mr. Rew on a roof, Mr. Carnes agreed that he didn’t know how long Mr. Rew was on the roof or what he was doing. Tr. at 218-229.

CRAIG HELIGMAN, M.D. (direct examination at Tr. 231-253; cross examination at Tr. 253-273)

Direct examination:

Dr. Heligman testified that he is employed by CSX as the Chief Medical Officer. He began working for CSX in 2012 as the Associate Chief Medical Officer and has been the Chief Medical Officer for almost six years. He gave his background and qualifications, which include a board certification in occupational medicine. He works at the headquarters building in Jacksonville, Florida. With regard to CSX employees, the medical department provides medical case management for injuries and manages the payment of the patient portion of the medical bills. He explained the process for reporting injuries. He said that the frontline supervisors are responsible for working with the employee to complete the initial report. He said that employees are required to submit medical information to them under the collective bargaining agreement. The employee is supposed to advise them when they are ready to return to work. The employee is expected to return to work as soon as their physician says they can do so safely. Tr. 231-239.
Dr. Heligman testified about what the physical requirements are for working as a conductor. He said he was familiar with Mr. Rew and that he reported an injury to CSX. He identified RX 5 as the report of Mr. Rew’s injury on January 23, 2018. The report states that Mr. Rew could return to work on January 26, 2018. He said if the employee does not return to work on the return-to-work date they would expect the employee to provide additional information to explain why. Dr. Heligman identified JX 7 as a certification of ongoing illness or injury report. The form gives a return-to-work date of March 26, 2018. The diagnosis is listed as scalp laceration, closed head injury and post-concussive syndrome. Dr. Heligman said that a post-concussive syndrome can result in a range of symptoms, including headaches, cognitive complaints and personality changes. He said that the Complainant did not return to work on March 26th. Tr. 239-243.

Dr. Heligman identified RX 2 as the April 18, 2018 office note by Dr. Gonzales, Mr. Rew’s treating neurologist. He said the office note was received by CXST on June 13, 2018. He said that Dr. Gonzales recommended medication and cognitive rehabilitation, which he said are standard treatments for post-concussive syndrome. Based on this note, Dr. Heligman said the Complainant was not ready to return to work. He said he received additional treatment notes dated from June to August of 2018 and identified the June note as RX 3. Dr. Heligman said the treatment note indicated that Mr. Rew had not yet started cognitive rehab. The note states that Mr. Rew had not had cognitive rehab yet and had been working as a roofer and has been very busy. Dr. Heligman said that the treatment note suggested to him that Mr. Rew was doing quite well. He believed that he would be ready to return to work at CSX. Dr. Heligman contacted the manager of field investigations who was handling the claim and told him what was in the note and that Dr. Heligman felt he was perhaps ready to come back to work and asked him to investigate further. He said he did not contact Mr. Rew about the note because it is the employee’s responsibility to present themselves when they’re ready to return to work and it looked like he should have done that. Tr. 243-46.

Dr. Heligman was at some point made aware that an investigation hearing was scheduled and he was asked to be a witness. He was not involved in the decision to charge Mr. Rew. He said that prior to his testimony he reviewed the medical records, which included the certification of ongoing injury, the original injury report, and the two records from Dr. Gonzales they had in the file, and the case management notes. Dr. Heligman was asked to refer to pages 51 to 60 of JX 4, the transcript of the investigation hearing, and said that it was an accurate transcription of his testimony. Dr. Heligman explained the basis for his hearing testimony that if Mr. Rew could perform duties as a roofer he could perform duties as a conductor. Dr. Heligman testified that based on the June treatment note, Mr. Rew’s headaches had improved and the fact that he was roofing suggests that it wasn’t impairing him dramatically. He said that the office note stating that Mr. Rew was very busy implied that he was working daily and at least a full day’s work as a roofer on a regular basis. He said there were photographs at the hearing of him on a roof. He did not review job descriptions of a roofer but had observed roofers. He said there was no

44 The injury report is signed by a Steve Wing, M.D., whose affiliation and specialty are not indicated.
45 The form was filled by a family medicine certified nurse practitioner (CNP).
mention of memory loss or confusion in the June note, unlike the April note. Dr. Heligman said that his opinion would not change if he knew that Mr. Rew was only able to work a few hours at a time because the activity of roofing and him being on the roof suggests that he had the capacity to do it full-time and be a conductor full-time because those required the same activities. Dr. Heligman stated that the medical department has approved for payment the invoices related to Mr. Rew’s injury. Tr. 246-253.

Cross examination:

Dr. Heligman stated that he did not know whether Mr. Rew’s medical bills have actually been paid. He stated that he received reports and other records from Dr. Gonzales but did not see anything regarding cognitive rehab, including a request or a prescription or an approval. He stated that he never met or examined Mr. Rew. He said that as medical director he could speak to an employee and the employee’s physician about his medical condition but didn’t find any reason to do that with respect to Mr. Rew. He agreed that medical records sometimes contain incorrect information. He agreed that because of the statement in the medical record about Mr. Rew working as a roofer and being very busy, he assumed that Mr. Rew was tearing shingles, replacing roofs and things like that. He said he asked for additional investigation because the information about working as a roofer needed to be validated. Dr. Heligman was directed to the June 15, 2018 treatment note in CX 2 and agreed that the review of systems indicates that Mr. Rew had memory loss and confusion. He agreed that memory loss or confusion could be a basis to not allow Mr. Rew to return to work. He agreed that the June 15th office note indicated that Mr. Rew had no problems with walking or imbalance. He said he assumed Dr. Gonzales did not clear Mr. Rew for work as of the June 15th treatment record. He said that CSX requires that the treating physician provide a recommendation for the employee to return to work safely. He said there was never a statement from Dr. Gonzales clearing the Complainant to return to work. He agreed that conductor is a safety-sensitive position. Dr. Heligman agreed that if Mr. Rew didn’t feel he was fit to return to work as conductor, he should not present himself for work. He said if a treating physician identifies barriers to an employee’s safe return to work, he would not be allowed to return. Tr. 253-67.

Dr. Heligman agreed that not all conversations between a physician and a patient at an office visit are documented in an office note. He said he saw the note that Dr. Gonzales provided for the investigation hearing, recommending that Mr. Rew be physically active and do light work.

He did not agree that this represented a treatment plan but that it was a recommendation. He said he would expect any patient to follow the recommendation of their treating physician. Dr. Heligman testified that he did not know how long Mr. Rew spent on any roof he saw in the photographs, or what specific roofing activities he performed. He said railroad employees are expected to work for at least eight hours and up to twelve hours. He agreed the photographs do not show how busy Mr. Rew was. He assumed he was doing roofing activities. He said he did not know how much time Mr. Rew spent on any roof. He said he was not aware that Mr. Rew

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46 Both the April and June office visits with Dr. Gonzales do in fact document both memory loss and confusion in the “review of systems” portions of the office notes.
47 JX 4, page 93 and CX 2 page 36.
was surveilled for 53 and one-half hours or what percentage of that time he was on a roof.  Tr. 267-73.

Deposition testimony

ERIC REW

The Complainant was deposed by the Respondent on January 23, 2020.  Mr. Rew testified that in 2017 he was working for CSX as a remote control operator at the Walbridge yard.  He explained the duties of a remote control operator.  One of his supervisors was Andrew Bamford.  Mr. Rew described how his injury in January 2018 occurred.  He said at the hospital Mr. Bamford asked him to file a formal injury report.  He said that several days after the injury he began to have terrible headaches, vision problems and nausea and he sought further medical treatment.  He saw his family doctor, Dr. Sigler, who ordered testing.  He first saw Dr. Gonzales around April 2018.  He said he continued to have terrible headaches almost daily in March.  He said it was his understanding that Dr. Sigler’s nurse practitioner was communicating with CSX.  Mr. Rew said that in June Dr. Gonzales recommended that he get out of the house and do some strenuous activity, see how much he could handle, and they would decide about future treatments from there.  He said Dr. Gonzales knew his father was a roofer and she said he should go work with him a little and see how he felt.  He said Dr. Gonzales wanted to know how he responded to the work before deciding the next step.  When asked what exactly Dr. Gonzales said to him he testified that she said “to do whatever I could to exert myself a little bit and test myself and see what my boundaries were.”  Mr. Rew said he had helped his father in his roofing business for his whole life.  Depo. Tr. 4-42.

Mr. Rew was directed to Dr. Gonzales’ treatment note on June 15, 2018 and her statement that “[p]atient works as a roofer during the day, and has been very busy.”  He said that the treatment plan they discussed was to start trying to work and that she recommended he do a little work for his father and see how he felt.  She said after the headaches were under control he would do cognitive rehab, cognitive therapy.  Mr. Rew said he told Dr. Gonzales that once the headaches were under control and he was off narcotics he maybe would be back at work for the railroad.  He said they discussed cognitive therapy but he told her it would be difficult doing therapy with a terrible headache and she said let’s get the headaches under control and then see what therapy he would need.  Mr. Rew said he didn’t start helping his father until July.  He said he was not compensated for his work.  He said he only went out a few times to help his father and couldn’t stay away from the house for more than three or four hours at a time.  He said he had headaches, nausea, and sensitivity to lights and loud noises.  He said he did not think he helped his father in August.  Depo. Tr. 42-47.

Mr. Rew was directed to the photographs exhibited at his investigation hearing.  He discussed what he was doing in the photos.  He said he did not help his father during the period prior to the investigation hearing with anything except climbing up to the roofs and seeing what work was needed.  He agreed that he was depicted in the pictures.  He was asked about the video

48 RX 28.
49 Depo. Tr. at p. 41.
50 Depo Tr. at p. 42, referring to Depo. Exhibit C, RX 28 p. 159.
showing him on CSX property near the ice machine and explained what he was doing. He said he went there to use the computer to check his seniority. He said he did not have a computer. He said he did not take any ice. He said when he opened the ice machine he was only looking for the broom that had been there. He said there had been broken brooms next to the ice machine and he wanted to clean out his truck. He said he had found the broom in the ice machine in the past. Mr. Rew was then asked about the letter from Dr. Gonzales stating she encouraged him to be physically active and to do light work. He said he stopped going to Dr. Gonzales after he was terminated in August 2018 because he no longer had insurance. He said that by the end of 2018 he felt that he could work a full-time job. He said he continues to help his father when he can. Depo. Tr. 47-76.

Mr. Rew discussed his income since he was terminated, income he has lost and emotional damages. He said he has not sought mental health treatment because he has no insurance. He said it was known at CSX that his father was in the roofing business and that he helped him out because his father worked, with the Complainant’s help at times, for numerous supervisors and others in management. He said no one at CSX told him there was anything improper about helping his family. He said he was not compensated for helping but his parents would help taking care of his children at times. He said when he started helping his father in July he believed he was following Dr. Gonzales’ treatment plan. He said that he had had one injury at CSX previously and was written up for a rule violation. He said his vehicle was backed up at the Rossford facility because it’s a CSX rule to back your vehicle in for safety. Depo. Tr. 77-107.

CARMELA GONZALES, M.D.  

Dr. Gonzales was deposed by the Complainant on August 27, 2020. Dr. Gonzales testified that she is a neurologist with Mercy Health, is board-certified and is licensed in Ohio, Wisconsin and Arkansas. She has a practice in Toledo, Ohio. She discussed her treatment of the Complainant. She first saw him on April 18, 2018, when he saw her for complaints of headaches, sleep disturbance and memory loss. The headaches were his main concern. He indicated that they started about three weeks after a work-related injury to his head. After her examination she assessed post-concussion syndrome, which is a constellation of symptoms secondary to a blunt head injury. She said his symptoms were due to his head injury. She started treatment with amitriptyline for his headaches. She also recommended cognitive rehab for his memory complaints. She was given a description of Mr. Rew’s job duties and stated that he would not have been able to perform those duties when she saw him. She next saw Mr. Rew on June 15, 2018. His headaches had improved to the point where he had stopped taking amitriptyline. His headaches had decreased to one or two per week lasting one to two hours. He said he was working as a roofer during the day and was very busy. She did not know how many hours a day he was working. His examination was mostly unchanged from his initial visit. She said he had a fairly normal exam with no significant impairment in motor or cognitive function. Since he was doing fairly well they decided not to start him on any medication and to hold off on taking the amitriptyline. Dr. Gonzales said she told him that he could always restart at a lower dose if his headaches returned and she encouraged him to start cognitive rehab to help with his

51 Depo Tr. at pp. 64-65 and Depo. Exhibit F at RX 28, page 203.
52 JX 18.
memory. Her opinion as to whether he should return to his railroad job had not changed. Depo. Tr. 4-15.

Dr. Gonzales identified and read into the record her letter of August 10, 2018 concerning her recommendation that Mr. Rew be physically active and do light work. She said that this has been shown to help in cognitive and physical recovery in patients with post-concussion syndrome. Dr. Gonzales stated that this recommendation was part of her treatment plan and it is one that she gives to other patients who have post-concussion syndrome. She said she next saw Mr. Rew on August 31, 2018. His symptoms had worsened and his headaches were now occurring daily. The person who accompanied him reported that his memory issues had gotten worse and that there had been a change in his personality. He was still off work and had not been able to do any physical activity recently because of the headaches. Dr. Gonzales said that the worsening of his symptoms was not typical after such a good improvement but could be influenced by sleep, stress, or physical activity. She said psychosocial stressors could include financial stress, problems with a spouse, children, work, basically the stress of daily life. Depo. Tr. 15-19.

Dr. Gonzales was directed to the Review of Systems on page 31 of her treatment records. She said she noted a mood disorder under “psychiatric” for the first time. She said a mood disorder can range from anxiety to psychosis to depression. She said the Complainant reported some depression. She recommended he start a Medrol dosepack, which is a low dose steroid, to break his current headache cycle, and planned to restart amitriptyline at a lower dose to help with his sleep and headaches. She again encouraged Mr. Rew to start cognitive rehab that day and documented in her note that it was not safe for him to return to his job. A follow-up in the next few weeks was planned. Dr. Gonzales said she did not see Mr. Rew again. Depo. Tr. 19-21.

On cross-examination, Dr. Gonzales testified that her notation of psychological stressors was based on Mr. Rew’s report, and that she did not do a psychological examination. She said that when she advised Mr. Rew not to return to work she was referring to his railroad job. She said she discussed with Mr. Rew his return to work during his visits but she did not give him anything official with regard to returning to work. Dr. Gonzales was referred to the “Assessment/Plan” at p. 22 of her treatment notes and she confirmed that her recommendations were to stay off amitriptyline, to restart it if his headaches became more frequent, to continue Excedrin and to start cognitive rehab. She agreed that she recommended cognitive rehab in April 2018. Her understanding was that Mr. Rew did not start cognitive rehab because he was too busy working as a roofer. She agreed he did not follow the treatment plan with respect to cognitive rehab. She said that she did not know if he ever started cognitive rehab. She said that cognitive rehab is usually done with a speech therapist and usually involves 30 to 45-minute visits two or three days a week. She said she did not do an assessment to confirm his reports of memory loss or cognitive difficulties. She said that her testimony that as of the June 2018 visit Mr. Rew could not have returned to his railroad job was based mainly on his memory and the plan was for him to have cognitive rehab to help with his memory. Depo. Tr. 21-27.

53 Depo. Tr. at 15, referring to letter at p. 69 of JX 18 (p. 36 of CX 2, Dr. Gonzales’ treatment records).
54 Depo. Tr. at p. 19, referring to JX 18, p. 64.
55 Depo. Tr. at p. 24, referring to JX 18, p. 55.
Dr. Gonzales said she composed the August 10, 2018 letter because Mr. Rew asked her to document what they discussed and that she encouraged him to do physical activity. She said other than the conversation about his inability to do cognitive therapy she never discussed his work as a roofer with Mr. Rew. Dr. Gonzales agreed that she did not encourage Mr. Rew to walk around on a roof without fall protection and that that would be dangerous for someone with the symptoms he reported. She agreed that she is not board-certified in occupational medicine and does not practice in that field. Depo. Tr. 27-29.

On redirect examination, Dr. Gonzales agreed that Mr. Rew’s level of activity would be dependent on the level of his symptoms at any particular time. Dr. Gonzales was asked to explain the note at page 35 of her treatment notes on September 5, 2018 regarding the telephone call from “SCH rehab.” She said that at Mr. Rew’s initial visit the cognitive rehab order was sent to occupational therapy, and at St. Charles Hospital (SCH) cognitive rehab is done by a speech therapist instead of an occupational therapist. Depo. Tr. 29-30.

ROBERT SARVER

Mr. Sarver was deposed by the Complainant on October 23, 2020. He said his current title is superintendent of the Midwest region. He has worked for CSX since 2009 and was hired as a management trainee. He did not work for any railroads before that. He discussed the various positions he has held with CSX. He said he did not know Mr. Rew personally and has never met him. He said the only role he had regarding the charges brought against Mr. Rew was that he was told by his general manager, Nicholas Male, to insure charges were inputted on Mr. Rew. He was informed by his general manager that there was video surveillance of Mr. Rew. He identified Exhibit 1 to the deposition as the discipline letter he issued dismissing Mr. Rew from employment. He said he agreed with the dismissal. He said he reviewed the transcript of the investigation hearing and made a recommendation on discipline. His recommendation was to dismiss him. He said the manager of labor relations also makes a recommendation. He said Macon Jones, the person in labor relations, also reviewed the transcript and recommended dismissal. He said he and labor relations generally agree on the findings and discipline and that they would disagree only once or twice out of 20 cases. He said the first charge against Mr. Rew, that of removing material from CSX property without permission, is a major offense as identified in their policy. He said if that had been the only charge against Mr. Rew he probably would not have recommended dismissal. He said if the only charge was that of dishonesty by engaging in other work, he probably would have recommended dismissal. Mr. Sarver discussed the Operating Rules Mr. Rew was determined to have violated. He stated that Mr. Rew violated Rule 104.2 because he was dishonest. He said his dishonesty was that he was on leave from CSX and was doing work as a roofer, which meant he could work as a conductor based on the testimony of Dr. Heligman. Mr. Sarver also discussed Rule 104.11, which provides that an employee must not engage in any other kind of work that interferes with the employee’s ability to perform work for CSX or creates a conflict of interest or is detrimental to CSX. Mr. Sarver agreed that he had no evidence that Mr. Rew had his own business or was in an employment

56 Depo. Tr. at 29, referring to JX 18, p. 68.
57 CX 8.
relationship with anyone other than CSX. He said that to his knowledge the term “work” as used in Rule 104.11 is not defined. Tr. 4-28.

Mr. Sarver testified that Mr. Rew was not cleared to return to work on any of the days he was photographed engaged in roofing activities and therefore could not have gone to work at CSX. He testified that if Mr. Rew could only work four hours a day he could not work as a conductor. He stated that Mr. Rew’s treating physician was keeping CSX advised as to his medical condition and treatment. He said that whether Mr. Rew violated Rule 104.11 would depend on whether his activity went against the treating physician’s recommendation and whether he was doing things that met the same requirements as a conductor. He referred to Dr. Heligman’s testimony at the investigation hearing that if Mr. Rew could perform roofing he could work as a conductor. Mr. Sarver agreed that there was no evidence in the record that Mr. Rew could perform activities for eight hours or more. He said there was no evidence in the record that Mr. Rew was lifting 40 pounds, which is what conductors have to lift. Tr. 28-38.

Mr. Sarver was directed to the August 10, 2018 note from Dr. Gonzales recommending physical activity and light work for Mr. Rew to aid in his recovery. He agreed that one of Mr. Rew’s responsibilities was to follow his physician’s orders and that employees should be permitted to engage in any physical activity the treating doctor recommends. He said he did not think an employee should be dismissed from service for following his physician’s orders. He agreed that based on the investigation hearing transcript he could not determine how long Mr. Rew performed the activities depicted in the photographs submitted at the hearing. He also agreed that he did not see from the photographs any evidence that Mr. Rew took a bag of ice from the CSX facility. He also agreed that the way Mr. Rew parked at the facility was the way CSX trains employees to park. He said he did not see anything in the photographs inconsistent with Dr. Gonzales’ recommendation that Mr. Rew be physically active and engage in light work. Mr. Sarver was directed to photographs 11, 12, 13, and 14 in JX 4. He testified that nothing in the first photograph indicated Mr. Rew could perform the duties of a conductor and nothing in the other three photographs suggested he was doing anything other than estimating and checking out a roof. Mr. Sarver said that he did not recall Mr. Bamford telling him that he was aware that before Mr. Rew’s injury Mr. Rew had worked in the roofing business. Tr. 39-63.

Mr. Sarver was directed to Exhibit 4, which he identified as CSX’s Code of Ethics. Mr. Sarver testified that nothing is done to see that conductors and engineers get copies of the code of ethics and they are not tested on it. Mr. Sarver was directed to the part of the code of ethics dealing with conflicts of interest. He indicated that Mr. Rew’s activities noted in the investigation interfered with his ability to get better and return to work as a conductor. He said that he would not have expected Mr. Rew to report part-time work unless it interfered with his work at CSX or his ability to get better and return to work. He said Mr. Rew’s work interfered with his recovery because his physician said he was busy working and performing roofing. He said he did not know whether his physician ever indicated that the roofing was interfering with his ability to get better. He said he did not know why Mr. Rew did not begin cognitive therapy

58 Carrier Exhibit 3 to the investigation hearing transcript.
59 The photos are Exhibits 11, 12, 13 and 14 to the deposition transcript and are also at pp. 80-63 of JX 4.
60 JX 10 at p. 13.
when it was first prescribed. He said he did not know of any other conductor or engineer who was disciplined because of the conflict of interest section of the code of ethics. He said that if Mr. Rew believed he was following the treatment plan of his physician by doing light work and being physically active he should not have been disciplined. He said to his knowledge no one asked Mr. Rew before the hearing why he was performing the activities he was doing. He said he did not think it fair that Mr. Rew was not asked if what he was doing was in furtherance of his care and treatment. Tr. 63-79.

Mr. Sarver was directed to Depo. Exhibit 6 and the email from Macon Jones on September 16, 2018.61 He was directed to the portion of the email that says “[h]owever, the employee provided no credible reason for his actions other than he was working as his physician described.” Mr. Sarver confirmed that when he and Mr. Jones made the decision to dismiss Mr. Rew they understood that his explanation was that he was working as his physician described.62 Mr. Sarver identified Depo. Exhibit 9 as an employee discipline report of an unidentified employee. He said all the records through Bates stamp No. 1437 are the same employee. Mr. Sarver said that he has never had any training in whistleblower situations or anti-retaliation situations and had never seen the document at the beginning of Depo. Exhibit 8 before.63 He was directed to the provision on the second page of the document titled “Prompt Medical Attention” and the language regarding following orders or a treatment plan of a treating physician. He said he receives annual training on injury reporting and that he is aware that it may violate the statute if he disciplines an employee for following the orders and treatment plan of a treating physician, and that he was aware at the hearing that Mr. Rew said he was following the treatment plan of his treating physician. He stated that he did not have any evidence to contradict what Mr. Rew said. Mr. Sarver agreed that it was undisputed that Mr. Rew’s physician wanted him to be physically active and do light work. He also agreed that when he performed the activities depicted in the photographs Mr. Rew believed he was following the treatment plan and orders of his physician. He said he did not believe Mr. Rew because of “the testimony and the investigation concerning the private investigator and risk management’s conclusion of - you know, investigating Mr. Rew, and Dr. Heligman agreed with that.”64 He said he did not believe Mr. Rew because of the testimony of Mr. Carnes and Dr. Heligman, but agreed that there was nothing in Dr. Heligman’s testimony that contradicts or disputes the treatment plan from Dr. Gonzales. He said Mr. Carnes testified that that Mr. Rew was consistently working a roofing job, even though he only saw the information from the private investigator. He agreed that there was nothing in the photographs introduced at the investigation hearing that disputed that Mr. Rew was following his physician’s treatment plan. Mr. Sarver said the whistleblower training he received did not to his recollection include anything about following the order and treatment plan of a treating physician. He said he and Macon Jones never discussed the issue of whether or not Mr. Rew was following the orders and treatment plan of his treating physician. Tr. 79-94.

On examination by the Respondent, Mr. Sarver said that based on the evidence at the investigation hearing and review of the transcript, he believed that Mr. Rew was working as a

---61 The top email at Bates stamp page number 950.
62 Sarver Depo. Tr. at 82.
64 Depo. Tr. at p. 89.
roofer. Referring to Dr. Gonzales’ note of August 10, 2018, Mr. Sarver stated that the note does not indicate that Dr. Gonzales’ treatment plan was that Mr. Rew should work as a roofer. He said he does not think that working as a roofer is light work. Tr. 95.

On reexamination by Complainant, Mr. Sarver testified that he could not tell from the photographs whether Mr. Rew’s activities shown in the photos constituted light work. He agreed that he did not see Mr. Rew performing any work that’s classified as heavy or medium. He agreed that he did not know from the photographs what level of activity Mr. Rew was engaged in. Tr. 96-97.

JEREMY CARNES

Mr. Carnes’ deposition was taken by the Complainant on February 5, 2020. Mr. Carnes stated that he is an attorney in inactive status and does not work as a lawyer for CSX. He began working for CSX in 2010, beginning in the risk management department as a manager of field investigations. In 2015 he was promoted and became a district manager of risk management. His supervisor is Michael Scully. He has three direct reports. His responsibility as a district manager is to handle claims against CSX, employee injuries, property damage claims, and various other things including exposure claims. Most of his time is spent on FELA claims. He agreed that when an employee is off work with an injury he is expected to get medical care and treatment and follow his doctor’s advice. Mr. Carnes was referred to the investigation hearing. Mr. Carnes was asked to bring the surveillance photographs to the investigation hearing. He said he made the decision to initiate surveillance of Mr. Rew because of an email he received from the medical department indicating that Mr. Rew told his doctor that he had not finished cognitive therapy because he was very busy working as a roofer. He said he did not know Mr. Rew. Mr. Carnes said he would have talked to Mr. Rew’s supervisors and managers during the injury investigation in January. He said he may have spoken to Andrew Bamford. He said that around the time he received the note from the medical department Mr. Bamford told him that Mr. Rew’s family was involved in the roofing business. Mr. Carnes testified that based on a conversation with Mr. Bamford he was aware that even before his injury Mr. Rew worked part-time in some capacity with the family business. He did not know whether he was paid for that work. Mr. Carnes said that he does not know what kind of activities employees who are off duty due to an injury are allowed to do. He said that his role in the investigation was to provide the factual background. He said he does not have an opinion on whether Mr. Rew was guilty of any rule violation. Tr. 4-19.

Mr. Carnes said he had some access to Mr. Rew’s medical records. He said he understood that Mr. Rew claimed a head injury and they referred to it as post-concussion syndrome and he was claiming sensitivity to light and loud noises. He said he reviewed the video on Mr. Rew by the surveillance company. He said one of the videos showed Mr. Rew on a roof and it appeared to Mr. Carnes that he was removing some material from the roof. He didn’t know how long he was on the roof. He said the surveillance started on July 27th. Mr. Carnes

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65 Exhibit B to the Depo. Tr. at Bates No. 95.
66 CX 6.
67 Depo. Exhibit 1.
said he received no report that Mr. Rew was involved in any roofing activities on July 27th that were not on the video. Mr. Carnes said the video on July 28th showed Mr. Rew on CSX property at 1601 Miami Street.68 He said he didn’t know how long Mr. Rew was on the property but he didn’t think it was very long. Mr. Carnes said that at some point between July 28 and August 2, Nick Male, who was the general manager of the Midwest region, became involved. Mr. Carnes said he contacted the manager of the facility, which is a trailer. He did not know what was in the facility but said there was probably a computer and there was an ice cooler outside in front of it. He did not determine if there were any reports of ice missing from the cooler and he did not know if there was any missing. He said he took photos of the ice machine sometime after July 28. He did not determine if any ice was missing. He said there was a video of the facility on July 28 but it was too far away to see any ice in the video. He said you could see the lid of the ice machine go up and down and the door open and close on the passenger side and Mr. Rew drive away. He said he did not think the surveillance video showed Mr. Rew taking ice out of his car. Mr. Carnes said he believed there was clear and convincing evidence that Mr. Rew took ice even though no ice is seen in the video and he didn’t know if there was any ice missing. He agreed that it was standard practice for CSX employees to back into parking spaces. He said when he went to view the property he did not go into the trailer. He did not know how long Mr. Rew was involved in roofing activities on July 28th.

Mr. Carnes testified that Mr. Rew was also under surveillance on August 2d through August 5th and there was video on the 24th and 25th. He said no activity by Mr. Rew was reported on August 2d or August 3rd. Mr. Carnes was directed to the photographs submitted at the investigation hearing.69 Mr. Carnes was directed to the first photograph. He said Mr. Rew was on the roof but he couldn’t tell what he was doing. Mr. Carnes reviewed the photos on page 3. He agreed that the time designations on the photos on the first three pages span seven to maybe ten minutes. He said there was nothing about Mr. Rew’s injury that would prevent him from carrying a ladder or walking. Mr. Carnes agreed that Mr. Rew was not performing any roofing activities in the photos at the Transflo facility.70 Mr. Carnes stated that in the video of the Transflo facility he could see Mr. Rew at the facility. He did not see any ice. He said he believes there would have been ice in the cooler on the day Mr. Rew was there but could not be sure. He said he believes there was ice in the cooler because Mr. Rew opened it twice and went back and forth to his car. He said he couldn’t imagine why he would do that if the cooler was empty. He said he did not know what Mr. Rew’s testimony was with respect to what he was doing there. Mr. Carnes said he reported to the CSX police that someone who was off work had entered the Transflo facility. He did not ask them to investigate and he didn’t know if they did anything in response to the information. Mr. Carnes said he not talk to any Transflo employees about whether any ice was missing on July 28.

Tr. 19-37.

68 The facility with the ice machine. See RX 11. The facility is referred to at times as Transflo, which Mr. Carnes identified as a CSX subsidiary. Depo. Tr. at 56.

69 Carrier Exhibit 3 to the hearing transcript.

70 Apparently referring to the photos on pp. 4 and 5 of the photographs (Bates Nos. 75-76).
Dr. Heligman was deposed by the Complainant on August 26, 2020. He discussed his medical and employment background. He testified that he is board-certified in occupational medicine and is the chief medical officer at CSX. He began working full-time for CSX in January 2012 and has been the chief medical officer since January 2015. He explained the process for an injured CSX employee to return to work. He said the employee is to present himself as ready to return to work and then CSX reviews the medical information provided. The treating physician completes a form and if additional information is needed CSX requests the actual medical records. CSX then determines if the employee is fit for duty. He said they need something from the treating physician telling them that the individual is prepared to return to work. He said that sometimes someone from the medical department will talk to the employee about his condition. Dr. Heligman said he is familiar with the duties of a conductor. Tr. 4-24.

Dr. Heligman said he has never treated or met Eric Rew. He said he wouldn’t approve to return to work anyone who was having side effects from medication that would adversely affect safety at work. Dr. Heligman identified Johnny Delk as a nurse who worked for him in 2018. Dr. Heligman said there is nothing in the collective bargaining agreement that would prevent either him or a nurse from talking to an employee about their medical condition or treatment, and that this is done at times. He said Mr. Delk would do that on a regular basis either on his own or at Dr. Heligman’s direction. Dr. Heligman testified that he is familiar with post-concussive syndrome and described its symptoms. He agreed that someone with post-concussive syndrome may be able to perform heavy work but have injuries that prevent returning to work as a conductor. With respect to his role in the surveillance of Mr. Rew, he testified that he found something in his medical records that seemed to be inconsistent and suggested that the manager of field investigations on the case take a look at it. Dr. Heligman referred to Dr. Gonzales’ statement in the June 15, 2018 treatment note that Mr. Rew was working as a roofer and was very busy. Dr. Heligman said he thought the ability to work as referenced in the treatment note seemed inconsistent with the inability to return to work at CSX and he pointed that out to the field manager. He said the examination on June 15th indicated his headaches had reduced in severity, he felt safe enough to climb a ladder and get on a roof. He agreed that he did not know the reasons why the Complainant had not started cognitive therapy. He said he does not know if Mr. Rew worked as roofer when he was qualified as a conductor. He said he does not know how long Mr. Rew performed the activities seen in the photographs. When asked why he or Mr. Delk didn’t contact Mr. Rew after looking at Dr. Gonzales’ June treatment note to see why he could not come back to work, Dr. Heligman said that is not part of their standard practice. Tr. 24-59.

Dr. Heligman was directed to his testimony at the investigation hearing that performing the duties of roofer while on medical leave is fraud and in violation of the code of ethics. He said that Mr. Rew’s ability to work as a roofer while not presenting himself as able to return to work for CSX is a conflict under the code of ethics. He said there is an inconsistency regardless of the amount of time he was able to work as a roofer. He said he had no criticism of Dr. Gonzales’ advice to Mr. Rew to be physically active to improve his condition. He agreed that activity and work is beneficial to individuals recovering from whatever medical ailment they have. Dr. Heligman stated that he did not consider a recommendation for activity to be 71 CX 7.
treatment. He said he doesn’t consider medical advice to stay active to be treatment specific to any particular condition. He agreed that being active would be beneficial in helping Mr. Rew overcome the symptoms of post-concussive syndrome, but he does not consider it to be medical treatment because it’s not specific to his particular condition. Dr. Heligman said he never attempted to contact Dr. Gonzales, but said that he is permitted to contact an employee’s physician. He said that if Mr. Rew had told him that he had headaches and other medical conditions that he believed prevented him from returning to work in a safe capacity, he would not have forced him to return to work. Tr. 59-72.

ANDREW BAMFORD

Andrew Bamford was deposed by the Complainant on February 5, 2020. He stated he started working for a railroad in 1991. He began work for CSX as a yardmaster in 1996. He left CSX in 2004 and went to another railroad. He returned to CSX in 2007 and has been a trainmaster since then. He supervises engineers, conductors and remote control operators and yardmasters and clerks. He said CSX employees are expected to work for up to 12 hours a day and cannot work for only six hours. He said train service employees must be capable of working without any restrictions. If an employee cannot remain alert and attentive at all times he is not fit for service. He said if he is aware that an employee has a condition that affects his ability to safely perform his duties he would not want him to work until he could do so. He agreed that employees are not supposed to work under the influence of prescription drugs that may affect their alertness and attentiveness. Tr. 4-21.

Mr. Bamford said he knows Eric Rew and he reviewed the transcript of the investigation hearing before the deposition. He was asked about the duties of a roofer. He said he was on duty at the time of the injury to Mr. Rew and was notified of the injury. Mr. Bamford took Mr. Rew to the hospital and filled out reports of the injury. He said he did not doubt that Mr. Rew reported the injury in good faith. He said the injury appeared to be confined to the head. He said that other than the day of the injury he did not have any other contact with Mr. Rew except possibly at the investigation hearing. He said that he had been Mr. Rew’s supervisor for virtually Mr. Rew’s entire career. He said he never had any significant concerns about his performance or his honesty or any recollection of Mr. Rew not following rules. Mr. Bamford said he was aware prior to the investigation hearing that Mr. Rew or his family was involved in the roofing business. He knew that his father had done work for other railroad employees and that Mr. Rew had a cousin who worked for the railroad and that both the cousin and Mr. Rew had spoken of their roofing experience. He was also aware that Mr. Rew had worked part-time in his father’s roofing business and he said he never took exception to that. He said it did not appear to be a conflict of interest. He said as long as they met the requirements to perform service at CSX he did not have a problem with it. He said he didn’t know the extent to which Mr. Rew did work for his father’s roofing company but he wasn’t failing to report to work as needed. He did not know if Mr. Rew was paid when he worked for his father. He said other employees do part-time

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72 JX 19.
73 Several of the deposition transcripts incorrectly refer to the injury as occurring in January 2017, but the injury date was January 23, 2018. See, e.g., JX 6 (injury report); JX 7 (CSX Certification of Ongoing Illness or Injury); CX 2, p. 7 (treatment record); Rew Depo. testimony at p. 16; Rew hearing testimony at p. 123.
work outside of CSX. He said to his knowledge neither he nor CSX have ever taken exception to part-time work. Mr. Bamford said he did not recall any prior CSX investigation against an employee who is engaged in part-time or light work before the investigation of Mr. Rew. Tr. 22-30.

Mr. Bamford was referred to the transcript of the investigation hearing. He said he was the charging officer because he was Mr. Rew’s immediate supervisor. He testified that a charging officer introduces the rules that are being investigated to find out if the employee complied with the rules. He also had a role in determining what the charges were and what evidence is used at the hearing. He said he was not a witness to any activities by Mr. Rew. He said he did not decide what rules would be introduced in this case. He was notified by Mr. Sarver which rules they would proceed with. He said that Mr. Sarver made clear to him that there was enough to warrant a charge. Mr. Bamford said he that over the years has appeared as a charging officer at about 15 or 20 hearings a year. He said he has had two other instances in which he has introduced the code of ethics at investigation hearing in cases involving employees who had acted violently. He said he did not look at any of the surveillance of Mr. Rew or any exhibits except those he introduced. Referring to the investigation hearing transcript, Mr. Bamford said he was informed by Mr. Sarver on August 6th that there had been an investigation of Mr. Rew. He said he was told that Mr. Rew had been observed engaged in roofing activities allegedly with his father’s business. Mr. Bamford was asked what activity an employee off work due to an injury or medical condition is permitted to perform and said he did not have a clear answer to that. He said that the code of ethics states that if you engage in other work activities you need to make sure it’s acceptable.

Mr. Bamford stated that if an employee is off work with an injury he believes it is acceptable for the employee to perform activities that are allowed by his physician. He said if the physician wanted the employee to perform light activities that would be acceptable. Mr. Bamford was directed to Rule 104.11, which he identified as a rule he introduced at the hearing. He said he was informed that he was to look at whether Mr. Rew may have been working in another capacity and may have violated rule 104.11. Mr. Bamford stated that he was aware that at the time of the surveillance Mr. Rew was off on medical leave and was not being called in to work on those days. He said Mr. Rew wasn’t cleared to return to work at that time. He agreed that in order to return to work Mr. Rew would have to comply with Rule 104.12 because he had been off work for at least seven consecutive days. He agreed that Mr. Rew could not have worked for CSX on any of the days of the surveillance because he had not been cleared by the medical department. Mr. Bamford was asked how Mr. Rew’s activities could interfere with his ability to perform service with CSX and said he didn’t know the answer to that. Mr. Bamford acknowledged that he introduced rules about dishonesty and theft. He said he was told by Mr. Sarver that Mr. Rew took ice from a CSX cooler. With respect to the section of the code of ethics that references “Outside Employment and Financial Interests,” Mr. Bamford said

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74 Exhibit 1 to the deposition.
75 This is an exhibit to the investigation hearing, described in the deposition as Exhibit 3 to the transcript. It is at page 87 of JX 4.
76 Rule 104.12 states that under certain situations an employee must not return to work until medically cleared by the medical department. One of the situations is being off work for at least seven consecutive days.
77 JX 10, p. 24 of the Code of Ethics (p. 13 of JX 10).
his interpretation of employment is that you’re being paid and working in another capacity somewhere. He added that the section might not be limited to paid employment. He said he was not aware of any training employees received as it relates to outside employment and financial interests and he was unaware of anything that defines outside employment. Mr. Bamford was referred to his testimony at the investigation hearing that Mr. Rew “engaged in other forms of employment, namely roofing, while on leave from CSX.” He said that was probably a conclusion he made because he was told that Mr. Rew was observed working as a roofer. He said he had no knowledge about whether he was paid, specifically what he was doing or how long he performed those services. Mr. Bamford stated that it is CSX’s policy that employees back their cars into a parking spot while on CSX property. He said he had no part in the decision about whether or not Mr. Rew was guilty of the charges. 

Tr. 40-59.

MACON JONES

Macon Jones was deposed by the Respondent on November 12, 2020. Mr. Jones testified that he is the Director of Labor Relations for CSX. He helps manage the administration of the collective bargaining agreements and manages the team that handles claim responses for issues arising under the agreements. He has worked for Labor Relations for five years. Prior to that he was a state prosecutor in Florida. He said that the terms of employment for conductors at CSX are governed by a collective bargaining agreement that includes a process to be followed before discipline can be imposed. He described the process. He said if an employee is subject to dismissal Labor Relations provides a recommendation to the top-level decision-maker after reviewing the transcript and exhibits and any findings by the hearing officer. He said the recommendations are not binding on the field managers. Tr. at 5-12.

He said Mr. Rew was dismissed relating to performing other types of work inconsistent with his medical explanation to CSX. He said he recommended and supported the dismissal. He said the recommendation was based on the hearing transcript and exhibits. He said his recommendation was based on the testimony of the carrier witnesses, particularly Dr. Heligman and his review of the employee’s treatment notes as compared to the photographic evidence of the work he was performing. He said he thought there was dishonest behavior and that Mr. Rew was defrauding CSX in his actions. He said Mr. Rew was holding himself out as unable to work at CSX as a conductor but engaged in outside work or employment or at the least actions that were inconsistent with that representation. He said people are consistently dismissed for this. Mr. Jones was asked to look at Dr. Gonzales’ note of August 10, 2018 stating that the patient should be physically active and do light work. He said he did not find Mr. Rew’s explanation at the hearing credible. He said Mr. Rew did not provide any good reason why he was working. Mr. Jones said he also did not find Dr. Gonzales’ note credible. He said Mr. Rew provided no reasons other than his physician had allegedly done that. He said he did not believe that Mr. Rew thought he was working light duty. With regard to the charge of taking ice, Mr. Jones said that he thought there was evidence that he was there to take ice. He said the main thing was that Mr. Rew was working as a roofer when he should have been working as a conductor. Tr. 12-22.

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78 JX 4, p. 41.
79 JX 20.
80 The document is Exhibit 2 to the deposition and is the last page of JX 4 (the transcript of the investigation hearing).
Mr. Jones stated that it is fairly routine for employees to be charged with violations of the code of ethics. He said the code of ethics overlaps with the other rules Mr. Rew was charged with violating. Mr. Jones said that Mr. Rew appealed the dismissal to arbitration and Mr. Jones was shown the decision of the arbitration panel, which upheld the charge of dishonesty for engaging in other work while on leave but found that the charge of taking ice was not supported. The panel upheld the dismissal.\(^1\) Mr. Jones said that CSX has a policy against retaliating against employees who report injuries and have annual training on things like retaliation and discrimination. Tr. 22-26.

On examination by the Complainant, Mr. Jones confirmed that he was not the decision-maker in Mr. Rew’s case. He said the individuals who make a decision with regard to a disciplinary charge against an employee are all management employees. He agreed that the hearing officers for train and service employees are almost always a manager. He further agreed that when a hearing is held employees typically generally do not see the evidence before the hearing, and that was true for Mr. Rew. Mr. Jones said that he knew Mr. Bamford was the charging officer in Mr. Rew’s case but did not know that Mr. Bamford was aware that Mr. Rew and his brother, who also works for CSX, worked part-time in the roofing business. Mr. Jones said that the code of ethics says employees are supposed to get approval for part-time work. He said that here Mr. Rew’s work interfered with his work at CSX because Dr. Heligman testified that he was not getting the treatment that CSX paid for with respect to his cognitive ability because he was too busy roofing. He also said that Dr. Heligman testified that if Mr. Rew could do the work of a roofer he could also have worked as a conductor. Mr. Jones stated that if Mr. Rew did not get cognitive therapy then CSX did not pay for it. He agreed that nothing in the hearing transcript indicated that any cognitive therapy had been paid for. Tr. 26-38.

Mr. Jones agreed that employees are supposed to follow the treatment plans of their doctors. He said that his understanding of the Union’s position at the investigation hearing was that Mr. Rew’s doctor said he could do light duty and all of the surveillance information was light duty that was in compliance with the doctor’s note. Mr. Jones said that Dr. Heligman said that was not true and he was greatly influenced by Dr. Heligman’s testimony. Mr. Jones said that Dr. Heligman testified that carrying ladders and climbing up and down roofs and working as a roofer was comparable to working as a conductor. He stated that in his review of the transcript of the investigation hearing he deferred 100 percent to Dr. Heligman’s opinions about the light duty nature of the work in the photographs and whether or not what Mr. Rew was doing was consistent or inconsistent with working like a conductor would work. Mr. Jones said that that being on multiple roofs, being outside of a hardware store, carrying a ladder, would be consistent with working as a roofer. He said he also considered Dr. Gonzales’ note that he was working as roofer. Mr. Jones agreed that if being physically active is an appropriate treatment plan from the doctor then the employee should follow that plan and stated that an employee cannot be disciplined simply for following the treatment plan of their doctor. Tr. 38-51.

Mr. Jones testified that rule 103.3 applied solely to the alleged taking of the ice.\(^2\) He said he believed the evidence regarding the ice was circumstantial. He agreed that employees are

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\(^1\) This document is CX 3 to the deposition and is also RX 29.

\(^2\) Referring to the Exhibit 2 to the deposition, the investigative hearing transcript at p. 86 of JX 4.
expected to back into parking spaces. He agreed that the Public Law Board found that the evidence was insufficient to support the charge of taking the ice. He said the current status of his discipline record is that he has been disciplined for violations of Rules 104.11, 104.2 and the Code of Ethics. He said Mr. Rew has no longer received any discipline for the alleged taking of ice. Tr. 51-55.

Investigation Hearing

The investigation hearing took place on August 21, 2018. Angelo Cassaro, trainmaster in Cincinnati, Ohio was the Conducting Officer. He read into the record Carrier’s Exhibit 1, the August 9, 2018 notice to Mr. Rew of the purpose of the investigation, regarding information that Mr. Rew removed material from CSX property without permission and that he was dishonest when he engaged in other work while on leave. The hearing participants were identified as Jacob Wolff, local chairman and Mr. Rew’s representative, and the following witnesses: Eric Rew; Andrew Bamford, company witness and Charging Officer; Jeremy Carnes, company witness and District Manager of Risk Management; and Craig Heligman, Chief Medical Officer and company witness. Prior to the hearing, Mr. Rew’s union representative asked to see the evidence that CSX would use at the hearing, but was told that the union was not entitled to prehearing discovery under the collective bargaining agreement.

Jeremy Carnes

Jeremy Carnes testified that he is a District Manager of Risk Management and is responsible for employee injury claims and litigation. He testified that Mr. Rew reported an injury in January 2018 and was off work related to the injury. He was also informed that Mr. Rew was making a claim for damages against CSX due to his personal injury. In July 2018 Mr. Carnes saw a note from Mr. Rew’s medical provider that included a statement that Mr. Rew was working as a roofer. He said CSX initiated surveillance of Mr. Rew starting July 27th and July 28th that yielded some video evidence that Mr. Rew may have been engaging in roofing activities, and also that he appeared to enter a CSX facility on July 28th and remove CSX property. Because of this, they continued surveillance on August 2 through August 5. The findings of the surveillance were turned over to Transportation. That information was received by Mr. Bamford. Fifteen pages of photographs from the surveillance were marked as Carrier Exhibit 3. Mr. Carnes was asked questions about the content of the photographs from the Conducting Officer and from Mr. Wolff. He indicated that certain photos were taken from the video surveillance. Investigation Hearing (“IH”) transcript pp. 6-34.

83 JX 4. The testimony at the hearing was not taken under oath.
84 RX 8. The collective bargaining agreement was not submitted as an exhibit.
85 Mr. Carnes also testified at the hearing in this case on December 9, 2020 and at a deposition on February 5, 2020 (CX 6).
86 The surveillance reports of the two companies who did the surveillance are in JX 12. The reports consist of photographs and narrative.
Andrew Bamford

Mr. Bamford is a trainmaster at Walbridge, Ohio. He said he was notified on August 6th that there had been an investigation of Mr. Rew’s activities and that he was engaged in work while on leave from CSX. He said that some of Mr. Rew’s activities were not in compliance with CSX operating rules and company policies. Mr. Bamford discussed the relevant operating rules. He stated that Rule 100.2 requires employees to know and comply with rules, instructions, and procedures that govern their duties. He said rule 104.11 provides that an employee must not engage in any other type of work or business that interferes with the employee’s ability to perform service with CSX or creates a conflict of interest or is detrimental to CSX. He referred to Rule 104.2, requiring employees to be respectful and courteous and not be dishonest, insubordinate, disloyal or quarrelsome. Mr. Bamford then identified a three-page excerpt from the CSX Code of Ethics. He referenced the portion on the first page of the exhibit titled “Outside Employment and Financial Interests” and the first bullet point under that heading, which states:

“Always disclose and discuss outside employment with your supervisor and Human Resources Business Partner. If approved, you need to ensure that this outside activity does not interfere or detract from your work at CSX.”

Mr. Bamford then read into the record, from the second page of the document, the language under “Fraud and Theft,” as follows:

“Fraud and theft are crimes that can cause lasting damage to our reputation as well as bottom line. Fraud and theft are completely contrary to our culture and Core Values. We do not tolerate this activity under any circumstances by anyone working at or on behalf of CSX.

Fraud is an intentional misrepresentation of fact that deceives or is intended to deceive another individual or entity for financial or personal gain.

Fraud can take the form of offering false or fictitious information, reports or claims to another person. It also includes taking unfair advantage of someone either through manipulation, concealing something, misusing inside information, or misrepresenting the facts. Some examples of workplace fraud may include: Misrepresentation of timesheets or expense reports; Abusing or misusing company equipment, material, property or credit cards; Dishonest accounting practices.

Theft includes stealing, misuse of assets for personal or non-business reasons or using assets without permission. For CSX, theft usually involves stealing materials and supplies, equipment or scrap.

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88 Mr. Bamford also testified at a deposition on February 5, 2020 (JX 19).
89 The Operating Rules are an exhibit to the transcript of the Investigation Hearing and are at JX 4 pp. 85-88 (Carrier Exhibit 4).
90 The exhibit is at JX 4 pp. 89-91 (Carrier Exhibit 5).
Remember that CSX is your company, and acts of fraud or theft impact your company in a variety of ways. We’re depending on you to help us identify these activities before harm is done.”

Mr. Bamford then pointed out on the third page to the document, under “To Stay on Track,” the following language:

“Use good judgment to safeguard our assets from misuse or waste.

Do not remove company tools, equipment, inventory, or scrap from CSX property for personal reasons.”

And, under “Always keep in Mind” on the same page:

“Company assets should be used for legitimate business purposes and should not be used for non-company business.”

Mr. Bamford discussed how he believed these provisions were applicable. With respect to Rule 103.3, Mr. Bamford said he became aware that Mr. Rew had removed ice from CSX property without authorization while he was on leave. With regard to Rule 104.11, he stated that Mr. Rew engaged in other employment, namely roofing activities, while on leave from CSX. With regard to Rule 104.2, he said Mr. Rew was dishonest and disloyal to the service of CSX by claiming he was unable to perform railroad service for CSX but was at the same time employed as a roofer. Mr. Bamford said CSX had no notice from Mr. Rew of any outside employment and there was no approval process. He said by removing company material from the Transflo location at Rossford Yard, Mr. Rew was not in compliance with page 2 of the Code of Ethics. He said that Mr. Rew was fraudulent by being unavailable for work with CXS and working in other capacities.

On examination by Mr. Rew’s representative, Mr. Bamford said he had known Mr. Rew for maybe 18 years and had never had a problem with him. The Hearing Officer admitted Organization UTU B, the August 10, 2018 letter from Dr. Gonzales, as an exhibit. Mr. Bamford said he did not have any evidence that Mr. Rew removed ice from CSX property but that Mr. Carnes had concluded that.

Craig Heligman, M.D.

Dr. Heligman stated that as Chief Medical Officer he is responsible for administering the Occupational Health Department, which includes case management for on-duty injuries. He stated that he was told in early August that Mr. Rew was likely working as a roofer while being off work, which would be in conflict with his reported medical state. He saw a treatment note dated June 15, 2018 that indicated he had not yet had any cognitive rehab, which had been

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91 The exhibit is at JX 4, p. 93. The letter is also at page 36 of CX 2, Dr. Gonzales’ treatment records.
92 Dr. Heligman also testified at the hearing and by deposition on August 26, 2020.
recommended, and that he works as a roofer during the day and has been very busy.  He said the note was submitted by Dr. Gonzales on July 23, 2018. Dr. Heligman stated that if Mr. Rew could perform duties as a roofer he could perform duties as a conductor. Dr. Heligman was referred to pages 2 and 3 of the photographs of Mr. Rew, showing him carrying a ladder and on a roof. Dr. Heligman said that if Mr. Rew could perform those duties he could work as a conductor. He also addressed the August 10, 2018 letter from Dr. Gonzales stating that she “highly encourages[s] the patient to be physically active and do light work.” In response to the Hearing Officer’s question, Dr. Heligman stated that performing work as a roofer while on medical leave from CSX is fraud and in conflict with the Code of Ethics.

On questioning by Mr. Rew’s representative, Dr. Heligman stated that he is familiar with the physical requirements of both roofers and conductors. He said the Complainant was diagnosed with post-concussion syndrome. He said he did not know how much time Mr. Rew spent on any roof. He said he was not aware that Mr. Rew was surveilled for 53 and one-half hours or what percentage of that time he was on a roof. He agreed that Mr. Rew’s injuries would not prevent the Claimant from walking. He stated that he did not know the weight of the ladder Mr. Rew was carrying in the photograph. He did not agree that carrying a ladder of that size would be considered light work. He said work as a conductor is defined as heavy work by the Department of Labor. He said that according to Mr. Rew’s treatment records, his headaches were an everyday occurrence. He said that the treatment records say that Mr. Rew’s severe headaches are associated with nausea, photophobia and phonophobia, which would be in direct conflict with the ability to be a conductor or roofer.

**Eric Rew**

In response to the Hearing Officer’s questions, Mr. Rew stated that he had been a remote control operator for at least 10 or 12 years and has been a CSX employee for 18 years. Referring to pages 2 and 3 of the photographs in Carrier’s Exhibit 3, Mr. Rew stated that he appeared in the photos on a roof. On examination by his representative, he stated that in the photo on page 2 he was not doing any work on the roof, and in the photo on page three he was not performing any work other than carrying a ladder. He said the photos on page 4 show him at Rossford Yard. He said he was there to look at the computer to check his seniority. He said he had heard that a lot of people had quit and in anticipation of returning to work he wanted to see where his seniority fell. He identified the other person in the photo at page 7 as his stepbrother. He said that the photo at page 9 shows his uncle’s house. He said he did not perform any roofing duties on the house. With respect to the photos of Mr. Rew on a roof on pages 12 and 13, he said he did not perform any roofing duties on the house. Mr. Rew was asked about the August 10, 2018 letter from Dr. Gonzales and said she told him to do some light work and see how he responded. He said he did not remove any material from CSX property on July 28th. He said he was not employed by anyone during his time off work and was not compensated for any work he did.

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93 The treatment note is in CX 2 at page 19.
94 Carrier’s Exhibit 3, at pages 70-84 of JX 4.
95 Exhibit UTU B at page 93 of JX 4.
96 Mr. Rew also testified at the hearing and by deposition on January 23, 2020.
97 The facility is also referred to as Transflo.
during his time off. In response to a question from the Hearing Office, Mr. Rew agreed that he appeared in all of the photos in Carrier’s Exhibit 3.

A. DISCUSSION

*Did Complainant engage in protected activity?*

The Complainant contends that he was discriminated against by the Respondent for the protected activities of following orders or a treatment plan of a treating physician\(^{98}\) and notifying the Respondent of a work-related personal injury.\(^{99}\) By letter dated August 9, 2018 the Complainant was notified to attend a formal investigation “in connection with information received August 6, 2018 that on July 28, 2018, at or near Toledo, you removed material(s) from CSX property without permission. Additionally, you were dishonest when you engaged in other work while on leave, and all circumstances relating thereto.”\(^{100}\) After an investigation hearing on August 21, 2018, the Complainant’s employment with CSX was terminated on September 20, 2018 for violations of CSX Transportation Rules 103.3, 104.2, 104.11 and the CSX Code of Ethics.\(^{101}\)

Rule 103.3 provides:\(^{102}\)

“The unauthorized possession, removal, or disposal of any material from CSX property or from the property of customers is prohibited. Any article of value found on CSX property must be protected and turned in to a supervisor.”

Rule 104.2 provides:\(^{103}\)

“Employee behavior must be respectful and courteous. Employees must not be any of the following:

a. Dishonest, or  
b. Insubordinate, or  
c. Disloyal, or  
d. Quarrelsome.”

Rule 104.11 provides:\(^{104}\)

“An employee must not engage in any other type of work or business that:

a. Interferes with the employee’s ability to perform service with CSX, or  
b. Creates a conflict of interest with or is detrimental to CSX.”

\(^{98}\) 49 U.S.C. § 20109(c)(2).  
\(^{100}\) The letter is at JX 4, p. 68. The hearing was postponed and took place on August 21, 2018.  
\(^{101}\) See JX 5.  
\(^{102}\) See JX 4, p. 86.  
\(^{103}\) See JX 4, p. 88.  
\(^{104}\) See JX 4, p. 87.
The Code of Ethics violation was based on a portion of a provision regarding “Outside Employment and Financial Interests.” The portion relied upon by CSX states:

“Always disclose and discuss outside employment with your supervisor and Human Resources Business Partner. If approved, you need to ensure that this outside activity does not interfere or detract from your work at CSX.”

Protected activity under 49 U.S.C. §20109(c)(2)

As noted above, the FRSA provides that a railroad carrier subject to the Act may not retaliate against an employee for following the orders or treatment plan of a treating physician. The Complainant testified that at his June 15, 2018 visit with his treating physician, neurologist Carmela Gonzales, while he was on medical leave for his January 23, 2018 work-related injury, Dr. Gonzales told him to get out of the house and exert himself and do some physical activity. Mr. Rew said that he told Dr. Gonzales that his father owned a roofing business and that he had been helping him out since he was a kid and Dr. Gonzales thought it would be a good idea to help him in addition to taking his medication. In her deposition, Dr. Gonzales’ said that Mr. Rew told her he was working as a roofer during the day and was very busy. She said they did not go into detail and Mr. Rew “just mentioned it offhand.” Mr. Rew testified that he did not tell Dr. Gonzales at the June office visit that he was busy roofing but said that his father was busy. The Complainant said that after his injury prior to June he “didn’t lift a finger doing anything.” The treatment note itself does not reflect the discussion and does not specify any particular type of work he should do. Dr. Gonzales confirmed in her August 10, 2018 letter that at the June 15th office visit she “highly encourage[d] the patient to be physically active and do light work.” She said Mr. Rew asked her to document that she encouraged him to perform physical activity and therefore she authored the letter. She said that this was part of her treatment plan for Mr. Rew and that she has given the same treatment plan to other patients who have post-concussion syndrome. She said that being physically active has been shown to help in recovery of patients with post-concussion syndrome. Dr. Heligman, CSX’s medical director, said the advice to be active would be considered medical advice but that he considered it to be a general recommendation rather than a treatment plan. Dr. Gonzales is a board-certified neurologist and testified that she gives this recommendation to her patients who have post-concussion syndrome and explained why. She confirmed that her advice was part of her

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105 See JX 4, p. 89.
107 Gonzales’ Depo. Tr. at p. 13.
108 Tr. at 135-36.
109 The August 10, 2018 letter is exhibited at CX 2, p. 36 and JX 4, p. 93. The letter does not define “light work.” According to appendix C of the Dictionary of Occupational Titles, light work involves exerting up to 20 pounds of force occasionally or up to 10 pounds of force frequently. https://occupationalinfo.org/appendxc_1.html#STRENGTH.
110 Gonzales depo. at 15-17; 29.
111 Heligman Depo. Tr. at 62-67.
112 Gonzales Depo. Tr. at 15-17.
As a specialist in neurology, Dr. Gonzales has greater expertise in that area than Dr. Heligman, who is a specialist in occupational medicine. Dr. Gonzales was also Mr. Rew’s treating physician and as such was more familiar with his condition than Dr. Heligman, who had never met or examined Mr. Rew.

I find that Dr. Gonzales’ recommendation to Mr. Rew in her letter of August 10, 2018 “to be physically active and do light work” is part of a “treatment plan” for purposes of Section 20109(c)(2) of the FRSA.

The Respondent contends that Mr. Rew was not following a treatment plan but was working as a roofer. The Respondent states that the Complainant “was not following the treatment plan of his physician because he was too busy performing roofing work.” [emphasis in original] The Respondent’s contention ignores the fact that, according to Mr. Rew, the work he performed was done pursuant to the treatment plan. Dr. Gonzales’ letter of August 10, 2018, in which she recommends that Mr. Rew “be physically active and do light work,” does not specify what kind of work he should do. Mr. Rew testified that the work he was doing for his father while on medical leave involved giving roofing estimates or finding out what the problem was at a job. He said he believed he was doing what he was supposed to do and was following the orders of his physician. The record does not clarify when CSX received Dr. Gonzales’ August 10, 2018 letter about the treatment plan, but Respondent was aware of the letter at least by August 21, 2018, the date of the investigation hearing, as the letter was introduced at the hearing as UTU Exhibit B. Dr. Heligman identified the letter and read it into the record and Mr.

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113 Id. at 17.
114 In Williams, the ARB rejected the Respondent’s contention and affirmed the ALJ’s finding that the physician’s treatment instructions were not just general advice but amounted to a “treatment plan” (citing Santiago, slip op. at 6-7).
115 See Respondent’s Initial Brief at pp. 13-14 and Reply Brief at pp. 3-4. The Respondent also contends that Mr. Rew’s work as a roofer interfered with Dr. Gonzales’ treatment plan because Mr. Rew did not start cognitive therapy after Dr. Gonzales put in her treatment note of April 18, 2018 that she would start cognitive rehab (CX 2, p. 12). The Complainant testified that Dr. Gonzales did not discuss cognitive therapy with him prior to the June 15, 2018 office visit and that she told him at the June visit that they needed to get his headaches under control before doing any therapy. He also stated that he never received a prescription for cognitive therapy (Tr. p. 177). He testified that he was told there was an appointment for cognitive therapy that was cancelled because the person for it wasn’t there. Dr. Gonzales’ treatment notes contain a fax on May 3, 2018 to Johnny Delk, a RN in the CSX medical department, seeking authorization for cognitive rehab with an occupational therapist. The response from Mr. Delk indicates that pre-authorization is not required (CX 2, p. 39). However, it appears that no prescription for cognitive therapy was given until after the investigation hearing. Dr. Gonzales testified that the order for cognitive rehab at the initial visit was sent to occupational therapy instead of to a speech therapist where it should have been sent. See testimony at JX 18 pp. 29-30 and note dated September 5, 2018 at page 35 of Dr. Gonzales’ treating records (JX 18, p. 68; CX 2 p. 35). Dr. Gonzales therefore placed another order on September 5th, after the investigation hearing (JX 18, p.68; CX 2 p. 35). After he was dismissed from CSX, Mr. Rew lost his health insurance and had no further visits with Dr. Gonzales. Dr. Heligman testified at the hearing that he received no prescription or request or any other information from Dr. Gonzales regarding cognitive therapy. (Tr. at p. 254-55). The August 9, 2018 letter to Mr. Rew notifying him of the charges that are the subject of the hearing (JX 4 p. 68) does not mention any charge related to not following treatment recommendations.
116 Tr. at 138. I note that the “review of systems” in both the June 15, 2018 and the August 31, 2018 office visits indicate under “neurologic” that the Complainant had no trouble with walking, imbalance or dizziness. His primary symptoms appear to have been headaches and some memory problems.
117 Tr. at 158.
118 Tr. at p. 268; JX 4, transcript at p. 54, 63-64. The letter is at JX 4, p. 93.
Rew identified the letter.\textsuperscript{120} The hearing officer asked no substantive questions to anyone about the letter or about Mr. Rew’s treatment plan. Mr. Sarver testified in his deposition that when he and Macon Jones\textsuperscript{121} made the decision to terminate Mr. Rew’s employment, they understood that Mr. Rew’s explanation was that he was working as his physician prescribed.\textsuperscript{122} He agreed that the evidence at the hearing was that Mr. Rew’s physician indicated what her treatment plan was and that Mr. Rew believed he was following it when performing the activities depicted in the photographs, and that there was no evidence at the hearing to dispute that. Exhibit 6 to Mr. Sarver’s deposition\textsuperscript{123} is an email from Macon Jones to Mr. Sarver and others stating, \textit{inter alia}, that “[Mr. Rew] provided no credible reason for his actions other than he was working as his physician described.” [emphasis added]. In other words, Mr. Jones indicated that the only credible reason for Mr. Rew’s activities with respect to his roofing activity as seen in the photographs and videos was that he was following Dr. Gonzales’ treatment plan.\textsuperscript{124} Mr. Sarver testified at his deposition that he and Mr. Jones never discussed the issue of whether or not Mr. Rew was following the orders and treatment plan of Dr. Gonzales.\textsuperscript{125} Mr. Sarver confirmed that no one contacted Mr. Rew prior to the hearing to ask him the reason for his activities.\textsuperscript{126}

The Respondent bases its contention that Mr. Rew was working as a roofer on the surveillance video and photographs and the testimony concerning them. The statements given at the investigation hearing have been summarized above. Jeremy Carnes, a District Manager of Risk Management, stated at the investigation hearing that he initiated surveillance of the Complainant based upon a treatment note from Mr. Rew’s physician that indicated Mr. Rew was working as a roofer.\textsuperscript{127} Mr. Carnes arranged for surveillance on July 27\textsuperscript{th} and July 28\textsuperscript{th} and on August 2\textsuperscript{d} through August 5\textsuperscript{th}. He gave the videos and photographs from the surveillance to Transportation management, Mr. Bamford.\textsuperscript{128} At the investigation hearing, the hearing officer

\textsuperscript{119} JX 4, transcript at p. 54.
\textsuperscript{120} Id. at pp. 63-64.
\textsuperscript{121} Mr. Sarver confirmed that Mr. Jones was the individual from labor relations who concurred in his decision to find Mr. Rew guilty and dismiss him. Sarver Depo. Tr. at 16-17, 80.
\textsuperscript{122} Sarver Depo. Tr. at 82.
\textsuperscript{123} This email is also JX 15, and is part of Exhibit 1 to the deposition of Macon Jones.
\textsuperscript{124} An alternative explanation for the Mr. Jones’ statement is that “working as his physician described” refers to Dr. Gonzales’ statement in the June 15, 2018 treatment note that Mr. Rew said he was working as a roofer and was very busy (CX 2, p. 19), rather than her statement in the August 10, 2018 letter that he should be physically active and do light work. However, the context of the statement in JX 15, that Mr. Rew “provided no credible reason for his actions” seems clearly to refer to Mr. Rew’s position at the investigation hearing that he was following Dr. Gonzales’ treatment plan. This also appears to be Mr. Sarver’s understanding when he was asked about the statement in JX 15 at his deposition (CX 8). He was referred to the statement in the email, “[h]owever, the employee provided no credible reason for his actions other than that he was working as his physician described,” and asked: “And I just want to make clear that when you and Mr. Jones made this decision to dismiss Mr. Rew, you understood his explanation was that he was working as his physician described, right?” Mr. Sarver responded: “Correct.” (Sarver Depo., CX 8 at p. 82.)
\textsuperscript{125} Sarver Depo. Tr. at 94.
\textsuperscript{126} Id. at 78.
\textsuperscript{127} Referring to JX 11, p. 2, which quotes the language in the June 15, 2018 office visit note that the “[p]atient works as a roofer during the day, and has been very busy.”
\textsuperscript{128} The photographs are Carrier’s Exhibit 3, at JX 4 pp. 70-84. The surveillance videos are RXs 12 through 16 but were unable to be viewed in the format provided; the Respondent also provided the videos on a flash drive and I was therefore able to review all of the videos. Some or all of the photographs were apparently screenshots from the video surveillance. Only the photographs, and not the surveillance videos, were introduced as exhibits at the
asked Mr. Carnes questions about what the photographs showed. He said the surveillance yielded some video evidence that Mr. Rew may have been engaging in roofing activities and that he entered onto a CSX facility on July 28th. Mr. Carnes summarized the content of the photographs. He stated it appeared that Mr. Rew removed ice from the ice cooler at the Transflo facility. Mr. Rew’s union representative also asked questions of Mr. Carnes, and introduced as evidence the letter from Dr. Gonzales dated August 10, 2018 recommending that Mr. Rew be physically active and do light work.

At the hearing before me, Mr. Carnes testified that he was not present at the Transflo facility or at any of the locations in the surveillance video or photographs. He testified that he never saw Mr. Rew with ice and that the investigation never determined whether or how much ice was in the ice cooler on July 28th. He did not know what the inside of the ice cooler looked like on July 28th. Referring to JX 12, he agreed that on July 27th Mr. Rew was under surveillance for over 9 hours and was never on a roof, and that the most he did all day was to put some items in the back of a trailer for about 15 minutes. He agreed that on July 28th he was under surveillance for about 9 ½ hours and was on a roof for only 15 minutes. He agreed that on August 2d Mr. Rew was under surveillance for 9 ½ hours and there was no activity, as Mr. Rew never left his house and his vehicle was at this house. He agreed that on August 3d Mr. Rew was surveilled for 10 hours and the surveillance report showed no activity during that period and Mr. Rew did not leave the house. With respect to the surveillance on August 4th and August 5th, Mr. Carnes said he did not know how long the Complainant was on the roofs or what he was doing. Mr. Carnes said that he did not inform anyone at the investigation hearing of the duration of the surveillance and the duration of the roofing activity observed, or that there were days with no activity.

At his deposition Mr. Carnes stated that he received an email from the medical department indicating that Mr. Rew told his doctor that he had not finished cognitive therapy because he was busy working as a roofer. He therefore initiated surveillance. He said that around the time he received the note from the medical department he was told by Mr. Bamford that Mr. Rew’s family was involved in the roofing business. Mr. Carnes said that Mr. Bamford told him that, even before Mr. Rew’s injury, he knew the family was in the roofing business and that Mr. Rew had previously worked part-time with the family roofing business.

Andrew Bamford, a trainmaster and Mr. Rew’s immediate supervisor, testified at the investigation hearing and by deposition. At the investigation hearing, Mr. Bamford identified the investigation hearing. See testimony of Jeremy Carnes at page 19 of the investigation hearing and at pages 218 and 221 of the transcript of the hearing before me.

129 As noted, the surveillance videos were not made exhibits at the investigation hearing.

130 The letter was identified as UTU Exhibit B and is at JX 4, p. 93.

131 He said the photos of the ice cooler were taken on August 8, 10 or 11 days after the video on July 28th.

132 The Respondent’s Initial Brief seeks to justify Mr. Rew’s discipline on the basis that he was not getting the cognitive therapy Dr. Gonzales wanted him to get. See page 10 of brief. As noted earlier, CSX’s charge letter of August 9, 2018 says the purpose of the investigation hearing was regarding Mr. Rew’s removal of material from CSX property and his dishonesty in engaging in other work while on leave. It does not mention the failure to get cognitive therapy, which it appears was not actually prescribed until after the investigation hearing (see footnote 115). No questions regarding cognitive therapy were asked at the investigation hearing.
three rules set forth above and the relevant portion of the CSX Code of Ethics.\textsuperscript{133} He stated that Rule 103.3 related to the alleged removal by the Complainant of ice from the Transflo facility. He stated that Rule 104.11 related to Mr. Rew’s engaging in other employment, roofing, while on medical leave from CSX. With respect to Rule 104.2, he said that Mr. Rew was dishonest and disloyal to CSX by claiming the he was unable to perform railroad service but was employed as a roofer. Mr. Bamford also referred to the CSX Code of Ethics and stated that Mr. Rew did not discuss or disclose any outside employment to CSX and none was approved.

At his deposition, Mr. Bamford testified that he knew Mr. Rew’s father had done work for other railroad employees and that Mr. Rew had worked part-time in his father’s business. He said he never took exception to that and that it did not appear to be a conflict of interest. He said other employees perform part-time work outside CSX and that to his knowledge neither he nor CSX have ever taken exception to part-time work. Prior to Mr. Rew, Mr. Bamford did not recall any CSX investigation against an employee doing part-time work. He said that if an employee is off work with an injury, he believes it is acceptable for the employee to perform activities allowed by his physician. Mr. Bamford said Mr. Rew was off on medical leave at the time of the surveillance and was not being called in to work. He said that Mr. Rew would not have been able to work for CSX on the days of the surveillance because he had not been cleared by the medical department. With respect to the section of the CSX Code of Ethics that references “Outside Employment and Financial Interests,”\textsuperscript{134} Mr. Bamford said that his understanding of the term “employment” is that you are being paid and working in another capacity somewhere. He said that the section may not be limited to paid employment. He was unaware of any definition of the term. He was referred to his testimony at the investigation hearing that Mr. Rew “engaged in other forms of employment, namely roofing, while on leave from CSX” and said that was probably a conclusion he made because he was told Mr. Rew was observed working as a roofer. He did not know whether Mr. Rew was being paid.

Mr. Sarver testified at my hearing and at a deposition. At the hearing he testified that he would not expect Mr. Rew to inform anyone that he was working part-time unless it conflicted with his employment at CSX, and there was never any indication of a conflict. Mr. Sarver could not think of any other employee who had been disciplined for a conflict of interest under the Code of Ethics and as far as he knew that had not happened before. He said if Mr. Bamford was aware of any part-time work by Mr. Rew and didn’t take exception to it, he had an obligation to let Mr. Sarver know. Mr. Sarver said that after his deposition, when he was told that Mr. Bamford was aware of this and testified that Mr. Rew should never have been charged, Mr. Sarver did not do anything to correct the situation. Mr. Sarver agreed that if Mr. Rew believed he was following his physician’s treatment plan by doing light work and being physically active he should not have been disciplined. With regard to Rule 103.3 and the alleged taking of the ice, Mr. Sarver agreed there was no witness and that the photographs at the investigation hearing did now show evidence that Mr. Rew took any ice and no one reported any ice missing. Regarding Rule 104.12, he agreed that because no MD-3 form had been submitted by Mr. Rew’s treating physician indicating he could return to work, Mr. Rew would not have been able to return to work at CSX on the days he was under surveillance. Mr. Sarver agreed that the term “work” in

\textsuperscript{133} The cited rules are Carrier’s Exhibit 4 to the investigation hearing and are at JX 4, pp. 85-88. The portion of the Code of Ethics referred to is in Carrier’s Exhibit 5 at JX 4 p. 89 (“Outside Employment and Financial Interests”).

\textsuperscript{134} JX 10, p. 24 of the Code of Ethics (p. 13 of JX 10).
Rule 104.11 refers to the employee being employed elsewhere and that there was no evidence that Mr. Rew had an employment relationship with anyone other than CSX, and that without such evidence he should not have been charged or found guilty of a violation of Rule 104.11. Regarding the photographs at the investigation hearing, Mr. Sarver said he could not tell what Mr. Rew was doing on the roofs and that if he were estimating the cost of a repair he could be performing light work and such work might take only 10 or 15 minutes. He said he did not ask Dr. Heligman to contact Dr. Gonzales to get additional information about her note and he never looked at the video surveillance.

At his deposition, Mr. Sarver stated, with reference to Rule 104.11, that there was no evidence that Mr. Rew had his own business or was in an employment relationship with anyone other than CSX. He said Mr. Rew was not cleared to return to work at CSX during the period he was under surveillance. He said Mr. Rew’s treating physician was keeping CSX advised as to his medical condition. With regard to Dr. Gonzales’ note of August 10, 2018, he agreed that one of Mr. Rew’s responsibilities was to follow his physician’s orders and that employees should be permitted to engage in any physical activity the treating doctor recommends. He said based on the investigation hearing transcript he could not determine from the photographs how long Mr. Rew performed the activities depicted in the photos submitted at the hearing. He did not see anything in the photographs inconsistent with Dr. Gonzales’ recommendation that Mr. Rew be physically active and engage in light work. He did not see in the photographs any evidence that Mr. Rew took a bag of ice from the CSX facility, and he agreed that the way Mr. Rew parked at the facility was the way CSX trains employees to park. Mr. Sarver said Mr. Rew’s work interfered with his recovery because his physician said he was busy working and doing roofing. He said he would not have expected Mr. Rew to report part-time work unless it interfered with his work at CSX or his ability to get better and return to work. He said he did not know if Mr. Rew’s physician ever indicated that Mr. Rew’s roofing work was interfering with his ability to get better. He said he did not know why Mr. Rew did not begin cognitive therapy when it was first prescribed. He did not know of any other conductor or engineer who was disciplined because of the conflict of interest section of the code of ethics. He said to his knowledge no one asked Mr. Rew before the hearing why he was performing the activities he was doing. Mr. Sarver was directed to Deposition Exhibit 6, the email from Macon Jones on September 16, 2018, and the language stating “[h]owever, the employee provided no credible reason for his actions other than that he was working as his physician described.” Mr. Sarver agreed that when he and Macon Jones made the decision to dismiss Mr. Rew, they understood that his explanation was that he was working as his physician described. Mr. Sarver said he never received any training in whistleblower situations or anti-retaliation situations and had never seen the document at deposition exhibit 8 before. He was directed to Depo. Exhibit 8 and to 49 U.S.C § 20109(c)(2) on the third page and said that he had received training on this provision and that they receive annual training on injury reporting. He said he was aware that it potentially violates the statute if you discipline an employee for following the orders and treatment plan of a treating physician.

Mr. Sarver agreed that Mr. Rew’s position at the investigation hearing was that he was following the orders of his treating physician, but that because of the testimony at the hearing he

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135 The email is at the top of the page on the second page of Dep. Exhibit 6 and is also JX 15.
[Mr. Sarver] had nothing to believe Mr. Rew was following a treatment plan. He agreed that the evidence at the hearing was that his doctor indicated what her treatment plan was and that Mr. Rew said he believed he was following the treatment plan when performing the activities depicted in the photographs, and that there was no evidence at the investigation hearing to dispute that. When asked what evidence there was to make him disbelieve Mr. Rew, he said “the testimony of Mr. Carnes and Dr. Heligman.” He agreed that Dr. Heligman didn’t testify about the treatment plan and so there was nothing in Dr. Heligman’s testimony that contradicted or disputed the treatment plan, but said that Mr. Carnes stated that Mr. Rew was “consistently working a roofing job.”\textsuperscript{137} Mr. Sarver agreed that there was nothing in the photographs used at the investigation hearing to dispute that Mr. Rew was following his physician’s treatment plan.\textsuperscript{138} He said he and Mr. Jones never discussed the issue of whether Mr. Rew was following the orders and treatment plan of his treating physician.

Dr. Heligman testified at the investigation hearing, the hearing before me, and by deposition. At the investigation hearing he said that while the Complainant was off work with a work injury he was advised that he was likely working as a roofer and that there were videos of him working as a roofer. He also saw the June 15, 2018 office visit note referencing the Complainant working as a roofer. He stated that if the Complainant was working as a roofer he could perform duties as a conductor. Dr. Heligman was referred to a photograph at pages 2 and 3 of Carrier’s Exhibit 3, showing Mr. Rew carrying a ladder and on a roof.\textsuperscript{139} Dr. Heligman was also referred to Dr. Gonzales’ letter of August 10, 2018 stating that she told Mr. Rew to be physically active and do light work. Dr. Heligman said that performing duties as a roofer while on medical leave is fraud and in conflict with the Code of Ethics. He stated that light duty as defined by the Department of Labor is carrying up to 20 pounds occasionally and 10 pounds frequently, and that the work of a conductor is rated as heavy work by the Department of Labor.\textsuperscript{140} He said he could not tell from the photo how much the ladder Mr. Rew was carrying in the photo on page 3 of Carrier’s Exhibit 3 weighed.

At the hearing before me, Dr. Heligman testified that employees who are off work for injuries are required to submit medical information periodically to the medical department. Employees are to advise the medical department as soon as their physician says they are ready to return to work safely. He discussed the physical requirements for a conductor, including the need to lift up to 85 pounds. He said the June 2018 treatment note by Dr. Gonzales suggested to him that Mr. Rew was doing well and would be able to return to work at CSX. He relayed that to the manager of field investigations and asked him to investigate further. Dr. Heligman said he did not contact Mr. Rew because it is the employees’ responsibility to present themselves when they are ready to return to work. He said the photographs he saw of Mr. Rew being on the roof suggested that he was able to be a conductor full-time because roofing and being a conductor require the same activities. He said that because of the statement in the medical record about Mr. Rew being very busy he assumed he was working daily and at least a full day’s work as a roofer. With respect to cognitive therapy, Dr. Heligman said that no document was submitted to the medical department approving cognitive therapy for Mr. Rew, and he did not see any

\textsuperscript{137} Depo. Tr. at 91.
\textsuperscript{138} Sarver Depo. Tr. at 90.
\textsuperscript{139} JX 4, pp. 2 and 3.
\textsuperscript{140} The job description for a “freight conductor” is Exhibit 5 to the deposition of Dr. Heligman.
information regarding cognitive therapy or rehab including a prescription. With regard to the statement in the medical record about Mr. Rew working as a roofer and being busy, Dr. Heligman agreed that additional information was needed about what duties he was performing as a roofer. He agreed that as of the June 15, 2018 treatment note from Dr. Gonzales he assumed she had not cleared Mr. Rew to return to work. He said that the employee’s treating physician must provide the medical department with information about their approval that the employee is safe to return to work. He agreed that if Mr. Rew did not feel fit to return to work as a conductor he should not present himself for work. Dr. Heligman stated that he would expect a patient to follow the recommendations of his treating physician. He agreed that he did not know how much time Mr. Rew spent on a roof in the photographs or what specific activities he was doing. He agreed that the photographs do not show how busy Mr. Rew was. Dr. Heligman said he wanted to validate that Mr. Rew was doing roofing work and to what degree. He said he did not know that Mr. Rew was under surveillance for 53 ½ hours. He said he was on the roof and according to information provided to him he was doing roofing work.

At his deposition, Dr. Heligman agreed that an individual with post-concussion syndrome may be able to perform heavy work but may have injuries that prevent returning to work as a conductor. He agreed that he did not know the reasons why the Complainant had not begun cognitive therapy. He said he did not know how long Mr. Rew performed the activities seen in the photographs. When asked why neither he nor Mr. Delk contacted Dr. Gonzales after looking at her June treatment note to see why Mr. Rew could not come back to work, he said that is not part of their normal practice. However, he also testified that Johnny Delk, the nurse on Mr. Rew’s case, would talk to employees on a regular basis and that he (Dr. Heligman) had done so on occasion.141 He said he did not consider medical advice to be active to be medical treatment because it is not specific to Mr. Rew’s specific condition.

Macon Jones, Respondent’s Director of Labor Relations, testified at a deposition. He said that his recommendation that Mr. Rew be dismissed was based on the testimony of the Carrier witnesses, especially Dr. Heligman. Mr. Jones said Mr. Rew was holding himself out as unable to work but was engaged in outside work or employment inconsistent with that representation. Mr. Jones said he was aware of and reviewed Dr. Gonzales’ letter of August 10, 2018 containing her recommendation that Mr. Rew “be physically active and do light work.” He understood that Mr. Rew’s position at the hearing was that he was acting in accordance with Dr. Gonzales’ note. He said he did not find Mr. Rew’s explanation credible. He said he also did not find Dr. Gonzales’ letter credible. He said he did not believe Mr. Rew thought he was working light duty and thought Mr. Rew was using that as cover to try to justify his actions. Mr. Jones said he was “mad” that Mr. Rew was working as a roofer when he should have been working as a conductor.142

Mr. Rew testified at the investigation hearing, my hearing and by deposition. At the investigation hearing, Mr. Rew identified his position with CSX as conductor, remote engineer, and engineer. He agreed that he is the person depicted in the photographs in Carrier’s Exhibit 3. He said he was not doing any work on the roof at pages 2 or 3. He said he went to Rossford

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141 Heligman Depo. Tr. at 28-30.
142 Depo. Tr. at 22.
Yard\textsuperscript{143} to look at the computer to check his seniority\textsuperscript{144} and did not remove anything from the CSX property on July 28\textsuperscript{th}. With regard to the August 10, 2018 letter from Dr. Gonzales, he said she did not give him a definition of light work but just said to do some light work to see how he responded. He said he was not employed by anyone else while on medical leave and was not compensated for anything he did while off work. On questioning by his union representative, Mr. Rew said he was not doing roofing work in the photographs\textsuperscript{145} and that he did not remove anything from the Transflo facility. He identified the August 10, 2018 letter from Dr. Gonzales encouraging him to be physically active and do light work.

At my hearing Mr. Rew testified that at his June office visit with Dr. Gonzales she told him that since he was starting to get his headaches taken care of he needed to get out of the house and exert himself and do some physical activity. He told Dr. Gonzales that his father was in the roofing business and he had been helping him out since he was a kid and she thought it would be a good idea for him to help his father out a bit in addition to taking the medication. She told him it would help if he exerted himself and tried to do a little more each week. She did not think he was ready to return to work as a conductor. Mr. Rew’s understanding was that he needed to get the headaches under control before doing any therapy. He said he never received a prescription for cognitive therapy and no one from the CSX medical department ever asked him about cognitive therapy. He testified that he did not tell Dr. Gonzales that he was busy working as a roofer but that that his father was busy in his roofing business. He said that prior to June he “didn’t lift a finger doing anything.”\textsuperscript{146} Mr. Rew testified that when he started feeling better in July he started helping his father a little bit. His father was very busy and asked Mr. Rew to look at a couple of roofing jobs to give an estimate or to determine what was going on.\textsuperscript{147} He said he was never active for more than four hours a day.\textsuperscript{148} He said that before his injury he had helped his father in his roofing business for 34 years. He was seldom paid for that but his father would help out with his children. He said Mr. Bamford knew of his father’s business and that Mr. Rew helped him out. He said that the fact that he helped his father out was well-known on the railroad and his father did roofing work for many of the railroaders, including supervisors. No one ever told him that helping his father was inappropriate or that he shouldn’t do it. He said his cousin also works for the railroad and also helps Mr. Rew’s father in his roofing business. Mr. Rew said he would not have helped his father if Dr. Gonzales had not told him he should do light work. Mr. Rew reviewed the photographs introduced at the investigation hearing and explained what he was doing.\textsuperscript{149}

At his deposition, Mr. Rew testified that he didn’t start helping his father until July. He said he was not compensated for his work. He said he only went out a few times and couldn’t stay away from home for more than three of four hours at a time. He testified about the photographs. He testified that he went to the Transflo facility to use the computer there to check his seniority and that he did not have a computer at home. When he opened the ice machine he

\textsuperscript{143} The Transflo facility.
\textsuperscript{144} Mr. Rew testified that he does not own a computer. Depo. Tr. at p. 53.
\textsuperscript{145} At his deposition Mr. Rew stated that he did not consider just looking at a roof to be doing any kind of work. Depo. Tr. at 51.
\textsuperscript{146} Tr. at 135-36; Depo. Tr. at 38-44, 45-47.
\textsuperscript{147} Tr. at p. 138.
\textsuperscript{148} Tr. at p. 158.
\textsuperscript{149} The discussion of the photographs is at Tr. 140-158.
was only looking for the broom he had found in it in the past. He said he backed up at the Transflo facility because it’s a CSX rule to back your vehicle in for safety.\(^{150}\) He stated that he stopped going to Dr. Gonzales after he was terminated because he no longer had insurance. He said he felt that as of the end of 2018 he could work a full-time job. He said when he started helping his father in July he believed he was following Dr. Gonzales’ treatment plan.

As indicated above, Robert Sarver testified at my hearing that he was advised that he was to proceed with charges against Mr. Rew based on the surveillance that had been conducted. He said the surveillance was the basis for the investigation hearing. He testified that he was the sole decision-maker with regard to the guilt of Mr. Rew and his discipline and he decided to dismiss Mr. Rew.\(^{151}\) He testified that the sole source for his decision was the information in the investigation hearing transcript and the exhibits attached to it. He did not look at the surveillance video or the surveillance reports. He did not talk to Mr. Rew or to Mr. Bamford, Mr. Rew’s supervisor, about his decision or question anyone about what type of employee the Complainant was. He was questioned about the rule violations and the violation of the Code of Ethics. With respect to the Code of Ethics violation,\(^{152}\) Mr. Sarver testified that this section was introduced at the investigation hearing because Mr. Rew did not disclose or discuss any outside employment with CSX. Mr. Sarver stated that employees under him do not tell him every time they take a part-time job and that he would not expect Mr. Rew to inform anyone that he was working part-time unless it conflicted with his employment with CSX. He said there was no indication that Mr. Rew’s part-time work helping his father conflicted with his employment at CSX. He agreed that at the time of the surveillance Mr. Rew was on medical leave and was not eligible to be called in to work at CSX. He stated that if Mr. Bamford was aware that Mr. Rew had done part-time work for his father’s roofing business then it would not be a violation of the code of ethics and Mr. Rew wouldn’t have been charged with a code of ethics violation. He said that he could not think of another employee who had been disciplined for a conflict of interest under the code of ethics and that as far as he knew that had never happened before. Mr. Sarver agreed that if Mr. Rew was following the treatment plan of his physician he should not have been disciplined.

With regard to the violation of Rule 103.3, relating to the alleged taking of ice,\(^{153}\) Mr. Sarver agreed that there were no witnesses and the photographs at the investigation hearing did not show evidence that Mr. Rew took any ice. He said there was no evidence that any ice was missing.

Mr. Sarver was asked about violation of the Rule 104.11, which states that employees cannot engage in any type of work or business that interferes with the employee’s ability to perform service for CSX or creates a conflict of interest or is detrimental to CSX.\(^{154}\) He agreed that CSX employees are allowed to perform part-time work outside of CSX. Mr. Sarver stated

\(^{150}\) Other witnesses agreed with this. See Sarver testimony at Tr. at 101-03 and Depo. Tr. at 57; Bamford Depo. Tr. at 58.

\(^{151}\) Macon Jones, the Director of Labor Relations for CSX, testified in his deposition that that if an employee is subject to dismissal, Labor Relations provides a recommendation to the decision-maker after reviewing the results of the investigation hearing and that he recommended dismissal. Jones Depo. p. 12.

\(^{152}\) See JX 4, p. 45 (testimony of Andrew Bamford) and Carrier’s Exhibit 5, p. 1 “Outside Employment and Financial Interests” at JX 4 p. 89, addressing employment outside of CSX.

\(^{153}\) See JX 4, p. 86.

\(^{154}\) See JX 4, p. 87.
that the term “work” is not defined anywhere in the rules and that he thought it meant the employee has to be employed somewhere else.\textsuperscript{155} Mr. Sarver agreed that there was no evidence that Mr. Rew had any employment relationship other than with CSX. Mr. Sarver agreed that Mr. Rew should not have been charged with a code of ethics violation and should not have been found guilty of violating Rule 104.11.

Referring to Rule 104.12,\textsuperscript{156} Mr. Sarver confirmed that Mr. Rew could not return to work at CSX without a completed form MD-3 (Attending Physician’s Return to Work Report), and that no such form was filled out by Mr. Rew’s treating physician indicating he could return to work in July or August 2018.

Mr. Sarver was asked about the photographs introduced at the investigation hearing.\textsuperscript{157} He agreed that if someone was on a roof to give an estimate for repair, that would potentially be light work and the person might be on the roof for only 10 to 15 minutes and that it would not involve doing heavy work. Mr. Sarver said that he couldn’t say from the photographs that Mr. Rew was doing anything other than light work. He said he did not know how long the surveillance of Mr. Rew was.

Mr. Sarver said he could have, but did not, ask Dr. Heligman or someone else in the medical department to contact Dr. Gonzalez about her note.\textsuperscript{158} Mr. Sarver testified that he was aware of the whistleblower provision indicating that you are not supposed to discipline an employee for following the orders or treatment plan of his treating physician, and was aware that Mr. Rew indicated at the hearing that he was following the treatment plan of his treating physician.\textsuperscript{159} Mr. Sarver agreed that from the activities depicted in the photographs, he did not see Mr. Rew performing heavy or even medium level work. He stated that if someone was just doing roofing estimates that would potentially be light work.

Mr. Sarver testified at my hearing that he thought Mr. Rew performed work that conflicted with his employment at CSX because his roofing work for his father prevented him from getting the treatment from his doctor to return to work at CSX. He said Mr. Rew was being dishonest by being able to work a roofing job consistently and not getting medical treatment. He said he did not consider Dr. Gonzales’ letter of August 10, 2018 to be a mitigating factor because he did not take roofing to be a light job. He said it wasn’t clear that whatever Mr. Rew was doing on a roof was only light work. Mr. Sarver stated that Mr. Rew did not say anything he believed to be dishonest. He agreed that Dr. Gonzales never said that Mr. Rew failed to follow her treatment plan. He said he did not know the reason why Mr. Rew did not get cognitive treatment right away and did not know whether Dr. Gonzales felt that his failure to get cognitive treatment delayed his recovery at all. He agreed that Mr. Rew stated at the investigation hearing that his doctor said to be physically active and do light work. Mr. Sarver was referred to JX 15, the email from Macon Jones that states that Mr. Rew “provided no credible reasons for his

\textsuperscript{155} Tr. at 53-54; Depo. Tr. at 25-26.
\textsuperscript{156} See JX 4, p. 87.
\textsuperscript{157} The photos are at JX 4, pp. 70-84.
\textsuperscript{158} Referring to her letter of August 10, 2018, at JX 4, p. 93.
\textsuperscript{159} Mr. Rew’s union representative introduced as UTU Exhibit B Dr. Gonzalez’ letter of August 10 2018 containing her recommendation that Mr. Rew be physically active and do light work. HX 4, p. 93.
actions other than that he was working as his physician described.” Mr. Sarver agreed that he and Mr. Jones knew it was Mr. Rew’s position that he was working as his physician had asked him to. He agreed that Mr. Rew’s union representative at the investigation hearing stated that Mr. Rew was working as his treating physician directed him to work.

In his deposition, Mr. Sarver said that he and Macon Jones both recommended that Mr. Rew be dismissed based on the investigation hearing. Citing Rule 104.2, he said Mr. Rew was guilty of being dishonest by working as a roofer while off on injury leave. Mr. Sarver said the dishonesty was that Mr. Rew was on leave from CSX because he could not perform duties that were the same type of duties he was doing as a roofer. He said that based on the testimony of Dr. Heligman, if the Complainant could do roofing he could work as a conductor. With respect to Rule 104.11, Mr. Sarver said he thinks it applies if you are employed. He did not have any evidence that Mr. Rew was employed by anyone other than CSX. Mr. Sarver said he thought Mr. Rew could work as a conductor because Dr. Heligman said if he can work as a roofer then he can work as a conductor. Mr. Sarver agreed that if Mr. Rew could only work for four hours a day he could not work as a conductor. He said that other than what Dr. Heligman said he didn’t see any indication that the Complainant could work eight hours or more a day. He said he did not know how long Mr. Rew spent on roofs when he was under surveillance. Mr. Sarver said he read the August 10, 2018 letter from Dr. Gonzales before making his decision that Mr. Rew was guilty and should be dismissed.

Mr. Sarver said that when an employee is on medical leave he is allowed to perform regular physical activities and physical activity that his doctor recommends. He agreed that if Dr. Gonzales recommended that Mr. Rew be physically active and do light work he should follow that recommendation and should not be dismissed from service because of that. He did not recall seeing any evidence of Mr. Rew carrying shingles on to a roof or tacking them down or similar activity. Mr. Sarver agreed that based on the investigation hearing transcript there was no way for him to determine how long Mr. Rew performed the activities depicted in the photographs. Mr. Sarver reviewed photographs used at the investigation hearing and said that he did not see Mr. Rew performing any activity other than estimating and checking out a roof for a potential roofing job and did not see roofing activities such as placing shingles on the roof or performing a replacement or repair. With respect to the Code of Ethics section regarding outside employment, he said that the evidence that indicated a conflict of interest was that Mr. Rew did not meet with his treating physician, stating he was too busy, and the testimony of the private investigator where he was roofing while on injury leave. He said that the activities shown in photographs interfered with his ability to get better and return to work as a conductor. He said the only evidence of that was the testimony of Dr. Heligman. He agreed that if Dr. Gonzales testified that being physically active helps Mr. Rew get better that would be in the best interests of CSX. He said he would not have expected Mr. Rew to inform anyone that he might be working part-time if it did not interfere with his work with CSX or his ability to get better and return to work. Mr. Sarver said that evidence at the hearing indicated that Mr. Rew’s roofing activities interfered with his work because his physician said he was busy working and performing roofing. He agreed that Mr. Rew’s physician did not indicate that roofing was interfering with his ability to get better and that he did not know why Mr. Rew did not begin cognitive therapy. He said he

160 The record does not indicate that Mr. Rew ever refused to meet with Dr. Gonzales, or that Dr. Gonzales said he did, and the record does not contain any testimony from a private investigator, only the narrative in JX 12.
could not think of another conductor or engineer who was ever disciplined for the conflict of interest section of the Code of Ethics. He said that if Mr. Bamford testified that he was aware that before the injury Mr. Rew had performed part-time work for his father in the roofing business, he should not have been charged with a code of ethics violation. He agreed that if Mr. Rew was doing what he believed to be following the treatment plan of his treating physician by being physically active and doing light work, he should not have been disciplined. Mr. Sarver said he did not think it fair that before charging Mr. Rew with something no one asked him whether or not what he was doing was in furtherance of his care and treatment. Mr. Sarver confirmed that before he and Mr. Jones made the decision to terminate Mr. Rew they knew his explanation was that he was working as his physician described. Mr. Sarver said that he had never had training in USC section 20109 and had not had training in whistleblower situations or anti-retaliation situations. He said he had received annual training on section 20109(c)(2) with respect to injury reporting. He said he was aware that disciplining an employee for following the orders and treatment plan of a treating physician potentially violates the statute. He agreed that there was no evidence at the hearing that disputed that Mr. Rew believed he was following the treatment plan and orders of his treating physician.

Macon Jones testified that he did not know that Mr. Bamford was aware that Mr. Rew had worked part-time in his father’s roofing business. Mr. Jones said that if Mr. Bamford was aware of that it would have potentially been relevant to the investigation and the charge of a violation of the ethics code. He said he thought that what Mr. Rew was doing interfered with his work at CSX based on the testimony of Dr. Heligman that Mr. Rew was not getting the treatment CSX was paying for and Dr. Heligman’s testimony that if Mr. Rew could do the work he was doing he could work as a conductor. He stated he did not know if CSX had in fact paid for any medical treatment for cognitive therapy. He agreed that employees are expected to follow the treatment plan of their doctors. He understood that Mr. Rew’s position at the investigation hearing was that he was performing light duty in compliance with his doctor’s note. He said he was greatly influenced by Dr. Heligman’s testimony that that was not true. Mr. Jones said he was referring to Dr. Heligman’s testimony that carrying ladders and climbing up roofs was comparable to working as a conductor. Mr. Jones was asked if he just relied on Dr. Heligman’s opinions about the photographs at the investigation hearing or made an independent determination that the photos show work that was greater than light work and stated that he “100 percent deferred to him.” He said he did make his own determination about whether Mr. Rew was working as a roofer based on the photographs but not as to whether the work was light duty or not. He agreed that he did not know what an appropriate treatment plan for post-concussive syndrome is. He agreed that if Dr. Gonzales’ recommendation in her letter is an appropriate treatment plan it would be appropriate for the employee to follow it. He agreed that an employee cannot be disciplined for following the treatment plan of his doctor. Mr. Jones agreed that the evidence related to the Rule 103.3 violation, taking the ice, was entirely circumstantial.

The surveillance evidence regarding the ice

At the hearing before me, Mr. Rew identified the photos at pages 73 and 74 of JX 4 as the Transflo facility, which he referred to as the Rossford Yard bunkhouse. The Complainant testified both at his deposition and at my hearing that he went to the facility to look at the CSX

161 Depo. Tr. at 45.
mainframe computer to check his seniority.\textsuperscript{162} He said the bottom photo on page 73 shows the door open because he was going to brush off his floor mat and carpet. He said there was a small bag next to the ice machine where there were extra tools and broken tools and for years there was a broken broom that people used to brush their boots or brush their cars out. He said the brush wasn’t there but he looked inside the ice bin for it because he had found it there in the past, but it wasn’t in it. He said he threw out the garbage that was in the bottom of the ice bin and left.\textsuperscript{163} He said the photo on page 74 shows him leaving the facility. He similarly testified at his deposition that when he opened the ice machine he was looking for a switch broom that had been there to clean out his truck, specifically to brush his floor mat and carpet off.

Mr. Carnes testified at the investigation hearing that photos of the Transflo facility appeared to show that Mr. Rew was removing ice from the cooler.\textsuperscript{164} At the hearing before me, after reviewing the surveillance video, Mr. Carnes testified that he did not see ice anywhere but he saw the lid of the ice cooler coming up and down twice and Mr. Rew went to the front passenger door of his truck and it looked like he was putting ice in there. Mr. Carnes testified at his deposition that he did not determine whether any ice was missing from the cooler. I have reviewed the video of the Transflo facility and the still photographs\textsuperscript{165} of the facility and I do not see any ice or other evidence that Mr. Rew removed ice from the facility. I note that the surveillance report of activity at the Transflo facility does not say that any ice was seen.\textsuperscript{166} Mr. Rew’s explanation of what he was doing at the facility is consistent with the photos and videos. Mr. Carnes’ testimony at the hearing that he did not see ice but saw the ice cooler lid go up and down is consistent with Mr. Rew’s testimony about looking in the cooler for the switch broom. Mr. Sarver testified at my hearing that no one witnessed Mr. Rew taking any ice and that the photograph used at the investigation hearing did not show evidence that he took any ice and no one reported any ice missing.

The surveillance evidence regarding roofing activity

I have reviewed the video surveillance and the photographs introduced at the investigation hearing.\textsuperscript{167} Surveillance was conducted by two different companies. Colley Intelligence conducted surveillance on July 27 and July 28, 2018. The surveillance on July 27\textsuperscript{th} was of Mr. Rew’s residence from 7:00 a.m. to 4:15 p.m. The only activity noted in the report for July 27 is that Mr. Rew and another man loaded several unidentified items into the back of a trailer between 1:15 and 1:30. On July 28\textsuperscript{th} surveillance was conducted from 6:30 a.m. to 4:00 p.m. Mr. Rew was observed at a home in a trailer park.\textsuperscript{168} Mr. Rew testified that the photographs on pages 70, 71 and 72 of JX 4 are all at the same job at the trailer home. He said the other person on the roof with him is his father. He said his father was repairing a leak on the roof but couldn’t quite figure it out and asked him to take a look at it to figure out what was leaking. He

\textsuperscript{162} He testified at his deposition that he did not own a computer.
\textsuperscript{163} Rew Depo. at 145-48.
\textsuperscript{164} On appeal, the Public Law Board found that the charge against Mr. Rew regarding the ice was insufficiently supported, but it sustained the remaining violations.
\textsuperscript{165} The photos were identified at the investigation hearing as on pages 4 and 5 of Carrier’s Exhibit 3 (JX 4, pp. 73-74.) The video of the Transflo facility is RX 16. Mr. Rew referred to the facility as the Rossford Yard bunkhouse.
\textsuperscript{166} See JX 12, p. 21.
\textsuperscript{167} The reports of the two surveillance companies are in JX 12.
\textsuperscript{168} Mr. Rew testified about the photos at the hearing (Tr. at 140-58) and at his deposition (Depo. Tr. at 49-59).
said he would not generally use fall protection just to give an estimate or look at something. He said he did not have any problems with his balance at the time he began being active. Mr. Rew said the third person in the bottom photo on page 72 is the trailer’s owner. Mr. Rew said he spent maybe 10 minutes on the roof in total. He testified that the photos on pages 73 and 74 are at Rossford Yard (the Transflo facility). Mr. Rew identified the photo on page 75 as ABC Supply, a store for roofing materials. He said he was there with his stepbrother. He said the account there was under his father’s name and his stepbrother had to meet the salesmen so he would be able to pick up roofing materials without Mr. Rew. Mr. Rew said the photos on pages 76 and 77 show the same place. He said he was probably there for about 20 minutes. Mr. Rew said the top photo on page 78 shows his uncle’s house on Beechway. His uncle thought there was something wrong with the flat roof on the back on his house. Mr. Rew is on a ladder in the bottom picture. He said he doesn’t think he got on the roof but just looked at it from the ladder. He said it was obvious that the roof needed to be replaced. He then spent some time visiting with his uncle. Regarding the photo on page 79, Mr. Rew didn’t remember the house or whose house it was. He said the photos on page 80 are on Taylor Street in Oregon.169 The owner wanted him to see why the roof was leaking. He said he knew her and she asked him if he would stop by and look at it. He said the photo on page 81 was on Joseph Street. He is pictured on the roof holding his pouch, which contains a tape measure, a hammer and stuff like that. He said it was either an estimate for a repair or for a new roof. He said sometimes you have to take a test cut to see how many layers are there. He said he was only on the roof for a few minutes. The photos on pages 82 and 83 are the same roof. He said he was on the roof for no more than 10 or 15 minutes. He said when he looked at a roof he spent some time talking to the owners. Mr. Rew said the house shown on page 84 is the same house as on page 80. He said the owner had to make a claim for a new roof because the shingles were bad.

Mr. Rew said during this period he was never active for more than four hours a day. He said he thought he was doing what he was supposed to do, trying to get better and get back to work. The surveillance reports of the two companies retained by CSX to conduct the surveillance are in JX 12.

The surveillance by Colley Intelligence is at pages 20-22 of the exhibit. The first report is on July 27, 2018. The report indicates that the surveillance of Mr. Rew’s residence began at 7:00 a.m. and was terminated at 4:15 p.m. There are no photographs on July 27. The only activity indicated is that Mr. Rew and an unknown male were observed lifting and loading items into the back of a trailer between 1:15 and 1:30 p.m. Therefore, of the 9 ¼ hours of surveillance, 15 minutes of activity by Mr. Rew was observed, consisting of loading unidentified items into the back of a trailer. No roofing activity was noted. On July 28th surveillance began at Mr. Rew’s residence at 6:30 a.m., and surveillance was conducted until 4:00 p.m. Mr. Rew left his residence at 9:15 a.m. and drove to a trailer park. The report states that he was on a roof for 15 minutes and then carried a ladder to a truck. Mr. Rew testified that he was on the roof of the trailer home with his father. He said his father was repairing a leak and apparently couldn’t find the source of the leak and asked the Complainant to help determine where the leak was coming from. Mr. Rew said the photos at pages 70, 71 and 72 in JX 4 are all at the same location.170 A total of 15 minutes of activity related to the roof was therefore observed on July 28th.

169 A town near Toledo.
170 See Tr. at 140-44. Mr. Carnes also discussed the photos at pages 9-17 of the Investigation hearing transcript.
surveillance report states that the Complainant then drove to the Transflo facility. The photos related to the Transflo facility are on pages 73 and 74 of JX 4. The report does not mention seeing any ice. Therefore, of the 9½ hours of surveillance, a total of 15 minutes of activity related to roofing was identified.

The remaining surveillance was conducted by Glass City Investigations and is at pages 1-19 of JX 12. The surveillance on August 2, 2018 began at 6:30 a.m. and ended at 4:00 p.m., a total of 9½ hours. No activity by Mr. Rew was noted. The surveillance on August 3d began at 6:30 a.m. and terminated at 4:00 p.m., a total of 9½ hours. No activity by Mr. Rew was noted. There appear to be no photographs at the investigation hearing related to this surveillance. On August 4th, Mr. Rew was noted spending about 20 minutes at ABC Roofing and Supply Company. He also went to his uncle’s house on Beechway. In his testimony at my hearing, Mr. Rew identified the photo on page 78 and the top photo on page 79 of JX 4 as his uncle’s house on Beechway. He said the bottom photo on page 78 shows him and his uncle. He said his uncle thought there was something wrong with a flat roof on the back of his house and the Complainant got on a ladder to take a look. He said he thinks he just looked at the roof from the ladder and doesn’t think he got on the roof. No other roofing activity was noted on August 4th. On August 5th the surveillance report indicates Mr. Rew went to a house on Joseph Road in Luckey, Ohio and was on the roof for an unspecified amount of time. He also went to a house on Taylor Street and was on the roof for an unspecified amount of time. The surveillance on August 4th began at 6:30 a.m. and ended at 4:30, a total of 10 hours. The surveillance on August 5th began at 6:30 a.m. and ended at 4:00, a total of 9 ½ hours.

Credibility

I have reviewed all of the videos and the photographs used at the investigation hearing, as well as the testimony at the investigation hearing, at the depositions and at the hearing before me. I find the Complainant’s testimony at the investigation hearing, his deposition and my hearing to be generally consistent and I find him to be a credible witness. I find the testimony of the Respondent’s witnesses less credible. Mr. Rew’s testimony about his activity while on medical leave was consistent with Dr. Gonzales’ treatment plan in her August 10, 2018 letter and consistent with the video surveillance and the photographs that resulted from the surveillance. The surveillance evidence, summarized above, is not consistent with a finding that Mr. Rew was working full-time as a roofer or that he was working “consistently” as a roofer. It in fact shows very little time spent on roofing activity, and does not show Mr. Rew performing heavy work. There is nothing in the surveillance evidence that is inconsistent with Mr. Rew’s contention that he was performing light work. I also find credible Mr. Rew’s explanation about Dr. Gonzales’ statement in the June 15, 2018 treating note that he was busy working as a

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171 Mr. Rew’s testimony refers to the facility as the Rossford Yard bunkhouse. Tr. at 144, 147-48.
172 See page 11 of JX 12 containing surveillance at the house on that date.
173 In assessing the witnesses’ credibility, I have considered the consistency of the testimony with all the evidence of record and the demeanor of the witness when I was able to observe the witness on video.
174 RXs 12-16.
175 JX 4, pp. 70-84.
176 I note that Mr. Rew was given no exertional limitations by Dr. Gonzales.
roofer.\textsuperscript{177} I further find his testimony regarding cognitive therapy to be credible, as the evidence shows that no prescription for cognitive therapy for Mr. Rew was given prior to the investigation hearing.\textsuperscript{178} The testimony of Robert Sarver at the investigation hearing was inconsistent with his testimony at his deposition and at the hearing before me. The assumptions of Jeremy Carnes, Dr. Heligman and Mr. Sarver that the surveillance shows that Mr. Rew was working full-time, or any significant amount of time, as a roofer is unsupported by the results of the surveillance evidence at the investigation hearing and the other evidence of record. Mr. Sarver stated that he did not look at the surveillance reports.\textsuperscript{179} He said that he reviewed photographs used at the investigation hearing and that he did not see Mr. Rew performing any activity other than estimating and checking out a roof for a potential roofing job and did not see roofing activities such as placing shingles on the roof or performing a replacement or repair. Dr. Heligman’s statement at the Investigation hearing that what he saw in the photographs indicated that Mr. Rew could perform the job of a conductor is unsupported by the evidence. Dr. Heligman testified at my hearing that he did not know how long Mr. Rew spent on the roofs in the photos and did not know what activities he performed or how busy he was. He said that additional information was needed about what duties Mr. Rew was performing. Mr. Sarver testified at my hearing that he could not tell from the photographs used at the investigation hearing what Mr. Rew was doing and that he could have been performing light work. Mr. Carnes testified at the hearing that he did not know how long Mr. Rew was on the roof on August 4\textsuperscript{th} and 5\textsuperscript{th} or what he was doing. The testimony of Andrew Bamford and Mr. Sarver as noted above undermine the results of the investigation hearing. Mr. Sarver said Mr. Rew was being dishonest by being able to work a roofing job consistently and not getting medical treatment, but the evidence shows that he was not working “consistently” during his medical leave and there is no evidence that he did not receive medical treatment because of the activity in the surveillance photographs. Mr. Sarver agreed that there was nothing in the photographs used at the investigation hearing to dispute that Mr. Rew was following his physician’s treatment plan. Mr. Bamford testified that if an employee is off work due to an injury he believes it is acceptable for the employee to perform activities allowed by his physician. Both Mr. Sarver and Mr. Bamford stated that the Complainant was not cleared to return to work at CSX during the period of the surveillance.

\textbf{Rule 103.3 – the Transflo facility ice}

Rule 103.3 deals with the unauthorized removal of any material from CSX property. No one saw Mr. Rew take ice from the facility and no one determined whether there was in fact any ice in the cooler at the time he was there or any ice missing from the cooler. Mr. Rew’s explanations for why he was there and his actions while he was there, including backing up to the facility as CSX wants employees to do, are consistent with the evidence, including the photos and video.\textsuperscript{180} The charge of unauthorized removal of material from CSX property appears to be unsupported by the evidence at the investigation hearing.

\textsuperscript{177} Mr. Rew testified that he said his father was busy working in his roofing business. Tr. at 136. I do not believe that Dr. Gonzales was intentionally untruthful about this conversation in her deposition testimony, but it is not unusual for parties to have different recollections of a remote conversation. I believe it is likely that Mr. Rew would have a more accurate recollection of the conversation as a patient than Dr. Gonzales, who presumably treats many patients.
\textsuperscript{178} See footnote 115.
\textsuperscript{179} Sarver Depo. Tr. at 49-50.
\textsuperscript{180} RX 16 is the video of the Transflo facility.
Rule 104.11, 104.2 and the Code of Ethics – outside employment

Rule 104.2 states that, *inter alia*, CSX employees must not be “dishonest.” Rule 104.11 prohibits a CSX employee from engaging in any work that interferes with the employee’s ability to perform service for CSX or creates a conflict of interest with or is detrimental to CSX. The relevant portion of the Code of Ethics, titled “Outside Employment and Financial Interests,” at page 24 of the Code, uses essentially the same language as Rule 104.11. Both Mr. Sarver and Mr. Bamford testified that their interpretation of the term “work” as used in the rule and in the Code of Ethics means paid employment. This definition is consistent with the generally-accepted definition of the term. Mr. Rew testified that he was not compensated for the work he did for his father while on medical leave and the Respondent produced no evidence to the contrary. Mr. Bamford testified that he was aware that prior to his injury Mr. Rew worked part-time in his father’s roofing business, that he never took exception to it, and that it did not appear to be a conflict of interest. Mr. Sarver agreed that there was no evidence that Mr. Rew was in an employment relationship with anyone other than CSX and that without such evidence he should not have been charged or found guilty of a violation of Rule 104.11. He said he would not have expected Mr. Rew to report his work for his father unless it interfered with his work at CSX or his ability to get better and return to work. The evidence at the investigation hearing does not appear to support violations under Rule 104.2, 104.11 or the Code of Ethics. Instead, the evidence supports Mr. Rew’s contention that he was following the treatment plan of his physician, Dr. Gonzales.

I therefore find that the Complainant engaged in protected activity under 49 U.S.C. § 20109(c)(2).

49 U.S.C. §20109(a)(4)

This section of the FRSA prohibits discrimination by an employer “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.” The Respondent does not contest that the Complainant’s injury was work-related or that filing the injury report constitutes activity protected under the FRSA.

I find that the Complainant engaged in protected activity under 49 U.S.C. § 20109(a)(4).

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181 JX 4, p. 89 (Carrier Exhibit 4).
182 See merriam-webster.com, which gives the first definition of “work” as “to perform work or fulfill duties regularly for wages or salary.”
183 I am aware of the admonition in Acosta v. Union Pacific Railroad Company, ARB Case No. 2018-0020 (Jan. 22, 2020) and other cases that ALJs do not sit as super-personnel advocates with respect to the employer’s decision for an adverse action. In evaluating the Respondent’s reasons for the adverse action I must decide whether Respondent honestly believed the reasons it gave for disciplining Mr. Rew and whether there was any other reason for the discipline imposed. The reasons articulated for the discipline assessed at the investigation hearing, the parties’ depositions and at the hearing before me are relevant to this determination.
184 The injury report is JX 6.
**Did the Complainant sustain an adverse action?**

The parties have stipulated, and I find, that the Complainant’s dismissal from CSX on September 20, 2018 constitutes an adverse action within the meaning of the FRSA.\(^{185}\)

**Was the Complainant’s protected activity a contributing factor to Respondent’s adverse action?**

In *Palmer v. Canadian National Railway/Illinois Railroad Co.*\(^{186}\), the Board held that in determining whether a complainant’s protected activity contributed to the Employer’s adverse action, the factfinder may consider all relevant, admissible evidence, including the employer’s evidence of non-retaliatory reasons for the adverse action. *Id.*, PDF at 15, 29. The Board further stated:

> 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 “[i]significant or [i]substantial” role suffices.\(^{187}\)

49 U.S.C. § 20109(a)(4)

The contributing factor element may be established by direct evidence or indirectly by circumstantial evidence.\(^{188}\) In *Thorstenson v. BNSF Railway Company*, ARB Case Nos. 2018-00059/2018-0060 (Nov. 25, 2019), the Administrative Review Board, citing *Kuduk v. BNSF Ry. Co.* (8th Cir. 2014), stated that “[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.” In *Thorstenson*, the ARB overturned its rule of “inextricably intertwined” and “chain of events” causation.\(^{189}\) It clarified, however, that an ALJ may still find that the adverse action and protected activity are intertwined such that contributing factor causation is factually established. That is the case here. I have found that the only activity that the Complainant engaged in, which was the subject of the disciplinary hearing and the reason for the adverse action, was the

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\(^{185}\) Stipulation No. 8.


\(^{187}\) See also *Klinger v. BNSF Railway Company*, ARB Case No. 2019-0013 (March 18, 2021) (“As the Board has repeatedly emphasized, a complainant’s protected activity need only be one, even insubstantial, factor in the employer’s and may still ‘contribute’ to the adverse action even if other factors also influenced the decision.” *See Consolidated Rail Corporation v. U.S. Department of Labor*, 567 Fed. Appx. 334 (6th Cir. 2014) (unpub.), slip op. at 4.


\(^{189}\) See also *Klinger v. BNSF Railway Company*, ARB Case No. 2019-0013 (March 18, 2021).
protected activity of following his physician’s treatment plan. Mr. Sarver testified that he was advised to proceed with charges against Mr. Rew based on the surveillance that was conducted. He said the charges against Mr. Rew were the result of the surveillance and the surveillance was the basis for the investigation hearing and the evidence he relied on. He said he was the sole decision-maker with regard to Mr. Rew’s guilt and discipline and the sole source for his decision was the information in the investigation hearing transcript and hearing exhibits. Mr. Sarver testified at his deposition about the email from Macon Jones on September 17, 2018; the email states, with respect to Mr. Rew’s activities that were the subject of the surveillance, that “the employee provided no credible reason for his actions other than he was working as his physician described.” When asked about this language Mr. Sarver agreed that when he and Mr. Jones made the decision to dismiss Mr. Rew they “understood that his explanation was that he was working as the physician described.”

The Respondent argues that Respondent “reasonably and honestly” believed that Mr. Rew was being dishonest about his inability to return to work and dismissed him on that basis. However, the evidence clearly shows that Respondent was aware of Dr. Gonzales’ letter of August 10, 2018. The letter states that Mr. Rew is being seen for a post-concussion syndrome and that “I highly encourage the patient to be physically active and do light work. This will aid in his recovery in my professional opinion. This is a discussion we had in the patient’s last appointment.” The letter also states: “If you have any questions or concerns, please don’t hesitate to call.” Dr. Gonzales testified in her deposition that her recommendation was part of her treatment plan for the Complainant. Her letter does not specify or prohibit any particular type of work, nor does it indicate any exertional restrictions. The letter was introduced at the investigation hearing and Mr. Rew testified about it and his union representative noted it in his closing statement. Neither Dr. Heligman nor any other representative of Respondent contacted Dr. Gonzales or Mr. Rew to question or clarify the treatment plan, despite Dr. Gonzales’ invitation in her letter to do so. The investigation hearing officer asked Mr. Rew no questions

190 Tr. at 32-33, 36. Mr. Sarver stated that he did not view the surveillance video. Tr. a7 47.  
191 JX 15, p.1; CX 5, p.1; Sarver deposition, Exhibit 6, p. 2; and part of Exhibit 1 to Jones deposition.  
192 Sarver Depo. Tr. at 82.  
193 Respondent’s Reply Brief at p. 4. The Respondent’s Initial Brief cites several examples of what it contends show Mr. Rew’s dishonesty: It states that Mr. Sarver believed “that Rew was dishonest when he told CSXT that he was medically unable to return to work.” Id. at p. 18. However, I am not aware of any such statement from Mr. Rew in the record. The Respondent states that Mr. Rew “was being dishonest by being able to work a roofing job consistently and not … attempting any of the medical treatment to come back to work for CSX.” Id. at p. 19. The record clearly shows that Mr. Rew was not working on roofing jobs “consistently,” nor does it show that he was not receiving medical treatment. The Respondent is apparently referring to cognitive therapy; as previously indicated, the record shows that Mr. Rew did not receive a prescription for cognitive therapy until after the investigation hearing (see footnote 115). The Respondent further states that Mr. Sarver believed at the time of Mr. Rew’s dismissal “that Rew was dishonest when he told CSX he needed to remain on medical leave.” Id. at p. 21. I find no such statement by Mr. Rew in the record. The Respondent states on page 25 of its brief that “CSXT dismissed Rew solely because he was dishonest when he represented he was unable to return to work.” Again, I find no such statement by Mr. Rew. I also note that Dr. Gonzales never cleared Mr. Rew to return to his job at CSX. She testified in her deposition that as of both the June 15, 2018 office visit and the August 31, 2018 visit Mr. Rew was still not able to return to work. Dr. Heligman testified at the hearing before me that CSX requires that the treating physician provide a recommendation for the employee to return to work and that Dr. Gonzales never provided a statement indicating that Mr. Rew was cleared to return to work at CSX. I also note that Mr. Sarver testified that Mr. Rew never made a dishonest statement to him. Tr. at 104.  
194 Gonzales Depo. Tr. at 17.
about the treatment plan. Mr. Sarver testified that he and Macon Jones were aware that Mr. Rew contended at the hearing that the activities he performed were in furtherance of Dr. Gonzales’ treatment plan. Mr. Sarver also testified in his deposition that he was aware of the provision in the FRSA about disciplining an employee for following the treatment plan of his physician.\footnote{Sarver Depo Tr. at 86 (CX 8).} Because the Respondent was aware of the letter from Dr. Gonzales recommending that Mr. Rew be physically active and do light work, and in light of the surveillance evidence showing minimal roofing activity over a period of six days, I do not find it reasonable that the decision-makers, Mr. Sarver and Mr. Jones, believed that none of Mr. Rew’s activity was because he was following his physician’s treatment plan and that all of it was because he was working for another employer. Mr. Rew testified at the investigation hearing that he was not employed by anyone else during his medical leave and he was not compensated for anything he did. The Respondent produced no evidence to contradict this and the surveillance evidence clearly shows that the amount of time Mr. Rew spent on roofs during the period of the surveillance was minimal and not consistent with the Respondent’s position that Mr. Rew was “consistently” working as a roofer. The record contains no evidence that Mr. Rew was employed by any entity other than CSX.

Andrew Bamford, the charging officer, who appeared at the investigation hearing, testified that he knew prior to the hearing that Mr. Rew had previously done work for his father, that it never interfered with Mr. Rew’s work for CSX and he did not consider it to be a conflict of interest. He was unaware of any prior CSX investigation into an employee who engaged in part-time work. Mr. Carnes testified that based on a conversation with Mr. Bamford he was also aware of Mr. Rew’s part-time work with his father prior to his injury. Mr. Sarver similarly testified that he was not aware of any CSX employee who had been disciplined for a conflict of interest under the Code of Ethics. He agreed that Mr. Rew should not have been charged with a Code of Ethics violation or been found guilty of violating Rule 104.11. Neither the surveillance video or photographs or other evidence at the investigation hearing established that the Complainant was working for another employer or was being compensated for his work. In the absence of such evidence, the only explanation for Mr. Rew’s activity was that he was following the treatment plan of his physician. There is no basis in the record to support Mr. Sarver’s statement that Mr. Rew was “consistently roofing.”\footnote{Tr. at 105. Mr. Sarver agreed that if Mr. Rew was under surveillance for 53 ½ hours “and just had this handful of time that he was even in the vicinity of a roof” he wouldn’t be consistently roofing. \textit{Id.} at 108.} An employer’s belief that its employee has been dishonest must be a reasonable belief.\footnote{\textit{Powers v. Union Pacific Railroad Company}, slip op. at 17 ARB No. 13-034 (Jan. 6, 2017).} Under the circumstances here, in light of the evidence at the investigation hearing and the evidence relating to Dr. Gonzales’ treatment plan, a belief that the reason for Mr. Rew’s work activity was that he was engaged in outside employment that interfered with his ability to perform work for CSX or created a conflict of interest was not reasonable. Based on my findings of fact, the only activity that Mr. Rew engaged in was the protected activity of following his physician’s treatment plan. Thus, the Respondent’s adverse action was based on the protected activity.

I therefore find that Mr. Rew was not engaged in “work” or “outside employment” as those terms are used in CSX’s Rule 104.11 and the Employment and Financial Interest section of CSX’s Code of Ethics. I find that the Complainant was following his physician’s treatment plan
by performing work for his father’s roofing business. I find he was not compensated for such work. I find that the Respondent’s professed belief that Mr. Rew was dishonest by working outside of CSX and not returning to work at CSX was not the sole reason for his dismissal. I find that the Complainant’s protected activity of following his physician’s treatment plan contributed to the Respondent’s adverse action of termination. The Complainant has thus established that his protected activity under 49 U.S.C. § 20109(c)(2) contributed to the Respondent’s adverse action.

49 U.S.C. §20109(a)(4)

The Complainant testified that he did not believe he was terminated for any reason other than following his physician’s treatment plan. Mr. Sarver testified at my hearing that Mr. Rew’s injury report did not play a role in his discipline decision. There is no evidence to show that the Complainant’s filing of the injury report contributed in any way to his termination.

The Complainant has therefore not shown that protected activity under 49 U.S.C. §20109(a)(4) contributed to the Respondent’s adverse action.

Has Respondent proven by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant’s protected activity?

Because the Complainant has proven that his protected activity was a contributing factor in the Respondent’s adverse action, I must determine whether the Respondent has proven, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 1982.109(b); see Palmer v. Canadian National Railway/Illinois Central Railroad Company, ARB Case No. 16-035, ALJ No. 2014-FRS-154, PDF at 56-57 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017); DeFrancesco v. Union Railroad Co., ARB No. 13-057, ALJ No. 13-057, PDF at 7-14 (ARB Sep. 30, 2015) (DeFrancesco II); Pattenaude v. Tri-Am Transport, LLC, ARB No. 15-007, ALJ No. 2013-STA-037, PDF at 14-17 (ARB Jan. 12, 2017). The ARB has stated that the “clear and convincing” standard of proof is the intermediate standard between “a preponderance” and “beyond a reasonable doubt,” and requires the ALJ to believe it is “highly probable” that the employer would have taken the same adverse action in the absence of the protected activity. Palmer. ARB No. 2014-FRS-154, PDF at 56-57; see also DeFrancesco II, ARB No. 13-057, PDF at 7-8. Factors to be considered are set forth in, inter alia, Speegle v. Stone & Webster, ARB No. 13-074 (April 25, 2014), DeFrancesco v. Union Railroad Company, ARB No. 13-057 (Sept. 30, 2015), and Pattenaude v. Tri-Am Transport, LLC, ARB No. 15-007 (Jan. 12, 2007). Some of those factors do not apply here because they assume the presence of both protected activity and non-protected activity. In this case, I have found that the only activity the Complainant performed

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198 Tr. at 171.
199 Tr. at 96.
and was disciplined for was his protected activity of following his treating physician’s treatment plan.

CSX’s brief cites *Smith v. Duke Energy Carolinas, LLC*, ARB No. 14-027 (Feb. 25, 2015), aff’d No. 15-1713 (4th Cir. Jan. 9, 2017) as a relevant case, stating that the Board affirmed a finding that the employer proved that it would have taken the same adverse personnel actions if it had learned of the employee’s misconduct through some means other than his protected activity.\textsuperscript{201} That is not the situation here, where the targeted activity was the protected activity, and was the only activity for which the Complainant was disciplined. Respondent’s brief states that it would have dismissed Mr. Rew “because he represented to CSXT that he could not return to work, even as CSXT had evidence that he was ‘very busy’ working as a roofer.”\textsuperscript{202} First, Mr. Rew made no statements to CSX that he could not return to work, and he had not been cleared by Dr. Gonzales to do so.\textsuperscript{203} Further, the evidence shows, and I have found, that Mr. Rew was not “very busy working as roofer,” but was performing a minimal amount of work helping his father pursuant to Dr. Gonzales’ treatment plan. I have found that the only activity the Complainant performed in the surveillance evidence was the protected activity. The Respondent would not have taken the same action in the absence of such activity because there would have been no activity to take action against.

Both Mr. Sarver and Mr. Bamford testified that they were unaware of any other employee being disciplined for engaging in part-time work,\textsuperscript{204} and the Respondent has not identified any past discipline for such activity. The Respondent has also not identified any past discipline it has assessed for violating Rule 104.11 or the “Outside Employment and Financial Interest section of the CSX Code of Ethics.”\textsuperscript{205} Mr. Bamford, who said he had been Mr. Rew’s supervisor for virtually Mr. Rew’s whole career, testified that he never had any significant concerns about Mr. Rew’s performance or honesty or not following rules.\textsuperscript{206} Without the protected activity, no discipline would have been imposed.

I find that the Respondent has failed to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of the Complainant’s activity.

\textsuperscript{201} Respondent’s Initial Brief at p. 29.
\textsuperscript{202} Id.
\textsuperscript{203} The Respondent may be referring to the fact that Mr. Rew did not present himself to CSX as ready to return to work at CSX, but this ignores that fact that he was not cleared by Dr. Gonzales to return to work and CSX policy would not allow him to return without such clearance. Dr. Heligman testified that he was aware that as of the June 15, 2018 treatment note Dr. Gonzales continued to hold Mr. Rew off duty as a conductor after her evaluation on that date and that CSX requires that the treating physician provide a recommendation for return to work. Tr. at 261-62; Depo. Tr. at 40-41.
\textsuperscript{204} See Sarver testimony at Tr. 40; Bamford testimony at Depo. Tr. at 28-29.
\textsuperscript{205} The Respondent submitted JX 14, Employee History Reports, and RXs 21, 22, 23 and 24, which are all History Reports and Discipline Letters for different unidentified employees. Exhibit 9 to Mr. Sarver’s deposition also consists of discipline reports for several unidentified employees. It is unclear if these are the same employees as those in RXs 21, 22, 23, and 24.
\textsuperscript{206} Bamford Depo. Tr. at 25-26.
Remedies

The FRSA proves that “[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.” 49 U.S.C. § 20109(e)(1). Section 20109(e)(2) states that relief shall include:

(A) Reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) Any back pay, with interest; and

(C) Compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

Section 20109(e)(3) provides that relief may include punitive damages in an amount not to exceed $250,000. See also 29 C.F.R. § 1982.109(d)(1).

In *Rudolph v. National Railroad Passenger Corporation*, ARB No. 14-253/14-056, PDF at 12 (ARB April 5, 2016), the Board noted that, as with other whistleblower statutes, the FRSA’s remedial purpose is to make a prevailing complainant whole. The goal of the Act is to compensate the whistleblower for losses caused by the employer’s unlawful conduct and restore him to the terms, conditions and privileges of his former position that existed prior to the employer’s adverse action. *Id.*

Reinstatement

As noted above, the FRSA states that remedies “shall include” reinstatement with the same seniority status the employee would have had but for the discrimination. The Complainant has requested reinstatement. Respondent is therefore required to reinstate Complainant, with no loss of seniority, to the position he held at the time he was terminated by CSX.

Abatement

Complainant is entitled to expungement from his personnel records of the discipline received in this matter and of any other negative references relating to this matter.

Back pay

The Complainant’s post-hearing brief seeks compensation for all wages lost, noting wages lost in 2019, 2020 and 2021. The Complainant bases his annual salary on JX 8, Mr. Rew’s Year End Earnings Statement for 2017, which was the last full year of his employment. JX 8 shows gross earnings of $71,631.76. The Complainant states that his income would have increased since 2018 and that a reasonable wage projection for 2021 would be $75,000. The Respondent contends that there is no evidence to show such an increase. As the Complainant
notes, Mr. Rew testified that he would have been able to return to his job at CSX by 2019.\textsuperscript{207} I find that the Complainant should be compensated for lost wages for the years 2019, 2020 and 2021 to the date he is reinstated in his former position, based on the amount of his earnings in 2017 plus any increase in earnings that he would have received had he not been terminated, as measured by increases given to other employees in positions comparable to that held by Mr. Rew prior to his dismissal. Mr. Rew’s earnings from other employment of $20,000 in 2019 and 2020 should be subtracted from this amount.

**Compensatory damages**

Complainant seeks compensatory damages for Mr. Rew’s emotional pain and suffering in the amount of $75,000. The Respondent argues that the Complainant has failed to show that he endured substantial mental suffering or emotional anguish due to his dismissal. Mr. Rew testified at the hearing before me that the effect of his dismissal was devastating and that he was distraught and angry. His said his companion, Amy, said he was not the same person anymore and they broke up for a while, but his testimony seems to indicate that some of this was prior to his dismissal rather than before.\textsuperscript{208} However, he testified that even in early 2019 he continued to experience some emotional issues because of the dismissal and was depressed.\textsuperscript{209} Dr. Gonzales testified that in her August 31, 2018 treatment note she indicated a mood disorder and depression in her Review of Systems.\textsuperscript{210} Damages for emotional distress are recoverable under the FRSA. See *Rudolph v. Amtrak*, ARB No. 14-053 and 14-056 (April 5, 2016) (*Rudolph II*); see also *Ferguson v. New Prime, Inc.*, ARB No. 10-075, PDF at 7-8 (ARB Aug. 31, 2011). Damages for emotional distress may be based solely on a complainant’s testimony where it is found to be credible. *Ferguson*, PDF at 7-8; *Anderson v. Timex Logistics*, ARB No. 13-016, PDF at 7-8. I find that Complainant’s testimony regarding how removal from his position affected him to be credible. The Complaint did not seek or receive treatment from a mental health professional, but this may have been in part attributable to his financial situation. Courts consider damage awards for emotional distress in other whistleblower cases in arriving at an appropriate amount.\textsuperscript{211} I have therefore considered the amounts of other awards for emotional distress in whistleblower cases in determining the appropriate amount to award here. Complainant credibly testified to emotional distress as a result of his removal from his position and Dr. Gonzales’ records indicate depression, although she did no formal assessment for depression.\textsuperscript{212} I find an award of $15,000 to be appropriate in this case.

**Punitive damages**

Complainant seeks an award of punitive damages in the amount of $150,000. Respondent contends that no award of punitive damages is warranted because the record does not show that CSX acted with reckless or callous disregard for Complainant’s rights. The ARB has held that punitive damages are warranted where “there has been reckless or callous

\begin{footnotes}
\item[207] Tr. at 166.
\item[208] Tr. at 163-64.
\item[209] Tr. at 168.
\item[210] Gonzales Depo. Tr. at 19-20 and CX 2, p. 31.
\item[211] See, e.g., *Ass’t Sec’y & Bingham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 95-STA-37 (Sept. 5, 1996).
\item[212] Tr. at 22.
\end{footnotes}
disregard for the plaintiff’s rights, as well as intentional violations of federal law.”” Youngerman v. United Parcel Service, Inc., ARB No. 11-047 (ARB Feb. 27, 2013).213 Youngerman noted that the Supreme Court has stated that while actual malice need not be shown, ‘its intent standard, at a minimum, required recklessness in its subjective form.’214 Here, the Respondent was aware of Dr. Gonzales’ treatment plan and of Mr. Rew’s position that the work he was performing was done pursuant to that plan. Mr. Sarver, the sole decision-maker, testified that he was aware of Section 20109(c)(2), that he had received training on it, that he knew that disciplining an employee for following the orders or treatment plan of a treating physician violates the statute, and that he knew that Mr. Rew’s position at the investigation hearing was that he was following the treatment plan of Dr. Gonzales.215 Respondent’s conduct is therefore either an intentional violation of the FRSA or, at least, evinces reckless or callous disregard for the Complainant’s rights under the FRSA. Despite its knowledge of the treatment plan and Mr. Rew’s position, the Respondent continued to maintain the position that Mr. Rew was performing outside employment as a roofer despite the absence of evidence that he was. The surveillance showed nothing more than what Mr. Rew contended, that the work he did was consistent with Dr. Gonzales’ treatment plan that he should be active and perform light work. The Respondent ignored the treatment plan and the evidence at the investigation hearing. I find an award of punitive damages in the amount of $100,000 to be appropriate in this case.

Attorney Fees and Costs

The Act provides for recovery by a successful claimant of his litigation costs, including reasonable attorney fees, and therefore Complainant is entitled to such fees and costs in this matter.

Conclusion

Complainant has shown by a preponderance of the evidence that he engaged in protected activity, that Respondent had knowledge of the protected activity, that he suffered an adverse action, and that his protected activity contributed to the adverse action. Respondent has failed to show by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. Complainant is thus entitled to the remedies under the Act described above.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondent, CSXT, shall reinstate Complainant, Eric Rew, with the same seniority status he would have had but for Respondent’s violation of the

215 Sarver Depo. Tr. at 86-90.
FRSA, to the position held by Complainant prior to his dismissal. Respondent is also to credit Complainant’s pension for the period of his discharge.

2. Respondent shall pay Complainant back pay for the period from January 1, 2019 to the date of reinstatement, based on the amount of his earnings in 2017 plus any increase in earnings that he would have received had he not been terminated, as measured by increases given to other employees in positions comparable to that held by Mr. Rew prior to his dismissal. Mr. Rew’s earnings from other employment of $20,000 in 2019 and 2020 should be subtracted from the total amount of back pay. Interest on the back pay is to be paid from the date such wages were unpaid until the date of payment, calculated at the interest rate for underpayment of taxes under 26 U.S.C. § 6621(a)(2), compounded daily. Respondent is also to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating the back pay to the appropriate months or calendar quarters.

3. Respondent shall pay to Complainant the sum of $15,000.00 in compensatory damages for emotional distress.

4. Respondent shall expunge from Complainant’s personnel file, and from any other records, the discipline received by the Complainant in this matter and any other negative references with respect to the charges against Complainant in the letter dated August 9, 2018 from Matthew A. Day to the Complainant notifying him to attend the formal investigation216 and the Discipline letter dated September 20, 2018 from R.R. Sarver to the Complainant.217

5. Respondent shall pay Complainant the sum of $100,000.00 in punitive damages.

6. Respondent shall pay Complainant’s litigation costs and reasonable attorney fees. Counsel for Complainant shall file a fully supported and verified application for fees, costs and expenses within thirty (30) days of the date of this Decision and Order. A service sheet showing that proper service has been made on Respondent and Complainant must accompany the fee application. Respondent has twenty-one (21) days from the date of receipt of the fee application to file any objections. If the Respondent asserts objections to the fee petition, the parties are directed to attempt to resolve their differences prior to the filing of objections.

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216 JX 4, p. 68.
217 JX 5.
SO ORDERED.

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE