

U.S. Department of Labor

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Issue Date: 26 June 2020

Case No.: **2017-FRS-00087 and 2020-FRS-00006**

In the Matter of:

BRUCE MURRAY,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Appearances:

Luther Sutter, *Esq.*
Sutter & Gillham, PLLC, Benton, Arkansas
For Complainant

Sierra M. Poulson and Jeffery J. Devashrayee, *Esq.*
Union Pacific Railroad Company, Omaha, Nebraska
For Respondent

Before: William S. Colwell, Administrative Law Judge

DECISION AND ORDER DENYING COMPLAINT

This proceeding arose under the employee protection provisions of the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations found at 29 C.F.R. Part 1982. Section 20109 protects railroad carrier employees from discrimination based on their prior protected activity pertaining to railroad safety or security. Here, Bruce Murray (“Complainant”) alleges that Union Pacific Railroad Company (“Respondent”) refused to promote him in retaliation for him reporting a safety issue.

I. Procedural Background

Complainant filed a complaint with the Secretary of Labor on May 17, 2017, alleging that he suffered an adverse personnel action in reprisal for reporting an alleged FRSA violation. On

July 28, 2017, the Secretary issued findings and dismissed the complaint. On August 2, 2017, Complainant requested a hearing before an administrative law judge (“ALJ”). The case was docketed as case number 2017-FRS-00087 at the Office of Administrative Law Judges (“OALJ”) on August 2, 2017. It was assigned to me on August 24, 2017. I issued a Notice of Hearing on July 3, 2019, and set the case for hearing in Little Rock, Arkansas, on December 10-12, 2019. (AX 1, Tr. 5).¹ On November 1, 2019, I issued an Order clarifying the hearing location and time. (AX 2, Tr. 5).

Complainant filed an additional complaint on September 23, 2019, that was amended on October 1, 2019. On October 8, 2019, the Secretary issued findings and dismissed the complaint so that it could be consolidated with the case pending at OALJ. The case was docketed at case number 2020-FRS-00006 at OALJ on October 28, 2019. It was assigned to me on November 7, 2019.

I held a conference call with the parties on November 26, 2019. During the call, I consolidated the two cases, cancelled the December 10, 2019, hearing and rescheduled the hearing on February 26-28, 2020, in Little Rock, Arkansas. Those decisions were set forth in an Order I issued on December 3, 2019. (AX 3, Tr. 6).

Respondent filed a Motion for Partial Summary Disposition on March 11, 2019, and Complainant filed his Response to Motion for Summary Judgment on May 3, 2019. I issued a Decision and Order Denying Respondent’s Motion for Partial Summary Disposition on October 2, 2019. (AX 4, Tr. 6).

Complainant submitted a Prehearing Statement on February 18, 2020. (AX 5). Respondent also submitted a Prehearing Statement on February 18, 2019. (AX 6). Both were placed in the record at the hearing. (Tr. 6).

I conducted a hearing in Little Rock, Arkansas, on February 26-27, 2020. Both parties were represented by counsel at the hearing. (Tr. 5). I admitted CX 1 and CX8 and RX 1-27. (Tr. 13-15).

II. Factual Background

Christopher Boeckman

Claimant called Christopher Boeckman as a witness. (Tr. 23). Mr. Boeckman started work for Respondent on September 1, 2012. (Tr. 24). He worked as a bridge foreman several times beginning in about 2014. He worked with Complainant on a number of job sites and attended safety meetings with him, and he considered Complainant to be a friend. (Tr. 25). Mr. Boeckman said that whenever someone is called out to a job site, the foreman at that site is the boss for the day. He worked under Complainant’s supervision several times and he said Complainant appeared to know what he was doing, even more so than himself. (Tr. 26).

¹ Complainant’s exhibits are designated “CX,” Respondent’s exhibits are designated “RX” and Administrative Law Judge exhibits are designated “AX.” Citations to the hearing transcripts are designated “Tr.” with the applicable page number(s).

Mr. Boeckman said he applied to be a bridge inspector in March or April of 2017. He had worked for Respondent for about four and a half years at that point and he had been a foreman since 2014. He graduated from high school, but he did not have a college degree, although he had completed some hours in trade school in welding. Mr. Boeckman said he could tell someone how to do anything with a bridge from building a new one to repairing or taking down an old one. By March or April 2017, he had a little less than five years of bridge experience. (Tr. 27). He believed that he and Complainant were equally qualified for promotion, although Complainant had seniority. (Tr. 28). Mr. Boeckman said he was not seeking a bridge inspector position. He was at a job site installing ties on a bridge when the bridge inspector, Randy Reynolds, approached him, said he did not have a partner at the time, and asked if he was interested in becoming an inspector. (Tr. 28-29).

Mr. Boeckman said he was injured in December 2017 and reported the injury. That was after he had become a bridge inspector. (Tr. 29-30). He said after he reported the injury, to Mr. Epps "I didn't exist. . . . After I reported it, I fell off the face of the Earth." (Tr. 33). Mr. Boeckman applied for the bridge inspector position on March 4, 2017 and he started working in that capacity on March 8, 2017. (Tr. 34). He said that Mr. Reynolds started pressing him in late January or early February 2017 to apply for the bridge inspector job . . . "my phone never stopped ringing from him to take the job." (Tr. 35). He said Mr. Reynolds provided him books and other materials to help him prepare for the job interview, although Mr. Boeckman said it was "material that I already knew. . . . I could have passed the test without the information he was leaving." (Tr. 35). When he went for the interview, some of the questions he was asked pertained to things Mr. Reynolds told him about. (Tr. 35-36). Mr. Boeckman said he was happy with his job as an assistant foreman, but he worked an eight days on, seven days off schedule and was away from home a lot. He and his wife were expecting their first child and the bridge inspector job would allow him to be at home more, so he wanted the job. (Tr. 36). Mr. Boeckman said that when he went into the interview he was not 100 percent certain he would get the job, but he knew everything there was to know about bridges. (Tr. 38). He said he did not believe he was aware at the time that Complainant had applied for the job, but he knew a lot of people had applied. (Tr. 39).

Mr. Boeckman was paid hourly as an assistant bridge foreman. (Tr. 40). He said he was making \$70,000 to \$75,000 a year. He earned less as a bridge inspector. He resigned from the bridge inspector job after he learned that Mr. Reynolds was "a very unpleasant individual." (Tr. 41). He said Respondent turned its back on him and punished him for resigning as a bridge inspector. (Tr. 41).

On cross-examination, Mr. Boeckman said he did not know why he was selected for the bridge inspector job rather than the other applicants, although he believed he was qualified for the position. (Tr. 44). He said he was not involved in any hiring decisions for the jobs Complainant had sought. Mr. Boeckman agreed that his issues with Respondent began after he became a bridge inspector. His higher earnings as an assistant foreman were based in part on overtime and per diem. He said Mr. Reynolds told him that Mr. Reynolds was part of the decision-making process for the bridge inspector position and that he had been in touch with Mr. Epps. (Tr. 45-46). He was unaware of any discussions involving Mr. Epps and the hiring panel as to why he was selected for promotion. (Tr. 46).

On redirect examination, Mr. Boeckman said he had a “heads-up” before he went to the interview that he was likely to get the bridge inspector job. (Tr. 46).

Danny Ervin, III

Mr. Danny Ervin was called as a witness by Complainant. He is a bridge inspector and works out of the headquarters in North Little Rock, Arkansas. (Tr. 48). He was promoted to bridge inspector in June 1, 2017 and he earns \$78,000 to \$80,000 per year. He had not reported any injuries prior to his promotion and he did not have a college degree, but he had completed five or six years of college and was about a semester short of an associate degree. He also completed two years at a bible college. (Tr. 49-50).

Respondent hired Mr. Ervin at the same time it hired Mr. Boeckman, September 10, 2012. (Tr. 50). He started out as an assistant foreman and was promoted to bridge inspector. When he was an assistant foreman, he often filled in for the foreman who had more vacation time, personal time-off and on occasion would go out to other jobs and leave Mr. Ervin behind. He said he did not have any kind of a “heads-up” that he was going to get the bridge inspector job when he went for the interview. Mr. Ervin said he heard Mr. Boeckman’s testimony and he could not agree with everything Mr. Boeckman said. He believed everyone who applied started out equally. (Tr. 52). He had been interested in a bridge inspector position since early in his career and he kept track of when openings were posted. He said he wanted the job because he is fascinated by bridges and the job paid more than being an assistant foreman. He said the bridge inspector job is about 50 percent as physically demanding as his prior job where he had to handle heavy power tools. (Tr. 43-54). Mr. Ervin said he works about 50 hours per week. He has never been injured on the job. He had about five years of bridge experience when he applied for the bridge inspector position. (Tr. 54).

Complainant – Bruce Murray

Complainant said that in October 2016, he was bitten by a spider when he used a Port-A-Potty at a work site. He reported the incident to Respondent. (Tr. 56). There were some bridge inspector positions open in 2017. He applied for those positions, but Mr. Boeckman and Mr. Ervin were selected. Complainant said he had engaged in protected activity prior to applying for the bridge inspector positions. He does not have a college degree, but has completed about 16 hours of college credits. (Tr. 57). Respondent hired him on October 4, 2004. He had about 11 years of bridge experience when he applied for the bridge inspector positions in 2017 and he had been a bridge foreman for about 14 years. He earns \$33 per hour and he would have earned \$20,000 to \$30,000 more as a bridge inspector. (Tr. 58). He is requesting \$25,000 in the current action as the difference in what he would have made had he been promoted. (Tr. 59).

Complainant said that no one gave him a “heads-up” when bridge inspector positions came open. He never was given the opportunity to gain experience as a bridge inspector and he said his manager in the track department, Joshua Spence, did not support him getting a bridge inspector position. (Tr. 59-60). No one ever provided him material to study to prepare for an interview to become a bridge inspector. (Tr. 60). Mr. Epps provided Complainant feedback on

why his efforts to get a bridge inspector job were unsuccessful. That was the fall of 2019. Mr. Epps did not give him any feedback between 2017 and 2019. When he spoke with Mr. Epps in October of 2019, Mr. Epps told Complainant that he needed to transfer back to the bridge department. (Tr. 61). Complainant said his supervisor in the track department was willing to let him work in the bridge department at the supervisor's expense, but Mr. Epps would not allow him to do so. (Tr. 62). Complainant said he tried to call and text Mr. Epps, but Mr. Epps had him blocked. When he did get to talk with him, he said Mr. Epps was "real hostile." (Tr. 62-63).

Complainant testified that he worked in the bridge department since 2006. (Tr. 63). He said a bridge foreman does the manual labor to repair the bridges and the inspector comes out and looks at it to see if there are any defects and writes a report. The foreman job is more physically demanding. Complainant was 46 years old at the time of the hearing. (Tr. 64). He was excited about getting a bridge inspector job that would be less physically demanding and allow him to use his mind and advance in the company. He said he discussed reporting the spider bite in the interviews for bridge inspector positions. (Tr. 65). Complainant said Darwin Davis cut him off in the interview when he was trying to present himself for the bridge inspector job. He said it made him depressed and sad, and he questioned why he was treated unjustly. He is asking to be a bridge inspector, for back pay and for any other relief that would be fair for what he has been through. (Tr. 66).

On cross-examination, Complainant said a bridge supervisor is senior to a bridge inspector and he had never held either position prior to February 1, 2017. (Tr. 67). He agreed that he had not worked in the bridge department for three years when he applied for the job and that based on his seniority he had the ability to go back to work in the bridge department, even now. (Tr. 67-68). He agreed that Ryan Reynolds got the bridge supervisor job in February 2017 and that Mr. Reynolds worked in the bridge department at the time the position was filled. (Tr. 68). He agreed that Mr. Boeckman got the bridge inspector position in March 2017 and that Mr. Boeckman worked in the bridge department at the time the position was filled. (Tr. 69). He agreed that Mr. David Kennedy was a bridge inspector and was selected for promotion to bridge supervisor in March 2017. (Tr. 69-70). He agreed that he applied for a bridge inspector position in May 2017, Mr. Ervin got the position and Mr. Ervin was working in the bridge department at the time the job was filled. (Tr. 70-71).

Eric Epps

Eric Epps was called as a witness by Complainant. (Tr. 71). Mr. Epps was the hiring manager for the bridge inspector and bridge supervisor positions that are in issue. Mr. Epps said he allowed Mr. Ervin to assist Mr. Kennedy with his bridge inspector duties because Mr. Ervin was part of the bridge department and he could cover his wages. He said he did not approve Complainant assisting a bridge inspector because Complainant worked in the track department and he did not have a way to bring him into the bridge department and cover his wages. (Tr. 74). He said departments have their own labor budgets and they want to stay within their budget limits. (Tr. 75).

Mr. Epps agreed that it would be improper to decide who was going to be the successful candidate in advance of the interview. He agreed that Complainant was qualified to be in the pool of candidates to be considered. (Tr. 77). He said there was no written policy for determining who among the pool of qualified applicants was invited for an interview. (Tr. 79). He agreed that it would be unfair to tell an applicant what the interview questions were in advance of the interview and Mr. Epps said he would never do that. (Tr. 81). He was aware that Complainant had filed a lawsuit prior to making a decision on who to hire for the bridge inspector positions, but he was unaware of the specifics of the lawsuit. (Tr. 81-82). He was aware that Complainant had been bitten by a spider. (Tr. 82). He did not take that into consideration when he made the decisions to hire Mr. Ervin or Mr. Boeckman. (Tr. 83). He said there are 66 bridge inspectors and they do not all have injury free records. An injury is not considered as a factor in employment decisions. He disagreed with the assertion that he made a bad decision hiring Mr. Boeckman as a bridge inspector. (Tr. 84). Mr. Epps said that if an assistant foreman and a foreman have a disagreement and are unable to resolve it themselves, their manager would act essentially as a judge and make a decision. (Tr. 87).

Mr. Epps said that Complainant did not interview well. He had interviewed Complainant before and he did not note any improvement in his interview skills when he last interviewed him in 2019. (Tr. 88). Parts of the interview call for objective answers, like defining the elements of a bridge, where there are clearly right and wrong answers. (Tr. 89). Other parts are subjective. (Tr. 89-90). No numerical score is assigned to an answer. (Tr. 91-92). Mr. Epps said Mr. Ervin and Mr. Boeckman were better qualified than Complainant, but that did not mean Complainant was not qualified for the positions. He agreed that he had blocked Complainant from contacting him on his iPhone. He said he had explained to Complainant that he was unable to bring him over to work in the bridge department because he was in the track department and worked for a different manager, but Complainant kept calling him to the point where Mr. Epps felt harassed and blocked the calls. (Tr. 92). Mr. Epps agreed that Respondent had an open-door policy and that employees are able to communicate with other employees. He said he blocked Complainant because he felt the calls were excessive. (Tr. 93). He knew Complainant had been bitten by a spider and had filed a lawsuit, but he was not aware Complainant had filed a complaint with the Department of Labor at the time Complainant kept trying to call him. He thought that he blocked Complainant's calls in 2017 and he agreed that later he unblocked him. (Tr. 94). He believed that in August 2019 Jeff Mancuso, an assistant vice-president for Respondent, asked him to call Complainant and make it clear why he was not selected. (Tr. 95-96). Complainant hung up during the call and Mr. Epps waited for 30 minutes to see if he was going to call back. He believed he had been clear and concise during the call and he was not upset that Complainant ended the call abruptly. (Tr. 98).

Mr. Epps said he has the greatest weight on the hiring panel, but he does not have final approval authority. He said he did not recall anyone being hired over his objection. There were times when his director would consult with the other members on the hiring panel to make sure there was consensus about the candidate that was selected. (Tr. 99). In the last interview with Complainant, which was done by telephone, Complainant only answered one of six technical questions correctly. (Tr. 101). Mr. Epps said had he known that Mr. Boeckman was given the questions in advance of the interview he would have disqualified him. (Tr. 104). The bridge inspector job requires a lot of data entry and computer skills is a key factor. Complainant's

response was not inaccurate. (Tr. 109). Mr. Ervin had a very high skill set with his bridge maintenance background and he also had strong computer, oral and written skills, which are important in a bridge inspection role. Mr. Epps said asking about computer skills is “pretty much a standard question,” but he could not swear that Complainant was asked about computer skills when he was interviewed in 2017. (Tr. 111).

[The testimony of Mr. Epps was interrupted in order to permit another witness to testify by telephone at a prearranged time.]

Peter Barley

Respondent called Peter Barley as a witness and he testified by telephone. (Tr. 113). Mr. Barley resides in Omaha, Nebraska, and he is the senior director of customer service for processing and quality for Respondent. He has worked for Respondent since 1989. (Tr. 114). He has a B.S. in communications from Missouri State University. (Tr. 115). He participates in hiring decisions for openings within his department. He has six people that report directly to him and eight more that report to him indirectly. (Tr. 117). Once a position is posted, they assemble an interview team. Mr. Barley reviews applications along with his boss, Allison Watson. He also works with Dawn in human resources. (Tr. 119). Mr. Barley schedules applicants for interview and he, Ms. Watson and Ruben Lopez do the interviews. The questions are to allow the applicant to explain why he or she is the most experienced person for the position. (Tr. 120). The same questions are asked of all of the applicants who are interviewed. All of the applicants are ranked and then Mr. Barley discusses the top candidates with Brad Moore, the vice-president for his department. Mr. Barley notifies the successful candidate that he or she got the job. (Tr. 122). He also calls the unsuccessful interviewees and lets them know that they can reach out to the panel for feedback on their interviews. He said there is no written policy that lays out the process. (Tr. 123). He is aware of the whistleblower policy that permits employees to report matters without fear of repercussions and he gets annual training on the whistleblower policy. (Tr. 124).

Mr. Barley said he was not familiar with Complainant other than he knew Complainant had applied for an opening as a senior manager in customer care and support in October 2019. He had never seen or spoken with Complainant. (Tr. 124-125). Mr. Barley said RX 27 was a description of the position. It was within his department and he was the hiring manager. The position required a bachelor’s degree or four or more years of experience. Mr. Barley said they were looking for someone with relevant work experience that would allow the person to be successful in the job. (Tr. 127). RX 5 is Complainant’s application for the position as senior manager customer care and support. (Tr. 127-128). Mr. Barley said he reviewed the application in October 2019. (Tr. 128). Complainant’s applications said he had the knowledge to be successful as a bridge inspector. That suggested to Mr. Barley that Complainant was not a serious candidate because of his lack of attention to details. He was not aware that Complainant had a lawsuit pending against Respondent until he read in the application that Complainant hoped his lawsuit would not be held against him. (Tr. 129). Complainant was not selected for the job because his qualifications did not match the requirements of the position. (Tr. 130). Mr. Barley was not aware when he reviewed Complainant’s application that he had reported being bitten by a spider in the past. (Tr. 131).

On cross-examination, Mr. Barley said that a person who met the minimum qualifications for a position would be eligible to be considered for an interview. (Tr. 132). He said they interview the strongest candidates and he agreed that he exercised discretion to decide who to interview. (Tr. 133). Mr. Barley was not aware of a secret set of better qualifications. (Tr. 136). He denied that there were “some sort of secret criteria to determine who gets an interview and who doesn’t.” (Tr. 139).

Mr. Epps (continued)

Mr. Epps said that better than minimum qualifications means relevant experience. (Tr. 143). He agreed that when he was deposed he said that they do not publish the better than minimum qualifications. (Tr. 145). He agreed that Complainant had more time working in the bridge department than Mr. Ervin or Mr. Boeckman. (Tr. 146). He agreed that among Complainant, Mr. Ervin and Mr. Boeckman, the only one who had reported an injury prior to the time hiring decisions were made was Complainant. (Tr. 151). Mr. Ervin and Mr. Boeckman had five years of bridge experience while Complainant had 11 years of bridge experience. (Tr. 151). He agreed that a bridge inspector is a salaried position. (Tr. 152).

On cross-examination, Mr. Epps said he had worked for Respondent since 1984. (Tr. 153). He has been the manager of bridge inspection for the southern region since February 2013. (Tr. 154). He is the hiring manager for positions within his group. (Tr. 156). He determines who will be invited for an interview in consultation with the workforce resources manager. (Tr. 160). Interviews are conducted by telephone. (Tr. 160). About 80 percent of the questions are standard questions that are asked by the workforce resources manager and the rest are technical questions asked by the rest of the members of the hiring team. (Tr. 161). All of the applicants are asked the same questions. Mr. Epps said he was not aware that any of the candidates that he interviewed had the advantage of knowing the questions in advance. After the last candidate is done, the panel discusses how the interviews went. (Tr. 162). Once that is done, Mr. Epps makes a recommendation to his director on who should be hired. Either the hiring manager or the workforce resources manager notifies the applicants of the outcome. (Tr. 163). There is annual training on how matters – ethical, fair treatment of employees – and on FRSA whistleblower protections for reporting injuries or safety issues. (Tr. 164-165).

Complainant’s application for bridge inspector based out of Gurdon, Arkansas, is RX 19. (Tr. 165-166). Mr. Epps was hiring for that position and it was ROS – right of selection – which means the job is not part of the bid, bump, collective bargaining process where seniority is the arbiter on who gets the position. The closing date for the position was February 4, 2017. (Tr. 166). Mr. Epps wrote the position description for the job posting. (Tr. 167). Required qualifications included the FRA certifications required to restore track back to service, put old track out of service and place slow orders, and the ability to develop and maintain a positive work environment. Preferred qualifications include availability for travel, to work longer hours and to take emergency calls. (Tr. 168). The qualifications are not secret and anyone applying for a position can review them and decide whether to apply. (Tr. 169).

Complainant's application for another position is at RX 11. (Tr. 170). Mr. Epps did not recall if Complainant was interviewed for that position. (Tr. 171). Randy Reynolds got the job. Mr. Reynolds' application is at RX 16. He got the job because he was better qualified than Complainant. (Tr. 172). He had nearly 20 years of bridge inspection experience and he was extremely proficient as a bridge inspector. (Tr. 172-173). The assistant to the lead bridge inspector position closing date was March 12, 2017. (Tr. 173). The qualifications required relevant experience as a bridge inspector with an understanding of bridge mechanics, the ability to use the computer system and to be a responsible person who can handle emergencies and communicate well with others. (Tr. 174).

Complainant's application for the bridge inspector position in Gurdon, Arkansas, is RX 12. (Tr. 174-175). In the qualifications for the position section, Complainant said he had worked as a truck driver, machine operator, foreman, surface gang supervisor, OTN gang supervisor, track inspector and detector car operator and he felt he had the experience necessary to be a bridge supervisor. (Tr. 175-176). Mr. Epps said that suggested Complainant just did a cut and paste and was not really passionate about the particular position. (Tr. 176). Derwin Davis was the workforce resources hiring manager for the position. Mr. Epps did not believe Complainant was interviewed because Complainant did not show he had the qualifications for the job. Blake Boeckman got the job. (Tr. 177). Mr. Boeckman's application is RX 17. Mr. Epps said Mr. Boeckman got the job and Complainant did not because Mr. Boeckman was better qualified. He said Mr. Boeckman was enthusiastic, came highly recommended, and had experience in bridge maintenance and bridge construction. He was currently in the bridge department as a bridge foreman when he submitting his application. He also had good computer skills. (Tr. 178). Mr. Epps said he was not aware that Mr. Boeckman was given the questions in advance when he made the decision to hire him. (Tr. 179). Mr. Epps said that current bridge experience was more relevant than length of overall railroad experience because current bridge experience meant the applicant was aware of current bridge standards and techniques. (Tr. 179-180).

Mr. Epps said RX 22 is a position description for a bridge inspector position in North Little Rock with a closing date of May 11, 2017. It was for a position as assistant to the bridge supervisor of inspections. Complainant's application for that position is RX 14 and Mr. Epps said he, the workforce resources hiring manager, and the hiring team members would have reviewed the application. (Tr. 181). The experience Complainant listed on the application was the same as from his application for the position in Gurdon, which suggested it was a cut and paste. That indicated to Mr. Epps that Complainant was not really serious about the job. (Tr. 182). Derwin Davis was the workforce resources hiring manager for this position. Mr. Epps did not believe Complainant was interviewed for this job because he did not establish that he had the qualifications. (Tr. 183). Danny Ervin was selected for the position and his application is RX 18. (Tr. 184). Mr. Ervin was in the bridge department at the time and he had assisted the local manager of bridge maintenance in doing a bridge inspection. Complainant had asked to do the same, but Mr. Epps said Complainant worked in the track department, so he could not facilitate his request. (Tr. 184-185). Mr. Epps said he chose Mr. Ervin and not Complainant for the bridge inspector position because Mr. Ervin was better qualified with current, relevant experience. (Tr. 185).

Mr. Epps said RX 23 is a position description for a bridge inspector position in Tyler, Texas. The qualifications were similar to those for the other bridge inspector positions he had already described. Complainant's application for the bridge inspector position in Tyler, Texas, is RX 1. (Tr. 186). Mr. Epps did not believe Complainant was interviewed for that position. (Tr. 187). Oscar Michael Haygood got the job. Mr. Haygood's application is RX 6. He was currently working in the bridge department at the time he applied, his skills and practices were up to date, he was familiar with the territory, and he had good computer skills. (Tr. 188).

Mr. Epps said RX 24 is a position description for a bridge inspector position in Bloomington, Texas. Mr. Epps was the hiring manager and the closing date was September 8, 2019. The qualifications and responsibilities were similar to the prior positions Mr. Epps described. (Tr. 189). Complainant's application for the bridge inspector position in Bloomington, Texas, is RX 2. Mr. Epps did not believe that Complainant was interviewed for the position because he did not show that he had the qualifications. Ernest Otto got the job. Mr. Otto's application is RX 7. Mr. Otto was selected over Complainant because he was better qualified.

Mr. Otto worked in the bridge department and developed a spreadsheet that was used throughout the department. He had a tremendous amount of expertise, knew the territory and had good computer skills. (Tr. 192).

Mr. Epps said RX 8 is a Rule 213.07 card. It means the person to whom it was issued was qualified under FRA Rule 213.07 to take track out of service, restore track to service and to apply appropriate speed restrictions. (Tr. 192-193). It is required for an applicant for a bridge inspector position and Complainant had the card. Mr. Epps said he believed all foremen and assistant foremen had to have the card and it did not mean the person was qualified for an interview to be a bridge inspector. (Tr. 193). Mr. Epps said he had some discussion with Jeff Mancuso, vice-president of structures, about providing Complainant feedback on the interview process. (Tr. 193-194). Mr. Mancuso said he had spoken with Complainant and said they would reach out to him and provide some feedback. (Tr. 195). Mr. Epps was aware that Complainant had a confrontation with a former manager in 2014 and that he had reported a spider bite. He said what he knew was that Complainant had filed a lawsuit. (Tr. 196). Mr. Epps said his knowledge of those events did not influence any hiring decisions he made and that the reason Complainant was not selected was because he was not as qualified as other applicants. (Tr. 196-197).

On re-direct examination, Mr. Epps said he spoke with Complainant in August 2019 to try and help him be more competitive in the future. He told Complainant that he needed to transfer to the bridge department and he mentioned computer skills. He did not talk with Complainant about errors made on his applications. (Tr. 198-199). RX 20-24 are bridge inspector and bridge supervisor job postings. (Tr. 199). Mr. Epps agreed that none of them mentioned computer skills as a qualification. He agreed that in his deposition he misspoke when he said Mr. Ervin had a college degree; instead, Mr. Ervin is one semester short of a degree. (Tr. 200).

Mr. Epps said there are basic qualifications that allow a person to get into the pool of applicants, then there are qualifications that separate out the top three or four applicants from the

rest of the pool, and then qualifications that really separate the top three or four during the interview process. (Tr. 201). Mr. Epps acknowledged that when he was deposed he was mistaken about Mr. Ervin having a college degree. (Tr. 203). Mr. Boeckman listed four years of bridge maintenance experience in his application, RX 17, and he answered “yes” to the question asking if he had at least five years of bridge maintenance or construction foreman experience. Mr. Epps agreed that four years is less than five years. (Tr. 205). He agreed that experience was the most important factor in selecting Mr. Ervin. (Tr. 206). Other factors were identification of nomenclature, how to diagnose a bridge and ability to use a computer. Mr. Epps agreed that he was not saying Complainant was not at all qualified for the position. (Tr. 207). Complainant was interviewed because he met all of the minimum qualifications for the position. He was not selected because he was not the best qualified candidate. (Tr. 208). Mr. Boeckman was selected as the best qualified even though his application said he had four years rather than five years of bridge experience. (Tr. 210).

Derwin Davis

Mr. Davis was called as a witness by Complainant. (Tr. 211). He is a senior recruiter for Respondent. He was been on interview panels that interviewed Complainant and he specifically remembered 2017. (Tr. 212). Mr. Davis reviewed notes prior to testifying and he did not bring the notes with him to the hearing. (Tr. 213). The notes were outside in his vehicle and he said he could retrieve them.

Gilbert Moser

Complainant called Mr. Gilbert Moser as a witness. (Tr. 214). Mr. Moser worked for Respondent from 1980 to 2017 and his last job was as a lead bridge inspector. He was replaced by James David Kennedy. He worked with Mr. Boeckman for about five hours at a derailment and he had not worked with Mr. Ervin. (Tr. 215). He worked “quite a bit” with Complainant in the bridge department. (Tr. 215). He believed Complainant should have at least five years in the bridge department, but he was not certain. He never had any disciplinary problems with Complainant and he was not around when Complainant left the bridge department. (Tr. 216). He observed Complainant use a computer when they worked together. (Tr. 217). He was sitting in a truck with Complainant at a Walmart when Complainant interviewed for a bridge inspector position. (Tr. 217-218). One question Complainant was asked was a bridge book question about a stringer and whether it had four columns or five columns. Mr. Moser said “everybody messes that up,” but Complainant got it right because he had a reference card that Mr. Moser believed Mr. Kennedy had provided to Complainant. Mr. Moser did not note anything unusual about the tone of the interview. (Tr. 218).

On cross-examination, Mr. Moser said the card Mr. Kennedy gave Complainant was a reference card, not a “cheat sheet.” (Tr. 219). Mr. Moser said he never participated in an interview other than when he interviewed for jobs he applied for and the interview he overheard when he was in seated in a truck with Complainant. (Tr. 220).

Mr. Davis (continued)

While Mr. Davis was off the witness stand, he prepared a document that was marked CX 9. (Tr. 221). Mr. Davis has been a senior recruiter for Respondent since January 2017. (Tr. 222). Part of CX 9 is an email from Mr. Davis to his supervisor, Ken Kimara, dated August 8, 2019. It passed along a comment from Complainant's July 29, 2019, application where he said he hoped his lawsuit would not be held against him and saying he would be happy to discuss it if it was a concern. (Tr. 223-224). Mr. Davis's email to Mr. Kimara said that the hiring manger, Mr. Epps, decided to interview Complainant for the position, but found it concerning that he would make a comment about a lawsuit in his application. Mr. Davis said he learned that in a telephone conversation with Mr. Epps when they were reviewing applications. (Tr. 224). He said he had been trained on retaliation and if a hiring manager said he was not going to hire someone because the applicant had filed a safety complaint he would tell the hiring manager that a safety complaint has no bearing on the hiring process. (Tr. 226). Mr. Davis was aware that Complainant had filed a lawsuit, but he was not aware of the specific details until recently. (Tr. 226-227). He said Mr. Epps did not express any other concerns about Complainant's application. (Tr. 233-234). Mr. Davis sent the email to Mr. Kimara because he had never encountered someone commenting on a lawsuit in the qualifications section of an application. He said the comment had no bearing on how they moved forward. (Tr. 234). Mr. Kimara responded and thanked Mr. Davis for "being on top of your game." Mr. Kimara said the law department advised to move forward with Complainant's application and if the lawsuit comes up in the interview to stop the discussion and explain that a lawsuit has no bearing on the interview process. (Tr. 235). Mr. Davis passed that along to Mr. Epps. (Tr. 236).

On cross-examination, Mr. Davis said Complainant was interviewed for the position. The position is not one of the positions in issue in the two FRS complaints that were the focus of the hearing. (Tr. 237). Mr. Davis was hired by Respondent in June 2003 and he served in a variety of positions before he became a senior recruiter in January 2017. (Tr. 238). When a position comes open, the department prepares a vacancy request. Mr. Davis screens applications for disciplinary and attendance issues and the hiring manager screens applications for qualifications and then they come together to schedule interviews. Mr. Davis considers his role as being a gatekeeper to protect the company and make sure policies and processes are followed. (Tr. 239). Mr. Davis arranges interviews and the interview team includes himself, the hiring manager, and hiring team members, which usually consists of two to four people. Interviews are usually conducted by telephone. (Tr. 240). Mr. Davis uses a structured interview guide with standard questions that are asked of every interviewee and then the more technical job-related questions are asked by the hiring manager and hiring team members. The standard questions are 70 to 75 percent of the questions and the technical questions make up about 20 to 25 percent of the questions. He said they use standard questions to be fair, consistent and ethical. (Tr. 241). Mr. Davis said he was trained on whistleblower protections and it means that if an employee reports a safety issue or an injury there is zero tolerance for retaliation. (Tr. 241-242). Mr. Davis said he had participated in two or three or more interviews involving Complainant and about the same with Mr. Epps. (Tr. 242).

Mr. Davis identified RX 12 as Complainant's March 8, 2017, application for a bridge inspector position in the Southern Region. He reviewed the application as did the hiring manager. (Tr. 243). This was a ROS – right of selection – position where seniority does not

apply and the hiring manager can select whoever he feels is best qualified for the job. In the qualifications section of the application, Complainant talked about positions he held as a truck driver, machine operator, foreman, surface gang supervisor, OTN gang supervisor, track inspector and detector car operator. Mr. Davis said this suggested a lack of attention to detail since this was an application for a bridge inspector position. (Tr. 244). At the top of the application it says "Application not used. Job order filled." Mr. Davis said this meant the applicant was not interviewed for the position and that the position had been filled. (Tr. 245).

Mr. Davis identified RX 14 as Complainant's application for a bridge inspector position in North Little Rock, Arkansas. (Tr. 245). Mr. Davis said he reviewed the application and it was odd for Complainant to say he had the qualifications to be a bridge supervisor when he was applying for a bridge inspector position. It said "Application not used. Job order filled." at the top of the application, which meant Complainant was not interviewed for the position and the job had been filled. (Tr. 246). Mr. Davis said he participated in at least two interviews involving Mr. Epps and Complainant. He said Complainant struggled with the technical questions and with answering in a clear and concise manner. (Tr. 247). After the interviews were done, Mr. Davis and the hiring team discussed the candidates. He said he challenges hiring managers to think critically about their choices. He said he believed Mr. Epps made the right decision. (Tr. 248). Mr. Davis was not aware that Complainant had reported a spider bite when he reviewed his applications, but it came out during the interviews. (Tr. 249). Complainant was not selected for either of the two positions because he was not the best qualified. His reporting of an injury had no bearing on the hiring decisions. (Tr. 250). Complainant reached out to Mr. Davis two or three times for feedback. Mr. Davis told him he needed to be honest and transparent about discipline and safety records because that information is available and an applicant would not have made it to the interview stage if that was a disqualifying factor, so use it to talk about what was learned from the experience. (Tr. 251-252).

On re-direct examination, Mr. Davis said he interviewed Complainant twice or perhaps three times. (Tr. 257). He said Complainant struggled with the technical questions in both of the interviews. (Tr. 257-258). After looking at some notes, Mr. Davis said there had been three interviews. Mr. Davis said he was not a technical expert, but he was provided the technical questions and answers prior to doing interviews. He agreed that it would be inappropriate for an applicant to get the questions and answers in advance. (Tr. 260). He agreed that he would not support a candidate who knowingly provided false information in an application. (Tr. 261). An employee who has been disciplined for a safety related violation is ineligible for promotion consideration. (Tr. 262). The hiring manager, Mr. Epps, makes the final decision, but it based on the consensus of the panel. (Tr. 263). Mr. Davis agreed that there was a difference between a false statement and a lack of attention to detail. He did not recall if Mr. Ervin said in his interview that he had a college degree. (Tr. 266-267). He agreed that Complainant had more years of service with Respondent than Mr. Ervin or Mr. Boeckman. (Tr. 270). Mr. Davis said that without the interview guides, he could not compare Complainant with Mr. Ervin or Mr. Boeckman. (Tr. 271). He said there is no policy that requires objective scoring for hiring decisions. (Tr. 272). He agreed that reasonable people can differ on their judgments of how a candidate performed in an interview. (Tr. 273).

On re-cross examination, Mr. Davis said whether Complainant reported an injury or filed a lawsuit against Respondent was not a factor in deciding who to hire. (Tr. 276). Likewise, whether he was disciplined in 2014 was not a factor. (Tr. 277).

David Bozarth

Mr. Bozarth was called as a witness by Respondent. Mr. Bozarth lives in Omaha, Nebraska. (Tr. 280). He has worked for Respondent since May 30, 2000. He is currently the senior manager of planning for track materials and scheduling. His team is responsible for getting track materials from vendors out to the work sites for all renewal and track construction projects. (Tr. 281). He has been in his current position since November 2018 and he is the hiring manager for positions within his department. (Tr. 282). An opening comes about in two ways. It may be a new position based on changes requirements or it may be a position that becomes available when someone leaves and creates a vacancy. (Tr. 282-283). When there is an opening, Mr. Bozarth submits it to his general director and then to the human resources representative, Sandy Christiansen. The human resources representative drafts the job posting and posts it on UP Jobs for 10 days. (Tr. 284). The hiring panel includes Mr. Bozarth, the direct supervisor for the position, and Sandy Christensen. Mr. Bozarth determines who gets interviewed. (Tr. 286). The interviews are conducted by telephone because Respondent has employees spread across 23 states. (Tr. 286-287).

Complainant applied for a position as materials supervisor on October 1, 2019. (Tr. 287-288). The recruiting managers Mr. Bozarth works with most often are Kevin Forrest and Edward Nicholson. Their job is to make sure all applicants are treated the same and are asked the same questions. (Tr. 289). As the hiring manager, Mr. Bozarth asks technical questions. He estimated that about 95 percent of the questions are standard questions and the rest technical questions. (Tr. 290). The same standard and technical questions are posed to each candidate. That is to make sure they end up identifying the best candidate. (Tr. 291-292). After the interviews are completed, the hiring team ranks the candidates and Mr. Bozarth forwards that on to his director and the general director for approval and then human resources extends the formal job offer. The hiring panel discusses the applicants and then they individually rank them. The hiring panel's recommendation is a consensus on who was the best candidate. (Tr. 292). Ultimately, as the hiring manager, Mr. Bozarth makes the decision. His director has never declined to accept his hiring recommendation. They follow the how matters, the FRSA, whistleblower protections and collective bargaining agreement provisions on hiring. (Tr. 293). The "how matters" is a collection of Respondent's diversity policy, statement of conduct and business ethics. Mr. Bozarth said he was trained annually on how matters and whistleblower policies. (Tr. 294)

Mr. Bozarth said he was familiar with Complainant because of this case, but he had never spoken with him and had never seen him before the hearing. Complainant applied for a job opening in Mr. Bozarth's department as a material supervisor and the job posting is RX 25. The opening was posted on September 5, 2019. (Tr. 295). The position was based out of Little Rock and was for someone who would go out to the field with the ballast equipment and be an onsite resource. The position had very little oversight and a key qualification was the ability to develop and maintain positive relationships with co-workers, supervisors, contractors and customers and

resolve conflicts. (Tr. 296). Complainant's application is RX 3. (Tr. 297). In it, Complainant said he had the qualifications to successfully perform the job of bridge inspector. Mr. Bozarth said that suggested to him that this was someone who was applying for a lot of positions and was just doing a cut-and-paste. Mr. Bozarth was the only one who reviewed Complainant's application. He was not aware until he read the application that Complainant had filed a lawsuit against Respondent. Complainant said in his application that he hoped his lawsuit would not be held against him. (Tr. 298). The three people Mr. Bozarth sent through to interviews included two who were ARASA supervisors and had proven their ability to perform with little oversight and the third had a college education. (Tr. 299). The person who was selected was already a supervisor in Mr. Bozarth's department. Mr. Bozarth was not aware that Complainant had reported a spider bite in October 2016 when he reviewed his application. (Tr. 300). Mr. Bozarth said he did not pick Complainant for an interview because he was not as qualified as the three candidates he selected. (Tr. 300-301).

On cross-examination, Mr. Bozarth said candidates are not given the interview questions beforehand because it would give a candidate an unfair advantage. He said he did not allow an applicant to work in a job before awarding the job to the candidate. (Tr. 301). It would cause Mr. Bozarth concern if he knew a candidate was allowed to work in a job beforehand. (Tr. 302). He said he had never heard of a candidate getting the questions in advance, a candidate being allowed to work in the job in advance, secret qualifications, or better minimum qualifications. (Tr. 304). Mr. Bozarth said he did not know what the term "better minimum qualifications" meant. (Tr. 306). He agreed that a process that is flawed could lead to a flawed conclusion. (Tr. 308).

Dana Swanson

Mr. Swanson was called as a witness by Respondent. (Tr. 308). Mr. Swanson has worked for Respondent since July 2007 and he lives in Little Rock, Arkansas. (Tr. 309). He is the director of system locomotive facilities and has been in that position since October 2018. He manages a 500-person shop that overhauls locomotives. (Tr. 310). He is the hiring manager for his department. He reviews applications and determines who moves on to an interview, which is conducted by telephone. (Tr. 313). After all of the interviews are done, the members of the hiring panel compare notes and come to a consensus on who to select. Ultimately, Mr. Swanson makes the decision. Depending on the position, he would either have final approval authority or he may have to send up a recommendation if it is a more senior position. (Tr. 314-315).

Mr. Swanson was not familiar with Complainant other than knowing he applied for an opening as manager locomotive maintenance. (Tr. 315). The position description is RX 26. It requires extreme familiarity with all facets of locomotive maintenance, so it would be difficult for someone from outside the department to step in as a manager. (Tr. 316). Complainant's application for the position is RX 4. (Tr. 316-317). In it, Complainant said he had the qualifications to be a bridge inspector. The job opening was to manage locomotive maintenance. (Tr. 317). Complainant said in his application that he hoped his lawsuit against Respondent would not be held against him. Mr. Swanson said he was not aware of the lawsuit before reading about it in the application. (Tr. 318). He was not aware that Complainant had been disciplined

in 2014 or that he had reported a spider bite. (Tr. 319-320). Mr. Swanson said he did not select Complainant for the position because he was not the best qualified candidate. (Tr. 320).

On cross-examination, Mr. Swanson agreed that no candidate should be given an advantage for a position. (Tr. 321). He said he never gave a candidate the interview questions in advance. (Tr. 322). He agreed that transparency in the hiring process is important and that he did not use any secret qualifications to decide who to interview. (Tr. 323-324).

Mr. Epps (continuation)

Respondent recalled Mr. Epps as a witness. Mr. Epps said five years of experience was not a knockout question. Asking about computer experience is a standard question. (Tr. 325). Mr. Epps identified RX 21 as a position description for a bridge supervisor of inspections position in Little Rock, which is in his department. The closing date for application was April 2, 2017. (Tr. 326). Complainant's application for the position is RX 13. Mr. Epps and Mr. Davis reviewed the applications and there was likely someone from human resources on the team. (Tr. 327).

Mr. Epps did not recall who else was on the hiring team. It said "Interviewed" at the top of the application, which meant that Complainant was interviewed for the position. He was interviewed because he met the requirements for the position. (Tr. 328). James David Kennedy was chosen for the job. He had 12 years of prior bridge inspector experience. (Tr. 329). Mr. Epps said the fact that Complainant had filed a lawsuit against Respondent had no bearing on his decision to hire Mr. Kennedy and not Complainant. (Tr. 330).

III. Legal Standards

Standards Applicable to FRSA Claims

The FRSA, under which Complainant brings this complaint, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a "contributing factor" motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of the complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of evidence that he engaged in protected activity, Respondent knew of the protected activity,

Complainant suffered an unfavorable personnel action,² and the protected activity was a contributing factor in the unfavorable action, provided that the Complainant is not entitled to relief if Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

The Administrative Review Board articulated the applicable standards for a complaint under the whistleblower protection provisions of the Federal Rail Safety Act in *Palmer v. Canadian National Railway*, ARB Case No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 31 (ARB Sep. 30, 2016) (reissued with full dissent Jan. 4, 2017).

The AIR-21 burden-of-proof provision requires the factfinder – here, the ALJ – to make two determinations. The first involves answering a question about what happened: did the employee’s protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee’s protected activity was a contributing factor in the employer’s adverse action.

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

Consequently, in order to meet his burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity, (2) Respondent knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action.³ *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-00032 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*,

² An adverse employment action must actually affect the terms and conditions of a complainant’s employment. *Johnson v. Nat’l R.R. Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-00006, slip op. at 3-4 (ARB Oct. 16, 2009). See also *Simpson United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-00031 (ARB Mar. 14, 2008); *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-00034, slip op. at 4 (ARB Nov. 30, 2005).

³ Although I list the knowledge requirement as a separate element, I note that the ARB has said repeatedly that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-00025 (ARB Apr. 30, 2013). See also *Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-00003 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis).

ARB No. 10-114, at 6 (ARB Feb. 29, 2012).⁴ As the Board said in *Palmer*, “The protected activity need only play some role, and even an ‘[in]significant’ or ‘[in]substantial’ role suffices.” Slip op. at 53.

IV. Discussion

Here, the parties do not dispute that Complainant engaged in protected activity – he reported that he was bitten by a spider while he was on-duty in October 2016 – that Respondent was aware of Complainant’s protected activity and that he was not selected for positions for which he applied. Therefore, the only issue that is in dispute under the first determination required by *Palmer* is whether Complainant’s protected activity played a role, any role at all, in his non-selection for the positions he applied for in 2017 and 2019.

Whether Protected Activity Contributed to Complainant’s Non-Selection for Promotions

A complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the retaliatory action, not the sole or even predominant cause. *Rudolph v. National Railroad Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 29, 2013); *see also Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3d Cir. 2013). The Administrative Review Board has explained that a contributing factor includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the [adverse employment] decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 3 (ARB Feb. 29, 2012); *see e.g., Id.*, slip op. at 4 (credible evidence that the employee’s report of a slip and fall injury led Respondent to investigate for safety violations and was a contributing factor); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ Case No. 2010-FRS-00012, slip op. at 7 (credible evidence that the employee’s report of back pain led Respondent to investigate for its timely filing and was a contributing factor); *Clark v. Airborne, Inc.*, ARB No. 08-133, 2005-AIR-00027 (employee memos discussing safety concerns during company downsizing was not a contributing factor). Further, “the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor.” *Henderson*, slip op. at 6.

The contributing factor element “may be established by direct evidence or indirectly by circumstantial evidence.” *DeFrancesco*, slip op. at 3. Circumstantial evidence may include:

⁴ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). *See also Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-00005 (ARB Sept. 13, 2011), at 31-32 ; *see also Kudak v. BNSF Railway Co.*, 768 F.3d 786, 791(8th Cir. 2014) (“[A] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”).

temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Id. “Standing alone, temporal proximity, pretext, or shifting defenses may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his Respondent's adverse action.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-00011, slip op. at 6 (ARB May 26, 2010). However, the totality of the evidence may nonetheless support a finding of causation. *Id.* Furthermore, failure to consider the totality of the circumstantial evidence of the causal relationship between protected activities and adverse actions is reversible error. *Rudolph, supra.*

When a complainant makes an inferential case of discrimination by means of circumstantial evidence, “[t]he ALJ (and ARB) may then examine the legitimacy of the Respondent's articulated reasons for the adverse personnel action in the course of concluding whether a complaint has proved by a preponderance of the evidence that the protected activity contributed to his Respondent's adverse actions.” *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-00055 (ARB Apr. 30, 2010). Thus, the nondiscriminatory reasons are evaluated contemporaneously with a determination of whether the protected activity contributed to the adverse action. “Thereafter, and only if, the complainant has proven discrimination by a preponderance of the evidence, does the Respondent face a burden of proof.” *Id.*; see also *Brune v. Horizon Air Indus., Inc.*, ARB 04-037, slip op. at 14, ALJ No. 2002-AIR-00008 (ARB Jan. 31, 2006) (explaining that Respondent's burden of proof arises after, and only if, complainant establishes discrimination by preponderance of the evidence).

Complainant has not alleged any direct evidence establishing that his protected activity was a contributing factor in Respondent's decision not to select him for the promotions for which he applied and none is suggested from my review of the record; therefore, the question is whether the circumstantial evidence establishes the existence of this essential element upon which Complainant carries the burden of proof.

Temporal Proximity

Determining what is temporally proximate “is not a simple and exact science but requires ‘fact-intensive’ analysis.” See *Franchini v. Argonne Nat'l. Lab.*, ARB No. 11-006, 2009-ERA-00014, slip op. at 10 (Sept. 26, 2012) (citing *Hicks v. Forest Preserve Dist. of Cook County*, 677 F.3d 781, 789 (7th Cir. 2012) for the proposition that there are no “bright line rules to apply when considering temporal proximity of adverse actions to protected activities”). On the other hand, an administrative law judge may consider case law to develop some general parameters of strong and weak temporal relationships, but the context surrounding the present claim plays a significant role. *Id.*, slip op. at 10. The closer the temporal proximity between the protected activity and the adverse action, the greater the causal connection there is to the alleged retaliation. *Smith v. Duke Energy Carolinas, LLC*, ARB Case No. 11-003, ALJ Case No. 2009-

ERA-00007, slip op. at 6 (ARB June 20, 2012). A range of five months has been suggested as sufficient to support an inference of unlawful discrimination. *Barker v. UBS AG*, 888 F. Supp. 2d 291, 301 (D. Conn. 2012) (SOX case).

Complainant reported that he had been bitten by a spider in October 2016. He filed an OSHA complaint on May 17, 2017. He applied for four positions as a bridge supervisor or bridge inspector between February 1, 2017 and May 4, 2017. He applied for other positions within the bridge department and elsewhere between August 31, 2019 and October 1, 2019. Complainant applied for the first four positions and was rejected within four to seven months of reporting that he had been bitten by a spider. That is close enough in time to support at least some inference of retaliation. The other positions in 2019, however, were well over two years after he reported the spider bite and filed an OSHA complaint, and are too remote in time to support such an inference.

Indications of Pretext

Black's Law Dictionary (10th ed. 2014) defines "pretext" as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive." In *Teruggi v. CIT Group/Capital Finance, Inc.*, 709 F.3d 654, 661 (7th Cir. 2013), the Seventh Circuit said, "[a]n unwise employment decision does not automatically rise to the level of pretext; rather, a party establishes pretext with evidence that the employer's stated reason or the employment decision 'was a lie – not just an error, oddity, or oversight.'" (quoting *Van Antwerp v. City of Peoria, Ill.*, 627 F.3d 295, 298 (7th Cir. 2010)).

Here, Complainant has not presented direct or circumstantial evidence that Respondent's stated reason for not selecting him – that other candidates were better qualified – is a lie. Mr. Epps said he was aware that Complainant had reported a spider bite prior to applying for the four positions in the bridge department in 2017, but he said that other bridge inspectors had reported injuries and such reports were not considered in making employment decisions. He explained why he chose each individual who was selected, and each one was a bridge department employee with current relevant experience that equipped them for the jobs that were being filled. The same was true for the two bridge department positions that Complainant applied for in 2019 that Mr. Epps filled with current bridge department candidates. Likewise, Mr. Bozarth and Mr. Swanson were aware of Complainant's protected activity – because he mentioned it in the qualifications section of his applications – and did not select him because he was not among the best qualified candidates for positions in the engineering and mechanical departments, respectively. All of the hiring managers said Complainant was not employed in their departments when he applied for openings they had and that his applications appeared to be cut and pastes that did not indicate they were tailored to the requirements of the jobs for which he applied. Considering all of the evidence of record, there is simply nothing that suggests Complainant's lack of current and relevant experience and his inattention to detail in describing his qualifications were used as a subterfuge for not selecting him because he had reported a spider bite.

Inconsistent Application of Policies

The Administrative Review Board declined to establish a bright-line rule for comparing the handling of different cases and instead affords an administrative law judge some flexibility in assessing the similarity or dissimilarity of comparators. *Echols v. Grant Trunk Western Railway Co.*, ARB Case No. 16-022, ALJ Case No. 2014-FRS-00049 (ARB Oct. 5, 2017).

In this case, each of the individuals selected for the positions Complainant wanted were current employees in the departments where the position openings existed. Mr. Epps advised Complainant that he needed to bid back into the bridge department from the track department in order to get the current experience he needed to be competitive for a bridge inspector or bridge supervisor position, but Complainant had not followed his advice as of the time of the hearing. Likewise, Complainant did not have current experience in the engineering or mechanical departments. Accordingly, Complainant's record was not comparable to the successful candidates who were selected for the positions to which he applied.

Shifting Explanations for Respondent's Actions

Complainant has not alleged that Respondent has varied in its explanation for its actions and none is suggested by the evidence of record.

Hostility Toward Complainant's Protected Activity and Change in Attitude Toward Complainant After His Protected Activity

Complainant's protected activity was in October 2016 and May 2017. He testified that Mr. Epps was "real hostile" with him when they spoke in October 2019. (Tr. 61-63). Mr. Epps admitted that he was "mildly annoyed" by Complainant's repeated calls asking if he could work with David Kennedy in the bridge department after Mr. Epps had explained to him that he could not bring in a track department employee to work in the bridge department. (Tr. 96-97). There is no evidence indicating that the hostility Complainant felt from Mr. Epps was related to him reporting a spider bite; instead, the evidence indicates Mr. Epps was annoyed by an employee from another department asking him repeatedly to let him work in his department when he did not have the ability to approve the request.

Falsity of Respondent's Explanation

The explanations provided by Mr. Epps, Mr. Bozarth and Mr. Swanson for not selecting Complainant for the positions he sought in their departments were all consistent and supported by the evidence of record. Each one said Complainant was not selected because there were more qualified applicants who were currently employed in their departments and Complainant's applications appeared to be cut-and-paste efforts that suggested a lack of attention to detail and that he was not genuinely interested in the positions for which he applied. Mr. Bozarth and Mr. Swanson did not know Complainant and the only reason they were aware of his protected activity was because he mentioned it in the qualifications section of his applications. There is no evidence that suggests the explanations these three hiring managers provided for not selecting Complainant were false.

V. Conclusion

The missing link in this case is the absence of evidence showing that Complainant's protected activity played a role, any role, in him not being selected for the positions he sought. While various types of circumstantial evidence that might, alone or together, establish the contributing factor element are discussed above, the most persuasive is the absence of any indications of pretext. Accordingly, Complainant has not met his burden to establish by a preponderance of the evidence that his protected activity played any role in his non-selection for promotions.

I note, too, that had Complainant established a prima facie case of retaliation and had the burden shifted to Respondent to prove by clear and convincing evidence that it would have taken the same actions in any event, Respondent would have met its burden of proof. As discussed above, all three of the hiring managers explained that they did not select Complainant because there were better qualified applicants from within their departments who had current experience that better equipped them for the jobs and that Complainant's applications indicated a lack of attention to detail and suggested he was not genuinely interested in the positions for which he applied. There was no evidence that suggested Complainant reporting a spider bite had any bearing at all on the subsequent employment decisions Respondent made.

VI. Order

For the reasons stated above, I find that Complainant failed to prove all of the elements required to establish a FRSA violation and his complaint is **DISMISSED**.

SO ORDERED.

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the

submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

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

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

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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