U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2016

CASE NO.: 2014-FRS-154

IN THE MATTER OF

KENNETH PALMER
Complainant

v.

CANADIAN NAT'L RAILWAY/
ILLINOIS CENTRAL RAILROAD COMPANY
Respondent

DECISION AND ORDER

This case arises from a complaint filed by Kenneth Palmer ("Complainant") against Canadian National Railway/Illinois Central Railroad Company (hereinafter "Illinois Central" or "Respondent") under the "whistleblower" protection provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.).

Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower provision — both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. The amended Section 20109 prohibits covered employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee related to the terms and conditions of her employment for engaging in protected conduct. This conduct includes providing information to covered employers which the employee reasonably believes constitutes violations of federal law, rules, or regulations related to railroad safety or security. Additionally, the amended Section 20109 will follow the AIR 21 procedure for adjudication at the U.S. Department of Labor.

Complainant alleges that he engaged in protected activity when he reported a workplace injury suffered on June 18, 2013 at Crystal Springs, Mississippi, and that Respondent retaliated against him by terminating his employment on July 8, 2013 on charges related to a switching mishap that occurred less than a month prior to the injury.

On December 30, 2013, Complainant filed his whistleblower complaint. On August 28, 2014, the Secretary of Labor, acting through its agent, the Regional Administrator for the Occupational Safety and Health Administration ("OSHA"), found that there was no reasonable cause to find that Respondent retaliated against Complainant for reporting an injury. Complainant made a timely request for a hearing. Pursuant to that request, a hearing was held on February 24, 2015 in Covington, Louisiana.

At the hearing, the parties were afforded the opportunity to call witnesses and introduce evidence. Complainant testified on his own behalf and called two witnesses: Jerry R. Russum, Jr., an Illinois Central conductor and Palmer's local union representative; and Roxie Palmer, Complainant's wife. Complainant introduced 45 exhibits, which were admitted during the hearing (CX-1 to CX 45).[1] Respondent called Will Noland, Illinois Central's general superintendent of transportation for the Gulf Coast Zone. Respondent introduced 33 exhibits, 32 of which were admitted into evidence. (RX-1 to RX-29, RX-31 to RX-33). The parties also submitted four joint exhibits which included the deposition testimony of Brad McDaniel, a former Illinois Central official who was the superintendent in Jackson, Mississippi in 2013. (JX-1 to JX-4).

The parties were also given the opportunity to submit post-trial briefs.

I. STIPULATED FACTS

The parties stipulated to the following facts:

1. Complainant alleges claims under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109.

2. Respondent Illinois Central Railroad Company ("Illinois Central") is a "railroad carrier" and an "employer" within the meaning of 49 U.S.C. § 20109.

3. Complainant Kenneth Palmer ("Complainant") is an "employee" within the meaning of 49 U.S.C. § 20109.

4. Complainant's employment with Illinois Central began on February 20, 2006, and continued until Illinois Central terminated him on July 8, 2013. Complainant's employment with Illinois Central resumed on January 13, 2015.

5. Complainant has worked as a conductor throughout his employment with Illinois Central.

6. As a condition of employment, all Illinois Central conductors must be union members.

7. Complainant is a member of the S.M.A.R.T. Transportation Division union, formerly known as the United Transportation Union,

[1] CX-46 is identical to the "plaintiff's exhibits" in JX-1.

8. On or about May 28, 2013[2], while working as a conductor for Illinois Central in its rail yard in Jackson, Mississippi, Complainant failed to properly align a switch for the intended movement. This mistake resulted in rail equipment running through the improperly aligned switch.

9. After completion of a formal investigation, Illinois Central determined that Complainant's actions were in violation of Illinois Central U.S. Operating Rules (USOR) General Rule C and Rules 701, 708 and 710.

10. Complainant reported this run-through incident to Illinois Central management immediately and admitted that it was the result of his mistake.

11. This run-through incident did not result in a derailment or personal injury.

12. On June 5, 2013, Illinois Central issued a letter instructing Complainant to attend a formal investigation on June 12, 2013 concerning this run-through incident.

13. J.R. Russum, who is Complainant's union representative, received a copy of this Notice of Investigation letter dated June 5, 2013.

14. In his role as a union representative, Mr. Russum negotiates with Illinois Central for waiver agreements on behalf of his members who are facing formal disciplinary hearings.

15. On June 10, 2013, Illinois Central issued a letter advising Complainant that the formal investigation concerning the run-through switch incident was rescheduled for June 26, 2013.

16. Shortly after midnight on June 19, 2013, Complainant reported to Illinois Central management that he had sustained a work-related injury to his left arm at approximately 11:15 p.m. on June 18, 2013, while trying to mount a railcar at Crystal Springs, Mississippi.

17. Complainant was evaluated and treated for this alleged work-related injury at the Mississippi Baptist Medical Center in Jackson the same night.

18. On June 20, 2013, Illinois Central issued a letter instructing Complainant to attend a formal investigation on June 27, 2013, "to develop facts and to determine whether you violated any Company rules, regulations and/or practices in connection with your alleged personal injury... on June 18, 2013, at Crystal Springs..."

19. On June 24, 2013, Assistant Superintendent [Brad] McDaniel emailed instruction to Tracy Phipps to postpone the June 27, 2013 formal investigation for two weeks.

[2] The parties acknowledge that some documentation refers to the incident occurring on June 4, 2013. They agree, however, there was only one switch-run-through incident that is the subject of this proceeding. (Resp. Pre-Tr. Stat., EX-A,).

20. On June 26, 2013, Illinois Central held the formal investigation hearing concerning the run-through switch incident. The hearing convened at 10:02 a.m. and concluded at 10:47 a.m. Assistant Superintendent McDaniel acted as the conducting officer and presided over the hearing.

21. In the formal investigation, company representative Kevin Rayborn testified on behalf of Illinois Central. Palmer testified on behalf of himself and accepted responsibility for the switch run through. A copy of Palmer's personal work record was introduced into evidence.

22. On July 8, 2013, Illinois Central sent a letter to Complainant in which it notified him that his employment was terminated.

23. Also on July 8, 2013, Illinois Central sent a letter to Complainant to advise that the formal investigation referred to in No. 18 above was cancelled.

24. On December 30, 2013, Complainant filed a complaint with the Regional Director of OSHA.

25. On August 28, 2014, the Secretary of Labor issued its decision finding no reasonable cause to believe that Respondent violated 49 U.S.C. §20109.

26. On September 4, 2014, Complainant filed his objection to the Secretary's findings and request for hearing to the Office of Administrative Law Judges.

II. ISSUES

1. Whether Complainant engaged in protected activity under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109.

2. Whether Complaint's alleged protected activity was a contributing factor, in whole or in part, in any adverse action taken against him by Respondent, including the July 8, 2013 decision to dismiss Complainant from his employment with Illinois Central.

3. Whether Illinois Central established by clear and convincing evidence that it would have made the same decision even if Complainant did not engage in the alleged protected activity.

4. Whether, and to what extent, Claimant is entitled to damages, including punitive damages, and other relief available under the FRSA.

5. Whether the decision to dismiss Complainant caused or contributed to Complainant's alleged damages, and if so, the extent, measure, and quantum of those damages.

6. Whether Complainant has failed to mitigate his damages by using reasonable efforts to obtain alternate employment.

7. Whether Complainant is entitled to backpay for the period of time during which he was unable to work due to bilateral plantar fasciitis.

8. Whether Complainant has met his burden of proof with regard to his claim for punitive damages.

III. TESTIMONY

A. Kenneth Palmer, Complainant

Complainant, Kenneth Palmer, is a 41-year-old male with a wife and two children, ages 23[3] and 9. (Tr. 31-33). He is originally from Pittsburg, Mississippi. After graduating from high school, Complaint entered the Army, where he served five years and worked as a welder. He was honorably discharged. Complainant returned to Mississippi and worked welding jobs in Mississippi and Louisiana for five years.

In 2002, Complainant joined Kansas City Southern Railroad and was based in Pittsburg, Mississippi. (Tr. 33-34). He worked as a conductor and engineer at Kansas City Southern for four years. On or about February 20, 2006, Complainant left Kansas City Southern and joined Illinois Central as a conductor in Jackson, Mississippi because the pay was better. (Tr. 34; RX-6). Complainant was employed by Respondent for seven years until his termination on July 8, 2013, although he has since been reinstated. (Tr. 30, 34-35). Complainant's home terminal was Jackson, and he resided in Byram, Mississippi.

As a conductor at the Jackson Yard, Complainant's responsibility was switching cars in the yard. (Tr. 35-36). The incident which led to his termination involved a "run through switch," or, as described in the termination letter, "running through the south end of a crossover switch." (Tr. 35-36). A run through switch, Complainant explained, occurs when the switch is not lined for the proper movement. (Tr. 36).

Complainant, with the use of diagrams (JX-2; JX-3), explained the switching process, specifically the mechanics of a turnout switch and a crossover switch and how they operate. "Switching" is a process that involves breaking down an inbound train and putting them on different tracks to make them another outbound train. (Tr. 35-37). A turnout switch is a switch through which rail cars are lines up. (Tr. 36-37; JX-2). In operating or "throwing" the switch, the employee lines the track for movement. Depending on how the with is aligned, it may go straight or to another track. If the switch is not aligned properly, a "run through switch" occurs, and there is the potential for damage to train cars and derailments. (Tr. 37-38). Thus, running through a switch is a switching mistake. (Tr. 38).

A "crossover" switch is a switch that connects two roughly parallel tracks together. (Tr. 38; JX-3). Two switches have to be aligned on each side to be able to work through a crossover. (*Id.*). Throwing the switch allows the cars to go from one track to the parallel track. (Tr. 39). If one end is aligned and the other is not aligned for the movement, a run through switch will occur

[3] The 23-year-old daughter is his wife's child from a previous marriage. (Tr. 32).

on the other side. Complainant testified that a run through switch at a crossover has a possibility of derailment. In his case, there was no derailment, but there was damage to the switch and it took an estimated 45 minutes to repair. (Tr. 39-41).

Complainant recalled the date of the crossover switch run through as being May 28, 2013.[4] (Tr. 41; CX-6). Complainant had been on the job several months and had a regular crew consisting of "engine man" Leo McMullen and himself as the conductor. (Tr. 43). His working hours were 8 p.m. to 8 a.m. During the course of a work shift, he operated or "threw" a switch at least 50 times. The majority of the time he operated the switch manually; others are operated electronically. (Tr. 59-61).

On the night of the crossover incident, Complainant had received instructions from the yardmaster for his first movement: pull "pig cars," which consist of 18-wheeler containers, north out of Track 1A; get all of the cars over the switch; go up the Main 1 Track; shove the cars south through the coal chute[5] and into Track 12. (Tr. 43-46, 53-54, 59-60; JX-4). Complainant described the area as "tight" and "congested," and that this area was not lit up.[6] (Tr. 46, 54). Once the last car is over the final [coal chute] switch, Complainant's job was to communicate with the engineer, via radio, to stop. (Tr. 48-50).

After lining the north end of the crossover switch, Complainant bypassed the south end of the crossover switch without lining it. (Tr. 50-52). He walked to the push button shack, an area consisting of an electronic board that controls all the switches in the yard, and then pushed the button for the No. 12 rail switch. (Tr. 52.).

Next, Complainant walked to the area to make sure that the job was in the clear, and then told the engineer to "come back 15 cars and I'd catch on at [No.] 8." (Tr. 52). He then turned around and saw that he did not line the south end of the crossover switch. He told the engineer to stop; however, a "couple of cars" got to the crossover switch, thus resulting in a run through switch. (*Id.*). Complainant realized he "messed up." (Tr. 53).

Complainant contacted the yardmaster and reported a run through switch. (Tr. 54-57). The trainmaster, Kevin Rayburn, arrived. Rayburn instructed the engineer to pull the cars slowly in a northbound direction, and the engineer complied. Rayburn had the cars pulled over the switch, and, he attempted to throw the switch himself to see if he could operate it. Rayburn then called the trackmen to repair the track and/or switches. Complainant testified that there was no derailment or no cars damaged.

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[4] Complainant read the job number as written on the termination letter (L55372-04) and indicated that the last two digits signified the day of the month and "L55372," signified a yard job, i.e. switching in the yard and breaking down inbound trains. The job number and the date, he added, do not match. (Tr. 41-42); *but see* fn. 1 (citing Resp. Pre-Tr. Stat., EX-A).

[5] Shoving through the shoot is also referred to as a reverse movement. (Tr. 59).

[6] To start the process, Complainant would take a light engine into Track 1A, couple up the train, release the hand brakes, and check in with the yardmaster in the tower. Once the yardmaster gave his approval, the movement could be made. Next, Complainant would check for switches in the appropriate direction. The engineer operates the locomotive; Complainant's position is on the front end of the engine on the engine steps, facing north looking for any switches that are lined. He rode in that position until reaching the coaching switch, and then stepped off, all while maintaining communication with the engineer, via radio, by counting down the number of cars he needs to stop the train, and then stopping the train once the last car gets over the switch. (Tr. 48-49).

Complainant and Rayburn then headed into the yard office to fill out a statement. Complainant described what happened to Rayburn and then handwrote the following:

> I, conductor Kenneth Palmer, was instructed by the Yardmaster to shove thru the coal [chute] and couple the pigs to 12 rail. I lined the north end of the crossover and failed to line the south end of the crossover, which resulted in me running [through] the switch. I take full responsibility for this incident, and throw myself upon the mercy of the court.

(Tr. 57-58, RX-1). Complainant also submitted to drug and alcohol testing.

Complainant testified that this was the first instance where there had been a run through that was the result of his mistake in not operating a switch. On two occasions, however, Complainant had been on a crew where the crew member had been responsible for the switch and there was a run through. (Tr. 62). The first instance occurred in 2008 when he worked as a remote control operator (RCO) on a two-man crew. (Tr. 62-66). He was inside of a shack during paperwork when the crew member ran through the switch. Respondent disciplined both employees for the mishap. In 2009, he disciplined again as part of a crew when the engineer moved forward and ran through a switch. (Tr. 66-69; RX-6). Complainant stated that he was talking to the yardmaster on a radio at the time, and it was the engineer's job to look out for switches on the movement when the switch run through occurred.

Following the May 28, 2013 run switch through, Complainant was provided with a letter notifying him that charges were being brought against him. (RX-3). He contacted J.R. Russum, the local chairman of his union, the Smart Transportation Division, who is also a conductor at Illinois Central. Complainant acknowledged that he ran through the switch as stated in the letter and asked Russum to see if he could obtain a "waiver." (Tr. 70). A "waiver" or "waiver agreement" acts as a plea bargain where leniency is granted by the company, and the employee agrees to waive his rights to a formal investigation hearing and accept a pre-determined punishment such as a 15, 25 or 30-day suspension; "days off your head," where you perform other duties; or a letter of reprimand. (Tr. 70-71; 119).

Although he was not present during the conversations regarding the waiver, Complainant testified that in the first week following the incident, he did talk to Russum, and it was his understanding that "everything was fine" for getting a waiver. The hearing was postponed until June 26, 2013. (Tr. 71-73). Complainant was not pulled out of service for the three weeks between the date of the charge letter and the date of the postponed hearing, and he worked regularly in the same job during that time.

Complainant's injury occurred June 18, 2013. Complainant recalled that it was raining that night. Complainant and engineer Wesley Nichols were assigned by the yardmaster to take a train to Crystal Springs.[7] It was Complainant's job to apply hand brakes to the rail cars at Crystal Springs so they would not roll away. (Tr. 74-77). Complainant, who is 5-foot-6, jumped to mount a ladder on the side of a plastic car, but his foot went through the bottom rung.

[7] Crystal Springs is a siding track where Illinois Central will, at times, store trains. (Tr. 74-75).

Complainant felt the left side of his elbow pop. (Tr. 76, 80). Still, he was able to apply three brakes despite the pain in his elbow. Complainant went back to the locomotive to talk to his engineer about whether or not he should report the injury. While waiting on the next train, he also spoke to Russum. (Tr. 81). Although he knew that the rules required him to report any injury, Complainant testified that he felt the need to discuss whether to report the injury because he was afraid of "repercussions," "retaliation," or "dismissal" for reporting the injury. (Tr. 81, 83). Russum reminded him that he did have an investigation coming up, and said "there's no telling what's going to happen," but "if the rules say to report it," then he should report it.

Complainant took a train to Jackson and called the yardmaster to report his injury. Tony Brower, a trainmaster, responded to his report, and he stated that he wanted to go to the hospital. Complainant got into the vehicle with Brower in the south parking lot. Brower made a stop in the north parking lot, then handed Complainant the phone. On the other line was Brad McDaniel, Assistant Superintendent at the Jackson Yard. Complainant testified that McDaniel asked him if he was "sure" he wanted to "report a personal injury," to which Complainant replied, "Yes, sir." (Tr. 85). Then, Complainant continued, McDaniel said "I hear that you're trying to get fired on purpose," addressing rumors that Complainant was considering work offshore.[8] (Tr. 85; 164). Complainant replied that he was not trying to get fired on purpose.

With his arm still swollen and in pain, Complainant arrived at Baptist Hospital, where X-rays were taken. (Tr. 86). He was told to ice the arm down, given ibuprofen, and released. He was also told to take off work for a few days. McDaniel and risk manager, Brett McCullough, were present when he was released. McCullough asked if Complainant could return to work, and Complainant stated that he could not return to work. (Tr. 88). He was taken back to the yard office where he gave a statement and filled out an accident report. (CX-9).

Complainant lost two days from work icing his elbow to get the swelling down as instructed. It was his second work injury in which he lost time. The first was in August 2011, when he sprained his groin moving a draw head. (Tr. 89-90). He was suspended 30 days for the rules violations associated with that incident. On June 23, 2013, Complainant received a charge letter associated with the injury at Crystal Springs. (CX-16).

Up to this time, Complainant had been told by Russum that getting a waiver for the run through switch incident would not be a problem. After the Crystal Springs incident, Russum informed Claimant that "[e]verything is off the table," he would not be receiving a waiver, and Respondent would be doing an investigation with a hearing scheduled for June 26, 2013. (Tr. 91).

At the hearing on June 26, 2013, Complainant went in and admitted his guilt. McDaniel was the hearing officer, and Rayburn was the company witness. Rayburn confirmed that the damage to the switch was minor. Complainant described the hearing as "pretty brief." (Tr. 92).

On July 8, 2013, McDaniel informed Complainant by telephone that he had been terminated. (Tr. 94-95). He read Complainant his dismissal letter and a letter cancelling the investigation of the Crystal Springs incident.

[8] Complainant had previously worked offshore as a welder. (Tr. 85).

Complainant and his family were living in Byram, Mississippi. Later in July 2013, they put the house up for sale. They also received calls from debt collectors, which Complainant testified made him feel "terrible." (Tr. 97).

Complainant appealed the termination through his union. He thought the punishment was unfair because several people have had run through switch incidents and they were not terminated. (Tr. 98). He did not know of any conductor in Jackson terminated for running through a switch during his employment with Respondent, and he did not know of any conductors who were denied a waiver agreement for running through a switch. (Tr. 113-114).

In addition to the instant matter, Complainant filed a complaint against Canadian National Railway (the parent company of Respondent) with the Equal Employment Opportunity Commission (EEOC). Complainant, who is African American, testified that he believed his race played a part in his termination as well. (Tr. 112, 177).

In December 2013, Complainant moved his family to Katy, Texas (near Houston) because of a "better economy and more jobs." (Tr. 103). In March 2014, he went to real estate school for one month, passed the required tests and became licensed by the Texas Real Estate Commission. He landed a job with Keller Williams. He was unsuccessful at getting any real estate listings but received $754.00 in commissions from two residential leases he arranged. Complainant testified that he applied for several jobs, including jobs at railroads.[9] He eventually found a job at UPS as a pre-loader for $11.00 per hour. At the railroad, Complainant made $35.61 per hour. (Tr. 107).

On January 18, 2015, the Public Law Board reinstated Complainant to his position, without back pay, as a result of the union appeal. (Tr. 99; RX-33).[10] He has since returned to work.

Complainant estimated that he lost $120,000 in wages during the period between his termination and reinstatement. (Tr. 100-102). He counted 13 months at an estimated $10,000 per month. He did not count the five months he would not have been able to work due to his two foot surgeries and the period he made $7,500 working at UPS. (Tr. 101, 111). He sold his house at a loss of $13,000, plus closing costs of $2,000. He also did not receive railroad retirement credit for the 18 months he was off. (Tr. 109).

On cross examination, Complainant acknowledged his experience and training as a conductor; his familiarity with Illinois Central's operating and safety rules; that enforcement of the rules through the disciplinary process established in the collective bargaining agreement; and his understanding that enforcement of switching rules is necessary for safe railroad operations. (Tr. 115-17). He also acknowledged that, while the incident of May 28, 2013 was "very minor," it is still important to follow the rules and switch run throughs can cause derailments and personal injuries. (Tr. 117-18).

[9] Complainant did not apply for a job with his former employer, Kansas City Southern Railroad, because "Once you leave Kansas City Southern they don't allow you back." (Tr. 103).
[10] He had received an Interim Award of reinstatement on December 17, 2014.

Complainant was asked about his five rule violations prior to the May 28, 2013 run through switch incident. Complainant acknowledged signing waiver agreements in the following instances: being AWOL [absent without leave] on March 10, 2013, for which he received a letter of reprimand; an incident in August 2011 for which he received a 30-day suspension; a switch run through in violation of U.S. Operating Rules 520 and 701, which is one of the rules found to have been violated in the May 28, 2013 run through, on March 31, 2009 for which he received a 20-day actual suspension; a switch run through on October 31, 2008 for which he received a 10-day deferred suspension; and not being available for call in 2007 for which he received a letter of reprimand. (Tr. 120-124). He agreed that Respondent was correct in its disciplinary actions for the 2013, 2011, and 2007 incidents. (Tr. 124).

Regarding the letter of reprimand for being AWOL [absent without leave] on March 10, 2013, Complainant testified that he signed a waiver agreement so as to not further incriminate himself. (Tr. 118-19). In the 2009 incident, Complainant was found, following an investigation, to have violated the rule and although the engineer took responsibility for those actions, he was disciplined as well and suspended for 20 days. (Tr. 121-22). Regarding the 2008 incident which resulted in a deferred suspension, Complainant stated that he did not sign that investigation or admit to any guilt in the proceeding and he felt the company was wrong; nonetheless, the company determined there was a violation. (Tr. 123). Complainant acknowledged that his suspensions rose progressively from 10 days to 20 days to 30 days. (Tr. 127).

Complainant testified about the details of his shoulder injury suffered while attempting to align a switch on August 15, 2011. (Tr. 124-26). He reported the injury and there was no lost time or discipline issued. There was no formal investigation, which Complainant attributed to the switch being defective.

Regarding the switch run through of May 28, 2013, Complainant agreed that he is the supervisor of the task who was responsible for protecting the shove and acting as the engineer's eyes behind the train. He did have a light with him as required.

Complainant testified that he did not comply with Operating Rule 701 in that he did visually check to see that the switches were properly aligned. (Tr. 131-32, 170, RX-7). Complainant also testified that he did not follow Operating Rule 708 because he did not pay attention to the south end of the switch, instead walking directly past it and, as the result of his direction, McMullen backed through the improperly lined switch. (Tr. 133-34, 170; RX-7). He acknowledged violating Operating Rule 710, which discusses run-through switches. (RX-7; Tr. 171). He disagreed with the finding that he violated General Rule C., the rule requiring him to be "alert and attentive." He thought he was alert and attentive because he saw that he did not line the switch properly and he stopped to move it, but cars had already gone through it. (RX 7; Tr. 170-71). He agreed that the switch run through resulted in some violations of the rules, but disagreed with the punishment. (Tr. 171).

Complainant was not surprised upon receiving the Notice of Investigation for the run-through switch incident in light of his previous five rule violations and his sixth rule violation in six years. He understood that punishment was forthcoming even before suffering his injury less than two weeks later. (Tr. 135-37). He would have accepted a suspension of up to 60 days and understood that "when you get suspended, all [events] are serious." (Tr. 137).

Regarding the waiver process, Complainant agreed that waiver agreements are not official until they are in writing and signed by the employee. Complainant stated that he called Russum the day after the run through switch incident to see if he could work on a waiver, even before he received the Notice of Investigation. (Tr. 139). Russum and Complainant spoke again before Complainant received the postponement notice dated June 10, 2013. Complainant testified that Russum told him there was a scheduling conflict, but Russum did not tell him that the postponement was issued because there was a deal. (Tr. 140-41; RX-4). As far as he knew, he was still charged, and the investigation was going forward with the potential for a waiver or discipline up to and including dismissal. (*Id*). In a third conversation prior to the June 18, 2013 injury, Russum had yet to indicate that a deal was reached and Respondent had accepted a 45-day suspension. (Tr. 142).

Complainant was asked about his EEOC charge and the wages reported in that document. Complainant stated his wages were $10,000 per month. (RX-27). His earnings statement at Illinois Central as of July 8, 2013 showed wages earned of $60,336.30, with $14,257.51, or approximately 25% of his pay, taken out for taxes. (RX-20).

Complainant also discussed the details of his foot surgeries and work search following his termination. He went to Dr. Thomas on May 23, 2013, days before the run-through switch incident, and the two discussed surgery due to his problems with plantar fasciitis. On July 10, 2013, he scheduled the first of two surgeries, and on July 29, 2013, had surgery on his left foot. On September 9, 2013, he had surgery on his right foot. Complainant was not medically able to work again until November 2013 – a period of five months. (Tr. 146). He is not claiming this period as part of his lost wage claim. He was cleared to work, but told he would continue to have problems with his feet. Before moving to Texas, he made no attempt to find alternative work or real estate work in Mississippi or North Louisiana, and he did not apply to KCS Railway. He looked for welding jobs, but not before the family moved to Texas. He did not apply for any other work beside real estate positions until August 2014. (Tr. 151).

Regarding his work history at KCS Railway, Complainant stated that he had no infractions and that he had not gone to any formal investigation. When shown a document dated September 10, 2003, with his signature on a waiver regarding an infraction for working at night without a light, Complainant testified that he did not remember doing it. (Tr. 149-50).

Complainant testified about his emotional distress, the source of which, he said, was because he was unfairly terminated. (Tr. 151). His financial condition caused stress because he did not have a job at the railroad. However, Complainant testified that he had "fired insurance"[11] payments totaling $75,000 over a period of approximately 12 months. (Tr. 152).

Complainant testified that on the evening of his work accident (June 18, 2013), it was raining, and he was wet. Complainant was presented with information from the National Climatic Data Center showing zero precipitation in Crystal Springs Station, Mississippi on June 18, 2013 and 0.33 inches of precipitation on June 19, 2013. (RX-14; Tr. 155-59).

[11] "Fired insurance" of a disciplinary insurance policy made available to union members. It protects an employee financially while he is suspended or terminated and attempts to get his job back. (Tr. 154-55)

There were no witnesses to the June 18, 2013 accident. Complainant did not have lighting with him, although he was required by company policy to have it. Complainant was shown pictures of a plastic car. (RX-11). He acknowledged that the car was similar to the car he was trying to mount, but he could not say for sure that it was the exact car or whether it was indeed a plastic car. (Tr. 160, 62). He testified that the picture did not reflect the location of Crystal Springs where his accident happened because it did not show the same type of terrain. Complainant stated that the pictures, taken by McCullough, must show the north end or a different area of Crystal Springs than where he was located. (Tr. 161-62).

Complainant recalled his conversation with McDaniel at the hospital, and McDaniel's insinuation that Complainant stated that "it pissed me off." (Tr. 163). In his deposition, Complaint testified that he told Brower he was upset about Brad's statements about "the offshore thing," how rumors persist among workers at the railroad, and how a conversation he had with someone else may have gotten back to McDaniel. (Tr. 164).

Complainant admitted that while he believes Illinois Central retaliates against employees for reporting injuries, he has no knowledge of the amount of injuries reported and how many disciplinary actions were imposed against employees who reported injuries. (Tr. 166-67). Complainant admitted to knowing about an engineer dismissed for running through a switch. He has reviewed the personnel records of some conductors who received lesser punishments for running through switches. However, he continued, the similar employees do not have the same amount of seniority he has, and therefore, their newer status, number of infractions, and the amount of damage done make their situations worse than his rule violations. (Tr. 168). Also, "I've been there longer, and there's others that have been there as long as I have and they've done as much as I have and they're still working, that's a question mark." (Tr. 169). He added that he weighs, and believes the company weighs, the amount of time an employee has been at the railroad with the damage done by the rule violation. *Id.*

On redirect, Complainant was shown the work history of P.T., a conductor at the Jackson Yard with 38 years of service with an extended list of infractions including a derailment in 1979 for which he was given a waiver and letter of reprimand; four violations of Rule 103 and punishment which is declining; and two violations of Rule 701 in 1994 and 2012, the latter of which resulted in a 30-day suspension. (RX 18-A). Based on his review, he believed that he was treated more harshly than P.T. (Tr. 176).

On both occasions he reported a lost-time injury, Complainant testified that he was disciplined. (Tr. 177).

B. Jerry R. Russum, Union Representative

Russum is a conductor at Illinois Central and the Local Chairman of the Smart Transportation Division, formerly known as the United Transportation Union. (Tr. 182-85). He is an Army veteran who has been employed by Respondent for 13 years. He has spent all of that time on the yard performing switches, first as a trainman and then as a conductor. Russum has been the local chairman of the union for 11 years, and he has also been a delegate and legislative representative for the union.

As Local Chairman, his responsibilities are to ensure that the collective bargaining agreement is upheld and to represent members in investigations. The membership size at Jackson Local 1334B, which includes Complainant, is about 50 members. The frequency at which Respondent charges one of the union members fluctuates anywhere from two times per month to four times per week. (Tr. 186). Russum testified as having been involved in more than 100 disciplinary proceedings, and that there are times when a rule infraction happened but the employee does not have to go through a formal investigation by waiving his right to an investigation, i.e. obtaining a waiver agreement.

Once an employee is charged and notified of the charges against him, he contacts the Local Chairman, Russum. Then, Russum asks the employee questions about the incident to determine what steps to take in the investigating it. Normally, he contacts the assistant superintendent to inquire about waivers or postponements of the hearing. (Tr. 186-87). They discuss the matter, and he tries to get as small a discipline as he can. The advantage of a waiver to the employee – although he may get punishment including days off of normal duties, probation for six months to a year, or days off without pay – is that he stays employed. (Tr. 188).

Russum testified that on the night of the switching incident, he received a call from Complainant stating that he had dropped his focus for a brief time while talking to someone, overlooked a switch, and ran through it.[12] (Tr. 190). Complainant also stated that he took full responsibility.

Russum testified that, like what happens a majority of the time, he was carbon copied on the charge letter informing Complainant that an investigation was being called. (Tr. 187, 191). He called McDaniel and asked for a waiver, and McDaniel said he would look into it. In a later conversation with McDaniel, Russum said McDaniel stated that Complainant was likely facing a 45-day suspension. Russum then tried to negotiate a "split" of 20 days off without pay and 25 over his head for the remainder of the year. McDaniel declined and stated that Complainant would have to serve the entire 45 days. (Tr. 192). Russum testified that he reached an agreement with McDaniel for waiver for 45 days to serve, but could not remember the date and time. (Tr. 192-193). He did not confirm the leniency agreement by email or in writing. (Tr. 219). He discussed the issue with Complainant prior to Complainant's injury incident and told him that "anything less than 60 days would be a good deal." (Tr. 193).

[12] Based on the job number, L55372-04, Russum testified that it would not be possible for Complainant have worked that job on May 28, 2013 because "04" represents the date the job is called for." (Tr. 190). S*ee* fn. 1, 3 (citing Resp. Pre-Tr. Stat., EX-A).

Russum stated that Complainant called him the night of his injury incident. Complainant told Russum that he was climbing on a car and it was raining, and he slipped and hurt his elbow. Complainant asked Russum, "What do you think I should do?" (Tr. 194). Russum testified that he counseled Complainant like he does all employees regarding injuries. (Tr. 194, 227). Specifically, he told Complainant that company rules require him to report the on-duty injury. Russum testified that he also told Complainant the following:

> You know it's not going to be good with this – we haven't got this other deal signed off yet. He hadn't signed on the other deal. I don't know what it's going to do with you." (Tr. 194).

Russum talked to McDaniel again, but does not remember when. A letter investigating the injury incident was released, and Russum testified that he asked McDaniel about a postponement for that investigation. Russum wanted to get the letter regarding the waiver for the 45-day suspension regarding the switching incident typed up before the investigation occurred. However, McDaniel notified him that "[t]he deal is off the table" and John Klaus, the General Manager, stated that all run through switches must be investigated because of the number of switches" the railroad experienced recently. (Tr. 195).

When asked whether Respondent had a practice of holding formal investigations against conductors in Jackson for every run through switch incident, Russum testified that, in his time as Local Chairman, it had not. He also responded, "No," when asked whether Respondent has had a practice of holding formal hearing for conductors who report run throw switches in the period since Complainant had been terminated. (Tr. 196). He answered affirmatively regarding a question about whether it had been Respondent's routine practice to offer waivers to conductors for run through switch incidents. (*Id*.). In the previous two years prior to Complainant's incident, Russum testified that the Illinois Central has offered a waiver to conductors for run-through switch violations, although a few conductors turned down the waiver offer. Also, Russum stated every conductor since Complainant has received a waiver or offered a waiver since Complainant's switch incident. Russum testified that he believed Complainant was treated differently because they asked for a waiver, were offered a waiver, received a response about the waiver, and then it was removed. (Tr. 198).

Russum represented Complainant at the investigative hearing. When questioned at the hearing, Complainant took full responsibility. Russum and Complainant inquired about the cost, and were told it was "minor;" the switch was not replaced.[13] (Tr. 198-99). Russum renewed his request for leniency in the closing statement. He did not mention the withdrawn waiver at the investigation because a "gentleman's agreement" existed between union and Respondent such that any discussions held in an informal conference will not be brought into an investigation. Tr. at 199).

[13] In the hearing transcript, Rayborn testified that the cost to repair the bottle rod in the switch incident was approximately $500. (CX-19, pp. 18-9). W.D. "Billy" Evans, chairman of the engineer's union and representative of McMullen at the hearing, remarked that "we're spending more on the investigation than was spent on the bottle rod." (*Id*. at 19.).

Russum learned of Complainant's termination when Complainant called him. He requested a copy of the letter, and on the same day he learned through another letter that the investigation for the Crystal Springs injury incident was canceled.

Russum also represented Complainant in his union appeal. The Public Law Board hearing was held December 17, 2014; Brower made a bench ruling putting Complainant back to work.

Russum reviewed the disciplinary history of other conductors for which disciplined had been assessed provided by Respondent in RX-18A. In the case of conductor "P.T.," Russum observed that P.T.'s record in terms of switch run-throughs, derailments, and damage July 0f 2013 was "a lot better" than Complainant's record. (Tr. 202-204). P.T., a 38-year employee of Illinois Central at the time, had an estimated 13 or 14 switching mishaps, and he was given three suspensions of 30 days in the year prior to Complainant's termination. P.T. was also given waivers on all three occasions and was never refused a waiver for any of his conduct. He was not terminated. Russum testified that he believed Complainant was treated differently than other conductors in Jackson.

Russum testified that when a "serious, major violation" occurs, the employee is pulled out of service and is not allowed to return to work until the investigation is complete. Complainant's violation was not considered major; he was drug-tested and returned to work, which is how "minor" infractions are treated most of the time. (Tr. 205).

On cross examination, Russum testified that P.T. was offered a waiver and allowed to retire in lieu of discipline and in lieu of termination. (Tr. 205-206). Russum acknowledged that another employee whose discipline he was involved with, "T.S." had three suspensions before he was dismissed; he was offered a leniency reinstatement where he was brought back as a carman. Russum would not agree that T.S.'s record was as bad as Complainant's because he had fewer prior rule violations but they were over a shorter period. (Tr. 206-207). Russum testified that he believed T.S. and Complainant were probably treated the same by being dismissed, and that T.S. had not reported an injury following his rule violation on July 30, 2014, but was still dismissed. He also acknowledged that W.P., an engineer, had one letter of reprimand and two suspensions before he was dismissed.

Russum did not speak to Noland, the general superintendent, before the dismissal decision was made. He was not aware of who actually made the dismissal decision but he was sure that Noland played a role in the decision because such decisions go "all the way up the chain." (Tr. 210). Russum testified that had no idea, assuming that Noland made the decision, what Noland's reasons were for making the decision to terminate Complainant, and he was not saying Noland decided to fire Complainant because he reported an injury. (Tr. 210).

Russum explained the positions within the union and their salaries, and his role as the Local Chairman, for which he receives about $100 per month. He has never worked for management at a railroad not made hiring and firing decisions pertaining to conductors. He has not ever agreed with management's decision to fire an employee, as his job is to advocate for employees. (Tr. 213-214). He reviewed the four rules the railroad found that Complainant had violated and stated that he believed in 100% rule compliance, and that minor incidents should be disciplined as well even if there was not much damage done during the incident.

Russum answered affirmatively when asked whether he agreed that Complainant's conduct warranted at least some discipline, and that he just disagreed with the level of discipline. (Tr. 217-218). He stated he was aware of employees injured on the job who received no discipline from Respondent.

Russum testified that he talked to Complainant before the postponement notice on June 10 was issued and told him that a deal was made, and that is why he likely asked for the postponement. He reviewed deposition testimony where he was asked about a conversation with McDaniel, where McDaniel stated that if an agreement was reached, the suspension would have to be for 45 days, and his response that when the investigation was postponed, the deal was made for 45 days served. (Tr. 220-221; EX-4). He reiterated his belief that he called Complainant and told him the deal was for a 45-day suspension and he had to serve it all, and that was the reason for the postponement. (Tr. 222). It is his normal practice to call employees and tell them that the deal is done and the investigation is postponed because he does not want them to show up for an investigation that is not going to happen.

Russum testified that he did not tell Complainant that the hearing was postponed because of a "scheduling conflict," and the normal language used by the union and management for all postponements is "scheduling conflict." (Tr. 223-224). When informed that his statement directly contradicted Complainant's testimony regarding their conversation, Russum testified that he did not remember that. He stated that the hearing was postponed due because a deal was reached. However, the postponement notice set another date for the haring and stated that "All other aspects of the original Notice of Investigation dated June 5, 2013 remain the same," including the charges against Complainant. (RX-4; Tr. 224).

Russum answered affirmatively regarding his statement at the closing hearing on June 26, 2013 that Complainant "asked for a deal for leniency and the Organization [union] will again request a deal for leniency for this infraction." (JX-1, pp. 216). He acknowledged his closing statement at the hearing conflicts with his testimony regarding a deal being reached, but that he could not speak up about it because of a gentlemen's agreement. (Tr. 226). Russum testified that he believed the employee's rights were violated because Respondent pulled the leniency deal. He disagreed that his testimony on a deal being reached conflicted with the postponement notice indicating the hearing was postponed due to a "scheduling conflict."

Regarding Complainant's injury incident, Russum testified that it is possible for Complainant to be chest high with a plastic hopper car due to ground conditions. The safe way to get up on the side of the ladder "within the rules" is to face the equipment and ascend and descend while facing the equipment, and the employee is required to have three points of contact on the ladder at all times, although sometimes, "that's impossible." (Tr. 228). If an employee does not have a firm hold and a firm stance, it is a rule violation.

Russum testified that he did not ask McDaniel for a leniency agreement regarding the Crystal Spring injury incident, but he did ask him for a postponement. He answered affirmatively when asked whether Respondent complied with all of the procedural requirements of the collective bargaining agreement and whether he was able to contact the superintendent directly. (Tr. 229-230).

On redirect, Russum testified that his contact on a day-to-day basis, for disciplinary matters for conductors in Jackson, is the assistant superintendent, not the superintendent. He estimated that he receives postponement notices 85 or 90% and an estimated 600 or 700 notices in the 11 years he has been the Local Chairman in Jackson. The form of the postponement is typically the same, and scheduling conflict is always the reason; the only difference would be in who asked for the postponement. (Tr. 231). The postponement notice in Complainant's case was normal. Postponement notices do not typically state that a deal has been reached, nor is there an email from the superintendent to verify that a deal has been reached.

Regarding his closing statement at the hearing for the run-through switch asking for the same deal for leniency, Russum testified that he was referring to the informal conference with McDaniel and, in a roundabout way, to the waiver McDaniel offered. (Tr. 232).

Russum added that when he raised the issue of McDaniel agreeing to the waiver and then not agreeing to the waiver, McDaniel told him that it had come down from John Klaus, the General Manager, that all run-through switches had to go to an investigation or the deal was off. Knowing that the information came from Klaus, Russum stated that "there was no reason to call anybody else." (Tr. 233).

C. Roxy Palmer, Complainant's Wife

Roxy Palmer and Complainant have been married for 10 years. They have a 9-year-old son together, and she has two children from a previous relationship. Mrs. Palmer stated that finding out Complainant had been terminated was a "tough day." (Tr. 235). With the family's finances strained following Complainant's termination, their house was put up for sale. The family moved to Katy, Texas in December 2013 in part because there were better opportunities for school and better jobs for the family. (Tr. 236-237).

Mrs. Palmer described Complainant as angry, sad, depressed, and unable to sleep in the months following his termination. (Tr. 237). She helped prepare his resume as he searched for jobs. Complainant ended up going to real estate school, passed the exam, and began working but, Mrs. Palmer added, "It just wasn't working out." (Tr. 238). He got the job at UPS, and then was reinstated in January, a month after the family renewed their apartment lease for a year. (Tr. 236, 239).

While her husband resumed work with Respondent in Mississippi, she stayed in Texas with their son because she and Complainant did not want to uproot the boy, for a second time, in the middle of a school semester. (Tr. 239-42). Complainant and his son communicated and sent pictures via a computer and/or telephone using "FaceTime," but being separated has been hard. She works as an assistant manager at Sally Beauty Supply. The family anticipates reuniting at the end of this year.

On cross examination, Mrs. Palmer stated that the family knew no one, other than her college roommate, when they moved to Texas and that Complainant had no real estate business contacts before moving there. She acknowledged that having their son in a school system using the Common Core curriculum, which made her uncomfortable, was also a decision in their decision to move to Texas. (Tr. 242-43). Complainant did receive $2,800 per month in "fired insurance" benefits from the railroad and an additional $1,000 per month in disability benefits. (Tr. 243-44).

D. Will Noland, General Superintendent of the Gulf Coast Zone South Region

Noland, of Denham Springs, Louisiana, is Respondent's General Superintendent of the Gulf Coast Zone South Region, which includes roughly every area south of Memphis, Tennessee. He was a drill instructor in the Marine Corps. He began working for Respondent in 1999 as a brakeman and was responsible for assisting the conductor, which included lining switches. (Tr. 248). He was then promoted to conductor, a post he referred to as person in charge of a three to four-person train crew. Noland has also served as a yard engineer, yardmaster, assistant trainmaster, trainmaster, and superintendent, and he was General Superintendent of the Chicago Division in Gary, Indiana. He has been in his current position since November 2013.

As the general superintendent, Noland is responsible for overseeing operations for Illinois Central and moving box cars as fast as possible and in the safest possible manner. He explained Illinois Central's purpose in imposing discipline against employees through the formal investigation process. The purpose of issuing discipline is an attempt to change behavior. The railroad invests money in employees, and while dismissing an employee also costs money, if it is done in the interest of safety, then it is the best course. Respondent, he added, "electively makes a point to issue the least amount of discipline possible if we can understand that the employee's behavior has changed." (Tr. 249, 296, 298).

Noland testified that he is "the sole bearer of discipline that's assessed within the Gulf Coast Region." (Tr. 247). The decision to terminate Complainant, he testified, "was my decision." (*Id*.; 304). Before terminating Complainant, he sent an "informative email" to his boss, Klaus. (Tr. 276). He keeps Klaus informed of what he is doing either verbally or in writing. McDaniel does not have authority to terminate an employee. The authority to terminate Complainant, he added "was mine and solely mine." (*Id*.).

Noland explained the difference between an informal and formal investigation. (Tr. 251). A formal investigation involves the union agreement. An informal investigation may be a meeting or fact-searching mission in which someone participates. All incidents are investigated, but not all events are formally investigated, and not all incidents that are formally investigated involve injuries. (Tr. 251-252). When asked whether every time an employee reports an injury is he or she subjected to discipline, Noland answered "No."

Noland testified that between July of 2012 and July of 2014, 17 Transportation Department employees reported injuries. (Tr. 252). There was zero discipline issued in those incidents, including Complainant's injury incident.

Noland explained that Respondent has several policies in regards to retaliation, including the Code of Business Conduct ("Code") that is given to every manager yearly. Managers must sign off on the Code after reading and adhere to the policy. (Tr. 252-253). The Code includes the policy against retaliation for reporting injuries, and management is trained on this this policy, among others. (RX-24). Noland answered affirmatively when asked if he follows the policies.

Noland testified that he makes discipline decisions based on the written transcript of the formal investigation, which includes accompanying exhibits, as well as the employee's work history, which includes prior rule violations and prior discipline. (Tr. 250, 256). Unlike a judge in a courtroom, he does not get to see the motion or anything else that took place during the hearing; "the only thing I see is what I read," he added. (Tr. 250, 256). Noland also explained Respondent's efficiency tests,[14] which are mandated by the Federal Railroad Administration; however, he does not consider results of the efficiency tests when making an assessment on discipline following a formal investigation. (Tr. 255).

When making a discipline decision, Noland testified that he tries to stay out of the formal investigation process as much as possible so that he can make an unbiased decision when he reads the transcript. (Tr. 256). While he is the "sole provider of discipline," he tries to be as fair as he can possibly be. He does not second guess previous disciplinary decisions because he does not know what the thought process was in making those decisions. (Tr. 251). The severity of the incident or incident type has no bearing on how discipline is issued. (Tr. 257). All infractions are treated the same with the exception of some infractions which are mandated by the FRA to have a certain amount of discipline applied to them on the first offense.

Noland discussed Respondent's safety action plan, which addresses how to prevent major accidents. One aspect of the safety action plan is to focus on what is causing its leading incidents. "Switches" were the leading cause for incidents within the Gulf Coast Zone for 2013 and 2014. (Tr. 257-58). Therefore, anything dealing with a switch "major" to him in operation. (Tr. 258). He also discussed the DuPont Safety Pyramid, which addresses small incidents and near misses in order to prevent major incidents.

[14] Noland testified that Respondent also uses efficiency tests to monitor an employee's operational rules compliance as part of its safety action plan, and to teach and mentor employees. (Tr. 254-255). All managers can administer efficiency tests to employees. Employees can be tested in a dynamic manner, in a stealth manner, by teams or by individuals.

In reviewing Complainant's formal hearing transcript, Noland testified that he noticed Complainant "took ownership that he actually ran through the switch" and "admits guilt." (Tr. 257). "So," Noland continued, "it's a no-brainer that he's guilty in regards to what you read." (*Id*.).

In reviewing Complainant's work history, Noland testified that the thing that jumped out at him was the three incidents involving switches in six years. In considering "all six incidents" – Noland added that "everything is an incident" – it averaged one a year for an employee that does not have much service time. (Tr. 258-259). Regarding Complainant's AWOL violation, he considers that an incident because although it deals with attendance, it is a violation within the U.S. Operating Rules. Caution letters, however, are not considered discipline and are given to employees for awareness that they have a problem or deficiency that they need to correct.

Noland testified that he did not suspend Complainant for 45 or 60 days like he wanted because he "I've already done that," and "[i]t didn't work. (Tr. 259-260). He then added that if an incident happened between Thanksgiving of 2013 and 2015, then he was the one that issued the discipline. When asked if, in reviewing Complainant's record and deciding to terminate him, it appeared that he received progressive discipline up to that point and it was not changing his behavior, Noland answered affirmatively. He answered "No" when asked whether he based his decision on Complainant's report of the Crystal Spring injury. (Tr. 260-261).

Noland testified that he did not agree to a leniency or waiver agreement, and that it was not possible for Respondent to enter into an agreement with Complainant or the union via Russum for a 45-day suspension because he would have been the one to approve the waiver. While McDaniel has the authority to discuss a waiver, the decision to grant a waiver is his. (Tr. 276). Also, he testified that he was not contacted by McDaniel or the union leadership to approve such an agreement.

Noland explained that 90% of the times when he approves a waiver, it is typed up within 24 hours. (Tr. 261-262). Noland's administrative assistant, Phipps, handles investigation notices for Noland, works through the assistant superintendents in regards to postponements, and is responsible for any waiver he approves. She also ensures that emails and letters reach the proper persons. If a waiver agreement is reached, Noland added, then there is no reason to have her type up a postponement notice as long as it could be issued the same day and the employee can sign it that day. Phipps also provides managers with charts of "Scheduled Investigations," which are investigations that have been scheduled or have yet to commence through the formal process; "Signed Waiver Needed" for what waivers have been agreed to and signed, and "Discipline Due" for what discipline is due following an investigation, and the date by which Noland is expect to read the transcript and issue the discipline. (Tr. 263; RX-8).[15]

[15] In RX-8, Phipps sent an email dated July 2, 2013 to McDaniel and another staff member with the charts discussing waivers, letters, investigations and discipline. Under "Discipline Due" were the names of Complainant and McMullen, with a discipline due date of July 11, 2013. Under "Scheduled Investigations" was Complainant's investigation scheduled for "Jul 11 @ 1500" regarding the "Alleged personal injury at approximately 2315 hours on June [sic] 2013 at Crystal Springs while working as a conductor on L5537." Additional employee names were redacted for privacy reasons.

Noland testified that there are gentlemen's agreements in regards to what managers and union officers do on and off the record. If a party violates the agreement, it would be "brought to light in some form or fashion." (Tr. 266).

Noland also reviewed the personnel records of Transportation Department employees, which includes a letter history[16] and a discipline history, and gave his assessment on each situation as to whether the record was comparable to Complainant's and whether Complainant was treated more harshly than other employees (RX-18A).

P.T.: In the case of P.T., a conductor, Noland testified that he was the decision-maker for his discipline involving an incident on November 13, 2012. Noland granted P.T. a waiver for 30 days actual suspension effective January 30, 2013, and testified that there was a gentlemen's agreement that P.T., who was hired in 1974, would retire. A review of P.T.'s record shows that from December 2, 2010 to November 13 2012, he had five disciplinary incidents, including a switch mishap and derailment, and was granted a waiver each time. Further, from September 17, 2012 to November 13, 2012, he had three actual 30-day suspensions and was granted a waiver each time.

J.S.: In the case of J.S., a conductor, Noland testified that this employee had one actual suspension and two deferred suspensions. The second deferred suspension was for throwing trash out of the locomotive, which Noland stated could be a terminable offense if the employee has been warned three times not to do it anymore. A review of J.S.'s record shows that he was hired in May 2012 and his three disciplinary incidents occurred over a period of 20 months (December 15, 2012 to August 3, 2014).

W.P.: In the case of W.P., an engineer, his first dismissal on June 28, 2012 was discipline for an incident on May 16, 2012 when he was dismissed after his fourth event dating back to 2009. Noland testified that since W.P. had just two suspensions and one reprimand prior to his dismissal, Complainant was not treated more harshly than W.P. Also, W.P. was reinstated and dismissed again for another rule violation. A review of W.P.'s record shows that waivers were granted for both incidents. In February 2010, he received an actual suspension of 30 days for a derailment and then an actual suspension of 60 days for occupying a joint track authority without permission in December 2011 before being dismissed for an incident in May 2012 involving the proper use of an engine bell and whistle.

[16] The letter history includes personnel events other than discipline, such as attendance at safety meetings, training, receipt of equipment, and caution letters.

T.S. (conductor): In the case of T.S., a conductor, the course of his discipline was "[s]uspension, suspension, suspension and dismissal," which Noland testified was consistent with the discipline issued to Complainant. (Tr. 270). Noland testified that he made the decision to dismiss T.S., and that T.S. did not report an injury in connection with any of the incidents on his record or within a few days of that dismissal. Noland did not believe that Complainant was treated more harshly than T.S., who has since returned to work for Respondent, though not to the Transportation Department because Noland would not allow it. (Tr. 271). A review of T.S. (conductor)'s record shows that he received suspensions of 15 days, 30 days, 45 days, and then a dismissal for incidents occurring from October 27, 2012 to July 16, 2014 – a period of less than two years.

D.J.: In the case of D.J., an engineer, was granted a waiver and a 10-day deferred suspension for a run-through switch on August 23, 2013. It was his first offense. Noland testified that his record was not comparable to Complainant's as of July 2013. D.J. has received four waivers and three suspensions incidents occurring from November 17, 2013 to January 23, 2015. The two most recent suspensions were the result of waivers and were both 60-day actual suspensions.

J.N.: In the case of J.N., an engineer, he received a waiver with a six-day actual suspension and 10-day deferred suspension for a run-through switch on October 9, 2013. This is his lone disciplinary event. Noland testified that J.N.'s disciplinary history was not comparable to Complainant's and this discipline history does not support Complainant's contention that he was treated more harshly than other employees.

O.B.: In the case of O.B., a conductor, he received a waiver and actual suspension for running through a switch on October 9, 2013. He had one prior disciplinary incident in 2009. Noland testified that O.B.'s record was not comparable to Complainant's, was better than Complainant's record, and this discipline history does not support Complainant's contention that he was treated more harshly than other employees.

W.W.: In the case of W.W., a brakeman, he ran through a switch on September 16, 2014 and received an actual suspension of 10 days and deferred suspension of five days. He had one disciplinary incident involving a "run over derail." He received waivers in both instances. Noland testified that W.W.'s record was not comparable to Complainant's, was better than Complainant's record, and does not support his contention that he was treated more harshly than other employees.

T.S. (engineer): In the case of T.S. (engineer), he received a waiver regarding a switch run through on January 10, 2014 and was given a waiver with a five-day actual suspension. He had four incidents resulting in discipline from 2004 to 2014 and was a granted waiver three times. Noland noted that T.S. (engineers)'s incidents were spaced out (four incidents in 10 years) and did not occur year after year. Noland testified that T.S. (engineer)'s work history was not comparable to Complainant's record at the time he made the decision to terminate Complainant; and that his first suspension of 30 days was mandatory. Also, this discipline history does not support Complainant's contention that he was treated more harshly than other employees. A review of the record shows that the severity of T.S.'s discipline went down from 30 days in 2004 to 10 days in 2010 to five days in 2015, and then it rose to a 15-day actual suspension and 15-day deferred suspension for the latest incident on April 22, 2014,

Noland testified that at the time he made the decision to terminate Complainant, he may have been aware of Complainant's elbow injury, but he "didn't connect the dots of the two" and "I'm not going to say I knew or didn't know because I do not recall." (Tr. 276-77). He answered affirmatively when asked whether it was customary to be informed of injuries of all Transportation Department employees and that it is likely someone sent him an email about an incident which had been reported. Noland testified that Complainant's report of an elbow injury on June 18, 2013 did not enter into his decision to terminate Complainant and he would have made the same decision.

On cross examination, Noland was shown an email dated July 7, 2013 at 5:22 to Klaus, his superior, in which he wrote the following:

> Need permission to terminate. Has another investigation coming up for the rules violation which resulted in an injury.

(CX-32; Tr. 278). When asked whether, in the email, he was "informing" Klaus that he was terminating Complainant or whether he was using the word "permission" in a different way than the dictionary definition of "to allow," Noland repeated that all decisions for discipline were his, not Klaus's, and that he "knows what the email says." (Tr. 278-279, 284-285). He acknowledged that the email says that he needed permission from his boss, that the investigation it references is the Crystal Springs injury incident, and it is "true" that he did know about the injury at Crystal Springs. (Tr. 279, 281).

When asked again whether he asked Klaus for permission to terminate, Noland read the email's words and added, "that's the email I sent, yes." (Tr. 280). When asked a third time whether he asked Klaus for permission, Noland stated, "No, I let him know." (Tr. 280). When asked whether it was his testimony that when he writes his boss and tells him "I need permission to do something" that he is just letting him know what he is going to do it and he is not really asking for permission to do something, Noland testified that if he is the decision-maker, "then yes." (*Id*).

Noland testified that no formal investigation was held for the Crystal Springs incident and he attempts to stay out of the investigation process so that he does not pre-judge an employee. When he wrote about the formal investigation coming up "for rules violated which resulted in an injury," Noland testified that he was "not making any determination," but there had been an informal investigation. (Tr. 281-282).

On June 29, 2013, in the hours after Complainant reported his injury, Noland testified that he received an email from McDaniel advising him of the injury and an email from McCullough which contained an injury summary, which was standard, and information that this was an "FRA medical only" reportable injury. (Tr. 282-283; CX-12; CX-13). Klaus and John Liepelt, Respondent's Senior Vice President for the Southern Region and Klaus' boss, were copied on the email. Noland stated that he could not testify as to what Klaus knew regarding Complainant's injury.

Noland reviewed the reply sent by Klaus to Noland at 6:54 a.m., on which McDaniel was copied. In the email, Klaus inquired about the date of the investigation, and McDaniel replied at 6:58 a.m. telling Klaus that it was Wednesday, July 10. 2013. At 7:02 a.m., Klaus then directly asked Noland and McDaniel,

> Is the next investigation tied to an injury? Is this the Crystal Springs injury?

(CX-34, Tr. 288). Noland testified that Klaus is "asking if this was the actual incident." (Tr. 288).

McDaniel, replying at 7:11 a.m, answered,

> Yes and Yes.

At 7:16 a.m., Klaus answered,

> Dismiss. We don't need to hold the next one.

When asked whether the emails mention any details about the switch run through, Noland answered that "no one was asking any questions about the switch run through." (Tr. 289).

Regarding the information that he uses when making a decision, which he testified was the transcript and work history, Noland reviewed the employee dashboard that he was sent to him by McDaniel on June 5, 2013 – the same day that an investigation notice was sent in the switch run through. (CX-5A).[17] Noland explained that the employee dashboard is a snapshot of everything about an employee and lists several key things on there that are not in other places. (Tr. 290). He estimated that Respondent introduced the dashboard about three or four years ago.

[17] McDaniel states the following in the body of the email "His 1 discipline in the last 2 years:" (CX-5A).

Noland also explained the dashboard's reference to "Active Discipline," which is discipline in the last three years and cumulative discipline, which is discipline issued over the employee's entire career. (Tr. 291-292). The discipline does not fall off an employee's record; it just ceases to appear after 36 months. A review of the "Active Discipline" shows that Complainant had (0) written reprimands; (0) deferred suspensions; and one (1) suspension in the last three years. (CX-5A). A review of Cumulative Discipline shows that Complainant had one (1) written reprimand; one (1) deferred suspension; and two (2) suspensions in his career. The fields of discharge and decertifications were blank under both "Active" and "Cumulative" discipline.

Noland testified about McDaniel's recommendation of a 60-day suspension or termination. Specifically, the email sent by McDaniel on July 3, 2013 at 2:38 p.m. reads as follows:

> The attachment below is K.T. Palmer's work discipline history.
>
> In the investigation, Mr. Palmer took full responsibility for running through the switch in Jackson, Ms. [sic]. His last discipline was 30 days. As you can see Mr. Palmer has progressed from 10 days, to 20 days, then to 30 days before this incident. Mr. Palmer has 2 injuries in the 2 years I have been in Jackson. He has shown an unsafe work pattern.
>
> I recommend 60 days hard or dismissal, whichever you agree is necessary. Mr. Palmer is fortunate by looking at his work history, that he has not hurt himself or someone else more severe than he has due to his poor work habits.

Noland testified that based on the date of this email, McDaniel had to have been referencing the prior two injuries of August 15, 2011, a right shoulder sprain which required no treatment and resulted in no lost time, and of August 19, 2011, a right groin sprain which resulted in eight days lost, but not the Crystal Springs incident. (Tr. 292-293; CX-5A). When informed that McDaniel had testified he was referencing the Crystal Springs incident (JX-1, p. 54, 108, 121-22; ex. 24), Noland stated that McDaniel "made a mistake." (Tr. 293).

Noland testified that he was not familiar with any document of Respondent's that categorizes infractions by severity or provides a punishment table, other than for attendance. (Tr. 293-294). With attendance, the discipline method is such that a Letter of Reprimand is issued and the after the third violation, there is the possibility of dismissal. Noland testified that there is no written procedure for the issuance of a waiver, either from Respondent or in the collective bargaining agreement. (Tr. 295-296). He explained that waivers are usually introduced by the employee to a manager or to the union and, sometimes, by management to the employee. There is no published waiver or sentencing guidelines, other than the arbitration process through the union agreement.

Noland reviewed the history of Conductors and Engineers charged with violating USOR General Rule C, 701, 708, and 710 in Mississippi for the period of July 8, 2012 through July 8, 2014. Noland agreed that, as it read in the chart, of the six conductors, five were granted waivers, and only Complainant was terminated and did not get a waiver. (Tr. 300-301).

Regarding conductor P.T., Noland acknowledged that he had incidents of damage and derailments 12 times in a 38-year career and that he was "assessed" three waivers and 30-day suspensions each time, with the final incident being a gentlemen's agreement allowing him to get a waiver and retire. (Tr. 304-306). Also, he was involved only in the last decision of record and could not speak for the other ones. (Tr. 302, 304). He admitted that he does rely on work histories that pre-date his arrival to the region when issuing discipline. Noland admitted that P.T.'s situation was "different," and the reason he gave was his long work history.

What distinguishes Complainant and P.T., Noland continued, is that "I was going to fire this employee just like I had for the other rules violations I have been associated with," but for the gentleman's agreement with the union and the agreement to retire, "I would have upheld the investigation and terminated this employee." (Tr. 306-307). Noland also referred to the incident in regards to P.T.'s history as atrocious." (Tr. 307).

Regarding his knowledge of the FRSA, Noland testified that he knows that Respondent does not retaliate. (Tr. 308). Noland testified that he received evaluations from Klaus. Injuries between Memphis and New Orleans are part of his performance review; they are listed as an FRA ratio of injuries based on man hours worked. Complainant's injury was part of that ratio. (Tr. 309). Noland testified that a small part of his bonuses are tied into performance reviews, and injuries in his territory are a factor. He did not agree when asked whether an official would prefer not to have injuries reported. Noland stated that he conducted the performance review for McDaniel. As part of the employee performance scorecard, he reviews "injuries, accidents, incidents, train speed, car velocity, coaching, mentoring, people, safety meetings and safety summits." (Tr. 310). When asked whether McDaniel's bonus was tied to the results of the performance review, Noland answered that "[a] portion of any employee performance evaluation is tied to safety." (*Id.*).

On redirect, Noland testified that he does not attempt to discourage employees from reporting injuries, and he does not hold investigations on all injuries so as to not discourage reporting. Of the 17 reported injuries in Mississippi during a two-year period, he issued no discipline in those incidents. (Tr. 311, 316). Noland testified that he has the authority to hire and terminate employees within his territory. (Tr. 311-312). Noland explained the contents of an employee dashboard,[18] but reiterated that only the employee's work history is considered in discipline decisions. He explained his position on the information in RX-18, a list of the Conductors and Engineers charged with violating USOR General Rule C, 701, 708, or 710 in Mississippi from July 8, 2012 to July 8, 2014 in that discipline is different for every employee and he would not, for instance, fire an employee for the first switch run-through in his work history. (Tr. 313).

[18] Noland stated that the dashboard includes such information as efficiency test functions, next of kin, emergency contacts as well as the discipline history. (Tr. 312).

Noland stated that he does not back out waiver agreements once he enters into them because he is the only one that can make the decision and "my honor and integrity is all I got." (Tr. 314). Noland testified that managers are informed of all incidents, not just injuries, and the information and informal investigations from those incidents are used every Thursday and Tuesday on the division and region safety calls. Therefore, there was nothing unusual about management being informed of Complainant's injury on June 18, 2013 and the May 28, 2013 run-through switch incident.

Regarding a formal investigation for the Crystal Springs incident, Noland testified that a formal investigation on that incident would be a waste of time and money since Complainant had already been terminated. Noland stated again that Complainant's report of injury had no part in the decision, and that "[t]he decision was made once the transcript was read." (Tr. 316).

On re-cross, Noland acknowledged that the only conductor ever denied a waiver in connection with a run-through switch was Complainant, but added that the circumstances were different with Complainant, who had three switching incidents, and "several" of waivers were granted because it was the employee's first "offense." (Tr. 318-19). Finally, Noland testified that he has to ask Klaus for permission to be off for the weekend. When asked whether he would use phrases such as "I would like permission" or "I need permission to be off this weekend," Noland answered, "Yes." (Tr. 320).

E. Deposition Testimony of Brad McDaniel, Former Assistant Superintendent of the Jackson Yard (JX-1)

Brad McDaniel, the former Assistant Superintendent of the Jackson Yard, was deposed on January 23, 2015. McDaniel resides in Haleyville, Alabama, and, at the time, he was in negotiations to work in operations for Norfolk Southern Railway. He previously worked for Norfolk Southern for about eight years, Illinois Central/Canadian National for 8½ years beginning in 2005, and Florida East Coast from January to November 2014. He has been a manager, assistant superintendent, terminal trainmaster, yardmaster, and conductor.

McDaniel held several positions at Respondent before becoming the assistant superintendent of the Jackson Yard from July 2011 to the end of 2013. (JX-1, p. 18-20, 65). He spent approximately 3½ years in Jackson. His territory included Yazoo City, just north of Jackson, Jackson, Mobile, Alabama, and Hammond, Louisiana. His job was to oversee the conductors, engineers, and brakemen at the Jackson Yard, manage the day-to-day operations of Jackson and ensure the safety and efficiency of the terminal. (JX-1, p. 19). He also served as the conducting officer for formal investigations.

McDaniel explained the difference between a formal investigation and an informal investigation. In a formal investigation, the hearing is on the record, the employee can choose to be represented (99% of the time, they are represented by the local union chairman), and that is the only way the company can assess discipline. (JX-1, pp. 22-26). The employee is allowed to put on evidence and question company witnesses, and they can make a statement on their own behalf. Formal investigations serve a safety purpose in that the company gathers information to see if any rules have been broken as well as if there is anything that the company failed to do and could do better to be a safer company. An informal investigation is held on all incidents, just to

bring the facts together; no witnesses are called. When injuries occur, there is always an informal investigation, but there is not always a formal investigation. The purpose of an informal investigation following an injury is to gather facts and to see if something happen that the company is not clear on of if there may have been a rule violated.

McDaniel was notified of Complainant's run-through switch by one of the managers; he did not remember whether or not he was involved in any informal investigation for the incident. (JX-1, pp. 28-29). He recalled that Complainant failed to line the south end of the crossover and started his movement, but could not stop it in time before he ran through the switch. McDaniel testified that running through a switch could damage a brow rod and create a gap that could lead to a derailment, and derailments could cause injury and damage the track, lading or equipment. He answered affirmatively when asked whether running through a switch is considered a safety violation in the railroad industry. When Complainant ran through the switch, he did not report any safety hazard or any FRA violation. (JX-1, p. 31).

McDaniel estimated that he had several conversations with Russum about the formal investigation that was scheduled for Complainant's switch run-through incident. (JX-1, p. 34). However, he testified that he "never" reached an agreement with Russum on a waiver agreement for a 45-day suspension and could not have reached such an agreement because of Complainant's work history. (*Id*.).

McDaniel was the hearing officer for the formal investigation conducted June 26, 2013. (JX-1, dx-3). Russum was Complainant's representative and was allowed to question the company witness. (*Id*. at 61-62). McDaniel testified that the formal investigation was held in compliance with the collective bargaining agreement and conducted in a full and impartial manner. (*Id*.). McDaniel recalled that Complainant took responsibility for the incident at the formal investigation and "told the truth" at the hearing, and that Complainant had been suspended at least three times (JX-1, pp. 37-38; 46). There was "no question" that Complainant was due some form of discipline based on his admission. (*Id*. at 47).

McDaniel also recalled the circumstances of Complainant's injury at Crystal Springs and the email he sent to the senior vice-president, general manager, and superintendent describing the incident. McDaniel did not remember whether or not he spoke to Complainant the evening of the Crystal Springs incident (June 18-19, 2013), and he denied delaying or interfering with Complainant's medical treatment and discouraging Complainant from seeking medical treatment. He testified that an investigation was initiated in connection with the Crystal Springs incident to see if Complainant violated any rules and whether discipline would be assessed. Since Complainant stated that he hopped up and tried to jump on the car, there was a reasonable basis to initiate a formal investigation because such action prevents the employee from maintaining three-point contact, which is required by safety rules. Also, Complainant stated that he was working at night without a light. (*Id*. at p. 45). A notice for the second formal investigation was issued on June 20, 2013; the investigation was scheduled for June 27, 2013 but was postponed.

McDaniel testified that he took into account Complainant's work history when making his recommendation to Noland on discipline for the switch run-through. He emailed a recommendation to Noland, his boss, "because he's going to have to determine the discipline"; Complainant's work/discipline history as attached to the email. (JX-1, p. 49; dx-8). McDaniel testified that he would not have made this recommendation if had already entered into a verbal leniency agreement with Russum and dismissal would be appropriate if Noland elected that form of discipline. (*Id*. at 51). McDaniel testified that he did not base his recommendation on Complainant's injury report.

When referring to Complainant's "two injuries" in the email to Noland, McDaniel testified that he was pointing out that there were multiple incidents and he was describing those two to distinguish between the other incidents. (JX-1, pp. 52). One of the injuries he was referring to was the August 19, 2011 injury in which Complainant admitted rule violations and received a waiver. The second injury incident McDaniel referred to was the Crystal Springs injury incident. (*Id*. at 54). McDaniel added that if Complainant had been observed working out in the rain with no flashlight and hopping on the bottom of a car, he would have been called to another investigation, even if there had been no injury, and his recommendation regarding the run-through switch would have been the same.

McDaniel testified that Noland made the decision to terminate Complainant, although he was unsure whether Noland conferred with Klaus or not. He was informed of the decision by Klaus' email to him and Noland. (CX-34, JX-1, dx-9). McDaniel stated that he agreed with the decision. McDaniel instructed the administrative assistant, Phipps, to prepare Complainant's dismissal letter and cancel Complainant's next investigation. (*Id*. at 63-64).

McDaniel recalled the investigation and dismissal of employee W.P., and that W.P. had not reported an injury yet received the same discipline as Complainant. (JX-1, p. 59). Also, McDaniel continued, other employees have been disciplined for running through switches without having suffered an injury.

McDaniel denied telling Russum or anyone else that all run-through switch incidents had to go to formal investigation. (JX-1, p. 61). The primary issue considered when making the determination is the employee's work history.

On cross, McDaniel testified that he had a conditional offer from Norfolk Southern but he was unemployed. He testified as being involved in handling discipline for run-through switch incidents in Jackson by sending out formal investigation letters and helping negotiate waivers on some cases, depending on the employee's work history. (JX-1, p. 66-69). There were no written guidelines on when he could and could not offer waivers, but normally, on the first offense, he could discuss a waiver and go to his boss for confirmation or approval. McDaniel testified that formal investigations were set up most of the time but they were not always held if there was a waiver agreement between the local union chairman and management, and, to his knowledge, Complainant was not offered a waiver. He was sure Russum asked for a waiver because he always did, and the transcript showed he was still requesting one and it had not been confirmed. (*Id*. at 71).

McDaniel reviewed an email dated June 5, 2013 with the subject "Run thru switch Jackson, MS 06/04/13" that he sent to Phipps and copied Noland, Rayborn, and trainmaster Robert Brower, Jr. (JX-1, px-1). In the email, he instructed Phipps to set up an investigation on June 12, 2013 in Jackson for Complainant and McMullen regarding Complainant's failure to line the south end of the crossover switch. McDaniel also reviewed the email sent on June 5, 2013 at 7:17 a.m. to Noland in which he sent Noland Complainant's employee dashboard and noted that he had one discipline incident in the last two years; the discipline was issued in connection with the rules he admitted violating on August 19, 2011, which involved an injury and a signed waiver. (*Id*. at px-2; 77-78). It was also Complainant's only discipline incident in the previous 36 months. McDaniel testified that discipline in the last 36 months is significant because it is always one of the parameters and involves Respondent's individual development assessment policy which is used, in part, to determine discipline. McDaniel also reviewed Complainant's efficiency testing, which shows he was tested on 70 rules on 32 occasions and passed each test.[19] Also on June 5, 2013, Phipps emailed the Notice of Investigation to several people, including McDaniel, Rayborn, and Russum. (*Id*. at px-3).

McDaniel testified that he did not have any recollection of the reason why he instructed Phipps to postpone Complainant's investigation in an email dated June 9, 2013. Investigations were postponed "all of the time" by request of the union, himself, or depending on what others had going on at the time, as well as because a waiver deal had been reached. (JX-1, pp. 81-83).

McDaniel reviewed several emails as part of his testimony, including the injury summary he received from McCullough on June19; his email to instructing Brower to have Phipps set up an investigation for the injury incident; his email to Phipps instructing her to postpone the formal investigation for the injury incident; his email to Brower about an "injury closeout" report; among other emails. (JX-1, pp. 83-94).

McDaniel discussed his email to Rayborn and several others stating that that Complainant's injury at Crystal Springs would count against the McComb subdivision and not the Jackson subdivision. (JX-1, p. 95; px-14). McDaniel explained that a digitial board lets employees know when the last injury occurred so as to keep safety at the forefront of their minds. (*Id* at 95; 137). McDaniel testified that the number of on-duty injuries is part of the "safety number" in the supervisor's performance review and could potentially affect the compensation the individual receives. (*Id*. at 95-96).

On July 3, 2013 at 2:13 p.m., Phipps emailed McDaniel and Noland the hearing transcript from the switch run-through incident. (JX-1, px-17). McDaniel testified that he reviewed the entire 37-page transcript, but does not remember when he actually read it. (JX-1, p. 98). At 2:18 p.m., five minutes after receiving the email containing transcript, McDaniel sent Phipps an email asking for Complainant's work history, which included his discipline history, and Phipps sent it four minutes later. (Id. at 100; px-18; px-19).

[19] The efficiency testing also showed that in the preceding 12 months, Complainant was given 37 efficiency tests in which 43 rules were tested and he did not fail any of the tests. (JX-1, pp. 79-80; px-3).

McDaniel reviewed the email the he sent to Noland at 2:38 p.m. on July 3, where he recommended a 60-day suspension and hard dismissal because Complainant had "shown an unsafe work pattern." (*Id*. at px 20; *see also* CX-28). McDaniel reviewed Complainant's efficiency tests, described how they are conducted, and testified that Complainant had no failures. (JX-1, p. 104-105).

McDaniel reviewed and discussed the emails between himself, Noland and Klaus on July 7, 2013. McDaniel stated that Klaus already knew of the injury because he was "sure" that either he or Noland had notified him, and it was his practice to notify his bosses of injury incidents. (JX-1, pp. 108-109).[20] McDaniel reviewed the emails from Noland to Klaus, in which Noland stated "Needs permission to terminate" and Complainant "[h]as another investigation coming for the rules violated which resulted in an injury," and Klaus' reply to Noland and McDaniel asking whether the injury as referring to the Crystal Spring incident, and McDaniel's affirmative answer that it was regarding Crystal Springs. When asked whether, at the time the decision to dismiss was made and approved by Klaus, it followed discussions of the on-duty injury, McDaniel answered, "Yes. Somewhat, yes." (*Id*. at 111). McDaniel testified that he answered "Yes sir" following Klaus' email in which he wrote: "Dismiss. We won't need to hold the next one." (*Id*. at p. 112; px-25; px-26).

McDaniel testified that he emailed Phipps a minute later and instructed her to cancel the investigation for the injury following Complainant's dismissal. Eight hours later, at 3:47 p.m. McDaniel told Russum "okay" when he asked to postpone the injury investigation for two weeks. He did not tell Russum that Complainant has been terminated because he always tells the employee first. (JX-1, p. 114).

McDaniel then discussed discipline for conductors who had switch run-throughs during the period of November 30, 2012 to December 12, 2013 while he was employed by Respondent. McDaniel discussed the discipline history of J.S., a childhood friend, whom he helped get a job in approximately 2011 or 2012. (JX-1, pp. 116-118). McDaniel testified that J.S. received waivers for his two switch run-throughs. McDaniel also testified that T.S.,[21] an employee he was asked by Senior Vice President Jeff Leipelt to hire around the same time as J.S., had three switch run-throughs, including a power switch on a main line, and received a waiver for two of them. (*Id*. at 119). When asked the severity of running through a power switch on a main line through a red block without permission, he replied that it was "very serious." (*Id*. at 119). McDaniel testified that J.S. and T.S. had more switch run-throughs during the period of time than Complainant, but not the same number of total incidents. (*Id*. at 120). McDaniel also answered that J.S. and T.S. and more "active" incidents, i.e. within the last three years than Complainant, but not the same incidents in their total history. (*Id*. at 120-121).

[20] Klaus was copied on the June 19, 2013 email from McDaniel (CX-12) and the Notice of Investigation for the Crystal Springs injury. (CX-19).

[21] McDaniel later testified that T.S. was an engineer, not a conductor, in the period he worked there, then walked back that statement. (JX-1, pp. 139-140).

McDaniel confirmed his direct testimony stating that, of the two injuries he was referring to in the email to Noland recommending a 60-day suspension or dismissal, one was the Crystal Spring injury, and added that "[i]t was based on the entire work history, not just the two injuries." (JX-1, pp. 121-122). McDaniel testified it would not be appropriate, as a company official, to prejudge an employee before a formal investigation unless the employee gives a written statement and claims negligence on his part. (JX-1, p. 122-123).

Upon further questioning, McDaniel testified that he is unaware of any reason to conduct a formal investigation once an employee has been dismissed. McDaniel explained how postponements are issued and the timeframe of notice that a formal investigation will be conducted pursuant to the collective bargaining agreement, and that these procedures were followed in Complainant's case. However, there is no timeframe as to how soon the investigation must be conducted, and thus postponing the second investigation did not violate the CBA.

McDaniel was asked whether Complainant was acting safely in incidents in his work history dated October 2008, March 31, 2009, October 19, 2010, and August 2011, as well as the Crystal Springs incident, and answered that he was not in each occurrence. McDaniel stood by his statement that Complainant demonstrated a pattern of practice of unsafe behavior. (JX-1, p. 130). McDaniel stated that the injury summary from McCullough (px-7) is used as part of the safety call, where colleagues discuss injuries and accidents, find out why they happened, and maybe learn something from it to prevent future injuries. (JX-1, pp. 134-13). McDaniel testified that he never felt pressure to discourage people from reporting injuries. He reviewed the July 2, 2013 email from Phipps (px-16) and stated that had an agreement been reached on a waiver, Phipps would have listed the information under the heading "Signed Waiver Needed" as a reminder to him and others, and noted that Complainant's incident was listed under "Discipline Due" for the first investigation. (*Id*. at 141-142). Also, if waivers has been approve, Phipps "usually [typed] them up and sent them back to us." (*Id*. at 144). McDaniel answered affirmatively when asked whether all of the decision-makers were aware of Complainant's injury. (*Id*. at 145-146).

E. Full Thread of Emails July 3, 2013 and July 7, 2013 with Subject: KT Palmer's Work History.jpg

The emails between McDaniel, Noland, and Klaus shortly before Complainant's termination were referenced and discussed throughout the testimony. The emails are arranged below in chronological order as provided by the parties in JX-1, px-25, px-26, and px-27:

-----Original Message-----
From; Brad McDaniel
Sent: Wednesday, July 03, 2013 2:38 PM
To: William Noland
Subject KT Palmer's Work History.jpg

Will

The attachment below is K.T. Palmer's work/discipline history.

In the investigation Mr. Palmer took full responsibility for running through the switch in Jackson, MS. His last discipline was 30 days. As you can see Mr. Palmer has progressed from 10 days, to 20 days, then to 30 days before this incident. Mr. Palmer has 2 injuries in the 2 years I have been in Jackson. He has shown an unsafe work pattern.

I recommend 60 days hard or dismissal, whichever you agree is necessary. Mr. Palmer is fortunate, by looking at his work history, that he hasn't hurt himself or someone else more severe than he has due to his poor work habits.

-----Original Message-----
Prom: William Noland
Sent: Sunday, July 07, 2013 05:21 AM
To: John C. Klaus
Cc: Brad McDaniel
Subject FW: KT Palmer's Work History.jpg

Need permission to terminate. Has another investigation coming up for the rules violated which resulted in an injury.

-----Original Message-----
From: John C. Klaus
Sent Sunday, July 07, 2013 06:54 AM
To: William Noland
Cc: Brad McDaniel
Subject; Re: KT Palmer's Work History.jpg

When is next investigation scheduled?

-----Original Message-----
From: Brad McDaniel
Sent: Sunday, July 07, 2013 06:58 AM
To: John C. Klaus; William Noland
Subject: Re: KT Palmer's Work History.jpg

This Wednesday July 10th.

-----Original Message-----
From: John C. Klaus
Sent: Sunday, July 07, 2013 07:02 AM
To: Brad McDaniel; William Noland
Subject: Re: KT Palmer's Work History.jpg

Is the next investigation tied to an injury? Is this the Crystal Springs last injury?

-----Original Message-----
From: Brad McDaniel -
Sent: Sunday, July 07, 2013 07:11 AM
To: John C. Klaus; William Noland
Subject Re: KT Palmer's Work History.jpg

Yes and yes

-----Original Message-----
From: John C, Klaus
Sent: Sunday, July 07, 2013 07:16 AM
To: Brad McDaniel; William Noland
Subject: Re: KT Palmer's Work History.jpg

Dismiss. We won't need to hold the next one

-----Original Message-----
From: Brad McDaniel
Sent: Sunday, July 07, 2013 7:18 AM
To: John C. Klaus; William Noland
Subject: Re: KT Palmer's Work History.jpg

Yes sir

-----Original Message-----
From: Brad McDaniel
Sent: Sunday, July 07, 2013 7:19 AM
To: Tracy Phipps
Subject: Re: KT Palmer's Work History.jpg

Tracy

Write up dismissal for KT Palmer on Monday and send to me. We can cancel the next investigation for his injury after the dismissal.

IV. CONTENTION OF THE PARTIES

A. Complainant

Complainant concedes that he ran through a switch in the Jackson Yard on May 28, 2013, and was aware that some form of discipline would likely result from the incident. Complainant contends that he engaged in a FRSA-protected activity on June 18, 2013, when he reported that he sustained a work-related elbow injury at Crystal Springs, Mississippi. As a result of the injury report, Respondent retaliated against him by: 1) refusing to offer (or honor) a waiver agreement, which every other conductor in Jackson had been granted for switching mistakes between July 2012 and July 2014; and 2) terminating him on July 8, 2013. Railroad management reacted to Complainant's report with hostility and treated him differently and more harshly in connection with the run-through than others who had switching mishaps. The parties disagree as to whether a waiver agreement had been reached prior to the protected activity, but he was forced to attend a disciplinary hearing and not given a waiver. In terminating Complainant, he was the only conductor in Jackson to be terminating in connection with a run-through switch.

The decision-maker and those around him were aware of the protected activity, and they discussed and were focused on the protected activity in their email correspondence that led to the ultimate decision to terminate Complainant. Complainant has established the contributing factor element because of direct and circumstantial evidence, including 1) temporal proximity: the retaliation came on the heels of reporting the on-duty injury at Crystal Springs; 2) his supervisor, McDaniel expressed hostility toward him the night of the injury; 3) he has discredited Respondent's stated, non-discriminatory reasons for treating him more harshly than other who ran through switches and 4) the inconsistent application of Employer's policies, in that the fact that he is the only conductor refused a waiver in connection with a switch run-through jumps out as an outlier. Respondent has not met its affirmative defense of clear and convincing evidence that it would have taken the same action absent the protected activity because Palmer was the only conductor denied a waiver and terminated in connection with a switch run-through, and it cannot point to any evidence that it was following a routine practice or policy in this case.

Regarding Complainant's harms and losses, he has an estimated $130,000 in lost railroad earnings; his home was sold at a loss of $13,000; and when he could not find comparable work at a comparable income, he relocated his family to Houston, Texas. He has since been reinstated to his position by the Public Law Board but was denied back pay. (RX-32, RX-33). Also, the termination has been financially and emotionally disruptive, as his wife and son remained in Texas to fulfill a lease obligation and so not as to take his son out of school in the middle of his third-grade year, and therefore seeks compensatory damages for emotional distress and the $13,000 loss due to the home sale. Complainant also seeks payment of legal expenses, and he seeks punitive damages of at least $100,000. (Comp. Post-Tr. Br., pp. 33-35).

B. Respondent

Respondent contends that it did not retaliate against Complainant for reporting an injury on June 18, 2013. Instead, it dismissed Complainant for running through a switch on May 28, 2013, an infraction which occurred before the protected activity. Undisputed objective evidence supports Respondent's non-discriminatory reason for terminating Complainant and that his injury report was not a contributing factor in that decision. Complainant admitted that he ran through the switch and violated four rules in connection with the incident. Contrary to Russum's testimony, Respondent had not agreed to a waiver agreement whereby Complainant would serve a 45-day suspension. There was no written evidence of such an agreement, and three of four witnesses, including Complainant, testified that Respondent did not agree to a waiver in lieu of a hearing.

Respondent further asserts has shown that it would have taken the same employment action absent the protected activity. Also, he was not treated more harshly than similarly situated employees who had not reported injuries.

Even if Complainant were to prove an FRSA claim, which Respondent denies he did, Complainant has failed to prove recoverable damages. Respondent contends that Complainant has not shown by a preponderance of the evidence that the termination caused the harm of 1) loss of money on the sale of the home and 2) emotional distress allegedly suffered by Complainant due to a loss of income, and thus compensatory damages are not warranted. Regarding back pay, Respondent contends that Complainant earned approximately $8,619.47 per month from January 1, through July 28, 2013, and less than his estimate of approximately $10,000 per month. Also, Complainant failed to mitigate his damages by enrolling in real estate school and had supplemental insurance ("fired insurance") of $75,000 for approximately one year. Complainant is also not entitled to punitive damages because Respondent's conduct was motivated solely by its desire to prevent reoccurring rules violations and thus falls short of the reckless or callous disregard standard set forth in *Smith v. Wade*, 461 U.S. 30, 51 (1983). (additional citations omitted).

Respondent also renewed its assertion that Complainant's claim is barred under the FRSA's election of remedies provision, 49 U.S.C. § 20109(f), because he sought protection under Title VII of the Civil Rights Act alleging racial discrimination before filing the instant complaint.

Employer's previous Motion for Summary Decision on this ground was denied by the undersigned on February 23, 2015. *See also Mercier v. Union Pac. R.R.*, ARB No. 09-0121 (ARB Sept. 29. 2011). Since the briefing period closed in this matter, the Fourth Circuit reversed the district court decision Respondent heavily relied upon in arguing its motion, *Lee v. Norfolk Southern Rwy. Co.*, 1:13-CV-00004, MR DSC (W.D.N.C. May 24, 2014), and found that the FRSA's election of remedies provision is narrow and applies only to overlapping anti-retaliation or whistleblower statutes that provide protections similar to FRSA, such as Section 11(c) of the OSH Act and similar state laws. *Lee v. Norfolk Southern Rwy. Co.*, __ F.3d __, No. 14-1585 (4th Cir. Sept. 17, 2015)(published). Thus, the undersigned finds, again, that this claim is not barred by the election of remedies provision 49 U.S.C. § 20109(f).

V. DISCUSSION

Whistleblower actions brought under the FRSA are governed by the burdens of proof set forth in the employee provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). *See* 49 U.S.C. § 42121; 49 U.S.C. § 20109(d)(2)(A)(i). A complainant must establish by a preponderance of evidence that (1) he engaged in protected activity as defined by the FRSA; (2) he suffered an adverse or unfavorable personnel action; and (3) the protected activity was a contributing factor in whole or part for the adverse or unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); *Rudolph v. National Railroad Passenger Corporation* (AMTRAK), ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 11 (ARB March 29, 2013); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-11, slip op. at 3 (ARB June 29, 2007); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); *see also Powers v. Union Pacific Railroad Co.*, ALJ Case No. 2010-FRS-30, ARB Case No. 13-034, slip op. at 10-11 (ARB March 20, 2015).

Even if complainant meets this burden of proof, the employer may nevertheless avoid liability if it can show by clear and convincing evidence that it would have taken the same adverse or unfavorable personnel action in the absence of complainant's protected activity. *Hamilton v. CSX Transportation, Inc.* ARB No.12-022 (ARB April 30, 2013).

A. Protected Activity

Section 20109(a)(4)[22] of the FRSA prohibits a railroad carrier from discriminating against an employee who engages in protected activity, which includes reporting a work-related injury or illness. The parties stipulated that shortly after midnight on June 19, 2013, Complainant reported to Illinois Central management, specifically McDaniel and McCullough, that he had sustained a work-related injury to his left arm at approximately 11:15 p.m. on June 18, 2013, while trying to mount a railcar at Crystal Springs, Mississippi. Also, McDaniel, Noland, and Klaus referenced the injury in emails leading up to Complainant's termination. Thus, I find Complainant engaged in protected activity and Respondent was aware of the protected activity.

[22] 49 U.S.C. § 20109"

> (a) In General--A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-- . . . .
>
> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee . . . .

B. Adverse Personnel Action

By its terms, the FRSA explicitly prohibits employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such discrimination is due, in whole or part, to the employee's lawful, good faith act done, or perceived by the employer to have been done to provide information of reasonably believed unsafe conduct, notifying respondent of a work-related injury or illness, or denying, delaying or interfering with Complainant's request for medical treatment or care. *See generally*, 49 U.S.C. § 20109 *et seq.*

For purposes of the retaliation statutes that the Department of Labor adjudicates, the ARB has referred to the Title VII material-adversity standard enunciated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 548 U.S. 53 at 67-68 (2006) in defining an "adverse action." *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008). In essence, for an employer's action to be "materially adverse," it must be such that it could dissuade a reasonable worker from engaging in protected activity. According to the Supreme Court, a "reasonable worker" is a "reasonable person in the plaintiff's position."

An adverse employment action may take the form of a discrete act such as termination, denial of a transfer, or refusal to hire. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114-115 (2002).

The parties stipulated that on July 8, 2013, Illinois Central sent a letter to Complainant in which it notified him that his employment was terminated. Thus, I find that Complainant suffered an adverse personnel action regarding the termination.

Complainant also contends that Respondent's refusal to offer (or honor) a waiver agreement constituted an adverse action. I agree with Complainant's characterization of this event as an adverse action. As stated by the Supreme Court in *Burlington Northern*, "[c]ontext matters." *Burlington Northern*, 548 U.S. 53.

First, Complainant testified that he was not surprised to see the Notice of Investigation issued June 5, 2013, before the protected activity occurred on June 18, 2015, and that he expected some form of discipline to be issued for the May 28, 2013 run-through switch incident. (Tr. 135-137).

Respondent contends that the testimony of Russum and Complainant raise questions as to whether a deal was successfully negotiated and agreed to by all parties prior to the protected activity. Also, there was increased scrutiny of run-through switch incidents due to the high occurrence of such incidents at the Jackson Yard. (Tr. 257-58). There was conflicting testimony about what the pre-determined punishment would be. Complainant testified that he would accept up to 60 days and was told by Russum that a deal was reached, but the hearing was being postponed due a "scheduling conflict." (Tr. 140-141). Russum testified that he had negotiated a suspension for Complainant of 45 days served, but during the June 26, 2013 hearing for the run-through switch, Russum stated he was "asking again" for leniency on behalf of Complainant. Also, McDaniel stated that an employee's work history determines whether an incident will

proceed to a formal investigation, and Complainant did have disciplinary incidents on his record. Thus, the record is not clear on whether a waiver deal was agreed to by the parties.

Assuming, arguendo, that a waiver deal had not been reached, it was still "on the table" until McDaniel told Russum, after the protected activity had occurred, that "the deal was off the table" due to the alleged new policy that all switch run-throughs had to go to a formal hearing. I find that Complainant has met his burden and demonstrated how Respondent's refusal to offer (or honor) a waiver for a separate incident occurring prior to the protected activity would dissuade a reasonable worker from engaging in protected activity. Without a waiver, Claimant in effect was facing the definite possibility of termination which the waiver, if granted, would preclude. Therefore, the denial of waiver meets the elements of an adverse action in this case.

C. Contributing Factor

The FRSA requires that the protected activity be a "contributing factor" to the alleged unfavorable personnel actions against Complainant. 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. 49 U.S.C. § 20109(a); *Ameristar Airways, Inc. v. Admin, Rev. Bd.*, 650 F.3d 563, 567 (5th Cir. 2011) (quoting *Allen v. Admin. Rev. Bd.*, 514 F.3d 468 (5th Cir. 2008). Essentially, the question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor which, alone or in connection with other factors, tends to affect, in any way, the decision to take an adverse action. Thus, the argument that respondent had a "legitimate business reason" to take the adverse action is inapplicable to FRSA whistleblower cases. *DeFrancesco v. Union Pacific Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (Feb. 29, 2012) (hereinafter *DeFrancesco I)*.

The Board recently observed in *Rudolph*, ARB No. 11-037, slip op. at 16, and *Powers*, ARB No. 10-114, that proof of causation or contributing factor is not a demanding standard. To establish that his protected activity was a contributing factor to the adverse action at issue, the complainant need not prove that his protected activity was the only or the most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the evidence that the protected activity, alone or in combination with other factors, tends to affect in any way the employer's decision or the adverse actions taken. 29 C.F.R. § 1982.104(e)(2)(iv); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3rd Cir. 2013) (citations omitted); *Klopfenstein v. PCC Flow Techs.*, ARB No. 04-149, ALJ Case No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006); Furthermore, neither animus nor retaliatory motive is required to prove causation under FRSA, as long as protected activity contributed in any way to the adverse action. *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014), slip op. at 3 (footnote omitted).

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ Case No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc), the Administrative Review Board (ARB) revisited the "contributory factor" evidentiary analysis enunciated in *Fordham v. Fannie Mae*, ARB No. 12-96, ALJ Case No. 2010-SOX-51 (ARB Oct. 9, 2014). In *Fordham*, a split panel of the ARB had ruled, *inter alia*, that a respondent's evidence of a legitimate, non-retaliatory reason for an adverse action may not be weighed by the ALJ when determining whether the complainant met his or her burden of proving contributing factor causation by a preponderance of the evidence.

The panel reasoned that permitting the employer to put on such evidence at the contributory factor stage would render the statutorily prescribed affirmative "clear and convincing" evidence defense meaningless.

In *Powers*, the ARB en banc panel stated that it was affirming, but clarifying the *Fordham* decision:

> [T]he ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham's* holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, i.e., the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point.

Powers, slip op. at 14.

The ARB's clarification is essentially that the employer's evidence must be **relevant** to the issue presented at the contributory factor stage of the analysis, and that proof of the respondent's statutory defense of proving by clear and convincing evidence that it would have taken the personnel action at issue absent the protected activity is legally distinguishable from the complainant's burden to show contributing factor causation. Specifically, the ARB stated:

> While, as *Fordham* explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof. 29 C.F.R. § 18.401. Thus, the *Fordham*

> majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well the credibility of the complainant's causation evidence." *Fordham*, slip op. at 23.

Powers, slip op. at 22 (footnote omitted).

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include 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. *DeFrancesco I, supra*.

In this case, I find Complainant has shown by a preponderance of evidence the contributing factor element by temporal proximity between the protected activity and the adverse action (June 18, 2013 and July 8,2013). Claimant presented direct and circumstantial evidence showing the inconsistent application of and change in Respondent's policies regarding the holding of formal hearings of run-throughs that were applied only to Palmer, the hostility expressed to Complainant by McDaniel when Complainant informed McDaniel of his June 18, 2013 accident, the inconsistent application of Employer policies in granting waivers to Percy Trunnel, who had 14 switching mistakes or run-throughs but was granted a waiver in each case and allowed to retire, and, most important, the presence of e-mails showing the connection between Complainant's protected activity and his discharge. (Tr. 195-204; RX-18 and 18(a).

Further, the ARB noted that where the protected activity and unfavorable personnel action are "inextricably intertwined," the respondent bears the risk that the influence of legal and illegal motives cannot be separated. *Powers*, slip op. at 23-24. In *DeFrancesco I, supra*, slip op. at 3, the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ Case No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012), the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ Case No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. Thus, in *DeFrancesco*, *Smith*, and *Henderson*, the protected activity and adverse action were "inextricably intertwined" because the basis for the adverse action could not be explained without discussing the protected activity. However in *Hutton v. Union Pacific R.R. Co.*, the respondent fired the complainant solely because he failed to comply with necessary steps to accommodate his return to work, and it consequently was not necessary to discuss that he reported his injury; the reporting of the injury and the adverse action were not inextricably intertwined. ARB No. 11-091, ALJ Case No. 2010-FRS-020 (ARB May 31, 2013).

In this case, Respondent cites the Eighth Circuit's decision in *Kuduk v. BNSF Railway Co.*, 768 F.3d 786, 791 (8th Cir. 2014) for its assertion that a complainant must first prove he experienced intentional retaliation which was "prompted by the employee engaging in protected activity." Respondent argues Complainant did not present neither direct nor circumstantial evidence of its discriminatory intent to terminate him from his position. Rather, Respondent alleges the basis for Complainant's termination was his admitted rule violations in the May 28 incident and other incidents in the past.

I agree with Complainant that Respondent has not met its burden of showing that the influence of legal and illegal motives cannot be separated. Unlike the complainant in *Kuduk,* Complainant here presented evidence that showed he experienced intentional retaliation prompted by his engagement in protected activity. While the complainant in *Kuduk* failed to show Respondent had any actual or constructive knowledge of his protected activity and that his protected activity was a contributing factor in his termination, Complainant in this case presented evidence showing Respondent knew of his protected activity as well as Respondent's acknowledgment that he was the only employee to be refused a waiver for his infraction. Further, Complainant presented direct evidence that he was the only employee to be terminated for such an infraction.

Further, it can be found that the termination and the refusal of waiver are inextricably intertwined with the Complainants' reporting of injuries. Like *DeFrancesco I*, *Smith*, and *Henderson*, discussed *supra*, the Complainant's termination and refusal of waiver occurred after he sustained an injury to his left arm. McDaniel, Noland, and Kraus referenced Complainant's injury in emails leading up to Complainant's termination. Further, the negotiations for a waiver ended after Complainant reported his injury on June 19, 2013. Thus, Complainant's termination and Respondent's refusal to offer (or honor) a waiver cannot be discussed without acknowledging Complainant's report of injury.

Because the foregoing violates the FRSA, Complainant has established a **prima facie** case of whistleblower discrimination. It is next Respondent's burden to prove by clear and convincing evidence that it would have taken the same unfavorable action despite the protected activity.

D. Clear and Convincing Evidence Defense

Respondent next has the burden to establish that it would have taken the same action absent the Complainant's protected activity. A respondent's burden to prove this affirmative defense by clear and convincing evidence is a purposely high burden, as opposed to a complainant's relatively low burden to establish a prima facie case. *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19, slip op. at 7 (ARB Sept. 18, 2014); *Araujo*, 708 F3d at 157-58. Clear and convincing evidence that an employer would have taken the same action against the employee in the absence of protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability. The clear and convincing evidence standard is the intermediate burden of proof, in between a preponderance of the evidence and proof beyond a reasonable doubt. *DeFrancesco I*, *supra*; *Araujo*, *supra* at 157. To meet the burden, Respondent must show that the truth of its factual contentions is highly probable.

Because proof of contributing factor does not require evidence of retaliatory motive, evidence of non-retaliatory motive, such as "self-serving testimony of Company managers," does not rebut a complainant's evidence of contribution. Rather, such evidence is more relevant to a respondent's affirmative defense, i.e., at the clear and convincing stage of the analysis. *Powers*, *supra* at 26-28.

Cain, ARB No. 13-006, is instructive regarding the clear and convincing evidence defense in FRSA cases.[23] In *Cain*, the ARB affirmed the ALJ's findings of protected activity and that the protected activity contributed to both the investigation leading to the suspension and imposition of probation and the charge of failure to file a timely report which occurred during a probationary period and resulted in the Complainant's termination from employment. Regarding the respondent's clear and convincing evidence burden, the ARB again noted that this is a high burden of proof, and that the respondent is required to provide not what "could have" done, but rather what it "would have" done. *Cain*, ARB No. 13-0067, slip op. at 7 (citing *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014)). The ARB stated:

> As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend Cain was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it "highly probable" that BNSF "would have" suspended Cain for 30 days absent the protected activity.

Id.

In regard to the suspension and probation, the ARB disagreed with the ALJ's conclusion the respondent of employees list of employees who had been disciplined for safety violations only established that lesser suspensions or a waiver had been issued for the same or similar conduct. The ARB parsed the list and found that of the nine employees charged with a serious violation and who chose (as had Cain) not to pursue alternate handling, eight had been suspended and subjected to one to three-year probations. Only one employee had been given a waiver. The ARB concluded that employees who chose the same disciplinary path as Cain (declining the waiver), and who were also charged with a serious violation, received the same discipline as

[23] In *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014), the complainant was involved a truck accident and filed an initial injury report. A few weeks later, he filed an amended injury report when he learned that the seat belt had caused more serious damage. Following an investigation of the accident by the Respondent, the Complainant was suspended and placed on probation for a violation of safety rules. Later, the Respondent concluded that the Complainant had violated a reporting rule by failing to report the extent of his injuries in a prompt manner, and notified the Complainant he was dismissed from employment. The ALJ found that the respondent violated the FRSA, and the respondent appealed.

Cain. The ARB thus found that BNSF met its burden of proof regarding the suspension. Yet the ARB ultimately affirmed the ALJ's determination that the FRSA had been violated because BNSF failed to establish by clear and convincing evidence that the decision to terminate Cain's employment, although it occurred during a probationary period, was not related to the protected activity.[24]

The Board revisited its analysis of the clear and convincing evidence standard in *DeFrancesco v. Union Railroad Co.*, ARB No. 13-057, ALJ No. 2009-FRS-9 (Sept. 30, 2015) (hereinafter *DeFrancesco II).* Specifically, the ARB stated:

> As in this case where the FRSA-protected activity involves the filing of an injury report ostensibly resulting from the employee's unsafe conduct, the focus in determining whether the respondent meets the required affirmative defense is on whether the employer has presented evidence that clearly and convincingly establishes that it would have taken the same personnel action against an uninjured employee engaged in identical unsafe conduct.

DeFrancesco II, ARB No. 13-0057, slip op. at 10.

The ARB agreed with the ALJ's conclusion that the respondent failed to meet the clear and convincing evidence burden. *Id*. at 14. Specifically, the ARB held it was not enough for Union Railroad to show that DeFrancesco violated its safety rules, that it had a legitimate motive for imposing the disciplinary action, or that it was imposes "appropriate discipline" against employees for safety violations and unsafe behavior regardless of whether they reported an injury. *Id*. at 13. Rather, Union Railroad was required to demonstrate through factors extrinsic to complainant's protected activity that the discipline to which complainant was subjected was applied consistently, within clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured. *Id*. at 13-14.

Here, Respondent contends its discipline of Complainant was warranted due to his admission of multiple rule violations during the May 2013 incident. Respondent also alleges it has consistently enforced its rules, regardless of if an injury is reported, and does not routinely discipline employees following a report of injury.

In this case, I find Respondent has not established by clear and convincing evidence that it would have terminated Complainant. Despite Respondent's arguments, I am presented with no conclusive evidence that demonstrates a different motivation for Respondent to terminate Complainant in July 2013. The record is devoid of any proof that Complainant would have been discharged without any regard to his subsequent injury report. Rather, McDaniel attempted to

[24] Specifically, BNSF failed to show Cain's "violation" during a probationary period would not have occurred in the absence of the amended injury report of April 8, 2010, and it did not offer an alternative reason that was not connected to the amended report for Cain's dismissal. As there was no allegation that BNSF would have terminated Cain's employment absent his filing of the amended report, the ARB affirmed the ALJ's determination that violated the FRSA's whistleblower provision. *Cain*, ARB No. 13-006 at 9 (footnote omitted).

dissuade Complainant from reporting his injury and later brought disciplinary action against him after his report of injury. Further, Complainant was then refused a waiver for the switch run-through, and his injury was referred to in the basis for disciplinary action.

Also, the argument that Illinois Central consistently enforced its rules by disciplining employees who violated ruled but did not report injuries is equally insufficient. The record shows that Complainant was the only employee not offered a waiver for a switch run-through. In addition, conductor P.T. had numerous violations during switch run-throughs and was given a waiver at least a dozen times and was never termination for these violations. See RX-18A. Further, the fact that Noland and McDaniel testified that Complainant would have been discharged even if an injury had not been reported does not meet the burden of providing clear and convincing evidence. Also, the record is unclear as to who had the authority to terminate Complainant. While Noland testified he had the authority, it appears email evidence shows Klaus actually had the power to make the decision. (Tr. 276; CX-34). Based on the email evidence, it is clear not only that McDaniel, Nolan, and Klaus knew of Complainant's injury, but that the injury was a factor in his termination.

Based on Complainant's **prima facie** case, the retaliatory nature of Respondent's action is still present. Likewise, Respondent failed to adhere to the ARB's holding in *DeFrancesco II* and demonstrate that the discipline imposed on Complainant was applied consistently, within its clearly-established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations but were not injured. *DeFrancesco II*, ARB No. 13-0057, slip op. at 13-14.

Thus, Respondent has failed to establish by clear and convincing evidence that it would have taken the same actions despite Complainant's protected activity.

VI. REMEDY

In cases such as this, where Respondent has unlawfully terminated an employee in violation of the FRSA, the appropriate remedy involves a make-whole remedy that includes reinstatement with the same seniority status the employee would have had but for the discrimination, back pay (wherein the discharged worker is made whole for lost wages due to his/her termination), compensatory damages, including compensation for any special damages sustained as a result of the discrimination, and punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

In accord with the remedy provision of the FRSA, Complainant requests back pay, with interest, compensatory damages for the loss of the sale of his house and emotional distress, and punitive damages.

A. Reinstatement

Respondent reinstated Complainant to his former position on December 17, 2014. (RX-32). Although Complainant stated in his post-trial brief there was no need for this Court to address his reinstatement, Respondent will ensure Complainant is reinstated to his same seniority status without any loss of lawful terms or conditions of his employment. Further, Respondent will also expunge Complainant's employment record of any wrongdoing associated with his suspension, termination, or waiver.

B. Back Pay

49 U.S.C. § 20109(e)(2)(B) permits the recovery of any backpay with interest should a Complainant prevail over an action under the FRSA. In this case, Complainant seeks backpay for a thirteen month period, from December 2013 until December 2014, at a rate of $10,000 per month. Complainant contends he earned roughly $10,000 per month from Illinois Central before his termination. On the other hand, Respondent contends Complainant failed to present sufficient evidence for this Court to calculate backpay and also failed to mitigate his damages during this thirteen month period.

Contrary to Respondent's contentions, I find the evidence shows Complainant experienced a loss of pay. Although Complainant was terminated in July 2013, he is not seeking compensation for lost wages until after Thanksgiving 2013 due to surgery for his plantar fasciitis. (Tr. 146). As such, I find Complainant is not entitled to an award for lost wages from August 2013-November 2013.

Further, I find Complainant is not entitled to an award for lost wages from December 2013-February 2014. Although Complainant alleged he tried to secure full time employment following his termination, Complainant failed to produce any sufficient evidence showing a search for full time employment during this three month period. While Complainant stated he moved to Texas in December 2013 due to the "better economy and more jobs," Complainant failed to produce evidence that he actually sought employment in Texas during this three month period. (Tr. 103). As such, I find Complainant is not entitled to an award for lost wages from December 2013-February 2014.

However, in March 2014, Complainant sought employment and eventually enrolled in real estate school. (Tr. 103). I find Complainant's enrollment in real estate sufficient to show he sought full time employment in March 2014. Thus, Complainant is entitled to lost wages for March 2014.

Similar to the three month period from December 2013-February 2014, Complainant is not entitled to lost wages from April 2014-July 2014 since he did not seek full time employment. Rather, Complainant spent this four month period after real estate school preparing for and completing the real estate licensing exam. Complainant also secured employment as a real estate agent at Keller Williams and received further training from his employer. (Tr. 104-105). I find this four month period was a "leap of faith" and a deviation from seeking full time employment. Thus, although unsuccessful in his real estate venture, Complainant is not entitled to lost wages from April 2014-July 2014.

In August 2014, Complainant began applying for full time employment for the first time outside of the real estate business. (Tr. 151). Complainant continued his search for full time employment in September 2014 and October 2014. (Tr. 107). Complainant was hired as a pre-loader by UPS from October 2014 until December 2014, earning $7,500 total while employed by UPS. (Tr. 107; 101). Complainant left UPS after he was reinstated by Respondent in December 2014. (Tr. 109).

I find Complainant is entitled to backpay during this four month period, since he was either looking for work or underemployed during this period. Further, Respondent is entitled to a $7500 credit for the wages Complainant earned while employed by UPS.

In determining the proper wage, I find that RX-20, Complainant's earning statement, provides the best guidance in calculating Complainant's lost wages. While Complainant claims lost wages of $10,000 per month, Respondent's RX-20 shows Complainant's actual lost wages were $8,619.47 per month, $1,380.53 less than his estimate. Thus, $8,619.47 per month is an appropriate amount in calculating Complainant's lost wages.

Complainant is entitled to six months of wages at $8,619.47 per month or $51,716.82 plus interest. Respondent is afforded a $7,500 reduction due to Complainant's employment with UPS from October 2014-December 2014. Thus, Complainant is owed $44,216.82 plus interest from Respondent. Interest is to be calculated in accord with the rate charged for the underpayment of federal taxes pursuant to 26 U.S.C. § 6621.

C. Compensatory Damages

Complainant also seeks compensatory damages for the loss of money on the sale of his money as well for his emotional distress as a result of his termination. Respondent argues Complainant failed to show his termination caused these damages by a preponderance of the evidence at the formal hearing.

49 U.S.C. § 20109(e) generally allows for the recovery of "all relief necessary to make the employee whole," including "compensation for any special damages sustained as a result of the discrimination." 49 U.S.C. § 20109(e). In light of the plain language of the statute, I will analyze Complainant's claims for compensatory damages for to the loss of money on the sale of his house and emotional distress separately.

1. Loss of Money on Sale of House

Complainant first seeks compensatory damages for the loss of money on the sale of his house. Respondent argues Complainant should not be awarded damages for the loss incurred on the sale of his house, because selling the family home was Complainant's personal decision and not caused by Respondent's wrongful conduct.

In this case, I credit Complainant's testimony regarding the reason why he and his wife sold their house. At the Formal Hearing, Complainant testified he and his wife put their house on the market after he was terminated, because they knew they "weren't going to be able to keep it." (Tr. 97). Complainant also stated he and his moved to Texas after his termination due to the "better economy and more jobs." (Tr. 103).

Complainant bought his house for $139,000 and sold it for $126,000, incurring an additional $2,000 in closing costs. Thus, Complainant lost $15,000 in the sale of his house. As such, I find Complainant is entitled to compensatory damages of $15,000 for the loss of money on the sale of his home.

2. Emotional Distress

Regarding his emotional distress, Complainant alleges $50,000 is a reasonable award to compensate him for his emotional distress. (Compl. Post-Hrg. Br., p. 33). In particular, Complainant contends that amount is reasonable due to the emotional impact of his termination for a minor offense. However, Respondent argues this Court should consider evidence that Complainant received unemployment payments to mitigate Complainant's damages for emotional distress.

Similar to Complainant's testimony regarding the sale of his house, I credit Complainant's testimony regarding the emotional impact of his termination. Specifically, Complainant stated "he was shocked, very upset, just my mind started racing." (Tr. 95). Complainant also stated he felt terrible and thought he was treated unfairly since he was terminated for committing a minor offense. (Tr. 97-98). Further, I credit the testimony of Complainant's wife, who stated Complainant was angry, sad, and depressed as a result of his termination. (Tr. 237). Thus, Complainant is entitled to damages for his emotional distress.

However, I find the amount of $50,000 an unreasonable sum to award for Complainant's emotional distress. Rather, I find $10,000 is appropriate to ensure Complainant is compensated for his emotional distress. Thus, Complainant is entitled to $10,000 for his emotional distress associated with his July 2013 termination.

D. Punitive Damages

Complainant also requests punitive damages of $100,000.00 for Respondent's callous disregard of his rights under FRSA. (Compl. Post-Hrg. Br., p. 35). In this case, I find that an assessment of $100,000.00 is excessive but that $25,000.00 is appropriate to ensure Respondent's future compliance with the FRSA.

VII. ORDER

Accordingly, I find Respondent liable for violating the FRSA as alleged, namely Sections 20109 (a)(1)(C) and (b)(1)(A), and order the following:

1. Respondent will reinstate Complainant to his same seniority status without any loss of lawful terms or conditions of his employment and also expunge from Claimant's personnel record all disciplinary references relating to Complainant's suspension, termination, and waiver.

2. Backpay, or lost wages, for March 2014 and from August 2014 to December 2014 in the amount of $44,216.82 plus interest.

3. Compensatory damages of $15,000 for the loss of money on the sale of his house.

4. Compensatory damages of $10,000 for the emotional distress associated with his July 2013 termination.

5. Punitive damages of $25,000 for Respondent's callous disregard of Complainant's rights under the FRSA and to ensure Respondent's future compliance with the FRSA.

6. Complainant shall have thirty (30) days to submit a fully supported application for attorney fees and litigation expenses with supporting documentation for any pre and post interest payments on awards to Complainant.

SO ORDERED this 19th day of January, 2016, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

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

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

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).