U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 January 2013

Case No.: 2011-FRS-00015

In the Matter of

BRANDY THOMPSON, *widow of*
JEFF A. THOMPSON, *deceased*,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

DECISION AND ORDER

This case arises out of a complaint of discrimination filed by Jeff A. Thompson ("Complainant") against Norfolk Southern Railway Company ("Respondent"), pursuant to the employee protection provisions of Section 20109 of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the "Act"), 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 and as implemented by federal regulations set forth in 29 CFR § 1979.107 and 29 CFR Part 18, Subpart A. The Act prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because of the employee's "lawful, good faith act done, or perceived by the employer to have been done or about to be done… 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." 49 U.S.C. § 20109(a)(4).

On June 11, 2008 Complainant filed a whistleblower complaint with the Occupational Health and Safety Administration ("OSHA") contending that Respondent suspended his employment in retaliation for his notifying the company of a work-related personal injury. OSHA concluded that Complainant engaged in a protected activity and that that activity was a contributing factor to the suspension of his employment. OSHA Final Investigation Report. Respondent appealed the OSHA determination to the Office of Administrative Law Judges ("OALJ"). A hearing was held by the undersigned on September 26 and 27, 2012 in Charleston, South Carolina. At the hearing, Complainant's Exhibits 1-9 and 11-16,[1] and Respondent's

[1] Complainant's Exhibit 13 is admitted without the attached deposition exhibit.

Exhibits 1-21 and 24 were admitted into evidence.[2] (TR 25-26, 29-34, 386) Both parties filed post-hearing briefs.

Stipulations

The parties entered into the following stipulations:

1. Respondent is a "railroad carrier" engaging in interstate commerce within the meaning of 49 U.S.C. § 20102 and § 20109.
2. Complainant is an "employee" within the meaning of 49 U.S.C. § 20109 employed as a conductor/brakeman.
3. Complainant died of natural causes on August 28, 2012 while still employed by Respondent.
4. Complainant was suspended from work on or about March 14, 2008 and timely filed a complaint with OSHA on June 11, 2008 alleging adverse action.
5. On March 18, 2008, pursuant to an investigation, Complainant was charged with providing false and conflicting statements concerning an alleged personal injury on March 13, 2008 and falsification of such injury.
6. A hearing was held on the charges and, in a hearing decision dated May 1, 2008, Complainant was found guilty and assessed with time out of service without pay between March 14, 2008 and May 1, 2008, after which Complainant returned to work.
7. Complainant appealed the decision and was denied on June 16, 2008. A second appeal was denied on July 29, 2008.
8. Complainant filed for an arbitration hearing and, on December 18, 2009, Complainant received a favorable decision awarding his lost wages.
9. Respondent paid Complainant back wages as required by the arbitration decision.
10. Following investigation by OSHA, the regional administrator ruled in favor of Complainant on April 4, 2011.
11. Complainant reported a work-related injury on March 13, 2008.
12. Respondent was aware of the above-referenced report.
13. Complainant suffered an unfavorable personnel action on March 14, 2008.

(TR 8-17)

Issues

1. Whether Complainant engaged in a protected activity.
2. Whether Complainant has shown by a preponderance of the evidence that circumstances were sufficient to raise an inference that the alleged protected activity was a contributing factor in the unfavorable decision.
3. If so, whether Respondent has shown by clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity.

[2] The following abbreviations will be used as citations to the record:
CX – Complainant's Exhibits;
RX – Respondent's Exhibits; and
TR – Transcript of the Hearing.

Testimony Evidence

David Patten[3]

David Patten has been employed by Respondent for approximately six years in the positions of environmental project manager, conductor, transportation officer, and in the railroad police department. (CX 12 at 4-7) Mr. Patten was a deputy sheriff prior to his work with Respondent. (CX 12 at 8) On March 13, 2008, Mr. Patten was working a yard extra board position in Charleston, South Carolina with Complainant and Roberto Mendoza. (CX 12 at 10-12) Mr. Patten met with Complainant and Mr. Mendoza prior to beginning work and did not notice any physical, mental, or emotional abnormalities at that time. (CX 12 at 13)

Mr. Patten was working on the west end of the yard when Complainant announced on the radio that he suspected a leak. (CX 12 at 14) Complainant provided Andy Thompson with the tank car number to determine what it carried and Mr. Patten and Mr. Mendoza moved to an open track so they could meet Complainant to discuss the problem. (CX 12 at 16) Although Mr. Patten could not remember if Complainant said anything about his physical condition at that time, Mr. Patten recalled that Complainant's breathing was heavy. (CX 12 at 16) After reviewing his handwritten deposition notes, Mr. Patten stated that Complainant indicated that a tank car was leaking because something was making his eyes burn and his throat hurt. (CX 12 at 17-18) Mr. Patten instructed Mr. Mendoza to stop the engine and they each walked toward Complainant. (CX 12 at 18)

When Mr. Patten met with Complainant, he noticed that Complainant's face was flushed, his eyes were watering, and he was breathing heavily. (CX 12 at 19) Mr. Patten observed Complainant slouching with his hands on his knees and tears running down his face. (CX 12 at 20) Mr. Patten and Complainant looked around to ensure they were upwind from the car and approached the car to determine if there was an active leak. (CX 12 at 21) Mr. Patten testified that he was upwind of the car during the entire process, based at least partially on the absence of any chemical smell. (CX 12 at 21) Mr. Patten and Complainant did not find an active leak coming from the car. (CX 12 at 21) Mr. Patten stated that it would not be unusual for a vapor leak to not be visible on inspection. (CX 12 at 22)

Mr. Patten observed residue on the side of the car from his position on the railroad south side of the car. (CX 12 at 22-23) Mr. Patten and Complainant were about 100 – 120 feet from the car. (CX 12 at 23) Mr. Patten believed that the railroad south position was upwind of the tank car for the entire process. (CX 12 at 24) Mr. Patten described the residue as being shiny and tar-like, about four or five feet wide and covering approximately three-quarters of the height of the car. (CX 12 at 24, 27) Mr. Patten believed the substance had run down the side of the car, based on the residue pattern. (CX 12 at 25) Mr. Patten was not able to see the other side of the car while remaining upwind. (CX 12 at 26)

[3] Mr. Patten's written statement was also entered into the record as RX 14 and CX 6. Because the statement closely resembles the testimony, it will not be separately discussed

Mr. Patten and Complainant then separated and met less than an hour later at the yard office. (CX 12 at 27-29) Complainant told Mr. Patten that he could continue working and so Mr. Patten or Randy instructed Complainant to bleed track seven. (CX 12 at 38-39) At the yard office, Complainant stated that his head was hurting and his chest was burning and he asked for medical attention. (CX 12 at 29) Although Mr. Patten no longer thought Complainant was flushed, he still observed that Complainant appeared fatigued and had red eyes, a noticeable deviation from Complainant's usual demeanor. (CX 12 at 30) Mr. Patten and Mr. Mendoza then returned to switching operations on the west end of the yard until the fire department told them to stop. (CX 12 at 32)

Mr. Patten testified that an employee who encounters or suspects a tank car is leaking must report it to his immediate supervisor. (CX 12 at 32) Mr. Patten stated that he believes Complainant properly reported the condition of the car subject to Respondent's procedures. (CX 12 at 33-34)

Ray Baldwin

Ray Baldwin retired from employment with Respondent where he worked in several positions for approximately thirty-five years and retired as a locomotive engineer. (TR 40) Mr. Baldwin served as the chairman of the BLET 321 local for thirteen years. (TR 41) Although Mr. Baldwin was not a witness to the reported injury, he was involved in the proceeding in his capacity as chairman of Complainant's union. (TR 43-44) Complainant informed Mr. Baldwin that he was not being allowed to return to work, so Mr. Baldwin contacted Mr. Whitehead, Complainant's supervisor, and was told that Complainant was going to be charged with making a false report. (TR 48-49) Mr. Baldwin testified that he considered Mr. Whitehead and Mr. Giles to be truthful and fair men. (TR 57-59)

Mr. Baldwin assisted Complainant during the investigation pursuant to the union contract. (TR 51-52) Mr. Baldwin testified that a Norfolk Southern employee must report any suspected injuries, accidents, and unsafe conditions. (TR 53) Norfolk Southern must then report any injury leading to medical treatment or lost time from work to the federal government under the FRS. (TR 55-56) Mr. Baldwin did not know whether Respondent reported the injury under the FRS or if the adverse paperwork had been removed from Complainant's file. (TR 56)

Brandy Thompson

Brandy Thompson, Complainant's wife, testified that Complainant was a volunteer fireman in addition to his job with Respondent. (TR 62) Mrs. Thompson testified that Complainant called her from the hospital after his injury and she met him there. (TR 64) Mrs. Thompson remained with Complainant until he was discharged at about midnight. (TR 65) She testified that Complainant became depressed when he was not allowed to return to work. (TR 67) Mrs. Thompson stated that she and Complainant did not have enough money without Complainant's salary to pay all their expenses and so had to accept money from both their parents. (TR 68-69) She testified that Complainant was most upset that his character was being questioned by allegations of false reporting. (TR 69) Mrs. Thompson stated that, to her knowledge, Complainant had no other problems at work either before or after the suspension.

(TR 73) Mrs. Thompson testified that Complainant did not feel that the award of back pay compensated him for the process of defending himself against the charges. (TR 74-75)

Will DeShazor

In March of 2008, Will DeShazor was the trainmaster in Charleston, South Carolina. (TR 81) Mr. DeShazor referred to a timeline he created in the weeks following Respondent's hearing. (TR 85; RX 18) On March 13, 2008, at 5:06 p.m. Mr. DeShazor received a phone call from Andy Thompson, the yardmaster on duty, informing him that Complainant had found a leaky tank car, but that Complainant did not need medical attention. (TR 86) After Mr. DeShazor determined that the tank car was carrying creosol, he told Andy Thompson to make sure no one came within 150 feet of the car and that he would address it further when he arrived at the yard. (TR 87)

Mr. DeShazor called Complainant and was told that Complainant had been bleeding tracks when he came across a noxious odor and saw spray on the car. (TR 87-88) Complainant told Mr. Deshazor that he was experiencing eye and throat irritation, but was fine. (TR 88) Mr. DeShazor then contacted the shipper of the creosol and was told that although the chemical was harmful to the skin, he did not believe that open air exposure would be harmful. (TR 90-91) Mr. DeShazor then received another call from Andy Thompson informing him that Complainant wanted to go to the hospital for medical treatment. (TR 94)

Mr. DeShazor arrived at the yard shortly thereafter and transported Complainant to the hospital. (TR 95) Mr. DeShazor did not recall Complainant looking distressed or appearing to have eye or throat irritation, although he did state that he felt burning in his chest and was dizzy. (TR 95-96) Mr. DeShazor testified that he began to think Complainant was not being truthful after the tests at the hospital were normal and Dr. Nony from the Center for Toxicology stated that creosol was primarily a skin irritant. (TR 97-99) Mr. DeShazor spoke with terminal superintendent David Stinson, a HAZMAT sentinel, to coordinate handling of the leaky car. (TR 100-101)

After Mr. DeShazor and Complainant arrived at the hospital, Mr. DeShazor was contacted by Mark Dudle from Respondent's safety and environmental department to get information about the incident and to notify him that ChemTrec would be contacting him. (TR 103-104) ChemTrec in turn notified the fire department. (TR 105) Dr. Nony informed Mr. DeShazor that he would fax information on the chemical to the hospital. (TR 110) Mr. DeShazor was told that Complainant had undergone a carboxyhemoglobin test to determine if he had high carbon dioxide levels or other pollutants in his blood and that the test had come back normal. (TR 11-113) Mr. DeShazor was also told that Complainant's chest x-ray and EKG were normal and that he was released with instructions to rest and avoid respiratory irritants. (TR 114)

After Complainant was discharged from the hospital at about midnight, Mr. DeShazor drove Complainant to the yard to retrieve his car. (TR 115) Complainant informed Mr. DeShazor that he could return to work and Mr. DeShazor stated that he would take care of marking him up. (TR 126) Mr. DeShazor then met with Mr. Stinson and walked down to the rail car. (TR 116) Mr. DeShazor observed some residue on the side of the car, which Mr. Stinson touched and

found to be dry. (TR 117-120) Mr. DeShazor testified that he did not observe any problems with the car, but that the responders may have corrected any issues. (TR 120-122)

On March 14, 2008, Complainant told Mr. DeShazor that his head still hurt and his throat still felt acidic. (TR 126) Mr. DeShazor contacted crew call and told them to hold Complainant off work pending an investigation. (TR 127) Mr. DeShazor took into account the report that the car had not been leaking and that the medical tests were normal when deciding to begin an investigation. (TR 128) He also considered the witness statements that Complainant had been flushed and out of breath with a running nose and red eyes into account, but felt that those conditions could be due to simply working outside. (TR 129) Mr. DeShazor testified that Complainant had a history of taking excessive sick time. (TR 130) Mr. DeShazor stated that Complainant was in the midst of a disciplinary process for his attendance problems and felt that could be a motivating factor to falsify an injury. (TR 130-131) Mr. DeShazor admitted that Complainant's attendance problems may have been related to the death of his brother in a fire approximately ten months earlier. (TR 135) Mr. DeShazor did not know of any other work issues Complainant may have had that would have led him to question Complainant's integrity. (TR 136-137)

Mr. DeShazor testified that he had completed his investigation into the incident in a matter of days, prior to sending Complainant a letter of charge. (TR 139) Mr. DeShazor admitted that Complainant never specifically said the car had been leaking, but that he had inhaled something. (TR 141) Mr. DeShazor did not remember whether he had spoken with Mr. Patten about the incident. (TR 141) Mr. DeShazor had personally determined that Complainant should be charged with falsifying a report the night of the incident or the following morning. (TR 142-143)

Mr. DeShazor testified that his understanding was that the wind was blowing from north to south at the time of the incident, blowing away from Complainant towards the rail cars. (TR 147) Mr. DeShazor stated that if Mr. Patten said the wind was blowing from south to north he would not agree. (TR 148) Mr. DeShazor stated that after meeting up with Patten, Complainant walked downwind into the path of the noxious odor. (TR 148) Mr. DeShazor testified that Complainant said he walked that way because it was upwind of the odor. (TR 149) Based on Mr. DeShazor's understanding of the direction of the wind, Mr. Patten and Complainant would have been directly downwind from the odor while inspecting the car. (TR 149) Mr. DeShazor stated that if Mr. Patten was correct about the direction of the wind, he would not have smelled an odor during the inspection. (TR 150-151) When the fire department arrived at the scene, they set up a command post to the northeast of the car so they would be upwind. (TR 181)

Mr. DeShazor was not aware that Dr. McAdams' clinical impression upon discharge was creosol exposure inhalation or that tachycardia was documented at the hospital. (TR 154-155) Mr. DeShazor stated that the car had a HAZMAT placard indicating a danger of toxic inhalation. (TR 161) Mr. DeShazor testified that a Norfolk Southern employer must report any suspected leak and that there are no consequences for being wrong. (TR164-165) Mr. DeShazor found the photographs of the substance on the side of the car and the missing vent cover to be sufficient to report the incident. (TR 165) He further stated that if Complainant experienced a personal injury,

he properly reported that injury. (TR 166) To Mr. DeShazor's knowledge, the incident had been reported to the FRA, but had not been supplemented as a false injury. (TR 168)

The Norfolk Southern Emergency Response Guide states that inhalation, ingestion, or skin contact with creosol can cause severe injury or death. (TR 170) Mr. DeShazor and Mr. Stinson made the decision that Complainant should be investigated in the early morning hours of March 14, 2008 and recommended such action to Mr. Whitehead. (TR 172) Mr. DeShazor stated that his understanding was that a hearing must be scheduled within seven days of an incident or there cannot be an investigation, but that the decision must be made approximately ten to fourteen days after the hearing. (TR 179, 186) Mr. DeShazor believes that Complainant was dishonest about being exposed to creosol and his symptoms. (TR 174-175) Mr. DeShazor told Mr. Whitehead that he believed Complainant was lying the night of the incident. (TR 177)

Mr. DeShazor stated that it was the policy of Norfolk Southern to fully comply with the FRA and not discourage employees from reporting accidents or injuries. (TR 183) Mr. DeShazor testified that if he had not believed Complainant had falsified the injury he would not have held him out of work. (TR 185)

Paul Nony, Ph. D.

Dr. Nony received his Ph.D. in interdisciplinary toxicology from the University of Arkansas for Medical Sciences and is employed at the Center for Toxicology and Environmental Health ("CTEH"). (TR 188-189) Dr. Nony spoke with Mr. DeShazor on March 13, 2008 and related an experience wherein he had assisted with cleaning up a significant creosol spill but no workers had required respiratory protection. (TR 193-194) Dr. Nony spoke with Complainant's treating physician to inform him of the nature of creosol and expected effects of creosol exposure. (TR 195) Dr. Nony testified that creosol smells like Band-Aids. (TR 196-197) Dr. Nony was not aware of any incidents where creosol inhalation led to serious health problems. (TR 199)

Dr. Nony testified that CTEH had a contract with Norfolk Southern to provide spill cleanup and litigation support. (TR 202) Dr. Nony never spoke with Complainant about his exposure or his symptoms. (TR 203) Dr. Nony stated that the wind was often the largest factor in the transportation of an airborne chemical and would affect how much exposure an individual suffered. (TR 205) Dr. Nony was not sure how much creosol escaped during the March 13, 2008 incident. (TR 206) Dr. Nony did not recall if he had seen the photographs taken of the car. (TR 208) Dr. Nony testified that the heat of the sun on the side of the car could have heated the creosol to the point that it could be inhaled. (TR 210) Dr. Nony stated that dried creosol could remain sticky or tacky. (TR 211)

Dr. Nony stated that creosol inhalation could cause heavy breathing, watery eyes, flushed skin, headache, runny nose, and potentially burning in the chest. (TR 212-213) Dr. Nony testified that different individuals would have differing levels of susceptibility to creosol exposure. (TR 214) Dr. Nony stated that if the creosol had already dried the heat would not have any effect on its volatility. (TR 215) He testified that creosol dries slowly and so would not be completely dry a few hours after a spill. (TR 216)

Bill Hyatt

Bill Hyatt is employed with HEPACO, an environmental cleanup company. (TR 218) Mr. Hyatt was called to the yard for the March 13, 2008 creosol incident. (TR 219-220) Mr. Hyatt arrived at approximately 6:00 p.m. (TR 220) When Mr. Hyatt arrived the fire department was doing air sampling and preparing for an entry by wearing fully encapsulated suits. (TR 222) The fire department turned control of the scene over to Mr. Hyatt at approximately 11:00 p.m. (TR 223) Neither the fire department's nor HEPACO's air sampling found any readings. (TR 223-224) Mr. Hyatt found the manway to be secured and the vacuum release valve to be functioning properly. (TR 224)

Mr. Hyatt testified that he took pictures of what appeared to be dried product from loading on the side of the car. (TR 226) Mr. Hyatt reported to Respondent that he did not find any problems with the car. (TR 228) HEPACO team members were unable to wipe off the dried product with an absorbent pad. (TR 230) The command post where Mr. Hyatt was located and where the majority of the air sampling was taking place was about a half a mile away from the car. (TR 233-235) Mr. Hyatt could not speculate as to when the product spilled onto the side of the car or how much was spilled. (TR 241)

David Stinson

In March of 2008, David Stinson was the terminal superintendent for Columbia, South Carolina. (TR 256) Mr. Stinson is a HAZMAT sentinel who received advanced training in responding to hazardous material spills in railcars. (TR 258-259) Mr. Stinson testified that, according to his training, a command center would be set up upwind from any chemical spill. (TR 259-260) Mr. Stinson received a telephone call on March 13, 2008 informing him of a possible tank car spill and he drove to the Charleston yard, arriving at about 8:00 p.m. (TR 261-262) The command center that the fire department set up was approximately 2,000 feet northeast of the car. (TR 272) Mr. Stinson remained at the command center until he was given the all clear from the incident commander at about 10:30 or 11:00 p.m. (TR 274)

After control of the rail car was turned back over to Respondent, Mr. Stinson approached the car with HEPACO representatives. (TR 275) Mr. Stinson touched the residue on the car and found it to be completely dry. (TR 276) A weather report generated from an airport approximately four miles away from the yard noted that the temperature fell from about 68 degrees to about 64 degrees between 8:00 p.m. and midnight with southerly winds, which Mr. Stinston testified was consistent with his observations. (TR 281-283) Mr. Stinson testified that he believed the wind was blowing towards the south because the incident command center had been set up northeast of the suspected leak. (TR 284)

Mr. Stinson took written statements from David Patten, Roberto Medoza, and Andy Thompson after his inspection of the car with HEPACO. (TR 286-287) Mr. Stinson does not believe he spoke with Complainant that night. (TR 287) Mr. Stinson testified that he reviewed Complainant's written statement and spoke with Mr. DeShazor that evening to review what had happened at both the hospital and the yard. (TR 288) Mr. DeShazor told Mr. Stinson that the tests performed at the hospital showed no signs of exposure and that Complainant wanted to

mark back up. (TR 290) Mr. Stinson informed Mr. DeShazor that neither the fire department nor HEPACO had found any leak. (TR 291) Mr. Stinson testified that it is rare to issue a charging letter to an employee who has reported an injury. (TR 292) Mr. Stinson spoke with Mr. Whitehead and received his authorization to issue a charging letter to Complainant. (TR 294-295)

When Mr. Stinson received the letter and decision finding that Complainant had falsified an injury he agreed with the decision. (TR 300) Mr. Stinson testified that he did not know Complainant very well, nor did he know of any reason why Complainant would file a false report. (TR 303-304) Mr. Stinson did not know of any medical records that may have been available during the administrative hearing or to what extent Mr. DeShazor spoke with the doctor at the hospital. (TR 305) Mr. Stinson's understanding was that Mr. DeShazor fully understood Complainant's treatment and diagnosis. (TR 306) Mr. Stinson testified that he believed Mr. Patten was incorrect about the direction of the wind, even though he admits that Mr. Patten and Complainant, as witnesses on the scene, were in the best position to determine the direction of the wind. (TR 312-313) Mr. Stinson admitted that Complainant did not characterize the incident as a leak or a spill in his report. (TR 314)

Mr. Stinson stated that employees working in the yard must report anything they perceive or suspect to be a possible HAZMAT leak of any kind. (TR 316) Mr. Stinson understood that the vent cap of the tank car was off. (TR 317) Mr. Stinson testified that an employee is obligated to report a tank car that appears to have spilled product or a bad smell coming from it. (TR 320-321) Mr. Stinson stated that an employee is obligated to report that he believes he is injured or has suffered an occupational exposure prior to leaving work. (TR 322) Mr. Stinson was informed that Complainant was described as having red and watery eyes, heavy breathing, and that he was slouched over and appeared fatigued. (TR 323-324) Mr. Stinson believed that these descriptions had been truthfully given. (TR 324) Mr. DeShazor told Mr. Stinson that he did not believe Complainant was being truthful late in the evening on March 13 or early in the morning on March 14, 2008 and Mr. Stinson agreed. (TR 326) Mr. Stinson considered the fact finding and investigation over after speaking to Mr. DeShazor that day. (TR 327) Mr. Stinson did not make any effort to speak with Complainant short of holding a formal hearing. (TR 328) Mr. Whitehead informed Mr. Stinson that he did not believe Complainant was truthful prior to the hearing. (TR 330)

Mr. Stinson testified that it would not be appropriate for the hearing officer, Mr. Giles, to speak with management about the facts of the case prior to the hearing because he is charged with conducting a fair and impartial hearing. (TR 332-323) Mr. Stinson did not know whether the negative information had been expunged from Complainant's file or who would be responsible for doing so. (TR 337-338) Mr. DeShazor did not tell Mr. Stinson that the treating doctor released Complainant from the hospital with a diagnosis of creosol exposure-inhalation. (TR 344)

Michael Giles

Mr. Giles is the assistant division superintendent in Greenville, South Carolina, a position he has held since prior to March of 2008. (TR 346) Mr. Giles had no involvement in the events of March 13th and 14th because he was off work that weekend. (TR 346-347) Mr. Giles has been a hearing officer about a hundred times during his career and is a HAZMAT sentinel. (TR 347) Mr. Giles was asked by Mr. Whitehead to be the hearing officer for Complainant's investigation. (TR 350) Mr. Giles testified that, as a hearing officer, he always speaks to the charging officer prior to the hearing to become familiar with the case and determine how the charging officer came to his conclusion. (TR 351)

Mr. Giles stated than a hearing will typically begin with an opening statement by the charging officer, who will then be questioned by the hearing officer and the employee's representative. (TR 352-353) This is followed by questioning of other company witnesses and typically ends with the testimony of the charged employee. (TR 353) Mr. Giles spoke with Mr. Stinson prior to the hearing to determine why he chose to bring charges. (TR 354) Mr. Giles testified that he did not speak about the case in detail with Mr. Whitehead prior to the hearing. (TR 355) Mr. Giles stated that it would have been improper for Mr. Baldwin, Complainant's union representative, to approach him to discuss the case and he would not have allowed that to happen. (TR 357) Mr. Giles testified that none of Respondent's officers attempted to persuade him prior to the hearing. (TR 357)

Mr. Giles did not recall Complainant or Mr. Baldwin making any request for documents prior to the hearing. (TR 359) Mr. Giles testified that Mr. DeShazor attempted to enter Complainant's medical reports, but Mr. Baldwin objected and they were not introduced due to privacy concerns over Complainant's social security number being included in the record. (TR 360) Mr. Patten testified at the hearing that he and Complainant remained upwind from the car when they walked over to inspect it after Complainant smelled an odor coming from it, but Mr. Giles thought Mr. Patten was incorrect. (TR 362, 400) Mr. Giles gave greater weight to the later report from the fire department as to the direction of the wind. (TR 406)

Mr. Giles determined Complainant was guilty of falsifying a report following the hearing and initially recommended dismissal. (TR 364) Mr. Giles informed Mr. Whitehead of his belief that dismissal would be appropriate because Mr. Whitehead would be responsible for handling any appeal of the decision brought by the union. (TR 365) Although Mr. Whitehead initially agreed to the dismissal, Drew Shepard suggested reducing the penalty to time served, although Mr. Giles could not remember his reasoning. (TR 365-367, 409) Mr. Giles stated that Mr. Whitehead must have agreed to reduce the penalty to time served, although he stated that he was the ultimate decision maker. (TR 410) Mr. Giles based his decision that Complainant was guilty of falsifying a report on the lack of any other person smelling an odor, the absence of any leak, the absence of positive results from the air monitoring, that creosol is primarily a skin irritant, and that the hospital tests were normal. (TR 367-371)

Mr. Giles testified that he did not know what symptoms would be caused by exposure to creosol. (TR 372-373) Mr. Giles attributed the changes in Complainant's appearance to his performing manual labor and being a large person, although he did not know how much work

Complainant actually performed prior to reporting his alleged injury. (TR 373, 380) Mr. Giles thought that it was possible that seeing the residue on the side of the car may have scared Complainant and caused him to think he smelled an odor. (TR 374) Mr. Giles found it unusual that Complainant took over the questioning of several witnesses during the hearing and had significant HAZMAT knowledge. (TR 375) Mr. Giles thought it was possible that Complainant was fabricating an injury so that he could bring a potentially profitable FELA lawsuit. (TR 377)

Mr. Giles testified that as the hearing officer he was responsible for gathering evidence as well as ruling on it. (TR 382) Mr. Giles wanted to ensure that the HEPACO report was in evidence prior to the hearing. (TR 383) Mr. Giles testified that he wanted to ensure that Complainant had access to the evidence and that he was able to admit his own evidence. (TR 383) Mr. Baldwin requested certain evidence, but was denied access to it until the hearing. (TR 386-387; CX 15; CX 16) Mr. Giles is not aware of a burden of proof that must be met, but bases his decision upon what a logical man would conclude under the circumstances. (TR 387-388) Although Complainant testified that he was discharged with symptoms consistent with creosol exposure, Mr. Giles did not find that testimony credible because of the absence of a leak. (TR 391)

Mr. Giles was informed of the sequence of events, timeline, and issues prior to the hearing by Mr. Stinson. (TR 393) Mr. Giles stated that is was better to come into the hearing with some knowledge of the case rather than to have the case presented to him for the first time at the hearing. (TR 395) Mr. Giles stated that it was his practice to get information prior to the hearing from other Norfolk Southern officials, but not the charged employee. (TR 396) Mr. Giles testified that it would be improper for Mr. Whitehead to have formed an opinion about whether an allegedly injured worker was lying prior to a hearing, although it would not be improper for Mr. Whitehead to be informed of the facts and hear the opinions of other officers before the hearing. (TR 398-399)

Andrew Shepard

Andrew Shepard works in labor relations for Respondent. (TR 421) Mr. Shepard was the management representative on the public law board that considered Complainant's appeal of his suspension. (TR 422) The appeal of the decision is on the underlying record, rather than *de novo*. (TR 423) Mr. Shepard was surprised by the arbitrator's decision to sustain Complainant's claim completely. (TR 424) Mr. Shepard instructed the division superintendent and payroll of the outcome of the appeal and the necessary steps to enforce the award. (TR 425) The back pay award was determined based on the work performed by others in Complainant's position to determine how much Complainant would have earned had he been working. (TR 426)

Mr. Shepard was not involved in the decision to charge Complainant, but did speak with Mr. Giles about what discipline should be assessed. (TR 427) Mr. Shepard read the transcript of the hearing and found that, while there was evidence that Complainant was not forthright, a dismissal requires to a higher burden of proof on appeal. (TR 430-431) Mr. Shepard testified that Norfolk Southern would never provide copies of documentary evidence to a charged employee prior to the hearing. (TR 434) Mr. Shepard considered Complainant's statements that the wind blew in his face and his complaints of physical symptoms to be untrue and that the medical

records demonstrated Complainant did not have any exposure. (TR 433) Mr. Shepard based his conclusion that the wind blew from the south on the weather reports and the location of the command center. (TR 439)

Mr. Shepard testified that a hearing officer would have the discretion to either sustain or overrule an objection to medical evidence being offered into a hearing record or to redact parts of the record that may have been a violation of privacy. (TR 442, 464) Mr. Shepard thought Complainant may have been falsifying an injury in order to file a FELA claim. (TR 443) Mr. Shepard was not sure where the monitor generating the wind report was located or how often it recorded a reading. (TR 451) Mr. Shepard was not aware of the distance between the command center and the tank car. (TR 456) Mr. Shepard was not aware of the symptoms caused by exposure to creosol. (TR 457) Mr. Shepard testified that a diagnosis of creosol exposure/inhalation would have been an important fact in the hearing, but he had not been aware that such a diagnosis had been made. (TR 459) Mr. Shepard testified that it would be improper for a hearing officer to know the opinions of people involved in an investigation prior to the hearing. (TR 465)

Mr. Shepard testified that Respondent had changed its policy and procedure in assessing a potential injury. (TR 467) Currently, labor relations would be consulted prior to issuing a charging letter and would be present at the hearing. (TR 467) Transcripts would then be provided to labor relations and the law department, each of which would provide recommendations for further action. (TR 468)

Patrick Whitehead

Patrick Whitehead was the division superintendent of the Piedmont Division of Norfolk Southern in March of 2008. (TR 470) Mr. Whitehead testified that all references to the March 2008 discipline have been removed from Complainant's file, although he did not know when it had been deleted. (TR 471, 523) Mr. Whitehead stated that Complainant's alleged injury had been reported to the FRA, but did not know if it had ever been declared falsified to the FRA. (TR 474) Mr. Whitehead is a HAZMAT sentinel. (TR 476) Mr. Whitehead provides training to junior officers on proper handling of injury reporting under the FRA. (TR 478) Mr. Whitehead has also disciplined officers for failing to comply with the injury reporting policy. (TR 479)

Mr. Whitehead was in contact with David Stinson and Will DeShazor throughout the events of March 13, 2008. (TR 480) Mr. Whitehead began to doubt Complainant's honesty when he learned that Complainant was upwind of the tank car, air monitoring had not detected any problems, and the tank car was wrench-tight. (TR 482) Mr. Whitehead did not consider the dried product on the side of the car to be a risk for fumes because it was not wet and the car was secured. (TR 484) Mr. Whitehead estimated that the car had been in transit between five and ten days by the time it reached the Charleston yard. (TR 485)

Mr. Whitehead reviewed and signed an injury report for his immediate supervisor describing the events of March 13, 2008. (TR 488-490) Mr. Whitehead confirmed Mr. Stinson's testimony regarding the charging letter and stated that Mr. Stinson would not have been able to issue a charging letter without Mr. Whitehead's authorization. (TR 491) Mr. Whitehead

understood that the command center location had been chosen because it was upwind of the car and was a large enough place to assemble the necessary vehicles. (TR 497) Mr. Whitehead believed the wind was blowing towards the south on March 13, 2008 and did not remember any suggestion during the hearing that the wind had been blowing from the south. (TR 499) Mr. Whitehead remembered that Ray Baldwin argued that the wind had been measured at the airport rather than the rail yard. (TR 500)

Mr. Whitehead testified that he did not tell Mr. Baldwin that he did not believe Complainant was truthful prior to the hearing. (TR 502) Mr. Whitehead stated that he informed Mr. Baldwin that Complainant's account of the incident did not add up to him. (TR 503) Mr. Whitehead testified that he would not have authorized a charging letter for Complainant if he had not already formed the opinion that Complainant was likely lying. (TR 503-504) Mr. Whitehead stated that he would not have discussed the merits of the case with Mr. Giles, but he did brief him on what had happened during his absence prior to appointing him as hearing officer. (TR 504, 527) Mr. Whitehead testified that he could have appointed another officer from a different division to be the hearing officer, but he believed Mr. Giles would be impartial. (TR 527-528) Mr. Whitehead did not agree that a hearing officer without knowledge of the case would be better than one who had already been briefed on the facts. (TR 528) Mr. Whitehead did not recall having a conversation with Mr. Shepard after the hearing. (TR 505) Mr. Whitehead recalled speaking with Mr. Giles about a recommendation of dismissal and eventually complying with the labor department's advice to reduce the discipline to time served. (TR 506)

Mr. Whitehead testified that an employee's career service history would be considered when determining appropriate discipline. (TR 511) In Complainant's case, Mr. Whitehead was aware of a rule violation for releasing a hand brake from the ground[4] and attendance issues. (TR 511-512) Mr. Whitehead considered the possibility that Complainant made an honest mistake about the tank car but rejected the idea based on the inconsistency of Complainant's symptoms with his alleged exposure, among other things. (TR 514) When Mr. Whitehead learned that Complainant was not fit for work the next day, he suspected that Complainant intended to file a false FRA report. (TR 516)

Mr. Whitehead stated that the Harriman award for fewest injuries had been awarded to Respondent several times but had been discontinued. (TR 517-518) Mr. Whitehead testified that Respondent had undergone significant cultural changes to its approach to safety. (TR 518) Respondent became aware that employees believed the Harriman award was Respondent's chief concern and pursued it in a militaristic and disciplinary way. (TR 519-520) Respondent then cancelled the Harriman award and has focused on providing training to positively reinforce safe behaviors. (TR 520-521)

Mr. Whitehead testified that if Complainant had simply reported a leaking tank car that was later found to be sound, he would only have been charged if there was reason to believe that there had been an attempt to sabotage the operation. (TR 535) Mr. Whitehead testified that he had no reason to believe that Complainant had been attempting to sabotage or cause panic when

[4] On cross examination, Mr. Whitehead admitted that the hand brake rule violation occurred after the disciplinary hearing in question and so could not have formed a basis for determining the appropriate punishment. (TR 532) Mr. Whitehead had been referring to more minor hand brake incident that had occurred prior to the hearing. (TR 533)

he reported the suspected leak. (TR 536) Mr. Whitehead stated that Complainant was charged in this case due to the suspected invalidity of the injury claim (TR 537) Mr. Whitehead stated that if the same events had happened today, even including the medical reports indicating creosol exposure, Mr. Whitehead would have suspected falsification and the case would have been referred to the legal department to determine whether to bring charges. (TR 541-542) Mr. Whitehead testified that under the new culture, an employee who makes a good faith mistake in reporting a suspected leak would be rewarded and would not be punished if he injured himself in the process. (TR 549)

Andy Thompson[5]

Andy Thompson was a yardmaster for Respondent in March of 2008. (CX 13 at 5) On March 13, 2008, Mr. Thompson received a phone call from Complainant that he had inhaled some type of gas. (CX 13 at 8) Complainant had been working on the east end of the yard, approximately 2,000 feet from Mr. Thompson's office. (CX 13 at 8) Mr. Thompson offered to come get Complainant from the yard, but Complainant said that he could make it back to Mr. Thompson's office himself. (CX 13 at 9) Mr. Thompson noticed that Complainant's eyes were puffy and he was sniffling. (CX 12 at 9) Complainant mentioned that he had a headache and burning in his chest. (CX 13 at 9) Complainant refused medical care twice, but then asked for medical help when his condition did not improve. (CX 13 at 9-10)

Mr. Thompson then contacted Mr. DeShazor, who stated that he would take Complainant to the hospital. (CX 13 at 10) Mr. Thompson began the notification process to handle a possible chemical spill. (CX 13 at 11) Mr. Thompson testified that Complainant appeared normal and healthy before he began work that day and that his eyes were red and slightly puffy after he reported the possible leak. (CX 13 at 13-14) Mr. Thompson testified that Complainant followed procedures by reporting the incident and his symptoms. (CX 13 at 17)

Douglas McAdams, M.D.

Dr. McAdams was an emergency physician at Roper Hospital. (CX 14 at 5) Complainant was admitted to Roper Hospital on March 13, 2008 with complaints of burning in his throat and chest, discomfort, headache, nausea, and a cough. (CX 14 at 8-9) Exposure to creosol was noted to be present with moderate severity. (CX 14 at 10) Dr. McAdams examined Complainant and found that Complainant's throat was irritated and he was tachycardic. (CX 14 at 10) Dr. McAdams concurred with the discharge diagnosis of creosol exposure inhalation. (CX 14 at 12)

Dr. McAdams testified that he did not recall treating creosol exposure prior to Complainant. (CX 14 at 14) Dr. McAdams stated that he would have had access to any documents relating to creosol faxed to the attention of Dr. Moe, although the documents would not usually be put into a patient's medical records. (CX 14 at 14-15) Dr. McAdams stated that he treated patients for workplace or industrial chemical exposures often during his practice. (CX 14 at 17) Dr. McAdams opined that a person of Complainant's size would be in fairly poor physical condition and may be prone to a tachycardic response to stress. (CX 14 at 20)

[5] Mr. Thomspson's written statement was also entered into the record as RX 13 and CX 8. Because the statement closely resembles the testimony, it will not be separately discussed.

Dr. McAdams stated that creosol exposure would cause irritation of the mucous membranes and that the intensity and duration of the exposure would correlate with the degree of symptoms experienced. (CX 14 at 21)

Documentary Evidence

Personal Injury Report Dated March 13, 2008

Complainant completed a personal injury report on March 13, 2008. Complainant stated that he was bleeding track two and was about thirty feet from car VTLX 71132 when he smelled a noxious odor, his eyes began to water, and he began coughing. Complainant saw a sticky substance on the tank car and noticed that the cap was not on the vent pipe. Complainant walked away and called the yardmaster to inform him of the car and walked back to the yard office to tell Andy Thompson that his chest was tight and he felt nauseous. Trainmaster DeShazor then transported him to the emergency room. (CX 1; RX 11)

Roper Hospital Records

Complainant presented at Roper Hospital on March 13, 2008 with chemical inhalation. Complainant noted burning in his throat and chest, discomfort, headache and nausea that had begun upon exposure to creosol and were presently continuing with moderate severity. Irritation was noted in Complainant's throat and a cough was documented. Complainant was tachycardic. Complainant was discharged with a clinical impression of creosol exposure due to inhalation after his symptoms largely resolved. Complainant was instructed to rest and avoid any respiratory irritants. (CX 4)

North Charleston Fire Department Report

The North Charleston Fire Department's report includes a description of the weather as sixty-five degrees with wind south at fourteen miles per hour. The Fire Department arrived at 6:25 p.m. and cleared the last unit at 11:32 p.m. (RX 1)

HEPACO Report

HEPACO employees responded to a call stating that an odor was emanating from a tank car. HEPACO conducted monitoring for air contamination and inspected the tank car. No product was found on the ground or on top of the car. Manway bolts were wrench tight and the pressure relief valve was intact. No detectable levels were found on air monitoring. Visible product was found on the side of the car but was dry to the touch and would not wipe off with an absorbent pad. (RX 2)

Incident/Investigation Report

Mr. Whitehead prepared an incident/investigation report for Mr. Comstock, Respondent's general manager for the eastern region. The narrative of the report closely resembles Mr. Whitehead's testimony.

Written Statement of Roberto Mendoza

Roberto Mendoza was working with Complainant and Mr. Patten on March 13, 2008 and prepared a written statement of the events that day. Mr. Mendoza stated that Complainant was bleeding track one when he said that a tank was leaking or there was a smell coming from the east end of track two. Mr. Mendoza stopped about eight cars away while Mr. Patten and Complainant inspected the tank. Mr. Mendoza went back to work and did not see or smell anything on that tank while he was going through track three. (CX 7; RX 15)

Discussion

The FRSA prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity. The whistleblower provision incorporates by reference the burden shifting framework under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2)(A).

The complainant carries the initial burden of establishing the elements of his claim by a preponderance of the evidence. To establish his burden, the complainant must show the following elements by superior evidentiary weight:

> (i) The employee engaged in a protected activity or conduct;
> (ii) The [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity;
> (iii) The employee suffered an unfavorable personnel action; and
> (iv) The circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b)(1)(i) – (iv); *see also Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037 at 13 (ARB Jan. 31, 2006)(defining preponderance of the evidence as "superior evidentiary weight"), *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007), *Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-003 (Jan. 30, 2004). A complainant's failure to prove by a preponderance of the evidence any one of these elements requires dismissal of his complaint. 29 C.F.R. § 1982.104(e)(1).

If a complainant establishes all of the elements, the burden then shifts to the employer to rebut the elements of the claim by demonstrating through clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.104(c). If the employer demonstrates by clear and

convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity, then relief may not be granted the employee. 29 C.F.R. § 1982.104(e)(4); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

Claimant's Case

Protected Activity

The FRSA defines a protected activity as including acts done "to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security" or "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." 49 U.S.C. § 20109(a). Respondent initially disputed that Complainant engaged in a protected activity, but conceded this issue in its brief. Further, the uncontroverted evidence establishes that the tank car had visible residue on its side which a reasonable person could believe indicated a potential leak and that Complainant had physical symptoms which he could reasonably believe were caused by chemical exposure. The only medical opinion entered into evidence is that Complainant's symptoms were consistent with cresol exposure. (CX 14) Accordingly, I find that Complainant engaged in protected activity when he reported his physical injury on March 13, 2008.

Knowledge of Protected Activity

Generally, it is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Gary v. Chautauqua Airlines,* ARB Case No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). The parties have stipulated and the evidence establishes that Respondent was aware of Complainant's protected activity.

Unfavorable Personnel Action

The parties have stipulated and the evidence establishes that Complainant was subject to an unfavorable personnel action when he was disciplined by suspension without pay.

Contributing Factor

The sole remaining issue to be decided is whether Complainant's protected activity of reporting his injury was a contributing factor in Respondent's decision to terminate his employment. Complainant must prove that it was a contributing factor by a preponderance of the evidence. 29 C.F.R. § 1982.104. 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." *Marano*

v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed.Cir.1993), *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n. 3 (5th Cir. 2008).

A complainant is not required to provide direct evidence of discriminatory intent; he may satisfy his burden through circumstantial evidence. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). In circumstantially-based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

The Administrative Review Board has held that it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *See Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 7-8 (ARB May 21, 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)).

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on the temporal proximity of the protected act and the adverse action. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

Here, Respondent admits that the temporal proximity of Complainant's protected activity to the adverse personnel action weighs in favor of a finding of contribution, but argues that it reasonably believed Complainant had falsified an injury when it took such adverse personnel actions. Because Respondent admits that it took disciplinary action in response to what has now been determined to be a protected activity, Respondent must show that its actions were taken in good faith to avoid liability under the Act. A respondent in a whistleblower action may avoid liability for assessing discipline against an employee engaging in protected activity if it is based on a good faith belief that the employee's actions were not in fact protected. *See Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 13 (ARB Sept. 30, 2008). Thus, Respondent is not liable under the Act if it suspended Complainant based on a good faith belief that Complainant had falsified his injury report.

To determine whether Respondent held a good faith belief that Complainant had falsified his injury, I must examine the procedures by which Respondent investigated and disciplined Complainant. The primary decision maker in determining that Complainant had falsified an injury was Mr. Giles, while the determination of the specific punishment to be assessed was decided by Mr. Giles with advice by Mr. Whitehead and Mr. Shepard. Accordingly, these men best represent Respondent's mindset regarding Complainant's reported injury. All witnesses here agree that there was visible residue on the side of the tank car that appeared to have leaked during filling or at some other time. Mr. DeShazor, Mr. Stinson, Mr. Shepard, and Mr. Whitehead each testified that they believed Complainant was upwind of the tank car during his reported exposure, based on weather reports indicating a southerly wind and the position of the fire department command center. I take judicial notice that the directionality of wind is reported based on the direction from which it blows; thus a southerly wind blows from the south and towards the north.[6] It is clear, therefore, that Complainant was in fact downwind of the tank car during his reported exposure. This mistake in fact is not itself sufficient to impose liability, given that discipline is not unlawful even when based on a mistaken conclusion as to the underlying facts, but only where it is motivated by retaliation. *Dysert v. Westinghouse Elec. Corp.*, 86-ERA-039, 2 (Oct. 30, 1991). However, Respondent's failure to determine the method of reporting wind directions bears upon the diligence with which it investigated Complainant's report.

Because Mr. Giles was the hearing officer responsible for Complainant's discipline, his mindset is especially relevant. Mr. Giles testified that it was his practice to speak to company officials prior to a hearing to determine why charges are to be brought against an employee, but that it would be improper for him to speak with a union representative before the hearing. (TR 351, 357) Mr. Giles further stated that Complainant's reported symptoms were from inhalation, but that creosol was primarily a skin irritant, although he could not state the symptoms that would be caused by creosol exposure. (TR 367-373) Mr. Giles found Complainant's knowledge of HAZMAT protocols suspicious and believed that Complainant intended to file a FELA lawsuit. (TR 375-377) Mr. Giles testified that he was responsible for gathering evidence and then ruling on it, but could not articulate the burden of proof to be met in a hearing. (TR 382, 387-388) Mr. Giles stated that it was possible that Complainant saw the residue on the side of the bar and became scared, causing him to imagine that he smelled an odor. (TR 374)

Mr. Whitehead authorized the charging letter against Complainant and took part in the determination of appropriate punishment following the hearing. (TR 491, 506) Mr. Whitehead testified that he briefed Mr. Giles on the issues prior to the hearing and held the opinion that Complainant was falsifying an injury prior to the hearing taking place. (TR 503-504, 527) Mr. Whitehead suspected that Complainant intended to file a FRA lawsuit. (TR 516) Mr. Whitehead provides training to other officers on the injury reporting policy and has disciplined officers for failing to comply with the policy. (TR 478-479)

Mr. Shepard recommended Complainant's punishment be limited to time served and was the management representative before the public law board that sustained Complainant's claim.

[6] The National Oceanic and Atmospheric Administration defines wind direction as "[t]he true direction from which the wind is blowing at a given location (i.e., wind blowing from the north to the south is a north wind)." NOAA.gov, Wind Direction, http://www.crh.noaa.gov/glossary.php?word=WIND%20DIRECTION (last visited Jan. 7, 2013).

(TR 422, 427) Mr. Shepard's assessment of the transcript led him to believe that Complainant had falsified an injury, although he was not confident that the decision would be upheld under the higher scrutiny given to claims where an employee is dismissed. (TR 430-431) Mr. Shepard testified that it would be improper for a hearing officer to know the opinions of people involved in an investigation prior to the hearing. (TR 465)

Although Respondent may have believed that Complainant had falsified his injury report, it is not apparent that it did so in good faith. Mr. Giles discounted the testimony of Mr. Patten, who observed Complainant's red, watery eyes and heavy breathing and failed to call Andy Thompson as a witness, although he had observed Complainant both before and after the reported exposure as Respondent's yardmaster on March 13, 2008. The failure to call Mr. Thompson as a witness becomes more problematic given Mr. Giles statement that his duties included gathering evidence and his admittedly strong desire to obtain the HEPACO report prior to the hearing. Further, both Mr. Whitehead and Mr. Giles believe that it is better for the hearing officer to be aware of the circumstances of the charged issue prior to the hearing, despite the labor relations department's, via Mr. Shepard's, statement that such knowledge would be inappropriate. Rather than appear as a neutral third party at the hearing, Mr. Giles came prepared with the beliefs of the charging officer while refusing such communication to Complainant's representative. Further, Mr. Giles admitted that Complainant's symptoms may have been caused by fear at the sight of what appeared to be a potentially hazardous leak. Finally, none of Respondent's officers questioned their mistaken beliefs regarding wind directionality. When taken as a whole, the procedure leading to Complainant's suspension without pay for falsification of an injury was manifestly one-sided and failed to constitute a good faith effort to determine the objective merit of the charges. Accordingly, I find that Complainant has established that his protected activity was a contributing factor to his suspension without pay.

Respondent's Case

In order to rebut a *prima facie* case of discrimination, the respondent must articulate a legitimate, non-discriminatory reason for taking the adverse employment action, and is not required to "persuade the court that it was actually motivated by the proffered reason…" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

Respondent does not dispute that Complainant's filing of an injury report was the motivating factor in assessing discipline against Complainant, but instead argues that the discipline was the result of a good faith belief that Complainant had falsified the injury report. As discussed above, I find that Respondent did not act in good faith in investigating and disciplining Complainant. Further, Respondent has not proffered evidence of any other reason for the suspension.

Relief

When a rail carrier violates the Act's employee protection provision, the Act provides make whole relief, including reinstatement with restoration of seniority and back pay with interest. It also provides compensatory damages, including emotional distress, litigation costs, expert witness fees, and reasonable attorney's fees. Finally, Congress provided for possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

Reinstatement and Back Pay

Complainant received the back pay due after his suspension following the decision by the arbiter to uphold Complainant's complaint.

Compensatory Damages

To some extent, Complainant's emotional losses were lessened when Respondent paid Complainant the back wages due. But the Supreme Court has made clear in an employment retaliation case that this is not enough to insulate the employer from compensatory damages. *See Burlington Northern v. White,* 548 U.S. 53 (2006). Even when an employer makes an employee whole for lost wages, it does not make the employee whole emotionally. *Id.* at 72. Thus, in *White,* even when the employer never terminated the employee but only suspended her until it recalled her after 37 days with full back pay, *id.* at 58-59, the Court observed:

> But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. . . . "That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed".

Id. at 72. A jury awarded the plaintiff in *White* $43,500 in compensatory damages, and the Supreme Court affirmed.

In the present case, Complainant was held out of work for 48 days pending the investigation and was then assessed time held out without pay. Complainant's wife testified that Complainant became depressed and was upset that his character was in question. (TR 67, 69) Complainant and his wife had to accept money from their parents in order to pay their bills. (TR 68-69)

The *White* trial was in 2000. A similar case based on a 2007 termination led to an award of $60,000 in compensatory damages in consideration of the rate of inflation from 2000 until 2007. *Anderson v. Amtrak,* 2009-FRS-003 (August 26, 2010). In this case, Complainant did not have dependent children and Complainant's wife was able to provide at least some income during Complainant's suspension. Keeping in mind the awards in *White* and *Anderson,* I award Complainant $30,000 in compensatory damages.

Punitive Damages

Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: 1) the degree of the defendant's reprehensibility or culpability, 2) the relationship between the penalty and the harm to the victim caused by the respondent's actions, 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001).

Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, 86-CAA-3/4/5, (Sec'y May 29, 1991).

> The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? The "state of mind" thus is comprised both of intent and the resolve actually to take action to effect the harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence.

Johnson at 29, citing the Restatement (Second) of Torts, §908 (1979). *Accord, Pogue v. United States Dept. of the Navy*, 87-ERA-21, (D&O on Remand Sec‟ y April 14, 1994).

In this case, the matter of punitive damages is complicated by the death of Complainant. Whether a claim survives the death of the claimant is grounded in federal common law, absent contrary legislative intent, and turns on whether the action is penal or remedial in nature. *U.S. v. NEC Corp.*, 11 F.3d 137 (11th Cir. 1993). A penal action imposes damages for harm to the general public and does not survive the death of the claimant. *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884). A remedial action compensates an individual for a specific harm suffered and survives the death of the claimant. *Id.*

Whistleblower laws are generally considered remedial statutes, designed to make claimants whole. *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, at 15 (ARB Sept. 13, 2011); *Vernance v. PATH*, ALJ no. 2012-FRS-00018. Punitive damages, however, are penal in nature. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Courts have addressed the survivability of federal remedial statutes that allow for punitive damages by allowing the compensatory aspect of the claims to continue while barring any punitive damage awards. *Smith v. Dept. of Human Services*, 876 F.2d 832, 837 (10th Cir.1989) (addressing survival of claim for punitive damages under the ADEA); *Caraballo v. South Stevedoring, Inc.*, 932 F.Supp. 1462, 1466 (S.D.Fl.1996) (addressing survival of claim for punitive damages under the ADA); *Green v. City of Welch*, 467 F.Supp.2d 625, 665-66 (S.D.W.Va. 2006). Accordingly, Complainant's claim for punitive damages does not survive his death.

ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against him in violation of the Federal Rail Safety Act for reporting a work-related injury. It is hereby ORDERED:

1. Respondent shall pay Complainant $30,000 in compensatory damages;

2. Respondent shall pay Complainant's reasonable attorney's fees and costs, including expert witness fees.

Complainant's counsel may file a petition for fees and costs (including expert witness fees) within 30 days.

Digitally signed by Daniel Sarno
DN: CN=Daniel Sarno,
OU=Administrative Law Judge, O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR./JRS/jcb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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

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).