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Office of Administrative Law Judges
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Issue Date: 15 October 2019

Case No.: **2018-FRS-00088**

In the Matter of:

TREVER HILLER,
Complainant,

v.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Respondent.

Appearances:

Robert B. Thompson, Esq.
Harrington, Thompson, Acker & Harrington, Ltd.
Chicago, IL
For the Complainant

Noah G. Lipschultz, Esq.
Corey J. Christensen, Esq.
Littler Mendelson, P.C.
Minneapolis, MN
For the Respondent

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER

This claim arises under the employee-protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C. § 20109, and its implementing regulations at 29 C.F.R. Part 1982. Complainant, Trever Hiller, alleges that Respondent, Grand Trunk Western Railway Company, retaliated against him in violation of the FRSA's whistleblower protection provisions.

On June 10, 2017, at about 4:30 a.m., Complainant was on duty and traveling on Interstate 69 in a company-provided taxicab. The cab was traveling about 71 MPH when it "struck a deer on the highway." (Transcript (Tr.) 95.) The collision rendered the cab inoperable. When Complainant arrived at the office a few hours later, Complainant reported to his supervisor that he was injured in the incident. Respondent conducted a preliminary investigation in which it

obtained video of part of the incident. It then conducted a formal investigation hearing (FIH) and purportedly dismissed Complainant for dishonesty in reporting the injury. (Joint Exhibit (JX) 10 at 1.)

I conducted a hearing on the record of this claim in Detroit, Michigan on May 21, 2019 and telephonically on June 6, 2019. JX 1-59 and Complainant's Exhibits (CX) 5 and 6 were admitted in evidence without objection. (Tr. 21-35, 111.) CX 1-4, 7, and 12 were admitted in evidence over Respondent's objections. (Tr. 34-35, 244-245.) Respondent's Exhibits (RX) 1 and 2 were admitted in evidence over Complainant's objections. (Tr. 316-317.) The parties submitted closing briefs. The record is now closed.[1]

In reaching my decision, unless noted otherwise herein, I have reviewed and considered all testimony and exhibits admitted in evidence and the arguments of the parties.[2]

I. PROCEDURAL HISTORY

On October 16, 2017, Complainant timely filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent terminated his employment in retaliation for protected activity under the FRSA. (JX 1 at 1.) In accordance with OSHA's Expedited Case Processing Pilot, Complainant requested OSHA terminate its investigation and issue a determination. (JX 2 at 3; *see also* JX 3.) On May 18, 2018, OSHA dismissed the complaint. (JX 4.) On May 31, 2018, Complainant timely requested a hearing before the Office of Administrative Law Judges. (JX 5.)[3]

II. THE FEDERAL RAIL SAFETY ACT

The FRSA has a whistleblower protection provision that prohibits railroad carriers from, among other things, "discharg[ing]" an employee if the discharge is "due, in whole or in part, to" the employee "notify[ing] . . . the railroad carrier . . . of a work-related personal injury."[4] "The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21)."[5]

For Complainant to prevail, he "must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; (3) and the protected activity was a contributing factor in the unfavorable

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[1] Neither party suggests which United States Court of Appeals has appellate jurisdiction over this case. Federal appellate jurisdiction of FRSA cases rests in the circuit in which the alleged violation occurred or in which the complainant resided on the date of the violation. 29 C.F.R. § 1982.112. Because the factual circumstances giving rise to the claim appear to have occurred within Michigan, I will apply the law of the United States Court of Appeals for the Sixth Circuit.

[2] Complainant attached an exhibit to its brief. The exhibit is not in evidence. Thus, I have neither reviewed nor considered it in deciding this claim.

[3] 29 C.F.R. § 1982.106(a) ("Any party . . . must file any objections and/or a request for a hearing on the record within 30 days . . .").

[4] 49 U.S.C. § 20109(a)(4)(2014).

[5] *Rathburn v. The Belt Ry. Co. of Chicago*, ARB No. 16-036, ALJ No. 2014-FRS-35, PDF at 3 (ARB Dec. 8, 2017) (citing 49 U.S.C. § 42121(b)).

personnel action.[[6]] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of complainant's protected activity.[[7]]"[8]

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Complainant and Respondent were covered under the FRSA at all relevant times. (Tr. 17.) Respondent hired Complainant in March 2014 as a conductor. (Tr. 90.) Complainant was employed as a conductor when he reported an injury on June 10, 2017. (Tr. 37; JX 8 at 8.) Conductors must be healthy, their jobs involve climbing and physical work. (Tr. 37.) Working as a conductor cannot be done with injured wrists. (*See* Tr. 37, 90.)

On June 9, 2017, Complainant and Engineer Kevin Merrill "took [] two locomotives to the Grand yard" in Flint, Michigan. They worked at "the Grand yard, doubled up the train and headed to Battle Creek" Michigan. (Tr. 92; *see* JX 19 at 7.) Complainant performed his usual work throughout his shift on June 9. (*See* JX 19 at 10.) Their "time expired,"[9] while "switching within the yard" at Battle Creek. (Tr. 92; *see* JX 19 at 7.) After their time expired, Complainant opted to stay the night with his parents, who live about 25 minutes from the rail yard. (*See* JX 19 at 10.) Mr. Merrill stayed in company-provided lodging. (Tr. 92-93.) Complainant testified that he "knew [he] was going to get called so [he] . . . went right to bed" without any additional physical activity. (JX 19 at 11.)

B. The Incident, the Video, and the Injury

At about 1:00 a.m. on June 10, 2017, Respondent recalled Complainant to work. (Tr. 93.) He was told to "show up at the [Battle Creek] yard by 3:00 a.m." (*Id.*) Complainant was on duty as of 3:00 a.m. (JX 8 at 12; JX 12 at 1; JX 19 at 9.)

Respondent decided to transport Complainant and Mr. Merrill to Flint via taxicab. (Tr. 94.) Riding in a third-party, company-provided cab is an ordinary practice referred to as deadheading. (JX 8 at 97; Tr. 57.) Complainant had deadheaded in this particular minivan, a Dodge Caravan,[10] with this driver before. (Tr. 94, 145.) While in a company-provided cab, Complainant was subject to company rules. (Tr. 94.) I find that Complainant was on duty during the entire cab ride.

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[6] 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121 (b)(2)(B)(iii)(iv); *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune*, ARB No. 04-037, slip op. at 13). Whether the employer had knowledge of the protected activity is part of the causation analysis in this test. *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015).

[7] 49 U.S.C.A. § 42121(b)(2)(B)(iv).

[8] *Riley v. Dakota, Minnesota & E. R.R. Corp.*, ARB Nos. 16-010, 16-052, ALJ No. 2014-FRS-044, 2019 WL 4170436, *2 (ARB Jul. 6, 2019).

[9] After time expires there is a mandatory 8-hour rest period. (Tr. 91-92.)

[10] *See* JX 16 at 1.

At about 4:30 a.m., while traveling about 71 miles per hour on I-69, around mile marker 93, the cab struck a deer. (Tr. 95, 115.) Complainant was in the front passenger seat. (Tr. 115.) Mr. Merrill sat in the back of the cab. (JX 19 at 14; *see* JX 6.) Complainant testified:

> As we were driving from Battle Creek yard on I-69 back to Flint yard, a deer entered into the highway and our vehicle struck the deer. Obviously the driver slammed on his brakes and we came to a halt eventually, and throughout the duration of the crash, at one point I had struck my knees and wrists, injuring them.

(Tr. 95.)

The Complainant further testified that: "[u]pon striking the deer, the deer impacted and lifted the hood up. It hit the windshield, and for the rest of the duration of the crash our visibility was completely obstructed." (Tr. 97.) Complainant characterized the driver's reaction as "emergency braking, stomping on the brakes, so abrupt." (Tr. 98.) Complainant testified that he had never "had an experience like that," and that it was frightening and "makes you kind of brace yourself because you don't know the unknown." (Tr. 97.) After the cab came to rest, "[t]he hood of the vehicle then fell back down on top of the engine block," and "the deer was still in [forward] motion being thrown from the vehicle." (Tr. 98.) Complainant estimated that after the cab stopped, the deer "was thrown about 20 feet." (Tr. 98.) The cab was damaged in the collision to the point that it was no longer drivable. (Tr. 114; *see* CX 12; JX 13 at 3.)

The cab was equipped with a camera recording system, which recorded video of a portion of the incident. (JX 6.)[11] The camera continuously recorded video, but only saved some seconds of video before and after a triggering event. (JX 14.) The video of the incident contains 2 views, a view of the road ahead of the cab, and a view of the cab's passenger compartment. The video contains an indication of "TIME," which progresses forward in seconds; and an indication of speed, "MPH," which represents the forward speed of the cab in miles per hour throughout the duration of the video. The video contains between 11 and 12 total seconds of footage, including about 8.50 seconds before, and about 3.25 seconds after the triggering event. The triggering event is noted on the video by the "TIME" counter at +0.00. The time before impact starts at -8.50 and progresses in seconds to +0.00, and onward to +3.25. (JX 6.)

The video shows 2 occupants in the front and 1 occupant in the rear, passenger side of the cab. Throughout the duration of the video, the occupants of the cab remain visible. Based on the driver's facial expression/reaction shown in the video, it appears that the driver saw the deer between -2.00 and -0.75. At approximately -1.25, the deer becomes visible in the video. At -0.25 the video's forward view becomes obscured. I infer that this occurred because the cab had struck the deer and the hood had flown back onto the front windshield as Claimant testified. (JX 6.)

The cab's speed as shown in the video remains at 71 MPH from -4.25 to at least +.50. At +.75, the cab's speed had slowed to 65 MPH. At +3.25, the end of the video, the cab's speed had reduced to 43 MPH. (JX 6.) Based on this reduction in speed over such a short amount of time and Claimant's testimony about the deer landing 20 feet in front of the cab after the cab came to

[11] Throughout this Decision, the term "incident" refers to the events and time depicted on the video as well as the time after the video ends until the cab comes to a complete stop and the forward momentum caused by the stop ends.

a complete stop, I find that the driver engaged in hard braking from some time shortly around or after the cab struck the deer to until the cab came to a complete stop.[12]

Complainant was using or holding his cellphone with both hands during the video and there is no indication that his wrist was injured at any time prior to the video cutting off. By the end of the video, Complainant had not dropped his phone nor hit his hands or knees on anything. (JX 6.) Indeed, there is nothing in the video that leads me to believe that Complainant injured his wrist at any time before the video ends. However, the video does not show the entire incident.

Complainant testified that he initially felt fine after the incident, but later "was sore," and "noticed swelling and pain in his right wrist." (Tr. 100, 104.) He asserts that he injured his right wrist during the incident. Respondent does not dispute that Complainant injured his right wrist during the incident. (Tr. 44, 54; *see* JX 8 at 108). And, medical records submitted as CX 1 – CX 5, one of which was created as early as 9:01 a.m. on June 10, only hours after the incident, corroborate the existence of Complainant's wrist injury. Complainant was diagnosed with a right wrist contusion and/or sprain. (CX 3 at 1; CX 4 at 1.) I find that Complainant injured his wrist in the incident after the video ended and that such injury was work-related.[13]

C. Protected Activity - the Report of Injury

1. Complainant's Initial Verbal and Written Reports

Complainant understood that company policy required him to promptly and truthfully report any injury. (Tr. 138; *see also* Tr. 182.) It was several hours after the incident before Complainant arrived at the yard office in Battle Creek. (Tr. 116.) Upon arrival, around 7:00 a.m., Complainant reported to Trainmaster Aaron Ramberg that he was injured in the incident. (Tr. 18, 38, 76, 116; JX 12 at 1.) Mr. Ramberg testified that this conversation was "relatively quick;" it was "30 seconds." (Tr. 38.) This conversation was "[t]he very first knowledge [Mr. Ramberg] had of the injury." (Tr. 38.) And, this was the only time he actually spoke with Complainant about the incident. (Tr. 38.)

Mr. Ramberg did not take any notes during his conversation with Complainant. (Tr. 39.) He handwrote his report later that day based on his recollection. (Tr. 39.) In that report, he wrote:

> Conductor was sitting in the front passenger seat when vehicle struck a deer in the road. It was dark, clear, 58° F at the time of the collision. All members were

[12] It appears that the triggering event was hard braking subsequent to the cab striking the deer because the hood obstructed the front windshield before +0.00. However, the exact triggering event need not be determined because it is not relevant to the ultimate resolution of this claim.

[13] Complainant obtained a statement from the cab driver via email. (*See* JX 9 at 14; *see also* Tr. 116.) The driver wrote that, "[u]pon impact [he] asked everyone inside the van if they were ok. Everyone at this time said that they were in fact good." He went on to note that he learned Complainant injured his "wrist or arms" from a report by Respondent. (JX 9 at 14.) Complainant's initial report to the driver that he was okay is consistent with his testimony at the hearing and the common experience of persons who suffer soft tissue injuries in motor vehicle collisions, such as a sprain – initially they feel fine and then they become sore later. Complainant's statement to the driver does not diminish the credibility of Complainant's testimony.

> reported to be wearing seat belts. Conductor stated he hit both knees and wrist to the dash, but only having pain in right wrist. No air bags deployed.

(JX 11 at 1.)

Complainant's handwritten personal injury report, completed while in the hospital on the day of the incident stated:

> Riding in cab, deadheading to Flint, struck deer going 70MPH on I-69. No airbag deployed. Was sitting in front seat, braced for impact. Wore seatbelt, however struck both knees and both hands/wrist.

(JX 9 at 5; *see* Tr. 61.)

Both Complainant's and Mr. Ramberg's initial written descriptions of the incident are similar. In particular, both descriptions include the collision with the deer, non-deployment of the airbags, Complainant's location in the front passenger seat, Complainant's seatbelt use, and that Complainant struck both knees and (at least) his right wrist. The exact timing of when during the incident Complainant struck his wrist(s) and whether he dropped his cellphone is conspicuously absent from both statements. The similarity between the statements tend to make them both credible.

Mr. Ramberg was the company official responsible for preliminarily investigating the incident. (Tr. 38, 41.) The taxicab company provided Respondent with the video of the incident on the morning of June 12, 2017. (*See* JX 14.) After Mr. Ramberg had "obtained the video," he drafted "June 10th, 2017 Notes for [Complainant]." (Tr. 60, 77.) In the Notes, Mr. Ramberg included additional detail not provided in his previous written report. Mr. Ramberg wrote that Complainant "stated that prior to collision, he braced himself for impact dropping his phone and struck both hands and knees against the dash of the van without the air bags deploying." (JX 12 at 1.) The information that Complainant braced for impact "prior to collision," dropped his phone, and hit "both hands" is all new information from Mr. Ramberg.

At the hearing before me, Mr. Ramberg testified that Complainant reported that "upon impact with the deer, he dropped his cell phone and hit both hands and both knees," (Tr. 38), and "[t]hat at the point of collision he braced for impact, that's when he claimed he hit his hands," (Tr. 55). Mr. Ramberg further testified an impact is "just a collision, half second, second." (Tr. 45.) He testified:

> My first initial thought after watching this video was from what he had stated happened, hitting both his hands and knees bracing for impact, dropping his cell phone during the impact, that's not what happened. It appeared to me that his hands didn't hit anything.

(Tr. 70.)

There is some disagreement over what Complainant initially told Mr. Ramberg occurred in the incident. Complainant testified:

> Q: And in that conversation, at least as far as Mr. Ramberg's recollection is concerned, you told him that you braced for impact, dropped your phone and struck your knees and hands or wrists on the dashboard; correct? That's what he's saying you told him?
> A: Then yes.
> Q: Okay. Now, as I understand your position at this hearing, you're stating that you never told Mr. Ramberg that?
> A: Correct.
> Q: But your testimony is you did tell Mr. Alcodray that two days later; correct?
> A: That is correct.
> Q: And your testimony is also that the things Mr. Ramberg says you told him actually happened, that is you did brace for impact, dropped your phone and struck your hands or wrists on the dash; correct?
> A: That is correct.

Complainant disputes that he told Mr. Ramberg everything that Mr. Ramberg reported, but he does not dispute that what Mr. Ramberg reported about the incident actually occurred. Thus, the substance of the disagreement is irrelevant. What is pertinent is whether the disagreement diminishes Complainant's credibility. I find that it does not. Mr. Ramberg's June 10th, 2017 Notes and testimony before me are less credible than his initial written report and Complainant's written report regarding what happened. The influence on Mr. Ramberg of obtaining the video before preparing his June 10th, 2017 Notes and testifying cannot be discounted. Additionally, even were I to believe Mr. Ramberg's version of what Complainant reported to him, Complainant disputes Mr. Ramberg's report because he does "not recall telling him about any of that." (JX 8 at 89.) Complainant's disagreement with Mr. Ramberg, based on Complainant's lack of recollection, does not impugn Complainant's truthfulness.

In addition to Mr. Ramberg's investigation, Respondent's risk department conducted its own interview of Complainant. Complainant's risk mitigation interview with Shaun Alcodray, Risk Mitigation Officer for Respondent, occurred on June 12, 2017, at 6:02 p.m. (after Respondent had received the video). (JX 19 at 1-2; *see* JX 14 at 2; Tr. 254-255.) The interview was recorded and transcribed. (JX 19.)[14] At the time of the interview, Complainant knew the

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[14] In the interview by Mr. Alcodray, Complainant stated:

> [W]e were going around the curve in the highway, and all of a sudden a dear [sic] appears in the middle of the road. And the cab driver uses profane words and the deer was close enough that he was not able to hit the brakes prior to impacting the deer, so upon impact he was -- he then started breaking. When the deer struck, it struck about center of the vehicle close to the driver's side. The hood came up and hit the windshield. It didn't crack the windshield, but vision was obstructed for the rest of the impact. The airbags did not go off.
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> * * *

incident was recorded. He stated, "I do know that there is an inward facing camera that the van has and that the cab driver informed the [police] officer of that. . . ." (JX 19 at 25.)

2. Respondent's Investigations

Mr. Ramberg, the company official responsible for preliminarily investigating the incident, agreed that had Complainant not reported an injury, there would not have been any investigation. (Tr. 53.) He testified that Complainant was cooperative and open with his investigation. (Tr. 41.) The details of Mr. Ramberg's investigation are discussed in Section III.E.2.b(1) below.

Mr. Ramberg testified that based on his review of the video, he determined that Complainant had been dishonest about when or how, during the collision, the injury occurred and that a formal investigation was necessary. (*See* Tr. 70, 80-81.) A "formal investigation allows both parties to present their facts and basically determine the rule, if there was a rule violation." (Tr. 71.)

Complainant was notified via letter dated June 17, 2017 that there would be a FIH. (JX 9 at 1.) Ronnie Strong conducted the FIH on June 30, 2017. (JX 8 at 1, 4.) Mr. Ramberg testified at the FIH about Complainant's report of injury.[15] Assistant Superintendent Eric Herbert[16] testified

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> Then the hood dropped back down. We could see that the deer had been thrown from our vehicle about 20 feet, and at that moment a semi-truck blew past us. . . .
>
> * * *
>
> However, upon impact I remember briefly seeing the deer, and my reaction was to pull my hands forward. As we did strike, my seat belt locked up and my knees hit the dashboard, and both my hands slammed into the dashboard. And my right hand as it struck, popped the top – there is two glove compartments. It popped the top glove compartment off its hinge, and my hand went in towards the compartment, not actually in the glove box, but it popped the hinge off.

(JX 19 at 14-16.) Complainant later stated "[a]t the moment that I saw the deer I naturally braced for impact." (JX 19 at 25.) Mr. Alcodray asked Complainant, "So the seat belt locks up on you and you go – and your body moves forward. And you drop your phone and your hands go out kind of like that? I know I'm recording the statement. I'm just trying to help out." Complainant replied, "Correct. Yeah. Yeah. Essentially both my hands went out." (JX 19 at 28.)

> But, as my hands were going forward, it was – my reaction time occurred essentially the same time the deer was striking the vehicle. So as my hands were still going forward, we hand not impacted the deer yet. Upon impact my body was then pushed forward more, and then the seat belt locked up but I had already struck the front dash.

(JX 19 at 28-29.)

[15] Mr. Ramberg testified at the FIH that after he arrived at the office, [Complainant] approached him:

> and said that he had had some pain in his right wrist from the accident and that the pain was getting worse. At that point, I asked him if, you know, if he wanted to seek medical attention. He replied, yes, he wanted to go in. So, I kind of asked him, you know what happened at that point, to kind of get my details. And he said, you know, they were just driving down the road and, **right before the collision, he said that he had dropped his phone and had [hit] both hands and**

at the FIH about what is seen on the video and how it does not show Complainant's version of events, and thus, he believed that Complainant violated Rule H by making a false report or statements. (JX 8 at 13-14, 31-32, 40.) And, Complainant testified at the FIH about the discrepancies between the video and his report of injury. (*See* JX 8 at 88-95.) At no point during the FIH was Complainant directly asked what happened after the video cut off. (*See* JX 8.)

3. Whether Complainant's Report of Injury Was Made in Good Faith.

There is no dispute that Complainant was injured in the incident. The dispute concerns whether Complainant lied about when during the incident he was injured, e.g., before or during the cab's impact with the deer, and possibly how he was injured in the incident. Respondent argues that Complainant lied because there are discrepancies between Complainant's various reports of the injury and the video. There are discrepancies between Complainant's various reports of the injury and what is seen on the video. However, I find that such discrepancies do not diminish the subjective and objective honesty with which Complainant reported his injury for several reasons.

First, as I found in Section III.B. above, Complainant was injured in the incident after the video cut off. In addition to (or restating) my reasoning in Section III.B., this conclusion is based on the following facts or inferences: There is no dispute that Complainant injured his right wrist in the incident; the video does not show any mechanism of injury to the right wrist; the momentum created by the cab coming to a final stop was strong enough to catapult the hood forward from the windshield and the deer approximately 20 feet forward; it is likely that this same momentum caused Complainant to strike and injure his wrist during the incident; and, there is no evidence to contradict these facts or inferences.

Second, based on his statement to Mr. Alcodray, Complainant knew that the cab was equipped with a camera that may have recorded the event. This knowledge weighs against Complainant lying about when and how his injury occurred.

Third, there is no evidence that Complainant had any motive to lie about when and how his injury occurred during the incident. Superintendent James Golombeski agreed that he could not "even hypothesize a reason" for Complainant to falsify anything about this incident. (Tr. 156.)

Fourth, the discrepancies between Complainant's reports of when and how his injury occurred compared to what is seen on the video are immaterial given that everything Complainant said happened, except for the second(s) at which they happened, could have and likely did happen after the video cut off.

> **both knees on the dash.** At that point, you know, I said – okay, well, we'll go in, and took him to [the hospital]. You know, and then the rest kind of went on there.

(JX 8 at 67 (emphasis added).) Mr. Ramberg testimony is slightly different than his June 10th, 2017 Notes, which report that Complainant braced for impact "prior to collision." (*See* JX 12 at 1.)

[16] Trainmasters, such as Mr. Ramberg, report to Mr. Herbeck, and Mr. Herbeck reports directly to Superintendent James Golombeski. (Tr. 248.)

Fifth, the "common experience of discrepancies in recalling startling or traumatic events,"[17] supports a conclusion that any discrepancies between Complainant's reports and the video resulted from unintentional error by Complainant. In *Christovich v. Pierce*,[18] the United States Court of Appeals for the Fourth Circuit restated with approval the enshrined language of the innocent misrecollection jury instruction. "An innocent misrecollection, just like the failure of recollection, is not an uncommon human experience. In weighing the effect of any discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood."[19] One district court judge's stock jury instruction provides:

> People often forget things, or they may honestly believe that something happened even though it turns later out that they were wrong. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to reject such testimony. Two or more persons witnessing an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to an important issue or an unimportant detail, and whether the discrepancy is innocent or intentional.[20]

Consistent with this instruction, even Mr. Golombeski agreed that "in the midst of a traumatic or startling event you can misremember things." (Tr. 149.) Complainant testified that the impact was "a matter of seconds, but brief." (Tr. 97.) He described the impact as "the point at which we struck the deer to the point which we stopped the motion." (Tr. 100.) After reviewing the video, Complainant agreed his account of the incident was truthful and to the best of his ability. (Tr. 107.)[21] I find that the short duration, sudden and emergency nature, and extreme danger of the incident all make it likely that Complainant would not be able to accurately perceive or retell every factual aspect of the incident.

Sixth, I found Complainant to be a credible witness. He testified at the hearing before me without evasion and appeared sincere.

Seventh, I discount the significance of any discrepancies between Complainant's testimony at the FIH and the video for all the above reasons as well as the facts that (1) nobody ever came right out and asked Complainant what happened in the incident after the video cutoff; and (2) the video was not provided to Complainant or his representative before the FIH. (*See* JX 8.) Complainant's representative testified at the hearing before me that he was not prepared to discuss "false and conflicting" information at the formal investigation. (Tr. 240.) He believed that the issue was whether Complainant had actually sustained an injury. (Tr. 240.) Moreover, Mr. Golombeski testified that "[w]e wouldn't send them up for a formal investigation if they

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[17] Cl. Brf. at 29.
[18] 59 Fed. Appx. 543 (4th Cir. 2003).
[19] 59 Fed. Appx. 543, 549 (4th Cir. 2003).
[20] http://ksd.uscourts.gov/index.php/jury-instructions-vratil/
[21] Complainant testified that when he spoke with Mr. Alcodray about the impact, he was referring to the entire "duration of the impact." (Tr. 143.) Mr. Ramberg did not ever ask Complainant to "define when the impact was." (Tr. 45.) He assumed it referred only to the moment of impact. (Tr. 45, 46.)

weren't guilty." (Tr. 164.) The FIH was an ambush and not a sincere search for the truth. I do not criticize Respondent for this as I understand it is perfectly permissible under its collective bargaining agreement. But, I also do not find that Complainant's statements at the FIH worthy enough to discount his credibility.

In order to qualify as a protected activity, Complainant must have reported his injury in good faith.[22] Complainant's confusion about the details surrounding his injury is insufficient to eviscerate his good faith.[23] Based on the record before me, I find that Complainant subjectively and objectively reported his injury honestly and in good faith. "[T]here is no dispute that notifying a railroad carrier of a work-related injury is a protected activity."[24] Thus, I find that Complainant's injury report constituted protected activity under the FRSA.[25]

D. Unfavorable Personnel Action

In a letter dated July 18, 2017, Mr. Golombeski informed Complainant that the "record contains credible testimony and substantial evidence proving that [he] violated: U.S. Operating Rules [sic] H Furnishing Information and Conduct." (JX 10 at 1.)[26] Mr. Golombeski dismissed Complainant from his employment with Respondent. The parties stipulated that "Respondent's discharge of Complainant was an adverse employment action." (Tr. 19.) And, I find the same.

Additionally, Respondent removed Complainant from service without pay on June 20, 2017, pending the results of the FIH. (JX 9 at 2.) I find that this was an adverse employment action as well because it deprived Complainant of wages or the ability to earn wages.

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[22] 49 U.S.C. § 20109(a).

[23] *See Bostek v. Norfolk S. Ry. Co.*, No. 3:16-cv-2416, U.S. Dist. LEXIS 110623, at *3 (N.D. Ohio Jul. 2, 2019) (holding that complainant's injury was reported in good faith irrespective of her confusion about specific details about the fall).

[24] *Bostek*, 2019 U.S. Dist. LEXIS 110623, at *7.

[25] Complainant alleges he was terminated for reporting a work related personal injury in violation of 49 U.S.C. § 20109(a)(4), which provides:

> 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 . . . 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). The parties agreed that in general the filing of a truthful injury report is protected activity under the FRSA. (Tr. 18.)

[26] Rule H. FURNISHING INFORMATION AND CONDUCT. Dishonesty, disloyalty, insubordination, willful neglect, gross carelessness, desertion from duty, making false reports or statements, concealing facts concerning matters under investigation, immoral conduct, including but not limited to conduct of any employee leading to the conviction of a felony, and serious violations of the law are prohibited. Employees must not be quarrelsome, vicious or enter into disputes, arguments, or fights with any person, regardless of provocation. Any incidents are to be reported to the proper authority. (JX 9 at 7.)

E. Contributing Factor

To prevail, Complainant must demonstrate, "by a preponderance of the evidence, that his protected activity was a contributing factor in the unfavorable personnel action."[27] "'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.' . . .' '[I]t just needs to be a factor;' the 'protected activity need only play some role, and even an '[in]significant' or '[in]substantial role suffices.' '[I]f the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.'"[28] In making this determination, I must consider "all the relevant, admissible evidence."[29]

1. Inextricably Intertwined

The Administrative Review Board has held that where it is impossible to separate the cause of discipline from the protected activity, such that the two are inextricably intertwined, causation is presumptively established as a matter of law.[30] In *Riley v. Dakota, Minnesota & E. R.R. Corp.*,[31] the Board stated:

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[27] *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154, PDF at 30 (ARB Sept. 30, 2016) (*en banc*). "This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Id.*, PDF at 53 (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)).

[28] *Powers*, 2017 WL 262014, at *10 (internal citations omitted).

[29] With regard to the evidence an administrative law judge is to consider and how to weigh such evidence when determining whether protected activity is a contributing factor, the Board has stated:

> Because the protected activity need only be a "contributing factor" in the adverse action, an ALJ 'should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons.' 'Since in most cases the employer's theory of the facts will be that the protected activity played no role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all.'
>
> When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should be aware that, 'in general, employees are likely to be at a severe disadvantage in access to relevant evidence.' Thus, an employee '*may*' meet his burden with circumstantial evidence.' So an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted to* infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, . . . the AL[J] must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Powers, 2017 WL 262014, at *10 (internal citations omitted).

[30] *Riley*, 2019 WL 4170436, at *3.

[31] *Id.*

> Because it is impossible to separate the cause of Riley's discipline—for filing his injury report late— from his protected activity of filing the injury report, the two are inextricably intertwined and causation is presumptively established as a matter of law. But as the ALJ explained: '[t]his court is not suggesting that a complainant automatically establishes a causal nexus by simply demonstrating an employer took any unfavorable personnel action after a report of injury. Rather, a case is established here because the basis for Complainant's suspension cannot be discussed without reference to the protected activity. Simply put, Complainant's reporting of his injury set in motion the chain of events eventually resulting in the investigation and is inextricably intertwined with the eventual adverse employment action.' In *Henderson v. Wheeling & Lake Erie Railway*, a FRSA case materially similar to the one before us, the Board explained in detail why disciplinary action taken against an employee for late injury reporting establishes presumptive causation as a matter of law:
>
>> The FRSA's legislative history, as outlined above, reveals a Congressional intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Effective enforcement of the Act requires presumptive causation under circumstances such as Henderson's, where viewing the "untimely filing of medical injury" as an "independent" ground for termination could easily be used as a pretext for eviscerating protection for injured employees. In this case, CP did not successfully rebut the causation presumption, and we affirm the ALJ's causation finding as supported by substantial evidence.[32]

Respondent claims that it dismissed Complainant for "providing false information . . . in violation of railroad operating rules." (Emp. Brf. at 1.) Complainant asserts that Respondent dismissed [him] in whole or in part due to his good faith protected activity of filing an injury report." (Cl. Brf. at 51.) Here, the basis for Complainant's dismissal cannot be discussed without reference to the protected activity. Complainant's "reporting of his injury set in motion the chain of events eventually resulting in the investigation and is inextricably intertwined with the eventual adverse employment action."[33] Had Complainant not reported an injury, he would have never been fired for alleged dishonesty during the ensuing investigation. The outcome of the decision was unquestionably affected. Without the injury report there would have been no investigation and no dismissal. Thus, Complainant's termination is inexplicitly intertwined with his reporting of the injury.

I find that effective enforcement of the FRSA requires presumptive causation under these circumstances. As Respondent did in this case, any employer could simply find discrepancies with the details of an injury report and discipline the employee for dishonesty. Because it is impossible to separate the alleged cause of Complainant's termination—"provid[ing] false information," (Emp. Brf. at 1), while reporting his injury—from his protected activity of

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[32] *Id.* at *3-4 (internal citations omitted) (quoting *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-12, slip op. at 14 (ARB Oct. 26, 2012)).
[33] *Id.* at 3.

reporting the injury, the two are inextricably intertwined and causation is presumptively established as a matter of fact and law.

2. Discriminatory Intent

Respondent asserts that the FRSA requires proof of discriminatory intent. Specifically, it argues that Complainant must "show some animus toward his protected activity to prove that such protected activity was a contributing factor in his termination." (Emp. Brf. at 1, 17.)

The Board has held that "an employee need not prove retaliatory animus, or motivation or intent, to prove that this protected activity contributed to the adverse employment action at issue."[34] However, some circuits courts have determined that the employee must show "retaliation was a motivating factor" to satisfy this prong.[35] The Sixth Circuit has yet to address whether proof of retaliatory animus is required to establish the "contributory factor" prong. However,

> [i]n *Consolidated Rail Corp.*, the [Sixth Circuit] quoted the Third Circuit, stating, 'the contributing factor standard has been understood to mean 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'' But, in concluding the employee had established this prong, the court stated there was 'substantial evidence that animus was a contributing factor.' Thereafter, the Eighth Circuit cited this conclusion in support of the statement that 'the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.'
>
> Without a definitive ruling, many trial courts within the Sixth Circuit have considered the following factors when faced with the "contributing factor" analysis proven by circumstantial evidence:
>
> (i) temporal proximity; (ii) indications of pretext; (iii) inconsistent application of an employer's policies; (iv) shifting explanations for an employer's actions; (v) antagonism or hostility toward a complainant's protected activity; (vi) falsity of

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[34] *Rathburn*, ARB No. 16-036, PDF at 8 (citing *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012)); *Riley*, 2019 WL 4170436, *4.

[35] *Bostek*, 2019 U.S. Dist. LEXIS 110623, at *10. The court cited and continued:

> *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (emphasis in original); *see also Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir 2017) ("[T]to establish a prima facie case, [the FRSA plaintiff] must demonstrate that [the railroad carrier]'s discipline was, at least in part, intentional retaliation prompted by his injury report."); *Lowery v. CSX Transp., Inc.*, 690 F. App'x 98, 101 (4th Cir. 2017) (holding the "contributory factor" prong was satisfied by proof of "retaliatory animus"). But some courts have followed the Third Circuit's holding that a FRSA plaintiff "*need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Araujo*, 708 F.3d at 158 (emphasis in original) (further citation omitted).

Id. at 10-11.

> an employer's explanation for the adverse action taken; and (v[ii]) change in the employer's attitude toward the complainant after he engages in protected activity.[36]

Although Complainant does not need to demonstrate discriminatory intent, I have considered whether he has done so. And, my consideration includes several of the factors set forth immediately above.[37]

a. Temporal Proximity

Complainant sustained and reported his injury on June 10, 2017. (Tr. 18, 38, 76, 116; JX 12 at 1.) He returned to work on June 15, 2017. (Tr. 104, 105.) On June 17, 2017, charges were leveled against Complainant and he was notified to attend a formal investigation. (JX 9 at 1.) He was removed from service without pay on June 20, 2017. (JX 9 at 2.)[38] The FIH was held on June 30, 2017. (JX 10 at 1.) And, Mr. Golombeski dismissed Complainant from service on July 18, 2017. (Tr. 19; JX 10 at 1.) There are no intervening events that could reasonably diminish an inference of retaliation from temporal proximity. Moreover, I find that because Complainant's dismissal and his reporting of the injury are inextricably intertwined, the relationship gives rise to an inference of retaliation. I find the temporal proximity factor somewhat probative evidence of discriminatory intent in this case.[39]

b. Pretext Versus the Honest Belief Rule

In *Powers*, the complainant claimed that the respondent terminated him for reporting a work-related injury in violation of the FRSA. The respondent claimed that it terminated the complainant for dishonesty relating to his post-injury activities. The Board affirmed an administrative law judge's decision to deny the claim even though respondent's managers turned out to be wrong in their belief that the complainant had been dishonest about his medical restrictions, where the judge thought they had been "correct in believing that [the complainant] was dishonest during the . . . conversation."[40] The Board stated that:

> An employer doesn't need to have *any* reason to fire an employee, let alone a 'legitimate business reason.' Unless the employer posits a nonretaliatory reason, however, a factfinder is very likely to conclude that retaliation was the real reason for, or at least a contributing factor in, the discharge. That is why the employer's

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[36] *Bostek*, 2019 U.S. Dist. LEXIS 110623, at *11-12 (internal citations omitted).

[37] The factors that are listed in *Bostek*, but not expressly discussed elsewhere in this Decision were considered. However, they are not discussed elsewhere because they were either not present or did not strongly weigh for or against a finding of pretext. Specifically, there was no shifting of explanations for Respondent's actions. There was a change in Respondent's attitude towards Complainant in that it notified him that he was being sent to a FIH only days after he returned to work. However, this adds nothing to my analysis beyond the temporal proximity between the protected activity and the adverse personnel action, which is discussed herein.

[38] Although this Section III.E. primarily addresses Complainant's termination, it is equally applicable to Complainant's removal from service without pay.

[39] I would have considered temporal proximity more important if the protected activity and adverse personnel action were not inextricably intertwined. When the two are not intertwined, temporal proximity is a link that connects them. But, when the two are intertwined, the link provided by temporal proximity is not as revealing.

[40] *Powers*, 2017 WL 262014, at *14.

> belief not only is relevant but also is crucial to determining whether protected activity was a contributing factor in the adverse action.
>
> The 'relevant causal connection' is thus not between 'a legitimate business reason and an adverse action.' Rather, the 'relevant causal connection' is between *the protected activity'* and an adverse action.[41]

Consistent with the Board's description of the relevant causal connection in *Powers*, the Board recently affirmed an administrative law judge's denial of a FRSA claim in *Austin v. BNSF Railway Co.*[42] In *Austin*, the complainant reported a hazard and work-related injury and was allegedly terminated for dishonesty/theft. In affirming the judge's decision, the Board noted that:

> The ALJ . . . found that 'McConaughey[, Respondent's decision-maker,] had a good faith belief that Complainant had taken Elledge's personal property without consent, and thus, he genuinely believed Complainant violated GCOR Rule 1.6. McConaughey's belief that Complainant engaged in theft was supported by the surveillance video and Elledge's testimony that Complainant did not have consent to enter her purse while she was not present. **The ALJ correctly stated that** even if Complainant had sincerely believed she was not stealing, it would not change the effect of [Employer's] belief that Complainant was stealing in making his decision to terminate her employment. The ALJ found that there was no pretext in the Respondent's reasons for making its decision to fire Complainant.[43]

In another case, *Fricka*, a railroad classified its employee's injury as not work-related and refused to pay his medical bills. The employee alleged that the railroad retaliated against him for reporting the injury by not paying his medical bills and giving him unfavorable performance appraisals. The Board remanded the case after finding adverse personnel actions as a matter of law, contrary to the administrative law judge's findings. In a concurring opinion, Administrative Appeals Judge Luis Corchado noted that:

> The thorny causation issue the ALJ will face as to the refusal to pay medical bills, among others, will be deciding (1) whether Amtrak **truly believed** that Fricka's injury was nonwork related and, if so, (2) how such belief plays into the question of contributing factor. In the end, the ALJ must be convinced that Fricka's act of *reporting* his work-related injury (as defined by FRSA) was in fact a reason that Amtrak refused to pay his medical bills. Stated differently, despite the fact that Amtrak's decision for medical benefits could only have occurred because of Fricka's reporting, can the ALJ find that a **good faith belief** that the injury was not work related was the sole cause of the refusal to pay medical benefits?[44]

The takeaways from *Powers*, *Austin*, and Judge Corchado's concurring opinion in *Fricka* are that the employer's **belief** regarding the reasons it took an adverse action are relevant and crucial to

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[41] *Id.* at *15 (internal citations omitted).
[42] ARB No. 2017-0024, ALJ No. 2016-FRS-13, PDF at 9 (ARB Mar. 11, 2019).
[43] *Id.* (emphasis added).
[44] *Fricka*, ARB No. 14-047, PDF at 11 (Corchado, J., concurring).

the court's contributing factor determination, while the employee's belief regarding such reasons are not. And, the employer's belief must be a good faith belief.

The foregoing takeaways are consistent with the "honest belief rule" utilized by the United States Court of Appeals for the Sixth Circuit and in other federal Circuits in certain types of discrimination cases.[45] In *Tibbs v. Calvary United Methodist Church*,[46] a case involving claims under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, the Sixth Circuit analyzed whether employer Calvary's reason for terminating plaintiff Tibbs was pretextual.[47] The court found that the "honest belief rule" protected employer's termination decision. The court described the rule as follows:

> Under this rule, if an employer demonstrates an honest belief in its proffered reason for the adverse employment action, the inference of pretext is not warranted. We have previously explained that
>
> > an employer's proffered reason is considered honestly held where the employer can establish it reasonably reli[ed] on particularized facts that were before it at the time the decision was made. . . .
>
> * * *
>
> Moreover, so long as the employer has established its honest belief, 'the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless.'
>
> * * *
>
> Although Tibbs continues to assert she was not, as a factual matter, insubordinate, 'arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are *right* but whether the employer's description of its reasons is *honest*.' The test is whether a reasonable jury could find that Calvary 'failed to make a reasonably informed and

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[45] *See, e.g., Tibbs v. Calvary United Methodist Church*, No. 11-5238, 505 Fed. Appx. 508 (6th Cir. Nov. 20, 2012) (unpub.); *Armstrong*, 880 F.3d at 381-83; *Cash v. Lockhead Martin Corp.*, No. CIV 15-506 JAP/LF, 2016 WL 8919403, *7-10 (D.N.M. July 1, 2016) ("the court's inquiry is limited to whether the defendant honestly believed the reasons it offered to explain its decision and whether it acted in good faith as to those beliefs").

[46] No. 11-5238, 505 Fed. Appx. 508 (6th Cir. Nov. 20, 2012) (unpub).

[47] In *Tibbs*, the district court applied the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to both of plaintiff's claims. Under this framework,

> if an aggrieved employee cannot prove discriminatory intent by direct evidence, the employee may do so by making a prima facie case of age discrimination through circumstantial evidence. Once a prima facie case has been established, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. 'Once the defendant meets this burden, the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation' as pretextual.

Tibbs, 505 Fed. Appx. at 512-13 (internal citations omitted).

considered decision before taking its adverse employment action, thereby making its decisional process unworthy of credence. . . .'[48]

And, to determine whether an employer made a reasonably informed and considered decision, the Sixth Circuit has examined whether the employer conducted a reasonable investigation before making its decision.[49] The court does "not require that the decisional process used by the employer be optimal or that it left no stone unturned."[50] But, it must be reasonable.[51]

Applying Board precedent and the law of the Sixth Circuit, whether Respondent was correct in believing that Complainant falsified details about his reported injury is irrelevant. Rather, whether Respondent's belief was honest and in good faith, *e.g.*, supported by a reasonable investigation or circumstances, are the inquiries pertinent to this court's determination of whether there are any indications of pretext.

(1) The Unreasonableness of Mr. Ramberg's Investigation

Mr. Ramberg agreed it was his responsibility to "get all the available evidence," including photos, videos, event recorders, and statements from all crew members, and to interview the witnesses. (Tr. 41-42.) Nonetheless, after reviewing the video, Mr. Ramberg took no additional steps to investigate the incident. (Tr. 49, 54.) And, he did not even fully appreciate what the video showed - he did not know that the cab's hood flipped up during the incident. (Tr. 46.)

Overall, Mr. Ramberg determined that Complainant was in compliance with all company rules during the incident. (Tr. 44.) Although Mr. Ramberg agreed that everything Complainant claimed "could have happened after the 43 miles per hour down to 0," he did nothing to investigate the severity of the stop when the vehicle came to rest because "with the statement that [he] had, it didn't seem necessary to investigate that portion." (Tr. 54.) He chose not to visually inspect the vehicle, interview the driver, interview Mr. Merrill, or re-interview Complainant. (Tr. 47, 51.)

Mr. Ramberg acknowledged that a full investigation would require an interview of both crew members. (Tr. 51.) Nonetheless, he determined there was no need to interview Mr. Merrill because he did not file an injury report. (Tr. 52, 65.) And, because Mr. Merrill was "sitting behind [Complainant] and wouldn't be able to see him anyways." (Tr. 71.) Despite Mr. Ramberg's opinion, it was unreasonable to not interview the other vehicle occupants.

Mr. Ramberg did nothing to investigate the severity of when the vehicle came to a stop, even though he knew that Complainant was injured during the incident. (Tr. 44, 54.) And, he

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[48] *Tibbs*, 505 Fed. Appx. at 513-14 (internal citations omitted); *Chen v. Dow Chemical Co.*, 580 F.3d 394, 401 (6th Cir. 2009); *Michael v. Caterpillar Financial Services Corp.*, 496 F.3d 584, 598-600 (6th Cir. 2007) ("The key inquiry in assessing whether an employer holds such an honest belief is 'whether the employer made a reasonably informed and considered decision before taking' the complained-of action") (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998); *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001).
[49] *See*, e.g., *Michael*, 496 F.3d at 598-600.
[50] *Id.* at 599.
[51] *Id.* at 598-600.

knew that Complainant could have been injured as the vehicle came to a stop. (Tr. 55.) Nonetheless, he testified:

> Q: You saw the forward facing video, that looked out forward. It stopped, there was nothing on the video after they struck the deer; correct?
> A. Correct.
> Q. Did you ever wonder what happened?
> A. Not really.
> Q: Did you ever investigate that?
> A: No.
> Q: At any time did you ever go back and talk to [Complainant] about it?
> A: I did not.
> Q: Do you know of anybody that went and talked to [Complainant] about it?
> A: Not to my knowledge.

(Tr. 46.) Additionally, Mr. Ramberg's investigation was not as thorough as Mr. Golombeski expected; Mr. Golombeski testified:

> Q: Now, when there was this reported incident of the van striking the deer, you would have expected that a statement be taken from the engineer, Mr. Merrill; correct?
> A: Depends on the situation.
> Q: Well, would you -- in this situation would you have expected it to include the statement of the engineer?
> A: Verbal, yes. Written, no.
> Q: Okay. Did you ever see a verbal statement from the engineer?
> A: No.
> Q: As a matter of fact, it's your testimony, is it not, that you would expect a full-out investigation; correct?
> A: Yes.
> Q: And a full-out investigation means that you would expect an interview with the engineer; correct?
> A: Yes.
> Q: You would expect at least an attempt to find out what went on with the driver; correct?
> A: Correct.
> Q: You would attempt to -- you would expect Mr. Ramberg to go and see the vehicle; correct?
> A: Correct.
>
> * * *
>
> Q: . . . you would expect him to look at the vehicle to see what happened?
> A: I'm not sure I'd tell him to look at the vehicle, but definitely get statements.
> Q: Okay. Definitely it would include statements from Mr. Merrill?

A: Yes.
Q: Okay. That wasn't done here?
A: No.

(Tr. 149-150.)

And, the mere 30 seconds that Mr. Ramberg spent obtaining a statement from Complainant "seem[ed] short"[52] to Mr. Herbeck. But, when Mr. Ramberg was asked whether he thought 30 seconds was a reasonable amount of time to spend interviewing the Complainant as part of his investigation, he replied "[h]e could have approached me." (Tr. 47.) The problem with Mr. Ramberg's statement is that Complainant did initially approach him and there is no evidence that Complainant should have thought to approach him again before Complainant received notice of the FIH, which was after Mr. Ramberg concluded his investigation. Moreover, Mr. Ramberg knew that the video cut off before the cab completely stopped, but testified that he never wondered what happened and never investigated. (Tr. 46.) By his own admission, it was Mr. Ramberg's duty to obtain all available evidence. (Tr. 41-42.) Mr. Ramberg's statement - "[h]e could have approached me" – and his testimony about not wondering what happened and never investigating evince an attitude of reckless indifference or callous disregard for the truth and Complainant's right to report, in good faith, a work-related injury. Not only did Mr. Ramberg fail to exercise due diligence in his investigation, he could not have cared less whether his investigation was reasonable or uncovered the truth. I find that Mr. Ramberg's investigation was far from reasonable.

Additionally, Mr. Ramberg's testimony before me was less than credible. Mr. Ramberg initially testified that his investigation did not determine whether Complainant's injury occurred during the incident. (Tr. 43.) But, after reviewing his previous deposition, he recalled that he had previously testified that Complainant's "strain of the right wrist" did occur during the collision with the deer. (Tr. 44, 54.) And, that the investigation "disclosed no indication that [the injury] could have occurred at any other time." (Tr. 44.)

(2) The Unreasonableness of Mr. Herbeck's Part in the Investigations

Mr. Herbeck also investigated the incident and was responsible for initiating the FIH. (JX 9 at 1; Tr. 268.) He testified that when he first viewed the video he was "very surprised" and "shocked by it," because "at the time the information that [he] had up to that point didn't match what [Complainant] had told Mr. Ramberg had happened verbally and also on his 475." (Tr. 252.) To his credit, after realizing that the video abruptly cuts off, Mr. Herbeck asked for more video footage. (Tr. 253; *see* JX 14 at 1.) Mr. Herbeck requested more information:

> Because at that point, [he] was really confused by the situation altogether, because the report of the details regarding the incident that [Complainant] was involved in, the information [he] was provided by Mr. Ramberg, what was written on the 475 Form, there was a clear discrepancy. So at that point, I had asked to obtain more

[52] Tr. 266.

> video. [He] was unfamiliar with the system that [the taxi company] equipped their vehicles with and wanted to ensure that the video was complete, essentially.

(Tr. 254.) He was advised there was no more video and received information about how the video system worked. (*See* Tr. 254-255.)

Despite his confusion over the discrepancies between what was reported and the video, Mr. Herbeck never asked Complainant what happened after the video cut off. (Tr. 267.) He agreed that he could have asked [Complainant] "what happened at the time of the crash that's not in the 3 and a half to 4 seconds of video," but he did not because "he had the video of what occurred." (Tr. 267.) And, he "had no reason to believe that anything occurred after the impact because the impact is what [Complainant] reported." (Tr. 277.) Mr. Herbeck testified that he also did not take a statement from Mr. Merrill and "never spoke with the driver." (Tr. 266-269, 270.) Although he understood that "there is [] significant momentum at the end,"[53] when a vehicle stops, he explained that "[t]he video shows what happened." (Tr. 270-271.)

Mr. Herbeck's explanation for failing to interview Complainant, Mr. Merrill, and the driver defies logic and is contradicted by his request to obtain more video. If he truly believed that nothing occurred after the impact with the deer, which does take place within the length of the video, there would be no reason to request more video. I find that Mr. Herbeck's explanation for not interviewing Complainant, Mr. Merrill, or the driver is disingenuous. Complainant argues that Respondent "intentionally departed from its normal procedure to conduct a complete investigation to narrow the focus to [Complainant] only, and once it had discovered what it viewed as a discrepancy, stopped investigation and went immediately to a sham hearing." (Cl. Brf. at 40.) Based on my review of the evidence, I agree with Complainant's position. I find that Mr. Herbeck's investigation was not reasonable.

(3) The Unreasonable Basis for Mr. Golombeski's Discipline Decision

Mr. Golombeski is responsible for making discipline related decisions and was the final decision maker in this case. (Tr. 147; *see* JX 10 at 1.) Mr. Golombeski "reviewed the transcript of the formal investigation . . . to develop the facts and to determine [Complainant's] responsibility, if any, and whether or not [Complainant] violated . . . ." any rules. (JX 10 at 1.) Based on that review, Mr. Golombeski determined that "the record contain[ed] credible testimony and substantial evidence proving that [Complainant] violated" Rule H. (JX 10 at 1.) "In consideration of the incident, the proven rule violations, and [Complainant's] past discipline record," Mr. Golombeski dismissed Complainant. (JX 10 at 1.)[54] Mr. Golombeski testified that

[53] Tr. 271.

[54] Respondent claims that Complainant's past discipline record was a factor that Mr. Golombeski considered in terminating Complainant's employment. However, Complainant testified that he had never before been disciplined. (Tr. 105.) His 2016 Employee Performance report rated him 100% compliant. (JX 9 at 10.) And, although Complainant received a letter of caution for "fail[ing] to properly inspect a car" on March 11, 2015, (JX 9 at 17), this was not considered a form of discipline. (Tr. 274.) Indeed, Mr. Golombeski testified that Complainant had a clean record, without prior discipline. (Tr. 161.)

he concluded that Complainant violated Rule H: "Because after the formal investigation, reading the transcript, comparing the facts of [Complainant's] statement said compared to the video, it was just determined that he was dishonest and he made a false report." (Tr. 185.)

I find that the unreasonableness of Messrs. Ramberg's and Herbeck's investigations influenced Mr. Golombeski's discipline decision because they both testified at the FIH consistently with their investigations and the FIH did not cure the deficiencies in their investigations. Neither Mr. Merrill nor the driver testified at the FIH. Complainant was not asked what happened after the video cutoff. And, additional information was not developed regarding how the cab's video system worked. This last point is important because, according to Mr. Herbeck, one of the reasons for the FIH in the first place was because Respondent did not have a clear understanding of how the video system worked:

> Q: Why did you believe a formal investigation was warranted?
> A: Because at that point, no one understanding [sic] how the system had worked, the camera system, and with all the information that I had present at that point, it was very clear to me that the information that [Complainant] had provided was wrong, it wasn't what happened.

(Tr. 255-256.)[55]

The unreasonableness of the information upon which Mr. Golombeski based his discipline decision is further evidenced by the same flawed logic as Mr. Herbeck's explanation for failing to interview Complainant, Mr. Merrill, and the driver, discussed above in Section III.E.2.b(2). Like Mr. Herbeck, Mr. Golombeski "tried to get the rest of the video" to see what occurred from 43 MPH to 0 MPH. (Tr. 155.) He testified that after he first reviewed the video, he wanted to investigate what happened after the video ended. (*See* Tr. 158.) He agreed that he had "consider[ed] the possibility that [additional video] may have contained information that substantiated what [Complainant] was telling" him. (Tr. 176.) He went so far as to testify that:

> Q: You know, if additional video had disclosed that [Complainant] braced himself for the stop and dropped his phone, you know, in that time period from 43 miles per hour down to 0, you wouldn't have fired him, would you?
> A: I wouldn't have sent him up on charges or had him sent up on charges for furnishing information.
> Q: You wouldn't have fired him; right?

[55] The importance of Respondent's failure to understand how the video system worked is further evidenced by Mr. Golombeski's assumption that there was no forceful stop after the video cut off because if there had been a forceful stop, it "would trigger a significant event on the recorder and there would have been video available." (Tr. 165.) He made this assumption despite his admission that he did not "know the physics" involved. (Tr. 166.) And, he provided no support for his understanding of how the video system works. The record does not contain any information about whether the system has the ability to record multiple events in succession. Nor is there any proof that there were multiple hard brake events. To the contrary, I infer that there was one continuous hard brake event until the cab came to a complete stop because there does not appear to be a respite in braking on the video and it is likely that the driver would want to come to a stop as soon as possible as his front windshield was obstructed by the hood. I give Mr. Golombeski's unsupported assumption about why there was not a forceful stop no weight.

A: Right, there would be no investigation.

(Tr. 166-167.) However, after learning there was no additional video, Mr. Golombeski inexplicably took no additional steps to investigate. He did not attempt to determine the severity of the stop or the time for the vehicle to come to rest. (Tr. 156.) Instead, he testified it was irrelevant because "we had on video what he claimed happened compared to his statement on that 3- to 4-second clip." (Tr. 156, 168; see Tr. 171.) If the discrepancy shown on the video, i.e., Complainant not dropping his phone or striking his wrist(s) before or upon impact with the deer, really was the basis for Mr. Golombeski's discipline decision, then why did Mr. Golombeski try to get the rest of the video? Why would, as Mr. Golombeski testified, he not have terminated Complainant had there been further video that showed Complainant dropping his phone and striking his wrist(s) later in time after the impact with the deer? The reason is that Mr. Golombeski's reason for terminating Complainant is disingenuous and mere pretext.[56] The unreasonableness of the investigations of Messrs. Ramberg and Herbeck and the information upon which Mr. Golombeski based his discipline decision as well as the disingenuous reasons given for not completing a reasonable investigation all contribute to my finding of pretext.

c. Additional Indicia of Pretext as well as Inconsistent Application of Respondent's Policies and Falsity

I have found that Messrs. Ramberg, Herbeck, and Golombeski were disingenuous or not credible; Mr. Ramberg's attitude towards his investigation was one of reckless indifference or callous disregard for the truth and Complainant's right to report, in good faith, a work-related injury; the investigations of Messrs. Ramberg and Herbeck were unreasonable, which influenced Mr. Golombeski's discipline decision; Mr. Golombeski's discipline decision was based on unreasonable information; and, Mr. Golombeski's reason for terminating Complainant's employment was mere pretext. (*See* Section III.E.2.b. above.)

In Section III.C.1. above, I determined that Mr. Ramberg's June 10th, 2017 Notes and testimony before me were less credible than his initial written report and Complainant's written report regarding what happened. Given Mr. Ramberg's lack of credibility and indifferent or callous attitude, I find that his June 10th, 2017 Notes were a fabrication. Mr. Ramberg's initial report, handwritten on the day of the incident, stated:

> Conductor was sitting in the front passenger seat when vehicle struck a deer in the road. It was dark, clear, 58° F at the time of the collision. All members were reported to be wearing seat belts. Conductor stated he hit both knees and wrist to the dash, but only having pain in right wrist. No air bags deployed.

(JX 11 at 1.) I understand Mr. Ramberg's initial report to mean that Complainant hit his right wrist and both knees, but only injured his right wrist. Mr. Ramberg's initial report does not have to be interpreted as Complainant striking his knees and right wrist or hands before or contemporaneously with the vehicle impacting the deer. His initial report can be interpreted as Complainant striking his wrist and knees anytime during the entire duration of the incident, which continues after the cab's video ends.

[56] Given these inconsistencies in Mr. Golombeski's testimony, I do not find him credible.

Conversely, Mr. Ramberg's subsequently prepared June 10th, 2017 Notes and his testimony at the FIH can only be interpreted as Complainant striking his hands and knees before or contemporaneously with the vehicle impacting the deer. The June 10th, 2017 Notes and his testimony at the FIH conflict with the video because the video does not show Complainant drop his phone, brace for impact, or hit his hands or knees. The June 10th, 2017 Notes and testimony at the FIH were both prepared or made after Mr. Ramberg obtained the cab's video. Moreover, no explanation was provided for why the Notes were prepared with new information not appearing in his initial report. It very much appears that Mr. Ramberg amended his story to directly conflict with the video. This seriously calls into question the credibility and truthfulness of Mr. Ramberg's June 10th, 2017 Notes and testimony at the FIH. I find that both Mr. Ramberg's Notes and testimony at the FIH were dishonest, not made in good faith, and are further evidence of pretext and discriminatory intent.

Rule H is vague regarding what constitutes "dishonesty" – whether it includes dishonesty as to all facts or just material facts. (*See* JX 9 at 7.) The vagueness of Rule H suggests "its potential for manipulation and use as pretext."[57] This is what occurred here.

Mr. Golombeski testified that an employee would not be disciplined for unintentional or immaterial discrepancies: An employee would not "get in trouble" for lying about the weather or for "saying [he] was switching a 6-track and it was really a 7-track." (Tr. 198-199.) This admission in conjunction with Respondent's agreement that Complainant injured his right wrist in the incident is damning. Respondent points to no possible motive for Complainant to lie about when during the incident he injured his wrist. Respondent points to no benefit Complainant may have hoped to gain from lying about when the injury occurred during the incident. Respondent points to no detriment to itself from Complainant injuring himself upon the cab's impact with the deer versus a few seconds later when the cab came to a complete stop. Respondent failed to take into account the emergency nature of the incident and how Complainant's perception or recollection of the incident, even immediately following the incident, may have varied in some ways from what actually occurred. Respondent failed to take into account the fact that Complainant knew there was a video camera in the cab, which further negates the likelihood that he would have lied about what happened. Any discrepancies between Complainant's description of what happened in the incident and what is recorded on video was unintentional and immaterial. Yet, Respondent fired Complainant anyway. This was an inconsistent application of Respondent's policy, as described by Mr. Golombeski, of not disciplining employees for making reports with unintentional or immaterial discrepancies.

Lastly, Mr. Golombeski's explanation of why Complainant was sent to a FIH when no other employee who has reported an injury has been was telling:

> Q: In your personnel experience over the time that you were superintendent would you say that it's rare that there would be a formal investigation in a situation in which an employee reports an injury?
> A: Just once.
> Q: And are there any other than [Complainant] that you're aware of?

[57] *See DeFrancesco*, ARB No. 10-114, slip op. at 13, n.43.

A: No.

Q: What makes [Complainant's] situation different than all the other times that employees reported injuries and they didn't go to formal investigation?

A: **Well, this is the first time we've actually had video proof of not corroborating an employee's statement.**

(Tr. 184 (emphasis added).) Note that Mr. Golombeski does not state that this situation was different because Respondent believed Complainant was lying, whereas in other cases Respondent believed the allegedly injured employees were telling the truth. Instead, Respondent sent Complainant to a FIH because it believed it could prove he was lying. I infer from this testimony that Respondent sent Complainant to a FIH, which according to Mr. Golombeski they only do when they believe an employee is guilty,[58] because they thought they could get away with firing him without liability.

I find that Respondent's purported belief that Complainant was intentionally deceptive about the specific details of how or when during the incident he sustained the injury to his right wrist is neither honest nor in good faith. I find Respondent has failed to demonstrate an honest belief in its proffered reason for the adverse employment action. For this reason as well as one or more of the following reasons: the temporal connection between Complainant's protected activity and the adverse personnel action, the unreasonableness of Mr. Ramberg's and Mr. Herbeck's Investigations, the unreasonable factual basis upon which Mr. Golombeski made his discipline decision, the disingenuous or non-credible reason for not conducting a reasonable investigation, the falsity of Mr. Ramberg's June 10th, 2017 Notes and his testimony at the FIH, the vagueness of Rule H and its manipulation to justify Complainant's termination, Respondent's inconsistent application of its own policies, and Respondent's belief that it could get away with terminating Complainant without liability, I find that Respondent's proffered reason for terminating Complainant was merely pretextual and that Respondent terminated Complainant with retaliatory intent. Complainant has met his burden of proof to establish that he engaged in protected activity, suffered an unfavorable personnel action, and that the protected activity contributed to that unfavorable personnel action.

F. Affirmative Defense

As stated above, "[i]f a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity."[59] "'Clear' evidence means the employer has presented an unambiguous explanation for the adverse action(s) in question. 'Convincing' evidence has been defined as evidence demonstrating that a proposed fact is 'highly probable.' Clear and convincing evidence denotes a conclusive demonstration, *i.e.*, that the thing to be proved is highly probable or reasonably certain."[60]

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[58] Tr. 164.

[59] *Riley*, 2019 WL 4170436, at *2 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)); *see Powers*, 2017 WL 262014, at *10.

[60] *DeFrancesco*, ARB No. 10-114, slip op. at 7-8.

I have already found that Respondent's proffered reason for terminating Complainant's employment was pretextual and that such termination was undertaken with the intention to retaliate against Complainant for his protected activity based on Complainant's reason for the termination being neither honest nor in good faith, the temporal connection between Complainant's protected activity and the adverse personnel action, etc. Respondent has presented neither clear nor convincing evidence to overcome these findings and establish that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected activity.

Respondent argues that because it has charged other employees in the past for dishonesty and false statements, it has established that it would have taken the same action in this matter absent the protected activity. Respondent has provided examples of five former employees who were dismissed for providing false information. (*See* JX 24; JX 25; JX 26; JX 27; JX 28.) None of those examples are similar to this case. In each of those examples, the employee had lied about material issues, and those lies were told to further the deception in attempts to avoid discipline.

Respondent also provided a list of 50 injury reports from 44 employees. (EX 1.) Respondent asserts that the evidence shows "that the overwhelming majority of employees who report injuries . . . are not disciplined in connection with their reports." (Emp. Brf. at 1.) Arguably, this demonstrates that Respondent did not engage in antagonism or hostility towards the reporting of injuries by employees, which is a factor to consider under *Bostek* in deciding whether protected activity is a contributing factor to the adverse personnel action.[61] Complainant asserts that the exhibit is misleading. Complainant's assertion has merit. Most importantly, the exhibit fails to address discipline and investigations arising out of rule violations (unrelated to the reporting of the injuries) in close temporal proximity to a reported injury or return to work after injury. Further, Mr. Golombeski admitted that discipline records can be removed from the records without his knowledge. And, unlike Complainant, the employees dismissed in the examples had prior records of discipline. (EX1; EX 2; *see* C. Brf. at 46-47.) Moreover, proof that Respondent complied with the FRSA in other cases is insufficient to establish that it did so in this case.[62]

The evidence does not support Respondent's assertion that it had a legitimate, non-retaliatory reason for the charges against Complainant or the FIH, nor does the evidence support its assertion that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity. Accordingly, Respondent has failed to establish that it would have taken the same unfavorable personnel action absent the protected activity. Complainant is entitled to relief under the FRSA.

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[61] *See Bostek,* 2019 U.S. Dist. LEXIS 110623, at *11-12.

[62] Although this evidence was not discussed in my analysis of whether Complainant's protected activity was a contributing factor to Respondent's adverse personnel action and whether Respondent's reason for such action was pretextual, I did consider such evidence in that analysis. It was just as unpersuasive in those determinations as my determination of Respondent's affirmative defense for the same reasons state above.

G. Damages

The damages available to Complainant are described in the FRSA[63] and in the implementing regulations:

> If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to $250,000.

1. Back Pay

2.

Complainant earned $45,760.49 from his employment with Respondent from January 1, 2017, until June 20, 2017 (170 days), when Respondent removed him from service without pay. (JX 9 at 2; JX 23 at 5.) By my calculation, Complainant would have earned $52,489.97 from his employment with Respondent for the remainder of 2017, had he not been removed from service and terminated.[64] Less the $700 he received in compensation from alternate employment after his dismissal,[65] he would be entitled to $51,789.97 in back pay for 2017. However, Complainant calculates his lost wages for 2017 to be $48,782.00. (Cl. Brf. at 48.) Complainant does not explain in detail how he reached this amount, but I defer to his calculation since it is lower than mine. I find that Complainant lost **$48,782.00** in wages in 2017, because of the adverse personnel actions taken against him by Respondent.

In 2018, the mid-point of earnings between the employees immediately below and above Complainant in seniority at Respondent was $95,548.54.[66] Although Complainant suggests that the mid-point amount should be used to determine Complainant's lost wages in 2018 and asserts that the mid-point is $95,600.00, he does not explain his calculation. (Cl. Brf. at 48.) I find that Complainant likely would have earned approximately $95,548.54 from Respondent in 2018, but for his termination. Complainant earned $25,108.99 in compensation from alternate employment

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[63] 49 U.S.C. § 20109(e).

[64] $45,760.49 / 170 days = $269.18/day. 365 days – 170 days = 195 days. $269.18/day x 195 days = $52,489.97.

[65] *See* JX 29.

[66] See JX 23 at 5. $96,701.38 - $94,395.70 = $2,305.68. $2,305.68 / 2 = $1,152.84. $94,395.70 + $1,152.84 = $95,548.54.

in 2018. (JX 29.)[67] Thus, I find that Complainant lost **$70,439.55** in wages in 2018,[68] because of the adverse personnel actions taken against him by Respondent.

The guaranteed wages for conductors at Respondent from the beginning of 2019 through July 2019 was $105,000 per year. That amount was to increase to $108,000 per year in August 2019. (Tr. 224.) Thus, Complainant would have earned $8,750 per month from January through July 2019, and $9,000 per month from August 2019 forward. In 2019, Complainant earns approximately $38,000 per year or $3,486.00 per month. (Tr. 112; JX 29; Cl. Brf. at 49.) Thus, I find that Claimant lost wages on account of the adverse personnel actions in the amounts of **$36,848** from January through July 2019,[69] of **$11,028.00** for August and September,[70] and **$2,668.05** in October through October 15, 2019.[71]

Based on the foregoing, I find that Respondent owes Complainant **$169,765.60** in back wages through October 15, 2019, plus an additional **$177.87** per day beginning October 16, 2019, until Respondent reinstates Complainant.[72]

2. Emotional Distress Damages

Complainant seeks an award of emotional distress damages in the amount of $50,000. (Cl. Brf. at 49.) Complainant testified that he suffered depression and sleeplessness as a result of his termination as well as friction with his wife's family. "[He] was getting married in three months [before he was terminated]. It was very difficult to explain to [his] in-laws as well as [his] own family and [his] what is now [his] wife at the time what exactly had occurred. Nobody could quite understand. They thought there was more involved, they thought there was less involved, none of it made sense, kind of a strain on [his] reputation." (Tr. 109.) He testified that he did not treat with a doctor for his symptoms because it was difficult for him to explain why he needed to see a doctor. (Tr. 110.) Complainant testified that these emotional problems continue, but they are not as bad as they were. Given that Complainant was terminated shortly before his wedding and his inability to find stable, comparable employment to his job as a conductor, at least in terms of pay, I find this testimony credible and accept it as findings of this court.

Complainant has been without his job for Respondent for more than 26 months. He has had to live with the embarrassment, which I infer from the above facts, and the emotional symptoms arising from his termination for more than 26 months. Based on the record before me, I find an award of $20,000.00 to Complainant would be reasonable and fully sufficient to make him whole for the emotional distress described by him during the hearing. This amount takes into account the amount of emotional distress suffered by Complainant, the duration of that emotional distress, and the fact that Complainant's emotional problems have lessened over time.

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[67] $5,529.38 + $16,760.88 + $2,179.18 + $639.55 = $25,108.99.
[68] $95,548.54 - $25,108.99 = $70,439.55.
[69] $8,750.00 - $3,486.00 = $5,264.00. $5,264.00 x 7 months = $36,848.00.
[70] $9,000.00 - $3,486.00 = $5,514.00. $5,514.00 x 2 = $11,028.00.
[71] $9,000.00 / 31 = $290.32/day. $3,486.00 / 31 = $112.45/day. $290.32 - $112.45 = $177.87/ loss per day. $177.87 x 11 days = $1,956.57.
[72] $48,782.00 + $70,439.55 + $36,848 + $11,028.00 + $2,668.05 = $169,765.60.

3. Entitlement to Punitive Damages

4.

Complainant seeks an award of punitive damages in the amount of $100,000.00. (Cl. Brf. at 50.) Respondent does not present an argument regarding punitive damages in its closing brief. Under *Youngermann v. United Parcel Service, Inc.*,[73] I am required to first determine whether an award of punitive damages is appropriate. If that question is answered in the affirmative, I will then need to perform a second analysis to determine the amount of punitive damages to be awarded.

At the first step of the punitive damages assessment, I primarily focus on the state of mind of those involved in the decision to terminate Complainant. I will also evaluate the state of mind of any other persons who may have taken actions(s) designed to discriminate against Complainant for his participation in activity protected by the FRSA. Phrases such as "reckless indifference" to, or "callous disregard" of, the federally-protected rights of Complainant describe in general terms the type of evidence that will indicate that an award of punitive damages is appropriate. I will also look for evidence of intentional violation of federal law(s).

I have already found that Mr. Ramberg's attitude towards his investigation was one of reckless indifference or callous disregard for the truth and Complainant's right to report, in good faith, a work-related injury, and that his unreasonable investigation influenced Mr. Golombeski's discipline decision. Neither Mr. Herbeck nor Mr. Golombeski chose to do anything to develop or require a more complete or reasonable investigation despite their knowledge that they had only the information from the video and the investigation completed by Mr. Ramberg was inadequate. And, Mr. Golombeski provided a disingenuous reason for not concerning himself with the adequacy of the investigation, i.e., "we had on video what he claimed happened compared to his statement on that 3- to 4-second clip."[74] This is evidence that the same attitude exhibited by Mr. Ramberg permeated through every level of Respondent's decision making chain. And, the pièce de résistance is Mr. Golombeski's explanation that they sent Complainant to a FIH, which they only do for guilty employees, not because they thought he was lying, but because they thought they could get away with terminating him without liability.

Based upon my review of all of the testimony, exhibits admitted in evidence, and the arguments of counsel, I find that Respondent intentionally violated the employee-protection provisions of the FRSA with respect to Complainant; was recklessly indifferent to the right of Complainant to report, in good faith, a work-related injury; and callously disregarded that right. Based on the record before me, I find that Complainant is entitled to an award of punitive damages.

5. Amount of Punitive Damages

Punitive damages are awarded to accomplish the twin aims of punishment and deterrence.[75] I have considered both of these aims as well as the proportionality of my award of

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[73] ARB No. 11-056, ALJ No. 2010-STA-047, 2013 WL 1182311 (ARB Feb. 27, 2013).
[74] Tr. 156, 168; *see* Section III.E.2.b(3).
[75] *Youngermann*, 2013 WL 1182311, at *7.

punitive damages to my award of compensatory damages (back wages and emotional distress damages), the seriousness of Respondent's violation of law, and Congress's intent to comprehensively address the problem of railway retaliation for occupational injury reporting.

Respondent's violation of the FRSA is extremely serious. Not only was Complainant's protected activity a contributing factor to Respondent's decision to terminate his employment, Respondent disciplined Complainant with retaliatory intent and then lied about its reason for disciplining him. It disciplined Complainant not because it thought he lied about a material fact in reporting his injury, which by its own admission is required to discipline an employee for dishonesty, but because it thought it could get away with it. It has shown no remorse for its action or given any indication that it will not repeat its conduct in the future.

In the meantime, Complainant has suffered emotional distress and a loss of wages for over 2 years. Complainant has suffered approximately $190,000 in compensatory damages. This is evidence of the seriousness of Complainant's conduct. Complainant was too lenient in requesting only $100,000 in punitive damages. It would be neither unfair nor unjust to award punitive damages of 2 times the amount of compensatory damages here. I find that this would be an amount that adequately punishes Respondent for its bad conduct and would be a good step towards deterring it from engaging in such conduct in the future, when it thinks it can get away with it. However, the FRSA limits the amount of punitive damages I can award to $250,000.[76] Thus, instead of awarding punitive damages of 2 times compensatory damages, I will award the lesser amount of $250,000. I do not believe that a lesser amount will adequately serve the purposes of punishment and deterrence.

IV. ORDER

Based on the foregoing, it is ORDERED that:

1. Respondent shall immediately reinstate Complainant to his position as a conductor at the level of seniority and with all the rights he would have had but for the adverse personnel actions taken against him;

2. Respondent shall strike all references of discipline relating to or arising out of the June 10, 2017 incident from Complainant's employment record. Respondent is prohibited from using evidence of the discipline in any future disciplinary proceeding or in any other personnel action. Further, Respondent is prohibited from using Complainant's report of injury or injury as evidence in any future FRSA claim;

3. Respondent shall pay Complainant back wages in the amount of $169,765.60, plus $177.87 per day beginning on October 16, 2019, until Respondent reinstates Complainant, plus interest on that amount from June 20, 2017, to be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C.§ 6621 and compounded daily. This payment is to be made in a lump sum and the wages will be subject to ordinary payroll deductions in effect at the time of the payment of these wages;

[76] 49 U.S.C. § 20109(e).

4. Respondent shall submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating my back pay award as appropriate for each calendar quarter from June 20, 2017 through the date Respondent pays Complainant back wages under this Decision and Order.

5. Respondent shall pay Complainant emotional distress damages in the amount of $20,000.00;

6. Respondent shall pay Complainant punitive damages in the amount of $250,000.00;

7. Complainant is to recover fully his litigation costs, expert witness fees (if any) and reasonable attorneys' fees; and

8. Within 21 days of the date of this Decision and Order, Complainant's counsel is directed to supply Respondent's counsel with: (1) the total number of hours spent by Complainant's counsel on the prosecution of this matter before OSHA and before the Office of Administrative Law Judges; (2) the hourly rate sought by Complainant's counsel for the legal services performed; (3) the total amount of expert witness fees (if any); and (4) the total amount of litigation costs incurred by Complainant. Within 14 days after Complainant's counsel supplies Respondent's counsel with this information, Complainant's counsel and Respondent's counsel are to meet and confer (either in person or by telephone) to attempt to reach agreement as to the amount of attorneys' fees and expenses to be paid to Complainant and, if no agreement can be reached, to narrow the issues in dispute. If no agreement is reached, Complainant's motion for attorneys' fees and costs must be submitted (postmarked and mailed) to the court within 60 days from the date of this Decision and Order. Any opposition to such motion must be filed[77] with the court within 14 days from the service of such motion. No reply will be permitted.

Digitally signed by JASON A. GOLDEN
DN: CN=JASON A. GOLDEN, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Jason A. Golden
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

[77] 29 C.F.R. § 18.30(b)(2) provides: "*Filing: when made—in general.* A paper is filed when received by the docket clerk or the judge during a hearing."