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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of Labor, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Case No. _____ COMPLAINT

Introduction

1. The plaintiff, Hilda L. Solis, Secretary of Labor ("the Secretary"), brings this civil action for declaratory and injunctive relief against the defendant, Union Pacific Railroad Company ("Union Pacific").

2. The Secretary seeks to enforce the preliminary order that she issued pursuant to authority granted her in the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, and to enjoin the defendant, Union Pacific Railroad Company, to comply with that order and to reinstate its former employee, Gennese Annen, to her former position. The Secretary has found

reasonable cause to believe that Union Pacific terminated Ms. Annen's employment in violation of the anti-retaliation provisions of the FRSA, and has issued a preliminary order directing Union Pacific to reinstate Ms. Annen to her former position. Union Pacific has refused to comply with the Secretary's lawful order. The Secretary is entitled to judicial enforcement of her order.

Parties

3. The plaintiff is Hilda L. Solis, in her official capacity as Secretary of Labor.

4. The defendant is Union Pacific Railroad Company.

Jurisdiction and Venue

5. This action arises under 49 U.S.C. § 20109(d)(2)(A)(iii) and 49 U.S.C. § 42121(b)(5). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1345.

6. Venue is proper in this judicial district pursuant to 49 U.S.C. §§ 20109(d)(2)(A)(iii) and 42121(b)(5).

Statutory Background

7. Under the Federal Railroad Safety Act (FRSA), "[a] railroad carrier engaged in interstate or foreign commerce . . . 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, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee . . . ." 49 U.S.C. § 20109(a)(4).

8. The FRSA also directs that "[a] railroad carrier . . . shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for – (A) reporting, in

good faith, a hazardous safety or security condition[.]" 49 U.S.C. § 20109(b)(1)(A).

9. The FRSA also provides that "[a] railroad carrier . . . may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment," 49 U.S.C. § 20109(c)(1), and that "[a] railroad carrier . . . may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician . . . ." 49 U.S.C. § 20109(c)(2). Although employees of railroad carriers may be subjected to alcohol or drug testing, "[i]n any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s)." 49 C.F.R. § 219.11(b)(2).

10. "An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b) or (c) of [49 U.S.C. § 20109], may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor." 49 U.S.C. § 20109(d)(1). The Secretary has delegated her enforcement responsibilities under the FRSA to the Occupational Safety and Health Administration ("OSHA"). *See* 75 Fed. Reg. 55,355 (Sept. 10, 2010).

11. A railroad employee who is aggrieved under the FRSA must file a complaint with OSHA within 180 days of the alleged violation. 49 U.S.C. § 20109(d)(2)(A)(ii). The procedures to be followed thereafter "shall be governed under the rules and procedures set forth in section 42121(b)" of Title 49, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act"). 49 U.S.C. § 20109(d)(2)(A)(i).

12. Under the AIR21 Act, as incorporated into the FRSA, upon her receipt of a complaint, the Secretary (acting through OSHA) is directed to "notify, in writing, the person

named in the complaint . . . of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded" to that party to respond to the complaint. 49 U.S.C. § 42121(b)(1). Those opportunities include the right to file a written response to the complaint within 60 days of the date of the respondent's receipt of the complaint, and an opportunity to meet with a representative of OSHA to present statements from witnesses. 49 U.S.C. § 42121(b)(2). *See also* 29 C.F.R. § 1982.104(f).

13. OSHA then "shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit"; it then will notify the complainant and the respondent in writing of its findings. 49 U.S.C. § 42121(b)(2). OSHA shall dismiss the complaint if the complainant does not make a prima facie showing that her protected actions were a "contributing factor in the unfavorable personnel action alleged in the complaint," 49 U.S.C. § 42121(b)(2)(B)(i), or if the employer demonstrates, by clear and convincing evidence, that it "would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).

14. "If the Secretary of Labor [as relevant here, acting through OSHA] concludes that there is a reasonable cause to believe that a violation . . . has occurred, the Secretary *shall* accompany the Secretary's findings with a preliminary order providing the relief" prescribed by statute. 49 U.S.C. § 42121(b)(2)(A) (emphasis added). The statute directs that, where she makes such a finding, "the Secretary of Labor *shall* order the person who committed such violation to" abate the violation, reinstate the complainant to her former position with back pay, and provide damages to the complainant. 49 U.S.C. § 42121(b)(3)(B); *see also* 49 U.S.C. § 20109(e).

15. After the Secretary issues her preliminary findings (including, if applicable, any

order of preliminary relief), both the complainant and the respondent are afforded the opportunity within 30 days to file objections to the findings and/or order and to request a hearing on the record before an administrative law judge. 49 U.S.C. § 42121(b)(2)(A). Parties may also seek review of the ALJ's decision before the Department of Labor's Administrative Review Board. 29 C.F.R. § 1982.110. Nonetheless, the "filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order," 49 U.S.C. § 42121(b)(2)(A), although other portions of the order, such as an award of damages, will be stayed during the pendency of any continued administrative proceedings. 29 C.F.R. § 1982.105.

16. "If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review." 49 U.S.C. § 42121(b)(2)(A). If, however, a hearing is requested, the Secretary shall issue a final order "[n]ot later than 120 days after the conclusion of [the] hearing[.]" 49 U.S.C. § 42121(b)(3)(A). Any person adversely affected by a final order may obtain review in the Court of Appeals for the circuit in which the violation occurred. 49 U.S.C. § 42121(b)(4)(A). An order of the Secretary that is subject to review in the Court of Appeals "shall not be subject to judicial review in any criminal or other civil proceeding." 49 U.S.C. § 42121(b)(4)(B).

17. The Secretary may seek judicial enforcement of a preliminary order issued under this procedure. The FRSA provides that "[i]f a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121." 49 U.S.C. § 20109(d)(2)(A)(iii). Similarly, the AIR21 Act provides: "Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in

the United States district court for the district in which the violation was found to occur to enforce such order." 49 U.S.C. § 42121(b)(5).

Factual Background

18. Union Pacific is a railroad carrier engaged in interstate commerce, within the meaning of 49 U.S.C. §§ 20102 and 20109.

19. At all times relevant to the complaint, before May 26, 2010, Union Pacific employed Gennese Annen as a locomotive conductor at its facilities in Pocatello, Idaho.

20. On the morning of May 3, 2010, Ms. Annen was completing her shift and was exiting a train when a bag, or "grip," slung over her shoulder caught on what she believed to be an edge of the doorframe, causing her to twist sharply to the right. At that time, she felt a muscle twinge on the right side of her torso, but the pain subsided immediately. Ms. Annen looked at the doorframe but did not notice any obvious defect. She accordingly finished exiting from the train and went home.

21. At about noon on the same day, while Ms. Annen was off duty, she again felt pain on the right side of her torso. On this occasion, her pain was intense and did not subside. Ms. Annen went to a clinic to seek medical attention. While en route to the clinic, she attempted to telephone four supervisory officials for Union Pacific.

22. Her first call, to her immediate supervisor, was not answered. Ms. Annen left him a voice mail that explained that she believed that she had been injured when she was exiting the train and that she planned to seek medical attention.

23. Her second call, to an "on-duty manager," was not answered, and Ms. Annen was unable to leave a voice mail message.

24. Her third call, to Union Pacific's Manager of Operating Practices, was answered. Ms. Annen informed that manager that she believed that she had been injured when she was exiting the train, that she was in pain, and that she planned to seek medical attention. That manager informed Ms. Annen that she should call a fourth supervisory official.

25. Ms. Annen complied with that request and placed a fourth call, but that official did not answer her call and Ms. Annen was unable to leave a voice mail.

26. Upon arriving at a medical clinic, Ms. Annen received a call from the Manager of Operating Practices, who requested that she come to the depot to see a nurse employed by Union Pacific instead of seeking outside medical attention. Ms. Annen replied that she was already at a clinic, that she was in a lot of pain, and that she planned to see a doctor.

27. Ms. Annen traveled to a second clinic, as the first clinic declined her request to keep her medical records confidential. Upon being examined by a doctor at the second clinic, Ms. Annen was diagnosed with a right intercostal muscle strain. Ms. Annen was prescribed cyclobenzaprine (also known as flexirel), a muscle relaxant that is used, with rest and physical therapy, to relieve pain.

28. Before she could fill her prescription, Ms. Annen received a telephone call from Union Pacific's Senior Manager of Terminal Operations. That official ordered Ms. Annen not to take the medication that had been prescribed to her. He directed that she submit to drug and alcohol testing before taking any medications. Ms. Annen questioned these instructions, and informed the supervisory official that she was in pain and that she needed to take medication to address that pain. The official repeated his instructions.

29. Ms. Annen complied with the official's instructions until her union representative contacted a Union Pacific representative and obtained permission for her to take her prescribed

medication. Ms. Annen continued to wait at the clinic until a Union Pacific supervisory official and a nurse employed by Union Pacific arrived there. Ms. Annen then submitted to a drug test, the results of which were negative.

30. Ms. Annen was asked at that time to complete a form "report of personal injury or occupation illness." On that form, Ms. Annen wrote: "I was walking out of the locomotive door and my bag that has my railroad equipment in it got caught on the door frame & twisted me & pulled me back a little . . . I believe my bag got caught on the door frame for some reason. I'm unsure if it was because of an obstruction or defect that shouldn't have been there." One section of the report asked: "Were there any defects in the equipment?" Annen did not check either the "yes" or "no" box, but instead wrote "unsure."

31. Ms. Annen's first day of work following her injury was May 10, 2010. When she reported for duty on that day, she was informed that she was under investigation for alleged misconduct and that she would be suspended without pay until the investigation was completed.

32. On May 19, 2010, Union Pacific held an investigative hearing, before two officials appointed to act as "conducting officers." At the conclusion of the hearing, one official declined to make a recommendation, and the second official recommended against any discipline. After receiving these recommendations, however, a Union Pacific superintendent sustained the charges against Ms. Annen and directed that her employment be terminated, effective May 26, 2010. The purported bases for her termination were her failure to immediately report her injury on the morning of May 3; her failure to immediately report a possible safety defect in the train's door frame at the same time; and her alleged dishonesty in claiming on the afternoon of the same day that her injury was caused when she exited the train.

33. Ms. Annen filed an FRSA complaint with OSHA on July 7, 2010, within the 180-

day time limitation specified in the statute.

34. OSHA served notice of the complaint on Union Pacific, and afforded it the opportunity to respond to the complaint. On August 27, 2010, Union Pacific submitted documents to OSHA in its defense. On December 9, 2010; December 10, 2010; March 17, 2011, and March 23, 2011, Union Pacific representatives met with OSHA investigators.

35. On August 18, 2011, OSHA issued a letter – known as a "due process" letter, *see* 29 C.F.R. § 1982.104(f), that notified Union Pacific that it found reasonable cause to believe that Union Pacific had violated the FRSA and that preliminary reinstatement was warranted. OSHA's letter included 22 exhibits that formed the factual background for its determination.

36. Union Pacific responded to OSHA's letter on September 21, 2011, and October 3, 2011.

37. The Secretary, acting through OSHA, issued a preliminary order of reinstatement on December 15, 2011. Her order found that Ms. Annen had made a prima facie showing that she had engaged in activity protected by the FRSA when she (a) reported her work-related personal injury; (b) sought medical treatment; (c) questioned Union Pacific's instructions not to take the medication that had been prescribed to her; and (d) reported a possible hazardous safety condition. Her order also found that Ms. Annen had made a prima facie showing that Union Pacific has subjected her to adverse actions for these activities, in violation of the FRSA, when it (a) ordered her to forgo medical treatment; (b) suspended her without pay; (c) subjected her to an investigative hearing; and (d) terminated her employment. The order also found that Union Pacific had failed to show by clear and convincing evidence that it would have taken the same adverse actions against Ms. Annen absent the protected activity. The order directed that Union Pacific reinstate Ms. Annen to her former position with back pay, and that it pay Ms. Annen both

compensatory and punitive damages.

38. Union Pacific has objected to the Secretary's preliminary order and has requested a hearing before an administrative law judge.

39. Union Pacific has informed the Secretary that it will not comply with the Secretary's preliminary order.

Count I – Enforcement of Preliminary Order

40. Paragraphs 1 through 39 are hereby incorporated by reference.

41. The Secretary of Labor's Preliminary Order of December 15, 2011, expressly directs the defendant, Union Pacific Railroad Company, to immediately reinstate Gennese Annen to her former position.

42. Union Pacific refuses to comply with the Preliminary Order.

43. Although Union Pacific has objected to that order in administrative proceedings before OSHA, the "filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. § 42121(b)(2)(A). Union Pacific is obligated to comply with the reinstatement remedy that the Secretary has ordered.

44. The Secretary is entitled to an order from this Court directing Union Pacific to comply with her Preliminary Order, to the extent that the order directs the reinstatement of Ms. Annen to her former position, pursuant to 49 U.S.C. § 20109(d)(2)(A)(iii) and 49 U.S.C. § 42121(b)(5).

Prayer for Relief

WHEREFORE, the plaintiff, Hilda L. Solis, Secretary of Labor, prays for the following relief:

A. That the Court enter an order declaring the Secretary's Preliminary Order

directing Union Pacific Railroad Company to reinstate Gennese Annen to her former position to be valid and enforceable;

B. That the Court award preliminary and permanent injunctive relief that enjoins the defendant, Union Pacific Railroad Company, to comply with the Secretary's Preliminary Order, to the extent that that order directs the reinstatement of Gennese Annen to her former position;

C. That the Court award preliminary and permanent injunctive relief that enjoins the defendant, Union Pacific Railroad Company, to reinstate Gennese Annen to her former position while the Secretary's Preliminary Order remains in effect;

D. That the Court assess against the defendant all costs incurred by the plaintiff; and

E. That the Court award such other and additional relief as the Court may deem to be just and proper.

Respectfully submitted this the 6th day of August, 2012.

STUART F. DELERY
Acting Assistant Attorney General

WENDY J. OLSON
United States Attorney

ARTHUR R. GOLDBERG
Assistant Branch Director

/s/Joel McElvain
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

N/A

AND I FURTHER CERTIFY that on such date I caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via hand delivery to:

Union Pacific Railroad Company
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

/s/Joel McElvain
Joel McElvain
Counsel for Plaintiff

CM/ECF Requirements

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil coversheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
HILDA L. SOLIS, Secretary of Labor,

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Joel McElvain, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Ave., NW, Washington DC 20001, (202) 514-2988

DEFENDANTS
UNION PACIFIC RAILROAD COMPANY,

County of Residence of First Listed Defendant Bannock County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff) and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☒ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
49 U.S.C. 20109(d)(2)(A)(iii); 49 U.S.C. 42121(b)(5)

Brief description of cause:
Enforcement of administrative order directing defendant to reinstate an employee

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions):*

JUDGE _____ DOCKET NUMBER _____

DATE 08/06/2012

SIGNATURE OF ATTORNEY OF RECORD /s/ Joel McElvain

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause **Do not cite jurisdictional statutes unless diversity**. Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Idaho

HILDA L. SOLIS, Secretary of Labor,

Plaintiff(s)

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNION PACIFIC RAILROAD COMPANY
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Joel McElvain
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20001
(202) 514-2988

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

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Counsel for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of Labor, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Case No. _____ PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The plaintiff, Hilda L. Solis, Secretary of Labor ("the Secretary"), respectfully moves for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a). The Secretary respectfully requests that the defendant, Union Pacific Railroad Company ("Union Pacific"), be preliminarily enjoined (a) to reinstate its former employee, Gennese Annen, to her former position with the defendants, and (b) to comply with the Secretary's Preliminary Order ("Order"), to the extent that the Order directed Union Pacific to reinstate Ms. Annen to that position.

The Secretary's motion for a preliminary injunction is supported by the complaint; by the Declaration of Dean Y. Ikeda and the exhibits attached thereto; and by the Declaration of Gennese Annen. The grounds for this motion are stated in the accompanying plaintiff's memorandum in support of her motion for preliminary injunction.

WHEREFORE, the Secretary respectfully requests that the Court enter a preliminary injunction that enjoins Union Pacific (a) to reinstate its former employee, Gennese Annen, to her former position with the defendant, and (b) to comply with the Secretary's Preliminary Order, to the extent that the Order directed Union Pacific to reinstate Ms. Annen to that position.

Respectfully submitted this the 6th day of August, 2012.

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Acting Assistant Attorney General

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/s/Joel McElvain
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

N/A

AND I FURTHER CERTIFY that on such date I caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via hand delivery to:

Union Pacific Railroad Company
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

/s/Joel McElvain
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Counsel for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of Labor, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Case No. _____ PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION FOR A PRELIMINARY INJUNCTION

Introduction

The plaintiff, Hilda L. Solis, Secretary of Labor ("the Secretary"), respectfully moves for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a). The Secretary respectfully requests that the defendant, Union Pacific Railroad Company ("Union Pacific"), be preliminarily enjoined (a) to reinstate its former employee, Gennese Annen, to her former position with the defendants, and (b) to comply with the Secretary's Preliminary Order ("Order"), to the extent that the Order directed Union Pacific to reinstate Ms. Annen to that position.

Pursuant to the authority granted her in the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, the Secretary has found reasonable cause to believe that Union Pacific terminated Ms. Annen's employment in violation of the anti-retaliation provisions of the FRSA, and has issued a preliminary order directing Union Pacific to reinstate Ms. Annen to her former position. Union Pacific has refused to comply with the Secretary's lawful order. The Secretary is entitled to judicial enforcement of her order.

Statutory Background

The Federal Railroad Safety Act (FRSA), specifies certain protected activities that railroad employees may undertake, for which they may not be discharged or otherwise subjected to adverse employment actions by their employer. Three provisions of the FRSA, in particular, form the basis of the preliminary order that is at issue here.

First, "[a] railroad carrier engaged in interstate or foreign commerce . . . 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, or attempt to

notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee . . . ." 49 U.S.C. § 20109(a)(4). Second, the FRSA also directs that "[a] railroad carrier . . . shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for – (A) reporting, in good faith, a hazardous safety or security condition[.]" 49 U.S.C. § 20109(b)(1)(A).

Third, the FRSA also provides that "[a] railroad carrier . . . may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment," 49 U.S.C. § 20109(c)(1), and that "[a] railroad carrier . . . may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician . . . ." 49 U.S.C. § 20109(c)(2). Although employees of railroad carriers may be subjected to alcohol or drug testing, "[i]n any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment must be accorded priority over provision of the breath or body fluid specimen(s)." 49 C.F.R. § 219.11(b)(2).

If a railroad employee believes that she has been subject to discharge, discipline, or other discrimination in violation of these or other provisions of the FRSA, she may file an administrative complaint with the Occupational Safety and Health Administration ("OSHA"), which has been delegated the Secretary of Labor's enforcement authority under the FRSA. 49 U.S.C. § 20109(d)(1); *see* 75 Fed. Reg. 55,355 (Sept. 10, 2010).

Any such complaint must be filed within 180 days of the alleged violation. 49 U.S.C. § 20109(d)(2)(A)(ii). The procedures to be followed thereafter "shall be governed under the rules and procedures set forth in section 42121(b)" of Title 49, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21 Act"). 49 U.S.C. § 20109(d)(2)(A)(i).

Under the AIR21 Act, as incorporated into the FRSA, upon her receipt of a complaint, the Secretary (acting through OSHA) is directed to "notify, in writing, the person named in the complaint . . . of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded" to that party to respond to the complaint. 49 U.S.C. § 42121(b)(1). Those opportunities include the right to file a written response to the complaint within 60 days of the date of the respondent's receipt of the complaint, and an opportunity to meet with a representative of OSHA to present statements from witnesses. 49 U.S.C. § 42121(b)(2). *See* 29 C.F.R. § 1982.104(f).

OSHA then "shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit"; it then will notify the complainant and the respondent in writing of its findings. 49 U.S.C. § 42121(b)(2). OSHA shall dismiss the complaint if the complainant does not make a prima facie showing that her protected actions were a "contributing factor in the unfavorable personnel action alleged in the complaint," 49 U.S.C. § 42121(b)(2)(B)(i), or if the employer demonstrates, by clear and convincing evidence, that it "would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).

Conversely, if the complainant does make a prima facie showing of unlawful discrimination, and if the respondent fails to rebut that showing by clear and convincing evidence, OSHA is required by statute to issue a preliminary order awarding relief to the complainant. "If the Secretary of Labor [as relevant here, acting through OSHA] concludes that there is a reasonable cause to believe that a violation . . . has occurred, the Secretary *shall* accompany the Secretary's findings with a preliminary order providing the relief" prescribed by statute. 49 U.S.C. § 42121(b)(2)(A) (emphasis added). The statute directs that, where she makes

such a finding, "the Secretary of Labor *shall* order the person who committed such violation to" abate the violation, reinstate the complainant to her former position with back pay, and provide damages to the complainant. 49 U.S.C. § 42121(b)(3)(B); *see also* 49 U.S.C. § 20109(e).

After the Secretary issues her preliminary findings (including, if there is reasonable cause to believe that a violation occurred, an order of preliminary relief), both the complainant and the respondent are afforded the opportunity within 30 days to file objections to the findings and/or order and to request a hearing on the record before an administrative law judge. 49 U.S.C. § 42121(b)(2)(A). Parties may also seek review of the ALJ's decision before the Department of Labors' Administrative Review Board. 29 C.F.R. § 1982.110. Nonetheless, the "filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order," 49 U.S.C. § 42121(b)(2)(A), although other portions of the order, such as an award of damages, will be stayed during the pendency of any continued administrative proceedings. 29 C.F.R. § 1982.105.

"If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review." 49 U.S.C. § 42121(b)(2)(A). If, however, a hearing is requested, the Secretary – acting through the Administrative Review Board – shall issue a final order "[n]ot later than 120 days after the conclusion of [the] hearing[.]" 49 U.S.C. § 42121(b)(3)(A). Any person adversely affected by a final order may then obtain review in the Court of Appeals for the circuit in which the violation occurred. 49 U.S.C. § 42121(b)(4)(A). An order of the Secretary that is subject to review in the Court of Appeals "shall not be subject to judicial review in any criminal or other civil proceeding." 49 U.S.C. § 42121(b)(4)(B).

The Secretary may seek judicial enforcement of a preliminary order issued under this

procedure. The FRSA provides that "[i]f a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121." 49 U.S.C. § 20109(d)(2)(A)(iii). Similarly, the AIR21 Act provides: "Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order." 49 U.S.C. § 42121(b)(5).

Factual Background

Union Pacific is a railroad carrier engaged in interstate commerce, within the meaning of 49 U.S.C. §§ 20102 and 20109. (Declaration of Dean Y. Ikeda, Exh. B ["Preliminary Order"] at 2.)[1] At all times relevant to the complaint, before May 26, 2010, Union Pacific employed Gennese Annen as a locomotive conductor at its facilities in Pocatello, Idaho. *Id.*

On the morning of May 3, 2010, Ms. Annen was completing her shift and was exiting a train when a bag, or "grip," slung over her shoulder caught on what she believed to be an edge of the doorframe, causing her to twist sharply to the right. *Id.* at 3. At that time, she felt a muscle twinge on the right side of her torso, but the pain subsided immediately. *Id.* Ms. Annen looked at the doorframe but did not notice any obvious defect. *Id.* She accordingly finished exiting from the train and went home. *Id.* at 4.

At about noon on the same day, while Ms. Annen was off duty, she again felt pain on the

[1] The factual discussion is drawn from the Secretary's findings, which form the basis of her preliminary order. It is appropriate to focus on the Secretary's findings, given that the Court's task in this proceeding is "not to review the evidence but to simply ascertain whether the procedures followed by the Secretary in issuing the ALJ order satisfied due process." *Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461, 473 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1201 (2d Cir. 1993).

right side of her torso. *Id.* On this occasion, her pain was intense and did not subside. *Id.* Ms. Annen went to a clinic to seek medical attention. *Id.* While en route to the clinic, she attempted to telephone four supervisory officials for Union Pacific. *Id.*

Her first call, to her immediate supervisor, was not answered. *Id.* at 4-5. Ms. Annen left him a voice mail that explained that she believed that she had been injured when she was exiting the train and that she planned to seek medical attention. *Id.* at 4-5. Her second call, to an "on-duty manager," was not answered, and Ms. Annen was unable to leave a voice mail message. *Id.* at 5. Her third call, to Union Pacific's Manager of Operating Practices, was answered. *Id.* Ms. Annen informed that manager that she believed that she had been injured when she was exiting the train, that she was in pain, and that she planned to seek medical attention. *Id.* That manager informed Ms. Annen that she should call a fourth supervisory official. *Id.* Ms. Annen complied with that request and placed a fourth call, but that official did not answer her call and Ms. Annen was unable to leave a voice mail. *Id.*

Upon arriving at a medical clinic, Ms. Annen received a call from the Manager of Operating Practices, who requested that she come to the depot to see a nurse employed by Union Pacific instead of seeking outside medical attention. *Id.* Ms. Annen replied that she was already at a clinic, that she was in a great deal of pain, and that she planned to see a doctor. *Id.*

Ms. Annen traveled to a second clinic, as the first clinic declined her request to keep her medical records confidential. *Id.* Upon being examined by a doctor at the second clinic, Ms. Annen was diagnosed with a right intercostal muscle strain. *Id.* at 6. Ms. Annen was prescribed cyclobenzaprine (also known as flexirel), a muscle relaxant that is used, with rest and physical therapy, to relieve pain. *Id.*

Before she could fill her prescription, Ms. Annen received a telephone call from Union

Pacific's Senior Manager of Terminal Operations. *Id.* That official ordered Ms. Annen not to take the medication that had been prescribed to her. *Id.* He directed that she submit to drug and alcohol testing before taking any medications. *Id.* Ms. Annen questioned these instructions, and informed the supervisory official that she was in pain and that she needed to take medication to address that pain. *Id.* The official repeated his instructions. *Id.*

Ms. Annen complied with the official's instructions until her union representative contacted a Union Pacific representative and obtained permission for her to take her prescribed medication. *Id.* at 7. Ms. Annen continued to wait at the clinic until a Union Pacific supervisory official and a nurse employed by Union Pacific arrived there. *Id.* Ms. Annen then submitted to a drug test, the results of which were negative. *Id.* at 8.

Ms. Annen was asked at that time to complete a form "report of personal injury or occupation illness." *Id.* On that form, Ms. Annen wrote: "I was walking out of the locomotive door and my bag that has my railroad equipment in it got caught on the door frame & twisted me & pulled me back a little . . . I believe my bag got caught on the door frame for some reason. I'm unsure if it was because of an obstruction or defect that shouldn't have been there." *Id.* One section of the report asked: "Were there any defects in the equipment?" *Id.* Annen did not check either the "yes" or "no" box, but instead wrote "unsure." *Id.*

Ms. Annen's first day of work following her injury was May 10, 2010. *Id.* When she reported for duty on that day, she was informed that she was under investigation for alleged misconduct and that she would be suspended without pay until the investigation was completed. *Id.* at 9. On May 19, 2010, Union Pacific held an investigative hearing, before two officials appointed to act as "conducting officers." *Id.* At the conclusion of the hearing, one official declined to make a recommendation, and the second official recommended against any

discipline. *Id.* at 10. After receiving these recommendations, however, a Union Pacific superintendent sustained the charges against Ms. Annen and directed that her employment be terminated, effective May 26, 2010. *Id.* The purported bases for her termination were her failure to immediately report her injury on the morning of May 3; her failure to immediately report a possible safety defect at the same time; and her alleged dishonesty in claiming on the afternoon of the same day that her injury was caused when she exited the train. *Id.*

Ms. Annen filed an FRSA complaint with OSHA on July 7, 2010, within the 180-day time limitation specified in the statute. *Id.* at 1. OSHA served notice of the complaint on Union Pacific, and afforded it the opportunity to respond to the complaint. (Ikeda Decl., Exh. A ["Due Process Letter"] at 1.) On August 27, 2010, Union Pacific submitted documents to OSHA in its defense. *Id.* On December 9, 2010; December 10, 2010; March 17, 2011, and March 23, 2011, Union Pacific representatives met with OSHA investigators. *Id.*

On August 18, 2011, OSHA issued a letter – known as a "due process" letter, *see* 29 C.F.R. § 1982.104(f) -- that notified Union Pacific that it had found reasonable cause to believe that Union Pacific had violated the FRSA and that preliminary reinstatement was warranted. *Id.* OSHA's letter included 22 exhibits that formed the factual background for its determination. *Id.* at 11. Union Pacific responded to OSHA's letter on September 21, 2011, and October 3, 2011. Preliminary Order at 2.

The Secretary, acting through OSHA, issued a preliminary order of reinstatement on December 15, 2011. *Id.* Her order found that Ms. Annen had made a prima facie showing that she had engaged in activity protected by the FRSA when she (a) reported her work-related personal injury; (b) sought medical treatment; (c) questioned Union Pacific's instructions not to take the medication that had been prescribed to her; and (d) reported a possible hazardous safety

condition. *Id.* at 12-13. Her order also found that Ms. Annen had made a prima facie showing that Union Pacific has subjected her to adverse actions for these activities, in violation of the FRSA, when it (a) ordered her to forgo medical treatment; (b) suspended her without pay; (c) subjected her to an investigative hearing; and (d) terminated her employment. *Id.* at 13. The order also found that Union Pacific had failed to show by clear and convincing evidence that it would have taken the same adverse actions against Ms. Annen absent the protected activity. *Id.* The order directed that Union Pacific reinstate Ms. Annen to her former position with back pay, and that it pay Ms. Annen both compensatory and punitive damages. *Id.* at 18-19.

Union Pacific has objected to the Secretary's preliminary order and has requested a hearing before an administrative law judge. In the interim, Union Pacific has informed the Secretary that it will not comply with the Secretary's preliminary order.

Argument

Union Pacific has placed itself squarely in violation of a valid and effective order of the Secretary by refusing to comply with her Preliminary Order. Pursuant to 49 U.S.C. § 42121(b)(2)(A), Union Pacific may not do so. The statute explicitly directs that an order of reinstatement relief remains in effect, and is not stayed, during the pendency of administrative proceedings on Union Pacific's objections to that order. Because Union Pacific refuses to comply with its clear obligation to obey the Preliminary Order, the Secretary is entitled to a preliminary injunction.

I. The Secretary Is Entitled to a Preliminary Injunction Enforcing Her Order, So Long as She Afforded Union Pacific Due Process in her Administrative Proceedings

As a general matter, a moving party is entitled to a preliminary injunction if it shows: "(1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the

absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Alternatively, the Ninth Circuit permits a "sliding scale" inquiry in which a strong showing of irreparable harm might justify a preliminary injunction if the plaintiff shows that there are "serious questions going to the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Here, however, the Secretary is under a statutory duty to issue a preliminary order of reinstatement, if she finds reasonable cause to believe that the employer has violated the FRSA in terminating a complainant's employment. *See* 49 U.S.C. § 42121(b)(2)(A) (directing that the Secretary "shall" issue a preliminary order awarding relief); 49 U.S.C. § 42121(b)(3)(B) (directing that preliminary order "shall" include reinstatement); 49 U.S.C. § 20109(e) (same). Nor does any statute give the employer the discretion to ignore a preliminary order of reinstatement. To the contrary, the statute specifies that an order for such relief is not stayed pending the completion of administrative proceedings. 49 U.S.C. § 42121(b)(2)(A).

In a case like this, where relief is mandated by statute, the federal government shows its entitlement to injunctive relief simply by showing a violation of federal law. "When the government is seeking compliance pursuant to a statutory enforcement scheme, irreparable injury from a denial of enforcement is presumed." *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 453 (9th Cir. 1983). *See also United States v. Odessa Union Warehouse Corp.*, 833 F.2d 172, 175 (9th Cir. 1987). Thus, the traditional "elements for a preliminary injunction are not relevant here as [the Secretary] is entitled to an injunction based exclusively on the Secretary's findings." *Bechtel v. Competitive Tech., Inc.*, 369 F. Supp. 2d 233, 236-37 (D. Conn. 2005), *rev'd on other grounds*, 448 F.3d 469 (2d Cir. 2006).

The Court accordingly must only determine that the Secretary has a cause of action to enforce her order – which she does – and that the Secretary afforded Union Pacific due process before issuing her order – which she did. *See Martin v. Yellow Freight Sys., Inc.*, 793 F. Supp. 461, 473 (S.D.N.Y. 1992), *aff'd*, 983 F.2d 1201 (2d Cir. 1993) ("the task of this court is not to review the evidence but to simply ascertain whether the procedures followed by the Secretary in issuing the ALJ order satisfied due process"). The underlying merits of the Secretary's order are not before the Court in this enforcement action. *See id.* If Union Pacific disputes the merits of that order, it may present its arguments in the continued administrative proceedings before the Department of Labor, and in any court of appeals proceeding challenging the final order that will result from those proceedings. *See* 49 U.S.C. § 42121(b)(4)(A). Any attempt by Union Pacific to attack the Secretary's order on the merits would only "intrude into the jurisdiction of the Court of Appeals," *Martin*, 793 F. Supp. at 473, in violation of the statutory directive that the review of the merits of the Secretary's order is reserved *solely* for the court of appeals. 49 U.S.C. § 42121(b)(4)(B).

As noted, the remaining three elements in the traditional test for preliminary injunctive relief are not relevant her in this statutory enforcement action. In any event, the Secretary has shown that she is likely to suffer irreparable injury in the absence of an injunction, that the balance of the equities weighs in her favor, and that the public interest would be served by an injunction. As a result, her motion for a preliminary injunction should be granted.

II. The Secretary Is Likely to Succeed on the Merits of Her Claim

A. The Secretary Is Entitled to Judicial Enforcement of Her Order

This Court has the authority to enforce the Secretary's order. Congress granted this Court such authority for an obvious reason; absent that authority, an employer could effectively

stay the operation of the Secretary's order simply by refusing to comply, contravening the statute's clear direction that the Secretary's preliminary reinstatement orders will *not* be stayed during the pendency of administrative proceedings, 49 U.S.C. § 42121(b)(2)(A). The FRSA accordingly explicitly provides a cause of action to the Secretary to enforce orders that she issues under the Act:

> If a person fails to comply with an order issued by the Secretary of Labor pursuant to the procedures in section 42121(b), the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred, as set forth in 42121.

49 U.S.C.§ 20109(d)(2)(A)(iii). In this case, the Secretary has exercised her authority under the FRSA (49 U.S.C. § 20109) to issue a preliminary order of reinstatement, following the procedures in the AIR21 Act (49 U.S.C. § 42121), and Union Pacific has failed to comply with that order. Consequently, she has a cause of action under 49 U.S.C. § 20109(d)(2)(A)(iii) for enforcement of her order.

Although the Court need not decide the issue, the Secretary also has a cause of action under the AIR21 Act, 49 U.S.C. § 42121(b)(5), which, as noted, is incorporated by reference into the FRSA. That statute permits the Secretary to file a civil action to enforce "an order issued under paragraph (3)" of the same section. *Id.* The Secretary may enforce both preliminary orders and final orders under her AIR21 Act authority. Although paragraph (b)(2) describes the Secretary's authority to issue a preliminary order under the AIR21 Act, paragraph (b)(3) describes the remedies that are available to her in such an order. Consequently, a preliminary order is "issued under paragraph (3)," and thus is enforceable in a civil action. *See Solis v. Tennessee Commerce Bancorp*, 713 F. Supp. 2d 701, 712 (M.D. Tenn. 2010). A contrary reading would permit an employer to stay the Secretary's AIR21 Act order by refusing to comply with it, contravening the command of 49 U.S.C. § 42121(b)(2)(A) that such orders may

not be stayed. *See Bechtel v. Competitive Tech., Inc.*, 448 F.3d 469, 487 (2d Cir. 2006) (Straub, J., dissenting). *But see Bechtel*, 448 F.3d at 473 (opinion of Jacobs, J.) (concluding that only final orders are enforceable under AIR 21 Act). (The Second Circuit did not decide the issue in *Bechtel*, as the third member of the panel would have decided the case on other grounds.) The issue, in any event, is academic in this case, as the Secretary clearly has a cause of action to enforce her order under the FRSA, 49 U.S.C. § 20109(d)(2)(A)(iii).

B. The Secretary Has Afforded Due Process to Union Pacific

Union Pacific has not challenged the process that it has been afforded in the Secretary's administrative proceedings. It would certainly fail in any such challenge. The Secretary has informed Union Pacific of the evidence forming the basis of her preliminary order of reinstatement, and has afforded Union Pacific numerous opportunities to meet with agency representatives and to submit evidence in its defense. *See* Ikeda Decl., Exh. A. These procedures easily fulfill the procedural requirements for the Secretary's Preliminary Order. In the context of orders requiring immediate reinstatement of whistleblower employees:

> minimum due process for the employer . . . requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceedings.

Brock v. Roadway Express, Inc., 481 U.S. 252, 264 (1987). Thus, due process requires only that "prereinstatement procedures establish a reliable 'initial check against mistaken decisions'" and that "complete and expeditious review is available." *Id*. at 263 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)).

The Secretary has met this standard here. After receiving the complaint from Annen, OSHA provided a copy to Union Pacific and invited Union Pacific to respond with a written

statement as well as evidence in support of its position. Union Pacific provided such materials and met with the OSHA investigators on December 9 and 10, 2010, and March 17 and 23, 2011. Subsequently, OSHA issued its "due process letter" on August 18, 2011, informing Union Pacific that there was reasonable cause to believe that Union Pacific had violated the FRSA and the basis for that belief. Notably, the due process letter included twenty-two enclosures of exhibits and statements provided by witnesses. Thereafter, OSHA invited Union Pacific to respond before issuing the preliminary order, and Union Pacific did so. *See* Ikeda Decl., Exh. B. Thus, this case does not present any due process concerns. *See Solis v. Tenn. Commerce Bankcorp*, 713 F. Supp. 2d 701, 716 (M.D. Tenn. 2010) (concluding that nearly identical procedures were "sufficient to satisfy due process requirements").

C. Union Pacific's Election-of-Remedies Argument Is Not Properly Before the Court, and, in any Event, Lacks Merit

The Secretary has a cause of action to enforce her preliminary order, and she afforded due process to Union Pacific before issuing her order. This should end the Court's inquiry; upon these showings, the Secretary is entitled to enforcement of her order. Union Pacific, however, will likely challenge the Secretary's order on the merits, arguing that it may ignore the Secretary's order because Ms. Annen's pursuit of a grievance under her collective bargaining agreement precludes relief for her under the FRSA. These arguments are not properly presented here, but instead should be reserved for the continuing administrative process, and then for the court of appeals upon review of the Secretary's final order, if that order is adverse to Union Pacific. *See* 49 U.S.C. § 42121(b)(4)(A), (b)(4)(B). In the meantime, Union Pacific's objections to the merits of the Secretary's order "shall not operate to stay any reinstatement remedy contained in the preliminary order." 49 U.S.C. § 42121(b)(2)(A).

In any event, its arguments lack merit. Union Pacific refers to 49 U.S.C. § 20109(f),

which provides that "[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." A collective bargaining agreement is "another provision of law," the argument goes, and consequently Ms. Annen's FRSA complaint is invalid. But a collective bargaining agreement is just that, an agreement; it is not a "provision of law." *Cf. Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir. 1989) (noting that former FRSA election-of-remedies provision "refers to federal statutes or regulations, not the common law remedies of the fifty states"). In other words, "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). This is because "the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement . . . . The arbitrator, however, has no general authority to invoke public laws . . . ." *Id.* at 52-53.

Union Pacific argues that the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, which authorizes the creation of collective bargaining agreements, is a "provision of law" that forecloses relief under the FRSA, even if the collective bargaining agreement is not itself a "provision of law." But the RLA does not itself create any rights that Ms. Annen could enforce; the Act merely establishes procedures for the adjudication of disputes under a collective bargaining agreement. For example, Ms. Annen's right to be terminated only for just cause is found in her collective bargaining agreement, not in any provision of the RLA. Thus, Ms. Annen's claim of wrongful discharge arose under the collective bargaining agreement itself, not under the statute. *See Graf v. Elgin, Joliet, & E. Ry. Co.*, 697 F.2d 771, 774-77 (7th Cir. 1985) (discussing this distinction).

Moreover, Ms. Annen did not challenge "the same allegedly unlawful act of the railroad

carrier," 49 U.S.C. § 20109(f), under the collective bargaining agreement and in her FRSA complaint. The former proceeding concerned her claim that Union Pacific violated the terms of the collective bargaining agreement itself. The latter proceeding did not concern her collective bargaining agreement, but instead her claim that Union Pacific violated the FRSA by retaliating against her.

Any doubt as to the foregoing is erased by Congress's 2007 amendments to the FRSA, which clarified that the pursuit of a grievance under a collective bargaining agreement does not foreclose relief under the FRSA. The Act now provides that "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement," and specifies that an employee's protections under the FRSA "may not be waived by any agreement[.]" 49 U.S.C. § 20109(h). Similarly, the amended Act also provides that "[n]othing in this section preempts or diminishes any other safeguards against discrimination . . . provided by Federal or State law." 49 U.S.C. § 20109(g). Union Pacific's reading would create a conflict between subsection (f) and these provisions; a complainant's rights under a collective bargaining agreement would be "diminish[ed]" if her pursuit of those rights foreclosed relief under the FRSA.

The Secretary has authoritatively construed the FRSA to avoid this conflict. *Mercier v. Union Pac. R. Co.*, ARB Case No. 09-121, 2011 WL 4915758 (Dep't of Labor Admin. Review Bd. Sept. 29, 2011) (included, for the Court's convenience, as Attachment A to this memorandum).[2] In *Mercier*, the Secretary rejected Union Pacific's arguments and held that a

[2] The Secretary has delegated her authority to issue final orders under the FRSA to the Administrative Review Board. *See* 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board's reasonable construction of the FRSA is accordingly entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). *See Welch v. Chao*, 536 F.3d 269, 276 n.2 (4th Cir. 2008); *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1173-74 (10th Cir. 2005). *See also United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) ("[i]t is fair

collective bargaining agreement is not a "provision of law" within the meaning of 49 U.S.C. § 20109(f), and that 49 U.S.C. § 20109(g) and (h) confirm that a complainant may pursue a grievance under a collective bargaining agreement without foregoing relief under the FRSA. *Id.* The Secretary's construction of the statute is reasonable, and thus is entitled to *Chevron* deference. Ms. Annen's pursuit of a grievance under the collective bargaining agreement therefore does not foreclose the Secretary's power to afford her relief under the FRSA.

In sum, the Secretary has exercised her authority to issue a preliminary order to Union Pacific to reinstate Ms. Annen to her position. That order is not stayed while Union Pacific pursues its objections to the order before the agency, and the FRSA affords the Secretary a cause of action to ensure that her order is enforced in the interim, even where Union Pacific refuses to comply with her lawful order. This Court reviews the Secretary's order only to ensure that she afforded Union Pacific due process, and she did so here. The Secretary accordingly is entitled to enforcement of her preliminary order, notwithstanding Union Pacific's arguments on the merits. Its arguments concerning the FRSA election-of-remedies provision lack merit, in any event.

III. The Secretary Meets the Remaining Elements for Preliminary Injunctive Relief

As noted above, in a statutory enforcement action, the Secretary need only show that she is likely to succeed on the merits in order to gain an injunction enforcing an administrative order. *See, e.g.*, *Navel Orange Admin. Comm.*, 722 F.2d at 453. But, in any event, the Secretary has met all of the elements of the traditional test for preliminary injunctive relief.

A. The Secretary Would Suffer an Irreparable Injury Absent Injunctive Relief

The Secretary has found reasonable cause to believe that Union Pacific terminated Ms. Annen's employment in violation of the FRSA's anti-retaliation provisions, and has ordered

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to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure" such as formal adjudication.)

Union Pacific to reinstate Ms. Annen to her former position. Union Pacific has refused to comply with the Secretary's lawful order. The Secretary would suffer irreparable injury if Union Pacific were permitted to flout the Secretary's order.

A failure to enforce the Secretary's order would discourage employees from reporting improper practices of their employers, and would encourage employers to retaliate against meritorious complainants, in direct contravention of the FLSA's purpose. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances . . . . For it needs no argument to show that the fear of economic retaliation might often operate to induce aggrieved employees to accept substandard conditions." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). If an employer were permitted to subject its employees to retaliation for activity protected by the FRSA, that would "provide[] the employer an opportunity for continued wrongdoing and [would] strike[] at the complaint-based enforcement mechanism contemplated by" the statute. *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 880 (2d Cir. 1988); *see also Garcia v. Lawn*, 805 F.2d 1400, 1405-06 (9th Cir. 1986) (retaliatory "conduct is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges"). As the Secretary is responsible for enforcement of the FLSA, then, she would suffer irreparable injury if Union Pacific were permitted to undermine the statutory protections that ensure the effective operations of the FLSA's administrative scheme.

B. The Public Interest and the Balance of the Equities Support Preliminary Injunctive Relief

The equities here weigh in favor of a preliminary injunction reinstating Ms. Annen to her position, and the public interest would be served by that relief. Indeed, Congress has weighed the public interest, and the competing interest of employers and employees, and has balanced those considerations in favor of the employee's reinstatement where the Secretary finds

reasonable cause to believe that an employer has violated the FRSA. Notably, in *Brock*, the Supreme Court considered the interests of the employer-defendant as well as the government-plaintiff and the former employee in deciding what procedures were required under the Due Process Clause. 481 U.S. at 263. The Court noted that the employer has an interest in "controlling the makeup of its work force," *id.* at 263; the government has a "substantial" interest in promoting safety in the applicable industry and in protecting employees from retaliatory discharge, *id*. at 262; and the former employee has an interest in "not being discharged for having complained," *id*. at 263. The Court held that "'[w]hile a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.'" *Id*. (quoting *Loudermill*, 470 at 543). The Court found that Congress had carefully balanced the interests involved in enacting the whistleblower provision at issue in *Brock*, and that the statute demonstrated "'the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action' and the need 'to assure that employers are provided protection from unjustified refusal by their employees to perform legitimate assigned tasks.'" *Id.* at 262 (quoting 128 Cong. Rec. 32,510 (1982)).

Such is the case here. After losing her employment with Union Pacific, Ms. Annen has accepted alternative employment at significantly lower pay. Declaration of Gennese Annen, ¶ 7. She has lost her health insurance, and has been forced to move due to her reduced financial circumstances. *Id.*, ¶¶7, 9. The "injurious effect [on her] financial status," *Brock*, 481 U.S. at 263, constitutes irreparable harm to Ms. Annen, and the balance of the equities weigh in her favor. This harm, and to the government caused by Union Pacific's flouting of the Secretary's lawful order, far outweighs any harm to Union Pacific that would result from the temporary

reinstatement of Ms. Annen. *See, e.g., Tenn. Commerce Bancorp*, 713 F. Supp. 2d at 717 (public interest favors enforcement of the Secretary's preliminary order, "given the importance of the statutory purposes here."). The public interest and the balance of the equities thus weigh strongly in favor of the enforcement of the Secretary's lawful order.

Conclusion

For the foregoing reasons, the Secretary's motion for a preliminary injunction should be granted, and Union Pacific should be enjoined to comply with the Secretary's preliminary order of reinstatement.

Respectfully submitted this the 6th day of August, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

N/A

AND I FURTHER CERTIFY that on such date I caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via hand delivery to:

Union Pacific Railroad Company
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

/s/Joel McElvain
Joel McElvain
Counsel for Plaintiff

A

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

MICHAEL L. MERCIER, **ARB CASE NO. 09-121**

COMPLAINANT, **ALJ CASE NO. 2008-FRS-004**

v.

UNION PACIFIC RAILROAD CO.,

RESPONDENT,

and

LARRY L. KOGER, **ARB CASE NO. 09-101**

COMPLAINANT, **ALJ CASE NO. 2008-FRS-001**

v. **DATE: September 29, 2011**

NORFOLK SOUTHERN RAILWAY CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant Michael L. Mercier:
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For the Complainant Larry L. Koger:
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For the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae:

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Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER ON INTERLOCUTORY REVIEW

The Complainants, Michael L. Mercier and Larry L. Koger, each filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaints, Mercier and Koger each alleged that his respective employer terminated his employment in violation of the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/Reuters 2011), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No.110-53. In each case, a Labor Department Administrative Law Judge (ALJ) issued a pre-hearing ruling. The ALJ in *Mercier* (ALJ No. 2008-FRS-004) ruled that Mercier's complaint is not barred under the FRSA's election of remedies provision at 49 U.S.C.A. § 20109(f) and thus denied Union Pacific Railroad's motion for summary decision. Conversely, the ALJ in *Koger* (ALJ No. 2008-FRS-003) ruled that Koger's complaint is so barred and thus granted Norfolk Southern Railroad's motion to dismiss the complaint.

Before the Administrative Review Board (ARB or Board), the parties in *Mercier* sought interlocutory review of the ALJ's ruling. Koger filed an appeal with the ARB. The ARB granted interlocutory review of the ALJ's ruling in *Mercier* and consolidated Mercier's appeal (ARB No. 09-121) for purposes of decision with Koger's then-pending appeal (ARB No. 09-101). ARB's Order Granting Interlocutory Review and of Consolidation for Purposes of Decision dated Sept. 16, 2009.

BACKGROUND

The ARB set forth the background facts of this case in its September 16, 2009, order in which it granted interlocutory review and consolidated the above-captioned cases. We summarize briefly.

1. Facts and proceedings in Mercier v. Union Pacific

Union Pacific terminated Mercier's employment in November 2007. On Mercier's behalf, his union, the Brotherhood of Locomotive Engineers and Trainmen, filed a grievance and later pursued arbitration under the Railway Labor Act (RLA), 45 U.S.C.A. § 151 *et seq.* (Thompson/Reuters 2011), alleging that the termination violated the collective bargaining agreement between the union and Union Pacific Railroad.

Mercier filed his FRSA whistleblower complaint with the Labor Department on March 27, 2008. The case was referred to an ALJ for hearing. Union Pacific moved for summary judgment, arguing that Mercier's complaint is barred under the FRSA's election of remedies provision, 49 U.S.C.A. § 20109(f), which states that an employee cannot "seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." Relying on subsection (f), Union Pacific contended that Mercier's decision to pursue his union grievance and arbitration under the RLA constituted seeking protection under "another provision of law." Union Pacific contended that Mercier's FRSA (whistleblower) complaint is thus barred by the election of remedies provision.

That ALJ rejected Union Pacific's argument. The ALJ observed that 49 U.S.C.A. § 20109(g) states that nothing in the section "preempts" or "diminishes any other safeguards against discrimination," and that under 49 U.S.C.A. § 20109(h), employees retained rights and remedies "under any Federal or State law or under any collective bargaining agreement" and that these rights and remedies "may not be waived." The ALJ noted that Union Pacific had made no attempt to reconcile subsections (g) and (h) with subsection (f), and concluded that subsections (g) and (h) do not prevent an individual who has filed a grievance pursuant to a collective bargaining agreement from pursuing an FRSA complaint. The ALJ noted that subsection (f) prohibits an employee from seeking protection under "both this section and another provision of law" and concluded that the contractual agreement or collective bargaining agreement under which Mercier had proceeded in his grievance/arbitration action is not a provision of law in itself although it is enforceable through provisions of law such as the RLA. The ALJ denied Union Pacific's motion for summary disposition. The ARB granted interlocutory review.

2. Facts and proceedings in Koger v. Norfolk Southern

Norfolk Southern terminated Koger's employment in August 2007. Koger's union, United Transportation Union, filed a grievance and pursued arbitration under the RLA on his behalf as provided for in the collective bargaining agreement it had with Koger's employer. Koger also filed a FRSA whistleblower complaint. Koger alleged in his complaint that Norfolk Southern discharged him for reporting an injury, activity protected by the FRSA's employee protection provisions.

Prior to a hearing, the ALJ granted Norfolk Southern's motion to dismiss the complaint. The ALJ determined that the FRSA's election of remedies provision, 42 U.S.C.A. § 20109(f), barred Koger's FRSA whistleblower complaint because Koger had

pursued a grievance and arbitration under the RLA, which constituted "another provision of law." The ALJ also found that the actions of which Koger complained in both the arbitration and the FRSA complaint involved "the same allegedly unlawful act of the railroad carrier," namely Koger's discharge. Koger appealed.

JURISDICTION AND STANDARD OF REVIEW

The ARB has the authority to hear interlocutory appeals of administrative law judge orders under the FRSA in exceptional circumstances. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 para. 5 (c) (48) (Jan. 15, 2010).

The issue before us in *Mercier* is whether the ALJ properly ruled that the FRSA's election of remedies provision does not bar Mercier's complaint where he previously pursued a grievance and arbitration provided for in his union's collective bargaining agreement and enforceable under the RLA. The ALJ's ruling in *Mercier* stands in opposition to the ALJ's ruling in *Koger*. We consolidated *Koger* with *Mercier* for purposes of decision; thus our decision in *Mercier* determines the outcome in *Koger*.

DISCUSSION

A. Statutory Scheme

In 1980, Congress amended the FRSA to allow rail employees who alleged retaliation to challenge their discipline only through the procedures afforded under the RLA. Congress added an election of remedies provision, Pub. L. No. 96-423 § 10(d) (1980), that remains the same in substance. The current election of remedies provision reads as follows:

> **(f) Election of remedies**. – An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

49 U.S.C.A. § 20109(f).

The legislative history of Section 20109(f) reveals Congress's concerns that some rail workers potentially qualified for protection from discrimination under two statutes, the FRSA and a Labor Department regulation, 29 C.F.R. § 1977.12 (2010), promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 660(c)(1) (Thomson/Reuters 2011). The OSHA regulation granted covered workers the right to be "protected against subsequent discrimination" for refusing to work under hazardous conditions. 29 C.F.R. § 1977.12(b)(2). Congress intended to bar rail employees from seeking a remedy under both acts. *See* 126 Cong. Rec. 26532 (1980) (statement of Rep. Florio describing the provision as "clarifying the relationship between the remedy provided [under the FRSA] and a possible separate remedy under [the Occupational

Safety and Health Act]. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results."). Congress apparently intended the original election of remedies provision to bar resort to both FRSA and Occupational Safety and Health Act remedies.

Congress enacted numerous amendments to the FRSA on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act), but did not alter the substance of Section 20109(f). The 2007 Amendments transferred authority for rail employees' whistleblower claims from the National Railroad Adjustment Board to the Labor Department's Occupational Safety and Health Administration and created new rights, remedies, and procedures. Under the Railway Labor Act, the National Railroad Adjustment Board has jurisdiction to issue a final decision in "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements." 45 U.S.C.A. § 153(h)(1). The 2007 Amendments stripped the National Railroad Adjustment Board of authority to resolve whistleblower complaints under 49 U.S.C.A. § 20109 and transferred that authority to the Labor Department.

The House Conference Committee report characterizes the 2007 Amendments as "enhanc[ing] administrative and civil remedies for employees." H.R. Rep. No. 110-259, at 31 (2007). Those purposes were also served by two provisions Congress added to Section 20109 as part of the 2007 Amendments: 49 U.S.C.A. § 20109(g) and (h). These sections provide:

> **(g) No preemption**. – Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.
>
> **(h) Rights retained by employee**. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The

> rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

49 U.S.C.A. § 20109(g), (h).

B. Section 20109 permits a whistleblower claim to run concurrently with a collective bargaining grievance

Union Pacific contends that Mercier's pursuit of a grievance under his collective bargaining agreement constitutes an election of remedies that, under 42 U.S.C.A. § 20109(f), precludes his whistleblower claim. We disagree.

It is fundamental that statutory construction begins with the statute itself. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *Johnson v. Siemens Bldg. Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011). *See* SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION, § 46:1 (7th Ed.). "If the statute's meaning is plain and unambiguous, there is no need for further inquiry and the plain language of the statute will control its interpretation." *Luckie v. United Parcel*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039 (ARB June 29, 2007) (citing *United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002)).[1] Section 20109(f) expressly states that an "employee may not seek protection under both this section and *another provision of law* for the same allegedly unlawful act . . . " 29 U.S.C.A. § 20109(f) (emphasis added). Under these terms, the plain language of Section 20109(f) limits its application to protection sought under "another provision of law."

In our view, the plain meaning of "another provision of law" does not encompass grievances filed pursuant to a "collective bargaining agreement," which is not "another provision of law" but is instead a contractual agreement. This understanding is illuminated by language used in Section 20109(h), which expressly references "a collective bargaining agreement" in describing the application of subsection (h). The fact that a party relies on the law to enforce a right in a collective bargaining agreement is not the same as a right created under a provision of law. *See, e.g.*, *Graf* v. *Elgin, Joliet and Eastern Railway Co.*, 697 F.2d 771, 776 (7th Cir. 1983) ("Nor does the fact that an activity is regulated by a federal statute, as collective bargaining in the railroad industry is regulated by the Railway Labor Act, mean that disputes between private parties engaged in that activity arise under the statute."). Consequently, if the parties' election of remedies defense rests on rights created by a collective bargaining, we do not need to

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[1] *See also, e.g.*, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46:4 (N. Singer, 6th ed. 2000) ("A party who asks the court to ignore the plain language of a statute must show that it is manifest that the legislature could not possibly have meant what it said in that language, or the natural reading of the statute would lead to an absurd result.").

interpret the remainder of the Election of Remedies provision. Nonetheless, further reasoning supports this interpretation of the statute.

First, the amendment to Section 20109, which added subsections (g) and (h) does not change the interpretation of subsection (f) in this case. A grievance and arbitration action provided for in a collective bargaining agreement and enforceable under the RLA does not work to waive the rights and remedies the FRSA affords here. By their terms, sections (g) and (h) anticipate and permit a concurrent whistleblower complaint *and* arbitration provided for in a collective bargaining agreement and enforceable under the RLA. The language of subsection (g) states that nothing in the Act "preempts or diminishes any other safeguards" against a variety of discrimination and/or retaliation employment-related actions, and subsection (h) ensures that workers retain certain rights to use grievance procedures for such actions. At a minimum, the addition of subsections (g) and (h) to Section 20109 reflect Congress's apparent intent to eliminate any preemption or bar of retaliation claims when there is a concurrent grievance procedure pending under a collective bargaining agreement emanating from the same "unlawful act." 29 U.S.C.A. § 20109(f). See, *e.g.*, *Gonero v. Union Pacific Railroad Co.*, No. Civ. 2:09-2009, 2009 WL 3378987, *2-*6 (E.D. Cal. Oct. 19, 2009) (district court determined that the FRSA's election of remedies provision allowed railroad employee to pursue multiple claims related to railroad safety or whistleblower retaliation, *including* under state law). Thus, Mercier's collective bargaining grievance does not preclude his whistleblower complaint under the plain meaning of Section 20109(f).

Next, interpreting Section 20109(f)'s reference to "another provision of law" to *not* encompass grievance procedures under a collective bargaining agreement is underscored in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Supreme Court addressed the relationship between a grievance process for collective bargaining agreements and the enforcement of an individual's right to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, et seq. (Thompson/Reuters 2010). The Court determined that contractual rights are distinct from federal statutory rights, and held that a "contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination." *Id.* at 52. The Court held further that

> [b]oth rights have legally independent origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. . . . [T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has *no general authority to invoke public laws* . . . .

Id. at 52-53 (emphasis added). *See also McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 288-289 (1984) (arbitration did not foreclose separate complaint brought under 42 U.S.C.A. § 1983); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-738 (1981) (arbitration award did not preclude a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provision of the Fair Labor Standards Act).

This interpretation of 49 U.S.C.A. § 20109(f) to permit whistleblower claims to proceed concurrent with collective bargaining grievance procedures, in light of subsections (g) and (h), is consistent with the Act's plain meaning and comports with the Supreme Court's tenet that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss,* 523 U.S. 26, 36 (1998); *Regions Hosp. v. Shalala,* 522 U.S. 448, 460 n.5 (1998) ("We agree that context counts and stress in this regard what the Court has said □[o]ver and over: In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (internal quotations and citations omitted). Like Title VII in *Alexander*, 415 U.S. 36, the 2007 Amendments to the FRSA incorporating Section 20109(g) and (h), reflect Congress's intent that railroad employees not be limited in pursuing their rights under the whistleblower statute despite also enforcing their contractual rights in arbitration. *See Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, -015, -106; ALJ Nos. 2009-AIR-015, -016, -017 (ARB Sept. 16, 2011).

While subsection (f) cannot be read to bar concurrent whistleblower and collective bargaining claims, we *do* understand the necessity for barring duplicative *recovery* under those claims. The FRSA provides that an employee prevailing in a whistleblower complaint "shall be entitled to all relief necessary to make the employee whole." 49 U.S.C.A. § 20109(e)(1). Damages may include reinstatement, backpay, compensatory damages, and punitive damages not to exceed $250,000. 49 U.S.C.A. § 20109(e)(2), (3). In this case, Mercier appears to pursue compensatory damages for pain and suffering stemming from mental hardship, stress, and treatment for depression. *See* Mercier Complaint at 9. These are damages distinct to his complaint under 49 U.S.C.A. § 20109 that may not be available to him under the collective bargaining agreement. In any event, it is well-established that any relief to which Mercier is entitled would be that which would make him "whole" and would not include double recovery. *See generally Sears Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956) ("a plaintiff may pursue an action against an identical defendant in several courts at the same time, even though inconsistent remedies are sought. But . . . there can be only one recovery."); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1317 (9th Cir. 1986) (same).

he Federal Railroad Administration[2] in 2008 expressed this bar to duplicative recovery as follows:

> The statutory "election of remedies" provision is intended to protect an employer from having to pay the same types of damages to an employee multiple times just because there are multiple statutory provisions upon which an employee could file a complaint or a suit. The election of remedies provision is intended to prevent, for example, an employee from getting double the backpay, compensatory damages, and punitive damages the employee is entitled to by seeking protection under both the Occupational Safety and Health Act of 1970, 29 U.S.C. [§] 660(c), and Section 20109.

73 Fed. Reg. 8455 (2008).

Based on the foregoing interpretation of the FRSA's mandate, (1) we deem nothing in these whistleblower protection provisions as diminishing Mercier's right to pursue arbitration under the collective bargaining agreement between his union and his employer, and (2) we hold that by pursuing arbitration Mercier did not waive any rights or remedies that the FRSA affords him, including the right to pursue a whistleblower complaint under its provisions.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's order in *Mercier* allowing the complaint to proceed and **DENY** Union Pacific's request that we dismiss it. In light of our ruling in *Mercier*, we **REVERSE** the dismissal of Koger's complaint. We **REMAND** to the Office of Administrative Law Judges the *Mercier* and *Koger* cases for further proceedings consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI,
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[2] The Federal Railroad Administration, part of the United States Department of Transportation, imposes railroad regulations, conducts inspections, and promotes safety and efficiency of the nation's railroads. *See* 49 U.S.C.A. § 103.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of Labor, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Case No. _____ DECLARATION OF DEAN Y. IKEDA

I, Dean Y. Ikeda, declare as follows

1. I am the Regional Administrator for Region X of the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor, with offices at 300 Fifth Avenue, Suite 1280, Seattle, Washington 98104-2397. As such I have overall responsibility for and control of all OSHA activities in Region X.

2. On July 7, 2010, OSHA Region X received a complaint from Gennese Annen alleging that she had been retaliated against by her former employer, Union Pacific Railroad

Company ("Union Pacific") in violation of the Federal Railway Safety Act ("Act"). Region X subsequently began an investigation of Ms. Annen's complaint.

3. On August 18, 2011, I sent Union Pacific a letter indicating that initial phase of our investigation into Ms. Annen's complaint was complete, and that OSHA had concluded that it had reasonable cause to believe that Union Pacific had violated the employee protection provisions of the Act. The letter explained the evidence upon which OSHA based that conclusion. Along with the letter, I included 22 exhibits covering much of the evidence OSHA had gathered. The letter also invited Union Pacific to submit rebuttal evidence; OSHA initially requested that rebuttal evidence be provided within 15 business days of Union Pacific's receipt of the letter. A true and correct copy of that letter is attached to this declaration as Exhibit A.

4. Union Pacific sought and received more than one extension of time to submit rebuttal evidence. OSHA ultimately allowed Union Pacific 42 days from receipt of the letter to submit rebuttal evidence.

5. On December 15, 2011, I sent Union Pacific a second letter containing the Secretary's Findings with regard to Ms. Annen's complaint. The Secretary concluded that Ms. Annen had engaged in activity protected by the Act when she reported a work-related personal injury; sought medical treatment for that injury; questioned her employer's instructions to forgo prescribed medication; and reported a possible hazardous safety condition. The Secretary also concluded that Union Pacific subjected Ms. Annen to an adverse action, in violation of the Act, when it (1) ordered her to forgo medical treatment; (2) suspended her without pay; (3) subjected her to an investigative hearing; and (4) terminated her employment. The Secretary further concluded that Union Pacific had failed to show that it would have taken the same adverse actions against Ms. Annen absent the protected activity. The Secretary's Findings also included

an order directing Union Pacific to reinstate Ms. Annen to her former position with back pay, and to pay Ms. Annen both compensatory and punitive damages. A true and correct copy of that letter is attached to this declaration as Exhibit B.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

Executed this 6th day of August, 2012.

DEAN Y. IKEDA
REGIONAL ADMINISTRATOR
OSHA, REGION X

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

N/A

AND I FURTHER CERTIFY that on such date I caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via hand delivery to:

Union Pacific Railroad Company
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

/s/Joel McElvain
Joel McElvain
Counsel for Plaintiff

A

U.S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101 - 3212

Via certified mail #7009 3410 0001 7957 9493
August 18, 2011

Mr. Rami Hanash
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179

RE: *Union Pacific Railroad Company/ Annen, Gennese/ 0-0160-10-018*

Dear Mr. Hanash:

The initial phase of the investigation into the above-referenced retaliation complaint is complete. Based on the available evidence, the Occupational Safety and Health Administration (OSHA) has determined there is reasonable cause to believe that Union Pacific Railroad Company violated the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (FRSA), and that the preliminary reinstatement of Gennese Annen is warranted. OSHA's investigation of this matter is ongoing. This letter is sent prior to the issuance of Findings and a Preliminary Order and does not constitute a final determination by the agency of a finding of violation.

Under OSHA's procedures for the handling of retaliation complaints under the rules and procedures set forth in 49 U.S.C. § 42121(b), Respondent is hereby notified of its opportunity to submit rebuttal evidence. Respondent may submit a written response, meet with OSHA officials, and offer rebuttal witnesses to be interviewed. Counsel may appear and act on Respondent's behalf regarding this matter. Please note that Respondent has fifteen business days from receipt of this notice to present any rebuttal evidence. If you cannot present the rebuttal evidence within fifteen days, we may arrange a mutually acceptable date, but you must contact us within the fifteen-day period. All relevant information submitted in a timely fashion will be fully evaluated before OSHA issues Findings and a Preliminary Order in this case. *See* 29 C.F.R. Section 1979.104(e).

As a preliminary matter, we note that Respondent was served notice of the complaint via Certified Mail, Return Receipt Requested, Article # 7009 2250 0004 4003 5737 on July 19, 2010. After being notified of this complaint, Respondent was provided an opportunity to submit a written statement and other relevant documents explaining or defending its position. On August 27, 2010, our office received Respondent's written response and supporting documents. Respondent was also afforded an opportunity to meet with the investigator to submit information related to this complaint, and to make available individuals who also had relevant information. Meetings between the investigator, you, and others took place on December 9-10, 2010, and March 17, and 23, 2011.

OSHA's investigation indicates that Complainant has demonstrated that reasonable cause exists to believe that Respondent has violated FRSA. Complainant alleged, in a timely fashion, a violation of FRSA by Respondent, a covered employer.

Protected Activity

The evidence demonstrates that Complainant engaged in activity protected by FRSA. Specifically, on May 3, 2010, Complainant engaged in protected activity when she reported a work-related personal injury. Complainant also engaged in protected activity when she sought medical treatment and questioned Respondent William Andrew Sanders' instruction that she "hold off" on taking the medication prescribed to her by Portneuf Urgent Care.

On May 3, 2010, Complainant engaged in a protected activity when she reported, in good faith, a possible hazardous safety condition, specifically a possible defect on the outside door frame of Union Pacific Locomotive 8073.

On July 14, 2010, Complainant engaged in a protected activity when she filed a whistleblower complaint with the Occupational Safety and Health Administration.

Employer Knowledge

Respondent had knowledge of each of Complainant's protected activities. Complainant reported a work-related injury to Respondent on May 3, 2010. Respondent does not dispute that Complainant reported this injury to multiple Respondent managers.

Respondent does not dispute that it was aware that Complainant sought medical treatment. Further, Respondent Sanders has acknowledged that he ordered Complainant to hold off on taking medication until a drug tester arrived.

On May 3, 2010, Complainant filled out an injury report. Complainant stated in the injury report that she was uncertain whether a possible defect existed. Respondent does not dispute knowledge that the injury report identified a possible defect.

On May 3, 2010, Complainant filled out a handwritten statement in which she identified that she was uncertain whether a possible defect existed on Union Pacific Locomotive 8073. Respondent does not dispute knowledge that Complainant's handwritten statement identified an injury and a possible defect.

At Respondent's request, Complainant answered multiple questions put forth by Respondent Gary Pfinster. Complainant indicated to Respondent Pfinster that she was uncertain whether she was injured at the time of the incident and was uncertain as to whether a possible defect existed in the doorway of Union Pacific Locomotive 8073. Respondent does not dispute knowledge that Complainant shared this information with Respondent Pfinster.

Adverse Employment Action

Complainant was subjected to four distinct adverse employment actions:

1. On May 3, 2010, Complainant was subjected to an adverse action when Respondent's Senior Manager of Terminal Operations William Andrew Sanders ordered her to forgo medical treatment.

2. On May 10, 2010, Complainant was subjected to an adverse action when she was suspended pending an investigation.

3. On May 19, 2010, Complainant was subject to an adverse action when Respondent brought charges against her and subjected her to an "Investigative Hearing" for reporting a work-related injury.

4. On May 26, 2010, Complainant was subject to an adverse action when she was fired.

Nexus between Complainant's Protected Activity and Adverse Employment Action

The available evidence indicates that Complainant's protected activities were, at a minimum, a contributing factor in the adverse employment actions that she experienced.

a. Temporal Proximity

Complainant reported a work-related injury to numerous Respondent managers starting at approximately 12:00 p.m. on May 3, 2010. She also informed them that she was seeking medical treatment. Later that same day, Complainant identified a possible defect on Union Pacific Locomotive 8073.

Within roughly an hour of her first phone call to Respondent, Respondent Andy Sanders contacted Complainant and ordered her to forgo medical treatment. Complainant told Respondent Sanders that she was in pain, but Respondent Sanders insisted that she not take any medication until a drug tester arrived at the medical facility. Respondent Pfinster told OSHA that he was aware of Respondent Sanders' instructions. However, Respondent Pfinster remained silent and allowed Complainant to simply wait in pain.

On May 10, 2010, seven days after being injured, Complainant attempted to return to work. Respondent Gary Pfinster informed her that she suspended pending an investigation. Respondent charged Complainant with three GCOR violations: 1.6 (Conduct); 1.2.5 (Reporting); 1.2.7 (Furnishing Information).

On May 11, 2010, Respondent sent Complainant a notice of investigation, which included charges that would lead to Complainant's termination. Those charges accuse Complainant of, among other things, not being forthcoming with information while she was seeking medical treatment for her injury.

On May 19, 2010, sixteen days after Complainant reported her injury Respondent held an "Investigative Hearing." Respondent Superintendent John Huddleston asked Brian W. Jones and Jeffrey Maughan to act as the "Conducting Officers." The evidence suggests that the Conducting Officers manage the hearing, similar to a judge, and write a "close out letter" at the hearing's conclusion. According to multiple witnesses, including Respondents Jones and Maughan, the close out letter often makes a recommendation regarding whether the charges against the employee were sustained.

Here, both Conducting Officers wrote close out letters and provided those letters to Respondent Superintendent John Huddleston. Although Respondent Jones often makes recommendations in his close out letters, he declined to do so here. Instead, he merely summarized what he believed to be the facts established at the hearing, and made no recommendation on whether to sustain the charges against Complainant. Respondent Maughan did make a recommendation. He concluded that none of the charges were supported by the evidence offered at the hearing. Consequently, the only recommendation to come out of Complainant's investigative hearing was that none of the charges against Complainant were supported by the evidence.

On May 26, 2010, Utah Superintendent Thomas Lischer upheld each and every charge against Complainant and terminated her employment. Respondent Lischer was not present during the hearing and did not interview Complainant. Instead, he claims to have based his decision on the transcript of the hearing and the exhibits attached thereto. Respondent Lischer had no memory of receiving a close out letter from either Conducting Officer and no memory of reviewing the TIR evidence.

The close temporal proximity between Complainant's protected activities and the subsequent adverse actions create an inference of retaliation.

b. Disparate Treatment

The investigation also uncovered substantial evidence of disparate treatment. Prior to being injured, Complainant appears to have been highly regarded by her supervisors. Respondent Scott Huffield described her as a good employee, someone who did her job and did it without complaint. Respondent Pfinster praised Complainant as a conscientious employee. However, shortly after she reported an injury and identified a possible defect, Complainant was ordered to forgo medical treatment, suspended, investigated and then terminated. Indeed, Complainant was never allowed to return to work after she reported an injury and possible defect.

Respondent contends that it terminated Complainant for being careless of the safety of herself or others. Specifically, Respondent contends that Complainant was careless insofar as she failed to immediately report a possible defect. Setting aside Complainant's testimony that she did not believe a defect existed at the time she was injured (indeed there was none), the weight of the available evidence suggests that Respondent does not regularly discipline employees who fail to immediately report possible or even actual defects.

OSHA's investigation revealed numerous instances in which employees failed to immediately report both possible and actual defects. However, where Complainant was terminated for failing to report a

possible defect, these employees do not appear to have been in any respect disciplined or even counseled.

Under 49 C.F.R. § 229.21, Respondent is required to inspect locomotives at least once each calendar day, identify non-complying conditions and create a report of such conditions. On numerous occasions employees reported that they received locomotives, after those locomotives were inspected per 49 C.F.R. § 229.21, with actual defects that went unnoticed and unidentified. While some of these defects were arguably subtle, such as one locomotive that did not have a locomotive door cable (which created a pinch point), others ranged from profound to obvious, including a missing horn button and door cables that were so short that the locomotive door only opened two-thirds of the way.

On April 19, 2011, OSHA requested the inspection reports, required to be maintained under 49 U.S.C. § 229.21, for nine separate incidents, all of which appeared to involve a failure to immediately report an actual defect. OSHA also requested the name of the person who inspected the locomotive with the defect, whether that person reported the defect, and if not whether that person was investigated or disciplined. Respondent refused to provide the requested information. Consequently, the available evidence suggests that Respondent does not discipline employees for failing to immediately report possible (or actual) defects.

c. Animus

The available evidence suggests that Respondent has exhibited ill will toward Complainant's protected activities in multiple respects. The most direct evidence of exhibited ill will stems from Respondent Sanders and Respondent Pfinster's decision to prolong Complainant's suffering while she was at Portneuf Urgent Care. Specifically, Respondent Sanders exhibited ill will toward Complainant's protected activities by intentionally delaying her use of the pain medication prescribed to her for no credible reason. Respondent Pfinster's exhibited ill will may be seen in his failure to act: his decision to remain silent while one of his employees sat in pain while waiting needlessly for a drug tester to arrive. Moreover, the fact that neither Respondent Pfinster nor Respondent Sanders were ever disciplined or even counseled with respect to their behavior, suggests that other managers, such as Respondent Superintendent Huddleston, tacitly endorsed denying Complainant medical attention.[1]

Additionally, evidence confirmed that Respondent is hostile toward injury reporting. For example, Conductor/Brakeman Doug Kroll reported that he has been specifically told, "if you report an injury, you will be fired." While he was told this prior to Respondent Huddleston's arrival, he believes that it is still the case with respect to Respondent Huddleston. Another witness reported that it is "common knowledge" that if you report an injury you are opening yourself up to discipline. Yet another witness, who claimed not to know the Complainant or the basis of her allegations, told OSHA that under Respondent Huddleston it seems like people are more intimidated with respect to reporting injuries. That witness testified that under Respondent Huddleston, Respondent is "way way harsher on people who have been injured." Two other witnesses confirmed that Respondent, especially under Superintendent Huddleston, is particularly hostile toward injury reporting.

[1] Respondent's lack of action on this point also suggests a disregard for 49 C.F.R. § 225.33(a)(1).

Although more subtle, Respondent's animus is also apparent in the rewards that it provides its managers for low injury statistics. Indeed, according to Respondents Huffield, Pfinster, Bosch and Huddleston, injury statistics play an important role in promotions, raises and bonuses. While the stated goal of these rewards (reducing injuries) is laudable, the fact remains that Respondent has created a powerful incentive not only to reduce injuries, but to suppress injury reporting.

Similarly, Respondent's decision to provide "safety feeds" based on groups of workers reaching 1000th day landmarks without injury, though positive in its stated intent (to encourage safety), also creates an incentive for the under-reporting of injuries. On the 999th day, what worker would want to be the one to cost the entire group the safety feed? While some injuries like a broken leg or a severed limb will obviously be reported, others (like a pulled muscle) appear all the less likely to be reported where the consequence is costing the entire group a reward. Finally, although less insidious than the safety feeds, even the safety award (which the evidence suggests can be lost due to an injury) creates an incentive for workers to cover up injuries.

Respondent's Stated Reasons for Terminating Complainant

Respondent denies that it retaliated against Complainant for reporting a work-related injury. To the contrary, Respondent contends that it terminated Complainant for violating three General Code of Operating Rules: 1.6 (Conduct), 1.2.7 (Furnishing information), 1.2.5 (Reporting). Respondent's reasons are not supported by the available evidence.

a. GCOR 1.6(1) Carelessness of the safety of themselves or others

Respondent charged Complainant with a 1.6(1) infraction because she allegedly failed to immediately report a possible defect. Respondent contends that this failure was careless of the safety of herself and others.

Over the course of this investigation, the evidence that Respondent has offered in support of its 1.6(1) charge includes: Complainant's Report of Personal Injury, Complainant's handwritten statement; testimony regarding Complainant's interview with Respondent Pfinster, and Respondent's "Investigative Hearing" transcript. Respondent maintains that based on this evidence it would have terminated Complainant for this alleged infraction even absent her protected activity.

Throughout this investigation, Respondent has focused on the fact that Complainant stated that she was unsure whether a defect existed in her Report of Personal Injury, in her handwritten statement, and in her interview with Respondent Pfinster. Respondent has taken Complainant's stated uncertainty, offered on reflection hours after the incident and while in considerable pain, to mean that Complainant suspected that a defect might exist at the time she was injured. Yet, the overwhelming weight of the evidence in no respect suggests that Complainant suspected that a defect existed at the time she was injured.

The evidence supports Complainant's contention that she did not suspect a defect existed at the time that her grip got caught. To the contrary, as Complainant explained in Respondent's "Investigative Hearing," at the time of the incident she saw nothing out of place, saw nothing that appeared to be a defect and thus had absolutely no reason to report a possible defect. Multiple witnesses confirmed that being caught up while exiting the narrow locomotive passageway at issue here is a common

experience that does not suggest a defect. Indeed, as Respondent later confirmed, there was no defect, and thus nothing for Complainant to notice or report. The mere fact that Complainant, in light of her injury, discovered hours later, did not feel that on reflection and while in considerable pain that she could state with certainty that no defect existed does not in turn mean that she suspected a defect five hours earlier and does not suggest that she was careless of herself or others. In fact, if anything, Complainant's decision to reconsider her earlier determination that no defect existed is entirely consistent with GCOR 1.6(1).

Further, Respondent's decision to suspend, investigate and fire Complainant for reconsidering her earlier determination will at best make employees think twice before expressing any uncertainty in similar circumstances. For example, it is not difficult to envision a situation in which an employee determines the existence of a possible defect, on reflection, that they did not notice earlier in the day. It is also not difficult to imagine that employee then deciding that it would be career suicide to report that later appreciated defect. This failed report could then lead to an injury. Stated simply, Respondent's decision to punish Complainant in this circumstance is inconsistent with its own rule and tends to cultivate employee harm. Employees should not be discouraged from raising concerns about possible defects.

Although not relied on by Respondent, as noted above, the available evidence also suggests that Respondent does not typically discipline employees for failing to immediately report either possible or even actual defects. OSHA's investigation showed that Respondent's employees did not always report possible defects immediately. Yet, those employees were not disciplined. Moreover, OSHA's investigation produced evidence that employees were regularly caught up on locomotive doors while exiting. Some complained to managers hours after the fact, others decided not to complain at all. None were disciplined for failing to immediately report a possible defect.

Respondent's own "Investigative Hearing" produced just one recommendation on the GCOR 1.6(1) charge – that it was not supported by the evidence. And yet, Complainant was fired for violating it.

As explained above, Complainant has shown that her protected activities contributed to Respondent's decision to terminate her employment. Respondent claims that it would have terminated Complainant under GCOR 1.6(1) even absent Complainant's protected activities. To succeed, the Respondent was required to provide clear and convincing evidence that it would have taken the same adverse action absent Complainant's protected activity. To date, Respondent has failed to provide clear and convincing evidence that it would have taken the same adverse action absent Complainant's protected activity.

b. GCOR 1.6(4): Dishonesty

Respondent also contends that it fired Complainant for violating GCOR 1.6(4). The only evidence that supports Respondent's contention is a video captured with a "Track Image Recorder" (TIR) that was attached to another locomotive. As noted above, Respondents Huddleston, Pfinster and Sanders (none of whom acknowledged being involved in the decision to terminate Complainant) all claim that the video conclusively establishes that Complainant lied about the incident. They each insist that the TIR evidence shows that Complainant was not caught up when she exited Locomotive 8073. This contention is at odds with Respondent's other claimed justifications for termination. Specifically, Respondent's assertion that Complainant lied about being caught up and in fact was not

caught up conflicts with Respondent's contention that she also violated GCOR 1.6(1) (Carelessness) and GCOR 1.2.5 (Reporting). Specifically, Respondent's claim that Complainant violated 1.6(4) because she lied about being caught up insofar as the TIR evidence shows that she *was not* caught up undermines Respondent's claim that Complainant failed to report per GCOR 1.2.5 that she *was* caught up and failed to report that she *was* caught up by a possible defect.

Moreover, four others, including Respondent Maughan, watched the same video and determined that it did not support a GCOR 1.6(4) violation. While Respondent consistently failed to provide a copy of the TIR evidence to OSHA (which it claims is critical to its defense), Respondent did allow the OSHA Investigator to review that evidence. Based on that review, the events appear to have taken place as described in Respondent Maughan's close out letter. Specifically, the TIR video shows Complainant come to a stop, set her lunch pail down, adjust her bag, and then detrain. Neither Complainant nor her grip are completely within view when she stops. Thus, while the TIR recording does not conclusively establish that the incident occurred precisely as Complainant described, it does nothing to contradict her description. Stated another way, at best the TIR evidence does no harm to Respondent's argument, and at worst substantially undercuts Respondent's contention that Complainant lied.

Additionally, the evidence does not suggest that Complainant's exit from the locomotive was fluid and smooth, as alleged by Respondents Huddleston, Pfinster and Sanders. This is especially apparent when Complainant's exit is contrasted with the Engineer's exit. The TIR evidence shows that the Engineer did walk straight through the door. He did not get part way through the door, come to an abrupt stop, set down a lunch pail and adjust his bag. The contrast between Complainant's exit and the Engineer's exit is plain: the Engineer walked fluidly through the doorway; Complainant did not.

Despite the fact that Respondent claims that the TIR evidence is central to the dishonesty charge, the ultimate decision maker, Thomas Lischer, claims that he has no memory of ever having watched the TIR video. Indeed, at his interview, Respondent Lischer could not recall the basis for the 1.6(4) charge against the Complainant. Respondent Lischer's inability to articulate a reason for the Complainant's termination does not assist Respondent in providing the clear and convincing evidence required to rebut Complainant's proof that her protected activities contributed to her termination.

Respondent's own "Investigative Hearing" produced just one recommendation on the GCOR 1.6(4) charge – that it was not supported by the evidence. Respondent's recommendation at the Investigative Hearing stage appears to be correct: the evidence simply does not substantiate the GCOR 1.6(4) charge.

c. 1.2.5 (Reporting)

Respondent also charged Complainant with violating GCOR 1.2.5. Respondent claims that it upheld this charge against Complainant because she claims that she suffered an on-duty injury at 6:45 a.m., but she did not report that injury to management until 1:00 p.m.[2]

[2] Although Respondent's termination letter indicates that Complainant did not report her injury until 1:00 p.m., the evidence offered at Respondent's Investigative Hearing established that Complainant phoned a Respondent Manager at 12:06 p.m.

All Respondent managers agreed that an employee cannot report an injury of which that employee is unaware. All Respondent managers also agreed that Complainant claimed that she was not aware of the injury at 6:45 a.m. To the contrary, she claimed that she merely felt a twinge, which she did not believe to be an injury.

When asked how Respondent could have expected Complainant to report an injury of which she was unaware, most management witnesses responded by asking: how would the Complainant know that the cause of her injury was the 6:45 a.m. incident if she did not realize that she was hurt until noon? Complainant claimed that she was able to connect the injury with the incident because the pain she felt occurred at the same place where she felt a twinge earlier in the day.

Respondent appears to have completely disregarded Complainant's account of how her pain developed. Indeed, Respondents, with the notable exception of Respondent Maughan, told OSHA that they simply assumed that if Complainant felt a twinge in the morning that she later reported to be an injury she clearly knew that it was an injury at 6:45 a.m. and should have reported it. However, this contention appears to be pretext.

None of the managers have any medical background that would qualify them to evaluate Complainant's description of how her pain developed. Respondent Maughan suggested that, as things stood, he believed that Complainant reported her injury as soon as she was aware of it. He also suggested that it would be wise to check on the medical probability of what she stated. Although Respondent employs doctors, has an entire medical department, and even has a Registered Nurse on site in Pocatello (her office is only a handful of yards from Pfinster, Sanders and Huddleston's respective offices), not a single manager bothered to try to determine the medical probability of Complainant's description. Respondent's investigation did not actually investigate.

While Respondent did nothing whatsoever to investigate the medical probability of Complainant's claim, OSHA did have an opportunity to interview Respondent's Registered Nurse, Susan Norby. Ms. Norby reported that her background with intercostal muscle strains (the injury suffered by Complainant) includes twelve years in urgent care, where she said "you see a lot of injuries like that." She also told OSHA that her husband and mother have both suffered intercostal muscle strains.

According to Ms. Norby, unlike other injuries that tend to feel better over time, intercostal muscle strains actually tend to get more tender over time: as Respondent Norby put it "they get better before they get worse before they get better." In other words, Nurse Susan Norby's description suggests that Complainant's description of how her pain developed is in fact medically probable, as Respondent would have learned had any manager taken the time to discuss the issue with its Occupational Safety and Health Nurse, as suggested by Respondent Maughan.

Respondent has failed to provide clear and convincing evidence that Complainant violated GCOR 1.2.5. To the contrary, the available evidence suggests that Respondent reached its conclusions before the "Investigative Hearing" and without any serious attempt to investigate.

d. GCOR 1.2.7: Furnishing Information

Respondent also charged Complainant with a violation of GCOR 1.2.7. In its Response Statement, Respondent links the failure to furnish information charge to Complainant's alleged failure to report a possible defect. However, not a single manager interviewed connected the GCOR 1.2.7 charge to the failure to report a possible defect and Respondent Huddleston confirmed that failure to report a possible defect was not the basis for the GCOR 1.2.7 charge. Instead, the substantial weight of the evidence indicates that Respondent charged Complainant with a GCOR 1.2.7 violation because she allegedly attempted to prevent the carrier from obtaining her medical records.

Respondent relied, in part, on a letter from Physicians Immediate Care to support the 1.2.7 charge. In that letter, Physicians Immediate Care repeatedly states that Complainant wanted to check in under "Work Comp." Physicians Immediate Care stated that Complainant told them that they "could not speak to her employer." Complainant contends that the letter leaves part of what she said out: that Physicians Immediate Care could not speak with her employer without Complainant's authorization (Complainant believed that had Physicians Immediate Care released her information without obtaining her authorization, they risked violating HIPPA). Complainant added that Physicians Immediate Care did not seem able to grasp that she, as a railroad employee, was covered by FELA and not covered by workers' compensation. The evidence, specifically the letter from Physicians Immediate Care (which repeatedly indicates that an understanding that Complainant was checking in under workers' compensation), supports Complainant's contention.

Complainant's version of events is also well supported by what eventually happened with respect to the requirement that Complainant furnish information: she did. In fact, she furnished all information requested. She filled out an accident report, wrote a statement and answered multiple questions from Respondent Pfinster (who described Complainant as "very forthcoming"). Moreover, she did all of this while in considerable pain – pain that she could have addressed but for Respondent Sanders order that she not take the medication prescribed to her until a drug tester arrived.

Finally, Respondent Sanders contention that Complainant attempted to evade him, that he had to "hunt her down" (which Sanders alleged violated GCOR 1.2.7) is not supported by the evidence. Complainant phoned four separate managers (including Sanders) while on her way to the hospital. She accepted incoming calls from Respondent Bosch and, while in the exam room, from Respondent Sanders. This is not the behavior of a person attempting to withhold information.

Conducting Officer Maughan determined that the GCOR 1.2.7 charge was unsupported. Conducting Officer Jones declined to make a recommendation. The ultimate decision maker, Respondent Lischer, could offer no explanation to OSHA as to why he upheld the 1.2.7 charge. He told OSHA that he just could not remember. The evidence uncovered over the course of this investigation fails to support a basis for this charge.

Based on the initial phase of OSHA's investigation, as described above, it is reasonable to believe that Complainant's protected activity was a contributing factor in the adverse personnel action. You have fifteen business days to provide additional evidence that supports your position.

It is the policy of the Secretary of Labor to facilitate resolution of complaints. This office will convey to the Complainant any offer that you propose. If you have any questions, please contact me at the telephone number or address listed above.

Sincerely,

Dean Y. Ikeda
Regional Administrator

cc: Paul Bovarnick, Complainant's Attorney, with enclosures, via certified mail #7009 3410 0001 7957 9509

Enclosures

Exhibits for Case No. 0-0160-10-018

1. Written OSHA 82
2. Transcript of Complainant's Recorded Interview
3. Letter from Complainant's Counselor
4. Respondent's Written Position Statement
5. Respondent's Supporting Documents
6. Safety Hotline Records
7. Respondent Lischer, Thomas – Utah Service Unit Superintendent Interview (on CD)
8. Respondent Huddleston, John – Service Unit Superintendent Interview (on CD)
9. Respondent Pfinster, Gary – Senior Manager of Operating Practices Interview (on CD)
10. Respondent Sanders, William – Senior Manager of Terminal Operations Interview (on CD)
11. Respondent, Bosch, Randy – Manager of Operating Practices Interview (on CD)
12. Respondent, Huffield, Scott – Manager of Terminal Operations Interview (on CD)
13. Respondent, Norby, Susan (RN) – Occupational Health Nurse Interview (on CD)
14. Respondent, Jones, Brian – Manager of Operating Practices Interview (on CD)
15. Respondent, Maughan, Jeffrey – Manager of Train Operations Interview (on CD)
16. Kroll, Doug, Former Conductor/Brakeman – Interview (on CD)
17. CONFIDENTIAL Witness Interview Summary
18. CONFIDENTIAL Witness Interview Summary
19. CONFIDENTIAL Witness Interview Summary
20. CONFIDENTIAL Witness Interview Summary
21. Hearing - Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses
22. Union Pacific Response to OSHA April 19, 2011, Request for Additional Information

B

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration
300 Fifth Avenue, Suite 1280
Seattle, Washington 98104-2397

Via certified mail #7009 3410 0001 7957 9301
December 15, 2011

Mr. Jeffrey J. Devashrayee
Union Pacific Railroad Company
280 South 400 West, Suite 250
Salt Lake City, UT 84101

RE: Union Pacific Railroad Company/Annen/ 0-0160-10-018

Dear Mr. Devashrayee:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Gennese Annen (Complainant) against Union Pacific Railroad Company (Respondent) on July 7, 2010, under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109. In brief, Complainant alleged that on or about May 26, 2010, she was discharged in retaliation for reporting a work-related personal injury. She further alleged that on or about May 3, 2010, Respondent attempted to interfere with her subsequent medical treatment in retaliation for her reporting a work-related personal injury. Complainant also alleged that prior to her discharge, she was subjected to a retaliatory internal investigation conducted by Respondent.

Postal records show that on August 22, 2011, Respondent received OSHA's letter stating that, based on the available evidence, reasonable cause existed to believe that Respondent had violated the Federal Railroad Safety Act. The letter also detailed the substance of the relevant evidence revealed in OSHA's investigation with attachments of the evidence. Per interim final rule 29 C.F.R. § 1982.104(f),[1] Respondent requested and was given an opportunity to submit additional and rebuttal evidence and an opportunity to meet with OSHA officials. Respondent was originally provided fifteen days to respond. Respondent subsequently requested two extensions and was given a total of 42 days to provide additional factual information in support of its contentions.

On September 14, 2011, OSHA officials had a conference call with you as the representative for Respondent. During that conference call, OSHA confirmed that the evidence gathered in the investigation, absent rebuttal evidence from the Respondent, provided reasonable cause to believe that retaliation had occurred. Respondent was informed of the specific actions needed to make the Complainant whole and to comply with the act. Respondent was also encouraged to provide rebuttal evidence.

[1] In the August 22nd letter, OSHA inadvertently referred to this Federal regulation as 29 C.F.R. Section 1979.104(e); however the correct regulation is referenced above.

On September 16, 2011, you sent OSHA an e-mail expressing concern that OSHA was advocating for the Complainant and had already made its determination without having received Respondent's response.

On September 21, 2011, Respondent sent a response, which consisted of a one and a half page letter in which Respondent again denied that it retaliated against Complainant and reiterated its original defense. Respondent failed to provide any rebuttal evidence of legitimate non-discriminatory reasons for delaying Complainant's medical care, the investigation of Complainant or the termination of her employment.

On September 29, 2011, after the deadline to provide rebuttal evidence had elapsed, Respondent contacted OSHA and made another request for additional time to provide rebuttal evidence. OSHA granted Respondent's request. In a letter dated October 3, 2011, Respondent claimed that the Department of Labor is "without subject matter jurisdiction to investigate" this complaint because the Complainant had allegedly elected a remedy under another provision of law by filing a grievance with her union and has "pursued her RLA grievance to the arbitration stage."

Respondent maintains that under 49 U.S.C. § 20109(f) a union grievance which proceeds to the arbitration stage is an election of remedy and therefore, the Complainant's FRSA whistleblower complaint should be dismissed. OSHA's position on 49 U.S.C. § 20109(f) was fully set forth in OSHA's Amicus Brief, submitted in *Mercier v. Union Pacific Railroad Co. and Koger v. Norfolk Southern Railway Co.*, ARB Case Nos. 09-121 & 09-101.[2] Additionally, in light of the ARB's recent decision in *Mercier* and *Koger*, ARB Case Nos. 09-121 & 09-101, which rejects Respondents' 49 U.S.C. § 20109(f) argument, this issue is moot.

In sum, while Respondent has reiterated its legal arguments since receiving OSHA's August 18, 2011, letter, it has not submitted any additional evidence to support its contention that it would have taken the same adverse employment action against the Complainant in the absence of her protected activity.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region 10, finds that there is reasonable cause to believe that Respondent violated the FRSA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. Respondent is engaged in interstate and/or foreign commerce within the meaning of 49 U.S.C. § 20109. Respondent's workforce includes approximately 43,500 employees. Complainant is a member of the United Transportation Union (UTU). Respondent employed Complainant as locomotive conductor at its facilities in Pocatello, Idaho. Complainant is an employee covered under 49 U.S.C. § 20109.

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[2] OSHA's Amicus Brief can be found on the Department's website at http://www.dol.gov/sol/media/briefs/main.htm

Respondent terminated Complainant's employment on or about May 26, 2010. On July 14, 2010, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against her in violation of FRSA. As this complaint was filed within 180 days of the alleged adverse actions, it is deemed timely.

Respondent hired Complainant in October 2006. Complainant worked as a locomotive Conductor out of Respondent's Pocatello, Idaho terminal. As a Conductor, Complainant was responsible for, among other things, assuring the safe and efficient operation of a train.

Respondent's Manager of Terminal Operations, Complainant's immediate supervisor, described her as a "very good" employee who was "always willing to go out and just go do the job and she never complained." Respondent's Senior Manager of Terminal Operations told OSHA that prior to Complainant's May 3, 2010, injury he had no issues with her and stated that "she did her job, was conscientious." The evidence shows that prior to her May 3, 2010, injury, Complainant had a spotless disciplinary record.

At 6:39 a.m. on May 3, 2010, Complainant and an Engineer returned to the train yard in Pocatello. They had just completed a 36 hour "turn" using Locomotive 8370. As is typical, each carried a "grip" or bag. Both employees carried approximately 12 pounds of required railroad equipment in their respective grips, along with a change of clothes, toiletries and other items needed for the 36 hour journey. Complainant's "grip" was an over the shoulder bag that she had purchased a week or two earlier.

In order to detrain from Locomotive 8370, Complainant was required to pass through the inner and outer doorway of that locomotive and climb down a ladder. The outside door of the locomotive is significantly narrower than a standard doorway: a standard doorway is typically 80" high, and between 30"-32" in width; the locomotive doorway here is essentially a hole punched through the steel nose of the locomotive, the dimensions of which are approximately 68" high and 22"-24" wide. The locomotive doorway contains multiple items on which an exiting railroad employee may be caught, including a lever door handle and an abrupt beveled edge.

As the Engineer was climbing down the ladder, Complainant approached the outside door of Locomotive 8370 carrying her grip and lunch pail. Before she reached the door, her grip caught on what she believed to be the outside door's doorframe, possibly the beveled edge, which twisted her sharply to the right. At the moment she was twisted, Complainant reported that she felt, for an instant, a muscle twinge on her right side, between her breast and stomach. According to Complainant, the pain she felt from the twinge subsided immediately.

The twisting motion caused Complainant's shoulder strap to fall off of her right shoulder and become caught in the crook of her elbow. Complainant stopped, set down her lunch pail, adjusted her shoulder strap and bumped her bag up. Complainant saw nothing wrong with the door or doorframe. She reported that being caught on the doorframe is a common occurrence.[3] After

[3] OSHA's investigation revealed that respondent's employees were regularly caught on the doors while detraining.

adjusting her grip, Complainant picked up her lunch pail, walked to the ladder, detrained and went home.

No witness observed Complainant get caught.

Once home Complainant took a shower and then worked on her computer. She felt another twinge in her right side between her breast and stomach. As had happened when she was twisted in the doorway of Locomotive 8370, Complainant felt a moment of pain that immediately subsided.

Around noon Complainant again felt pain on her right side. The pain occurred in the same spot where she had felt a twinge when she twisted while attempting to exit the narrow outside door of Locomotive 8370. However, this time the pain was intense and did not subside.

Complainant, who had never been injured while working for Respondent, phoned her Union Representative to ask what she should do. Her Union Representative told her that she needed to call a manager and seek medical attention.

Respondent has a policy dated February 27, 2009, and entitled, "Employee Personal Injury Response." This policy states that it is intended for "all operating department management employees" and includes the following "basic procedural guidelines:"

- Any harassment or intimidation of an employee to prevent reporting of the injury is forbidden. In all cases, proper reporting procedures will be followed.
- When an employee is taken for medical treatment, do not try to direct or influence the employee…as to the type of treatment the employee should receive.
- Any manager or supervisor who consciously jeopardizes an injured employee's ability to obtain appropriate medical care will be subject to discipline up to and including dismissal.
- The FRA [Federal Railroad Administration] has expanded their interpretation of what constitutes harassment and intimidation and/or interfering with medical treatment. Specifically, the FRA considers virtually ANY discussion of medical treatment options…to be interference with medical treatment.

Respondent required that its Employee Personal Injury Response policy "be posted at all locations where employees report to work, etc." Each of the managers interviewed specifically acknowledged that they understood that it was against the law to retaliate against an employee for reporting a work related injury.

At 12:06 p.m., while in route to a clinic, Complainant phoned her immediate supervisor, Respondent's Manager of Terminal Operations. When he did not answer, Complainant left him a

voicemail in which she explained that she believed that she might have been injured while exiting Locomotive 8370 and planned to seek medical attention.

Complainant next phoned the number for the "on-duty manager." No one answered. Complainant could not leave a voicemail because the on-duty manager phone's voicemail was not set up.

The third manager that Complainant tried to reach was Respondent's Manager of Operating Practices who answered her call. Complainant explained that she had suffered an injury. Complainant told Respondent that she believed that she was injured when her bag got caught up on the outside doorframe of Locomotive 8370, that she was in pain, and that she was on her way to seek medical attention.

Respondent's Manager of Operating Practices told Complainant that she needed to call Respondent's Senior Manager of Terminal Operations. At this point in time Complainant had arrived at a medical clinic. Complainant testified at Respondent Union Pacific's "Investigative Hearing" that despite the fact that she was "in a lot of pain" she "was trying to do the right things, make sure [she] notified the right people and he [Respondent Manager of Operating Practices] said you need to call [Respondent's Senior Manager of Terminal Operations], here is his phone number." Consequently, instead of going inside the clinic to seek treatment, Complainant wrote down Respondent's Senior Manager of Terminal Operations telephone number. Complainant, who had already phoned three managers then called a fourth. Respondent's Senior Manager of Terminal Operations did not answer and did not have his voicemail set up to accept messages.

Just before entering the medical clinic, Complainant received a phone call from Respondent's Manager of Operating Practices. At Respondent's Senior Manager of Operating Practices direction, Respondent's Manager of Operating Practices requested that Complainant come in to the depot to see the Respondent's Occupational Health Nurse, instead of seeking outside medical attention. Complainant told Respondent's Manager of Operating Practices that she was in a lot of pain, already at a doctor's office, and would like to see a doctor.

Complainant attempted to check in at the medical clinic and informed the clinic personnel that she was covered by the provisions of the Federal Employers' Liability Act (FELA), as opposed to Idaho's workers' compensation laws. Complainant had a "FELA Card," provided by her union, which explained some of the basic differences between FELA and workers' compensation including information that injured railroad employees do not have any rights under a state workers' compensation plan.

Complainant asked the medical clinic to obtain her authorization before releasing medical records to Respondent. However, the clinic reportedly told Complainant that it routinely released all information to employers regardless of the employee's consent. Complainant reiterated that she was not covered by workers compensation; and the clinic subsequently refused to treat her injury.

Complainant returned to her car and a friend drove her to a different medical clinic in Chubbuck, Idaho. The second medical clinic agreed to obtain Complainant's consent before releasing medical records to Respondent.

The second medical clinic diagnosed Complainant with a right intercostal muscle strain. To treat the injury, Complainant was prescribed cyclobenzaprine (aka flexirel). According to the National Center for Biotechnology Information, cyclobenzaprine is "a muscle relaxant, used with rest, physical therapy, and other measures to relax muscles and relieve pain and discomfort caused by strains, sprains, and other muscle injuries."[4] However, before she could fill the doctor's prescription, Complainant received a phone call from Respondent's Senior Manager of Terminal Operations.

Respondent's Senior Manager of Terminal Operations phoned the second medical clinic and asked to speak with Complainant. A nurse answered the phone and went to find Complainant, who was still in the examination room. Complainant told the nurse that she would take the call. Complainant told Respondent that she had just been treated and "needed to take medication and then [she] was going to come down and fill out the accident report."

Respondent's Senior Manager of Terminal Operations ordered Complainant not to take the medication prescribed to her by the second medical clinic. He informed her that "before you take any medications, we [Respondent] need to drug [and alcohol] test you." Union Pacific's drug and alcohol testing policies explicitly state that an employee who fails to cooperate in the drug and alcohol testing process will be terminated. Complainant asked: "Are you telling me I can't receive medical treatment?" Respondent's Senior Manager of Terminal Operations repeated that Complainant was not to take any medications or to leave the second medical clinic until she had been drug tested. Complainant complied with Respondent's order. She did not object to the drug test at any point in time. To the contrary, she merely told Respondent's Senior Manager of Terminal Operations and Senior Manager of Operating Practices that she was in pain and needed to take the medication prescribed to her to address that pain.

Notably, 49 CFR 219.11(2) provides that "[i]n **any** case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment **must** be accorded priority over provision of the breath or body fluid specimen(s)." (emphasis added). Respondent's Senior of Manager of Terminal Operations is not a medical doctor and has no medical training beyond basic first aid. He was not qualified to determine whether taking the medication prescribed to her was necessary medical treatment and made no attempt to determine whether it was until the date of Complainant's investigative hearing. Nevertheless, he ordered Complainant to forgo that treatment.

When asked about this exchange at his OSHA interview, Respondent's Senior Manager of Terminal Operations denied that he instructed Complainant to forgo the medication that the second medical clinic had prescribed. However, Respondent's Senior Manager of Terminal Operations admitted twice during Respondent's "Investigative Hearing" that he had instructed Complainant not to take the prescribed pain medication.

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[4] Source: http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000699/

When asked about his statements as written in the transcript from Respondent's "Investigative Hearing," Respondent's Senior Manager of Terminal Operations changed his answer. He then admitted to OSHA that he had, in fact, instructed Complainant not to take any medications until the drug tester arrived. Indeed, once shown the statements that he made at the hearing, Respondent's Senior Manager of Terminal Operations also remembered the specific details of the reasons he had done so. Among other things, he indicated that he was concerned that he might be accused of having interfered with Complainant's medical treatment.[5] In fact, Respondent's Senior Manager of Terminal Operations was so concerned that on the day of the hearing, he reached out to Respondent's Drug and Alcohol Manager in an attempt to "have his bases covered." Thus it appears that, at the time of his instructions to the Complainant, Respondent's Senior Manager of Terminal Operations knew it was improper to delay and interfere with prompt medical attention for injured employees.

The available evidence indicates that at approximately 1:10 p.m. Respondent's Senior Manager of Terminal Operations, who has no medical background, did not consult with a single medical professional to determine whether it was medically necessary for Complainant to take the medication prescribed to her, yet he instructed her to not take the prescribed medication.

Complainant feared that Respondent would terminate her employment if she failed to follow the Official's instructions. Consequently, although in considerable pain, Complainant held off on taking the medication prescribed to her by the second medical clinic.

After getting off of the phone with Respondent, Complainant phoned her Union Representative. She told the Union Representative that she did not believe she was being treated fairly and asked him to come to the second medical clinic while she waited for the drug tester.

When the Union Representative arrived at the hospital, he spoke with the Respondent Official. Their conversation ended without Respondent agreeing to allow Complainant to take the medications prescribed to her by the second medical clinic. The Union Representative waited with Complainant for approximately one hour until the drug tester arrived.

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[5] FRSA expressly prohibits delaying or interfering with medical or first aid treatment of an employee who is injured during the course of employment. 49 U.S.C. § 20109 (c)(1). The Federal Railroad Administration's regulations at 49 C.F.R. 225.33 also require railroads to maintain an internal control plan that includes a "policy statement declaring the railroad's commitment . . . to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment . . . will not be permitted or tolerated and will result in some stated disciplinary action against any employee, supervisor, manager, or officer of the railroad committing such harassment or intimidation." Although Complainant delayed taking pain medication because Respondent's Senior Manager of Terminal Operations told her that she must be drug tested, no evidence could be found indicating that Respondent at any point disciplined or counseled its Senior Manager of Terminal Operations or any other manager as a result of this incident.

While Complainant was waiting for the drug tester, Respondent's Senior Manager of Operating Practices and Respondent's Occupational Health Nurse arrived at the second medical clinic. The Senior Manager of Operating Practices told OSHA that the Complainant "was in discomfort" and that she complained about being in pain.

Complainant's friend had filled her prescription and had the medication there ready for her to take. Respondent's Senior Manager of Operating Practices was aware that Complainant was holding off on taking the medication prescribed to her based on the Senior Manager of Terminal Operations' orders. However, at no point did Respondent's Senior Manager of Operating Practices tell Complainant that she could in fact take the medication prescribed to her. Instead, he asked Complainant to fill out a two page form entitled, "Report of Personal Injury or Occupational Illness."

Complainant wrote the following on the "Report of Personal Injury or Occupational Illness":

> I was walking out of the locomotive door and my bag that has my railroad equipment in it got caught on the door frame & twisted me & pulled me back a little…I believe my bag got caught on the door frame for some reason. I'm unsure if it was because of an obstruction or defect that shouldn't have been there.

Section VI box (6) of the Report of Personal Injury or Occupational Illness asks "WERE THERE ANY DEFECTS IN THE EQUIPMENT" and provides a "yes" and "no" check box. Complainant, who asserted that she saw no defect when she detrained, did not check either box and wrote "unsure". In Section VI box (7) Complainant continued to write "unsure if there was any defect on door frame."

Once she completed that form, Respondent Senior Manager of Operating Practices asked that she make a handwritten statement, which Complainant did:

> This is Gennese R. Annen. I was getting off the KPDG2 02 at the fuel plugs in Pocatello on 05/03/10 at about 6:45 a.m. when my bag caught on the outside door frame & twisted & pulled me back a little causing my stomach muscles to get twisted sharply. I got my bag unstuck, got off the locomotive & tied up. After I got home, the slight muscle twinge I felt at the depot gradually got worse & increased in pain. As soon as I realized I had actually gotten injured I sought out medical attention and contacted Management.

Complainant gave her authorization to the second medical clinic to provide all medical records requested by Respondent. Respondent Senior Manager of Operating Practices described Complainant as "very forthcoming."

Complainant received a drug test at 2:19 p.m., approximately one hour after being told that she could not take any medication until a drug tester arrived. The results of the drug test were negative.

Complainant was released to return to work on May 10, 2010. On that day, Complainant gave Respondent's Senior Manager of Operating Practices her release paperwork. Respondent's Senior

Manager of Operating Practices informed Complainant that she was being investigated and would not be allowed to return to work until after the investigation had concluded. Respondent's Senior Manager of Operating Practices told OSHA that Complainant appeared to be "flabbergasted" that Respondent had decided to investigate her.

On May 11, 2010, Respondent sent Complainant a "Notice of Investigation" and required her to attend an "Investigative Hearing." The alleged purpose of the hearing was to determine whether Complainant had violated Respondent's rules and would be subject to disciplinary action. Respondent's notice stated the following:

> While employed as a Conductor…on May 3, 2010, you allegedly failed to immediately report to the proper manager a case of personal injury that allegedly occurred at 0645 hours, while you were on duty. You did not notify a manager about the injury until approximately 13:00 hours on May 3, 2010. You allegedly were dishonest in completion of Form 52032 when you allege you were injured when a bag carrying company equipment was caught by the locomotive door frame of the outside door of the locomotive while you were exiting the locomotive. In addition, you allegedly failed to immediately report equipment (locomotive front door frame) to the train dispatcher, other crew members, or on duty yard manager, that you later reported may be defective and the cause of a personal injury. These alleged actions indicate a possible violation of Rule 1.6 (Conduct), Rule 1.2.5 (Reporting), Rule 1.2.7 (Furnishing Information), and any other applicable rules that may be brought up during the investigation that are contained in the General Code of Operating Rules, effective April 7, 2010.
>
> You are withheld from service effective May 10, 2010, and you will continue being withheld pending results of this investigation. This is a Level 5 infraction, and if you are found to be in violation of this alleged charge, the discipline assessment may result in dismissal.

With this Notice, the Complainant was suspended from work without pay beginning May 10, 2010.

On May 19, 2010, Respondent held its "Investigative Hearing". The Superintendent for Respondent's Pocatello Service Unit appointed two officials to act as the "Conducting Officers." The Conducting Officers manage the hearing, similar to a judge, and write a close out letter at the hearing's conclusion. The close out letter often makes a recommendation regarding whether the charges against the employee were sustained. Both Conducting Officers wrote close out letters and provided those letters to Respondent's Superintendent.

The evidence provided at Respondent's May 19, 2010, "Investigative Hearing" centered on Complainant's answers on form 52032, Report of Personal Injury or Illness, her handwritten statement and her description of events. Specifically, Respondent spent significant time at the hearing on the fact that Complainant stated that she was "unsure" of whether a defect existed, in her handwritten statement and in the answers she gave to Respondent's Senior Manager of Operating Practice when she was at the hospital. Respondent's scrutiny of Complainant does not take into account that she made those statements hours after the injury, on reflection and in the second

medical clinic's waiting room while she was in pain -- pain that could have been addressed but for Respondent's Senior Manager of Terminal Operation's instruction that she forego her prescribed medication.

Complainant insisted throughout the "Investigative Hearing" that at the time of the incident she saw nothing out of place and saw nothing that appeared to be a defect and thus had no reason to report a possible defect.

Respondent later inspected the door and door frame on which Complainant's bag was caught. Like Complainant, Respondent found nothing that could be perceived to be a defect.

At the conclusion of the "Investigative Hearing" both Conducting Officers wrote close out letters. Both Conducting Officers told OSHA that they sent their respective close out letters to the Pocatello Service Unit's Superintendent. Ordinarily the Pocatello Service Unit Superintendent would decide whether to sustain charges against an employee. Here, the responsibility for determining whether the charges were sustained was transferred to the Utah Service Unit Superintendent. The Utah Service Unit Superintendent reported that he had no memory of receiving the close out letters in this case.

While one of the conducting officers declined to make a recommendation, the other wrote the following in response to whether Complainant had violated rule 1.6 (Conduct): "I can find *nothing* in testimony from our witnesses nor in her testimony that indicates to me she was careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome or discourteous...." [emphasis added.]. The same conducting officer also concluded that none of the charges were sustained: "[w]ith the information gathered during this Investigation and having personally been present to see and hear the entire proceedings, *I do not believe that these charges were sustained.*" [emphasis added].

The Utah Superintendent reached a different conclusion. He told OSHA that if Complainant believed that she was twisted on a door then she should have reported it "so that the subject matter experts in the mechanical department could determine whether there was something the matter." He explained "I do not think that is a normal experience that folks have, that their bags get caught on the door." He further stated that he believed that the door was "a standard size door."

In truth, the door frame on which Complainant reported being caught is *not* a standard sized door. To the contrary, evidence shows that the style of door through which Complainant had to exit on May 3, 2010, was roughly one foot narrower and one foot shorter than a standard doorway.

Respondent also charged Complainant with violation of GCOR 1.6(4) because she was allegedly dishonest in completion of Form 52032 (her injury report) insofar as she claimed that she was injured when her grip got caught on the locomotive's outside door's frame while she was detraining. Respondent contends that a video recording known as a "Track Image Recorder" (TIR) attached to another locomotive captured Complainant exiting UP 8073. Respondent claims that the TIR validates the dishonesty charge against Complainant.

Respondent's Conducting Officer gave a thorough description (the most detailed available to OSHA) of what he saw on that recording in his close out letter, which is quoted below:

> It showed the lead locomotive (UP 8370) stopped in Pocatello, Id. on main track just west of the Benton Street Overpass. We observed an employee come out the front door, turn to the left, properly position them self facing the locomotive then back down the locomotive steps to the ground. This employee[] was identified as [an] inbound locomotive engineer... Next we could observe an employee coming out thru the same front locomotive door. This employee was identified as Ms. Annen. The picture indicated that Ms. Annen had stopped prior to coming outside the door, made some kind of a bounce movement, stop, set something through the door (identified as her lunch cooler) to the outside platform. She then came through the door with her Grip on her right shoulder, pick[ed] up the lunch pail, move[d] toward the step. She stopped to place the lunch pail closer to the step. Turned around to face the locomotive steps with her bag over her right shoulder. Took a few steps down, stopped to reposition her lunch pail, then stepped off the bottom step, reached up to retrieve the lunch pail and walk westward toward her Engineer away from the locomotive.

This Conducting Officer determined that the available evidence, including the TIR video, did ***not*** provide a basis to conclude that Complainant lied about what happened.[6] Accordingly, he recommended against sustaining the dishonesty charge against Complainant. Notably, the only evidence, other than Complainant's testimony, that exists regarding what occurred as Complainant exited the train is the TIR video. However, Respondent's Utah Superintendent reported that he had no memory of ever receiving or viewing the TIR evidence. Respondent's Utah Unit Superintendent did not recall whether he had viewed the TIR video before sustaining the charged violation.

Respondent also charged and investigated Complainant for violating Rule 1.2.5; late reporting of injuries. Respondent upheld this charge against Complainant ostensibly because her injury report indicates that she suffered an on duty injury at 6:45 a.m. but she did not report her injury to Respondent until several hours later at approximately 1 p.m.[7]

Complainant said that she was unaware that she was injured at 6:45 a.m on May 3, 2011. She further reported that aches, pains and twinges are fairly common experiences for all conductors. She pointed out that conductors regularly tighten handbrakes, climb up and down ladders, operate pin lifters, align draw bars, walk on ballast and occasionally travel in rough riding locomotives. According to Complainant, these physical activities leave many railroaders with occasional aches, pains and twinges.

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[6] Although Respondent allowed OSHA to view the TIR video on December 8, 2010, Respondent has refused multiple times to provide a copy of the TIR evidence to OSHA. Based on OSHA's observation of the video, OSHA finds the Conducting Officer's account of the video is accurate.

[7] In fact, Complainant established at the "Investigative Hearing" that she reported her injury by no later than 12:06 p.m. However, the termination notice adopts the charges listed in the "Investigative Hearing" notice without any alteration.

Evidence revealed during the OSHA investigation confirmed that Respondent's employees feel aches, pains and twinges fairly regularly as a part of their work. Employees said that they did not report every twinge that they felt and stated that to do so would likely bring a variety of retaliation from the Respondent.

As with the other rule violations, the only Respondent Conducting Officer to make a recommendation determined that there was insufficient evidence to uphold a 1.2.5 charge against Complainant. He wrote in part, "I believe what she stated [.] As soon as she was aware that the pain she was experiencing could be due to the '[t]winge' she felt in the locomotive door area she took action to contact a Railroad manager. She did not feel injured immediately when she felt a muscle twinge at 6:45 AM."

Respondent Conducting Officer told OSHA that Complainant's version of events was consistent with his own personal experiences: "during my life I have played a lot of sports and I know that you can injure a portion of your body and the pain will not actually start until sometime after the injury." He also said that an opinion from a medical professional that contradicted Complainant's contentions (and was contrary to his own anecdotal experiences) could raise suspicion.

Respondent's Utah Service Unit Superintendent upheld the charges against Complainant and fired her effective May 26, 2011.

With respect to the GCOR 1.2.5 charge, Respondent's Utah Superintendent agreed that a person cannot report an injury of which that person is unaware. Further, he acknowledged that Complainant claimed that she was unaware of her injury at the time she states that it occurred but he did not believe Complainant's account that she felt a twinge at the time of the injury and only later realized that she was injured.

OSHA asked every manager involved in the decision to discipline Complainant whether any attempt whatsoever had been undertaken to determine whether Complainant's description of the pain that she felt was likely to be true. According to Respondent's Managers, nothing was done to investigate the medical probability that Complainant's description that she initially felt a twinge and then felt pain hours later was accurate. Thus, the available evidence suggests that Respondent simply assumed that Complainant felt injured immediately, waited 5.5 hours to report that injury and then lied when she said that she was unaware that she was injured at the time she felt a twinge.

With respect to the GCOR 1.2.7 charge (Failure to Furnish Information), the ultimate decision maker, Respondent's Utah Service Unit Superintendent, could offer no explanation as to why he upheld that charge. He told OSHA that he simply could not remember.

The evidence demonstrates that Complainant engaged in activity protected by FRSA. Specifically, on May 3, 2010, Complainant engaged in protected activity when she reported a work-related personal injury. Complainant also engaged in protected activity when she sought medical treatment and questioned Respondent's repeated instructions to "hold off" on taking the medication prescribed to her by the second medical clinic.

On May 3, 2010, Complainant engaged in a protected activity when she reported, in good faith, a possible hazardous safety condition, specifically she reported that she was unsure about whether there was a defect on the outside door frame of Union Pacific Locomotive 8073.

On July 14, 2010, Complainant engaged in a protected activity when she filed a whistleblower complaint with the Occupational Safety and Health Administration.

Respondent had knowledge of each of Complainant's protected activities.

Complainant was subjected to four distinct adverse employment actions:

1. On May 3, 2010, Complainant was subjected to an adverse action when Respondent's Senior Manager of Terminal Operations ordered her to forgo medical treatment.

2. On May 10, 2010, Complainant was subjected to an adverse action when she was suspended without pay pending an investigation.

3. On May 19, 2010, Complainant was subject to an adverse action when Respondent brought charges against her and subjected her to an "Investigative Hearing."

4. On May 26, 2010, Complainant was subject to an adverse action when she was terminated.

The available evidence indicates that Complainant's protected activities were a contributing factor in the adverse actions that she experienced.

The timing of Complainant's protected activity and the adverse actions supports the conclusion that her protected activity was a contributing factor in the adverse actions taken against her. Complainant reported a work-related injury to numerous Respondent officials starting at approximately 12:00 p.m. on May 3, 2010. She also informed them that she was seeking medical treatment. Later that same day, Complainant identified a possible defect on Respondent's Locomotive 8073. Within roughly an hour of her first phone call to Respondent, Complainant was ordered to forgo medical treatment in spite of the fact that she was in pain, and that Respondent knew that Complainant was in pain. She then had to wait for approximately one hour for a drug tester to arrive and administer a drug test before she was allowed to take the medication prescribed to her by the second medical clinic.

On May 10, 2010, seven days after being injured, Complainant attempted to return to work and was notified that she was being charged with possible disciplinary action, she was immediately suspended without pay, and was required to attend Respondent's "Investigative Hearing."

On May 19, 2010, sixteen days after Complainant was involved in a protected activity of reporting a work-related injury, Respondent held its "Investigative Hearing." Respondent's Conducting Officers wrote close out letters and provided those letters to Respondent's Superintendent. One of the Conducting Officers declined to make a recommendation; the other concluded that none of the charges were supported by the evidence offered at the hearing. Consequently, the only

recommendation to come out of Respondent's "Investigative Hearing" was that none of the charges against Complainant were supported by the evidence.

On May 26, 2010, and contrary to the Conducting Officer's recommendation, Respondent upheld each and every charge against Complainant and terminated her employment. It is important to note that Respondent's Official who made this decision was not present during the hearing and did not interview Complainant. Instead, he claims to have based his decision on the transcript of the hearing and the exhibits attached thereto. This Official said he had no memory of receiving a close out letter from either Conducting Officer and no memory of reviewing the TIR evidence.

The close temporal proximity between Complainant's protected activities and the subsequent adverse actions create an inference of retaliation. That inference is strengthened in this case by Respondent's deciding official's seeming failure to consider the close-out letter of the Conducting Official, which thoroughly explained his reasons for recommending that the charges not be sustained, and the TIR video, which the Conducting Official found corroborated Complainant's account of events.

The investigation also uncovered substantial evidence of disparate treatment. Prior to being injured, Complainant appears to have been highly regarded by her supervisors. However, shortly after she reported an injury and identified a possible defect, Complainant was ordered to forgo medical treatment, suspended, investigated and then terminated. Indeed, Complainant was never allowed to return to work after she reported an injury and possible defect.

Respondent contends that Complainant was careless insofar as she failed to immediately report a possible defect. Setting aside Complainant's testimony that she did not believe a defect existed at the time she was injured (indeed there was none), the weight of the available evidence suggests that Respondent does not regularly discipline employees who fail to immediately report possible or even actual defects.

OSHA's investigation revealed numerous instances in which employees failed to immediately report defects. Although Respondent eventually learned of the defects, typically through an employee report, the evidence indicates that the Respondent did not take any action with respect to employee failure to immediately report the defects. These defects included at least one missing horn button, one missing locomotive door cable (which created a pinch point) and seven locomotive cables so short that the doors on those locomotives only opened 2/3rds of the way, which in turn narrowed the already narrow passage way even more. However, where Complainant was terminated for allegedly failing to report a possible defect, the employees who did not immediately report the defects identified in this paragraph do not appear to have been in any respect disciplined or even counseled.

Under 49 C.F.R. § 229.21, Respondent is required to inspect locomotives at least once each calendar day, identify non-complying conditions and create a report of such conditions. On numerous occasions, employees reported that they received locomotives, after those locomotives were inspected per 49 C.F.R. § 229.21, with actual defects that went unnoticed and unidentified. While some of these defects were arguably subtle, such as one locomotive that did not have a

locomotive door cable (which created a pinch point), others ranged from profound to obvious, including a missing horn button and door cables that were so short that the locomotive door only opened two-thirds of the way.

On April 19, 2011, OSHA requested the inspection reports, required to be maintained under 49 U.S.C. § 229.21, for nine separate incidents, all of which appeared to involve a failure to immediately report an actual defect. OSHA also requested the name of the person who inspected the locomotive with the defect, whether that person reported the defect, and if not whether that person was investigated or disciplined. Respondent refused to provide the requested information. Consequently, the available evidence suggests that Respondent does not discipline employees for failing to immediately report possible (or actual) defects.

The available evidence indicates that Respondent was hostile toward Complainant's protected activities in multiple respects. The most direct evidence of hostility is Respondent's swift termination of Complainant contrary to the recommendations of the Conducting Officer, who found that there was no basis for sustaining the charges against Complainant.

Respondent's Officials (Senior Manager of Terminal Operation and Senior Manager of Operating Practices) also demonstrated hostility to Complainant's injury report by prolonging Complainant's suffering while she was at the second medical clinic. Respondent's Officials failed to comply with the railroad's policy about interference with medical treatment. Respondent knew about the actions of these Officials (and confirmed such knowledge to OSHA in interviews), yet, again failed to follow its own policy when neither Official was disciplined.

Additionally, evidence confirmed a belief among employees that Respondent is hostile toward injury reporting and that employees will be terminated for reporting injuries. For example, an employee told OSHA during the investigation that he has been specifically told, "if you report an injury, you will be fired." While he was told this prior to the current Pocatello Service Unit Superintendent's arrival, he believes that it is still the case with respect to the current superintendent. Another witness reported that it is "common knowledge" that if you report an injury you are opening yourself up to discipline. Yet another witness, who claimed not to know the Complainant or the basis of her allegations, told OSHA that under the current Pocatello Service Unit Superintendent it seems like people are more intimidated with respect to reporting injuries. That witness testified that under the current Pocatello Service Unit Superintendent, Respondent is "way, way harsher on people who have been injured." Two other witnesses confirmed that Respondent, especially under the current Pocatello Service Unit Superintendent, is particularly hostile toward injury reporting.

The investigation also revealed that Respondent rewards its managers for low injury statistics, which may have contributed to the Respondent's managers' motive to retaliate against Complainant. According to several Respondent Officials, injury statistics play an important role in their promotions, raises and bonuses. Management witnesses, with the exception of the Senior Manager of Terminal Operations, reported that injury statistics play an important role in their evaluations. For example, Respondent Senior Manager of Operating Practices told OSHA that ***safety*** (of which injury statistics is a component) makes up approximately half of his evaluation.

On the other hand, Respondent Manager of Terminal Operations stated that half of his evaluation was based on ***injuries***.

As described above, and as demonstrated by the thoroughly explained close-out letter of the Conducting Officer, Respondent's claimed legitimate non-discriminatory reasons for its actions remain unsupported by the evidence. All available evidence shows that Complainant was injured, informed multiple managers immediately as soon as she discovered the injury, and honestly recounted what she remembered about what occurred as she exited the train.

Respondent failed to provide any credible evidence to justify why it brought disciplinary charges against Complainant and fired her. Respondent has not demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior or conduct. Respondent was granted extensions to provide rebuttal information and failed to submit any.

Respondent's non-discriminatory explanation for the discharge – that Complainant failed to report a defect and was dishonest – is not credible. All available evidence indicates that there was no defect, that Complainant honestly reported to Respondent what she believed occurred, and that, hours after the extremely brief instant when her bag got caught as she exited the train, she was unsure whether there was a defect.

FRSA prohibits a railroad from discharging, demoting, suspending, reprimanding, or "in any other way" discriminating "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, or attempt to notify the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee…" 49 U.S.C. 20109(a)(4)

Under Section (c)(2) of FRSA, a railroad carrier is prohibited from disciplining, or threatening to discipline, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

As outlined above, OSHA finds reasonable cause to believe that Respondent violated Sections (a)(4) and (c)(2) of FRSA when it delayed Complainant's medical treatment, brought disciplinary charges against her and ultimately fired her in retaliation for reporting a work-related injury and seeking medical treatment.

The preponderance of the evidence establishes that Respondent's retaliatory acts caused Complainant to suffer emotional distress. Complainant was treated by a mental health professional for anxiety, stress and depression related to Respondent's retaliatory treatment of her for exercising her rights under the Act.

As a result of the termination of her employment, Complainant was forced to rent out her home and had to borrow money to pay bills. Complainant resides in a small town and was humiliated with the loss of her job. The preponderance of the evidence indicates that instances of the emotional

distress, humiliation, depression, mental anguish, lessened self esteem, anxiety and embarrassment resulted directly from Respondent's retaliatory acts.

49 U.S.C. §20109(e)(3) provides an award up to $250,000 in punitive damages. Here, punitive damages are warranted for several reasons, including:

- Respondent's retaliation caused Complainant to suffer both economic and physical harm and left her financially vulnerable;

- Respondents' managers consistently acknowledged that they were aware that it is against the law to retaliate against an employee for reporting a work related injury. However, the evidence establishes that despite this knowledge, Respondent managers did in fact retaliate against Complainant because she reported a work related injury;

- Respondents' managers' actions and omissions evidenced an indifference to and a reckless disregard of Complainant's safety and health: specifically, Respondent's Senior Manager of Terminal Operations ordered Complainant to forgo the medications prescribed to her without doing anything to determine whether those medications were medically necessary. Respondent's Senior Manager of Operating Practices failed to act: he merely allowed Complainant to wait in pain for a drug tester to arrive; Respondent's Pocatello Service Unit Superintendent, upon learning of his subordinate's treatment of the Complainant, suspended, investigated and then had terminated the Complainant. Respondent's Pocatello Service Unit Superintendent did not counsel or in any respect address the interference with the Complainant's medical treatment that occurred here. This failure to act tacitly endorses the conduct of Respondent's Senior Manager of Terminal Operations and Senior Manager of Operating Practices, which evidences an indifference to the Complainant's safety and indeed the safety of other employees who may be instructed to forgo treatment just as Complainant was here.

- Respondent has terminated and otherwise retaliated against other employees in the past for exercising their rights under the Act to report work-related injuries. Respondent has been put on notice by OSHA that retaliatory treatment of injured employees is not acceptable, and yet, continues to retaliate against injured employees. Respondent's conduct in this regard is egregious and intentional.[8]

[8] See OSHA's Secretary's Findings in Union Pacific Railroad /9-3290-10-023 Union Pacific Railroad Company /0-1650-09-003 and Union Pacific /7-3620-10-008. On August 25, 2011, OSHA's Assistant Secretary David Michaels reminded Respondent that workers have the right to report work-related injuries without fear of retaliation and advised Respondent to "take immediate steps to change" the "climate of fear" it has created (U.S. Department of Labor News Release dated August 25, 2011). In July 2010, OSHA notified Respondent that it had retaliated against an employee who reported a work-related injury and subsequently issued a news release from this Regional Office about the violation in September 2010.

- Respondent's conduct is egregious. Complainant had a spotless record before she suffered a minor on-duty injury. Upon reporting her injury, Respondent interfered and delayed the prompt medical attention offered to Complainant by a treating physician. She was then quickly charged with discipline, suspended, investigated and terminated. Neither of the officers who conducted her disciplinary hearing recommended her termination. In fact, one Conducting Officer persuasively explained the reasons why none of the charges against her should be sustained and the other Conducting Officer declined to make any recommendation. Nonetheless, Respondent terminated Complainant based on the decision of the Utah Service Unit Superintendent who did not consider either the close out letter of the Conducting Officer or the TIR video of the incident.

Cases suggesting less employer culpability than present here have awarded significant punitive damage awards. For example, in *Anderson v. Amtrak*, 2009-FRS-00003 (ALJ, Aug 26, 2010), the Office of Administrative Law Judges awarded a railroad employee punitive damages in the amount of $100,000 because the employee was suspended for 30 days without pay in retaliation for reporting a work-related injury.[9] Here, in view of the Respondent's greater culpability a higher punitive damage award is ordered.

In summary, a preponderance of the evidence indicates that Complainant's protected activities were a contributing factor in the unfavorable personnel actions taken against her. Respondent has not provided clear and convincing evidence that it would have taken the same actions against Complainant absent her protected activity. Consequently, these Findings, concluding that there is reasonable cause to believe Respondent violate the Act, are accompanied by a Preliminary Order, including the Preliminary Reinstatement of the Complainant effective immediately.

The following is a Preliminary Order which provides relief in accordance with 49 U.S.C. §20109 of the Federal Railroad Safety Act.

Preliminary Order

(1) Upon receipt of these Findings and Preliminary Order, Respondent shall immediately reinstate Complainant to her former position with all the pay, benefits, and rights she had before her discharge.

   a. Respondent shall pay Complainant back wages in the amount of $3,358.40 per month from May 10, 2010 to the date of her reinstatement. Respondent shall pay Complainant interest at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code ($67,426.28 as of November 5, 2011);

(2) Respondent shall pay Complainant compensatory damages in the amount of $120,537.00 for the following:

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[9] Complainant remains unemployed over a year after her termination.

- $512.00 for moving and rental expenses;
- $14,085.00 for retraining related expenses;
- $5,940.00 in attorney fees;
- $100,000 for Complainant's emotional distress;

(3) Respondent shall pay Complainant punitive damages in the amount of $175,000;

(4) Respondent shall refrain from retaliating or discriminating against Complainant in any manner for exercising her rights under the FRSA;

(5) Respondent shall provide all employees in its Pocatello Service Unit with a copy of the FRSA Fact Sheet, *Whistleblower Protection for Railroad Workers* and a copy of the "FAQs on Employee Protections for Reporting Work-Related Injuries." Both documents are enclosed with this Preliminary Order;

(6) Respondent shall post in its Pocatello Service Unit for no less than 60 consecutive days the Notice to Employees enclosed with this Preliminary Order; and,

(7) Respondent shall remove from Complainant's employment records any reference to the exercise of her rights under FRSA and any references to the unfavorable personnel actions taken against her, including the disciplinary and termination letters dated May 2010.

Respondent has thirty (30) days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge. If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Phone: (202) 693-7300; Facsimile: (202) 693-7365

With copies to:

Paul S. Bovarnick
Rose, Senders & Bovarnick, LLP
1205 NW 25th Avenue
Portland, OR 97210
Phone: (503) 227-2486;
Facsimile: (503) 226-3131

Dean Y. Ikeda
Regional Administrator
U.S. Department of Labor, OSHA
300 Fifth Third Avenue, Suite 1280
Seattle, WA 98104
Phone: (206) 757-6700;
Facsimile: (206) 757-6705

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

Please be advised that the U.S. Department of Labor generally does not represent any complainant or respondent in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge, along with a copy of the complaint. The rules and procedures for the handling of FRSA cases can be found in 29 C.F.R. §1982, which may be found at http://www.whistleblowers.gov.

Sincerely,

Dean Y. Ikeda
Regional Administrator

Enclosures: Notice to Employees
OSHA Fact Sheet, *Whistleblower Protection for Railroad Workers*
Frequently Asked Questions for Reporting Work-Related Injuries in the Railroad Industry

cc: Paul Bovarnick, counsel for Complainant #9325
Rami Hanash, general counsel for Respondent #9318

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Counsel for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

HILDA L. SOLIS, Secretary of Labor, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.	Case No. _____ DECLARATION OF GENNESE ANNEN

I, Gennese Annen, declare under penalty of perjury as follows:

1. My name is Gennese Annen. I am 32 years old. I was first hired by Union Pacific as a brakeman/conductor in October, 2006. After I was hired by UP, I received five weeks of classroom training in Salt Lake City, followed by approximately six months of on the job training in Pocatello.

2. Following my training I began working as a full-fledged brakeman/conductor. As a brakeman/conductor I was responsible for the safe movement of freight cars. I was in charge of making sure the cars were placed in the proper order within trains, on the proper tracks and delivered to the proper customers. When the trains to which I was assigned were stopped, I was responsible for the safe securement of the freight cars. I was evaluated by my managers annually, and my evaluations were uniformly positive. I loved my job. It was my plan to make a lifetime career as a railroader.

3. On May 3, 2010 I suffered a pulled muscle in my chest. I initially felt only a twinge, but as soon as I began to feel pain, I reported my injury as I was required to do. But when I reported my injury, my managers reacted with enormous hostility. I was called repeatedly and my managers tried to interfere with my medical treatment. Their reaction was unexpected, shocking and terrifying.

4 .My managers met me at the clinic where I had gone for treatment of my rib strain. They ordered me not to take the medication that I had been prescribed, and they ordered me to wait for the arrival of a drug tester. During the wait I found it painful to sit and painful to speak.

5. My doctor released me to return to work a week later. But when I tried to return to work, I was told that I could not. UP accused me of reporting my injury four hours after it occurred, of lying about my injury and of failing to report a defective locomotive. Two weeks after that, I was permanently dismissed. I was devastated.

6. In 2007, with my railroad income, I bought a small house for myself in Pocatello. However, without my railroad job, I could not afford to live there. So in about January, 2011, I rented the house to tenants and moved in with a roommate, then into my grandparent's tiny mobile home in American Falls.

7. Having few skills other than those I had acquired on the railroad, I began to look into continuing my education. I enrolled full time at ISU in August, 2010. I looked unsuccessfully for work until February, 2011, when I began working at a part-time job as a marketing intern in the College of Business. That job lasted until August, 2011. I also worked part-time as a highway flagger during the summer of 2011. In August, 2011 I was concerned about my growing educational debt and the difficulty I was having in finding work, so I did not re-enroll at ISU. Instead, starting in August, 2011, I found a part-time job through a temporary agency, and then in March, 2012, I finally found a full-time job at Lamb Weston in American Falls. I earn $11.50 per hour. I receive no benefits, and my wage is just barely enough to live on. In contrast, in 2009, I earned more than $46,000 from my job with UP. I have also had to borrow money from my family, which I worry about constantly.

8. Since being fired, I have incurred approximately $11,000 in educational debt. I have not been able to afford to live in my own house. If I were to try to sell my house I would be unable to recover my investment, and I would still owe money to the bank, and it is not certain that I could sell the house.

9. The last 26 months have been very hard on me. I loved my job, and thought that I had found a home on the railroad. Instead, simply because I reported an injury as the UP rules require, I was subjected to a harsh and sustained attack. Not once did any manager show any concern for my well-being. My future remains uncertain as I try to restore my employment. I have had trouble sleeping. I have had to seek counseling. I worry constantly about my future, and I suffer from frequent headaches, something that only began after I was fired. I no longer have health insurance. To finish my degree would require that I borrow at least another $10,000, money that I do not have, and which I worry about being able to repay. This experience

has been terribly difficult and demoralizing.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated: August 04, 2012.

Gennese Annen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

N/A

AND I FURTHER CERTIFY that on such date I caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via hand delivery to:

Union Pacific Railroad Company
c/o CT Corporation System
1111 W. Jefferson, Suite 530
Boise, ID 83702

/s/Joel McElvain
Joel McElvain
Counsel for Plaintiff