U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 March 2019

Case No.: 2018-FRS-32

In the Matter of:

SCOTTY LANCASTER,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

Appearances:

Brian Reddy, Esq.
The Reddy Law Firm
Maumee, Ohio
For Complainant, Scotty Lancaster

Joseph C. Devine, Esq.
Amanda L. Godzinski, Esq.
Baker & Hostetler, LLP
Columbus, Ohio
For Respondent, Norfolk Southern Railway Co.

Before: STEVEN D. BELL
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act ("Act"), as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, codified at 49 U.S.C. §20109 (2008), and the implementing regulations found in 29 C.F.R. Part 1982. Scotty Lancaster ("Complainant"), a locomotive engineer employed by Norfolk Southern Railway Company ("Respondent"), alleges that Respondent violated those whistleblower protection provisions when Respondent imposed a 40-day suspension on Complainant on November 27, 2015.

PROCEDURAL HISTORY

Complainant was initially disciplined by Respondent on November 27, 2015.[1] On June 8, 2016, Complainant submitted a complaint to the Department of Labor's Occupational Safety and Health Administration ("OSHA").[2] In his submission to OSHA, Complainant alleged that Respondent had violated the whistleblower protection provisions of the Act. Following an investigation, OSHA dismissed the complaint on November 6, 2017.[3] Complainant submitted his Objections to the Secretary's Findings and Request for Hearing on February 6, 2018.[4] This case was docketed in the Office of Administrative Law Judges on February 16, 2018. The case was assigned to me on March 7, 2018.

On March 7, 2018, I issued an Order opening discovery and setting the matter for hearing. Respondent filed a Motion to Dismiss and Motion for Stay on March 21, 2018. Respondent's Motion to Dismiss argued that Complainant had not timely filed his Objections to the Secretary's Findings. Following briefing of the matter, I issued an Order on April 21, 2018 denying Respondent's Motion to Dismiss. On April 23, 2018, Respondent filed a Motion asking me to reconsider my Order Denying the Motion to Dismiss, or, alternatively, asking me to certify the matter for interlocutory appeal. On April 24, 2018, I issued an Order denying the request that I reconsider my prior Order, and refusing to certify the matter for interlocutory appeal.

Respondent filed a Motion for Summary Decision on August 15, 2018. Complainant filed his Brief in Opposition on September 13, 2018. I issued an Order Denying the Summary Decision Motion on October 1, 2018.

The hearing in this matter was held in the Carl B. Stokes United States Courthouse in Cleveland on December 3 and 4, 2018. Post-Hearing briefs were submitted by the parties on March 1, 2019.

THE HEARING

Prior to the commencement of the hearing, the parties entered into the following Stipulations,[5] which I hereby adopt:

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[1] Complainant was removed from service as an employee of Respondent on November 27, 2015. On December 4, 2015, Respondent sent Complainant a letter which formally charged Complainant with having been insubordinate on November 27, 2015. JX C. Respondent convened a disciplinary hearing on December 11 and 22, 2015. The transcript of this disciplinary hearing is JX A and JX B. On January 5, 2016, Complainant was notified by letter that he had been found responsible for the charged insubordination, and that his punishment was 40 days without pay, retroactive to November 27, 2015. JX J. Complainant returned to work in January 2016 and was, as of the time of the hearing in December 2018, still employed by Respondent as a locomotive engineer. Tr. at 68.

[2] JX L.

[3] JX N.

[4] JX O.

[5] Transcript of Hearing ("Tr.") at 6. Some of the stipulated facts (paragraphs c and f) are largely irrelevant to my decision-making in this case.

a. At all relevant times, Respondent, Norfolk Southern Railway Company is a railroad carrier engaged in interstate commerce.

b. At all relevant times, Complainant Scotty Lancaster is an employee of the Respondent.

c. Complainant is represented by the Brotherhood of Locomotive Engineers and Trainmen ("BLET") and his employment is covered by a Collective Bargaining Agreement between the BLET and Respondent.

d. On December 11 and 22, 2015, Respondent held an investigation hearing into Complainant's conduct on November 27, 2015.

e. On January 5, 2016, Respondent notified Complainant that he was assessed discipline of a 40 calendar day suspension without pay beginning November 27, 2015.

f. Lancaster filed a grievance of his suspension to independent arbitrators established under the Railway Labor Act, called the Public Law Board, or the National Railroad Adjustment Board. An award on that grievance has not yet issued.

g. Had Complainant not been suspended and worked for the Respondent during the period specified above, he would have earned $12,599.51 in gross wages.

h. Complainant filed a complaint with OSHA on or about June 8, 2016.

i. OSHA investigated the complaint and dismissed the complaint on November 6, 2017.

j. Complainant appealed OSHA's decision on February 6, 2018.

The hearing lasted two full days. A total of 8 witnesses (including Complainant) testified. At the conclusion of the hearing, I admitted Joint Exhibits ("JX") A through P,[6] Complainant's Exhibits ("CX") 1 through 10,[7] and Respondent's Exhibits ("RX") 1, 10 through 13, 16, 17, 20 through 29, and 32 through 39.[8] I have reviewed the exhibits as part of my preparation of this

[6] Tr. at 409.
[7] *Id.* at 410.
[8] *Id.* at 412.

Decision and Order. Some of the exhibits have been given significant weight.[9] Some have been given almost no weight.

WHISTLEBLOWER PROTECTION UNDER THE ACT

The employee protection provisions of the Act are these:

> **In General.**—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-
>
> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
>
> (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the

[9] In general, I have assessed the exhibits in these ways: The exhibits which substantiate the timeline of events, such as JX C, D, E, J, K, and CX 2, 9 and 10, have been given substantial weight. In general, the prior written statements or deposition testimony of witnesses who testified in the hearing before me (such as JX H, CX 7 and RX 1) have been given less weight than I give to the in-court testimony of those same witnesses, because I was able to observe the witnesses who appeared before me, and I am able to evaluate their credibility. In general, and for the same reason expressed in the preceding sentence, I have given more weight to the testimony of witnesses who appeared before me than I have given to the transcribed testimony of that witness if he also testified during the disciplinary hearing (JX A and B). I have examined the prior out-of-court statements made by the witnesses who testified before me in order to assess the credibility of the in-court testimony of those witnesses. I have given little evidentiary weight to the statutory and regulatory materials (CX 3, 4, 5 and 6), although those statutory and regulatory provisions will form the spine of my decision-making in this case. For the reasons I expressed during the hearing (Tr. at 98), I have given little weight to the Federal Railway Administration materials in CX 1 and 8, at least insofar as those FRA materials might be used to suggest to me that the ultimate issue(s) in this case have already been decided by the FRA and the FRA's decisions bind me. I do not believe that any question of Complainant's misconduct on November 26 and 27, 2015 has been presented to me for adjudication in this case, and I do not find Complainant's past disciplinary record to have much relevance to the issues I decide in this Decision and Order. Consequently, I have given those prior disciplinary materials (RX 2, 3, 4, 5, 6, 7, 8 and 13) almost no weight. Some other exhibits are discussed in more detail throughout the course of this Decision and Order. The fact that a specific exhibit is not mentioned in this Decision and Order does not mean that I did not review and consider that exhibit and assign to it the weight I believed appropriate.

Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452);

(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.[10]

Congress has amended the Act to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. §42121(b).[11]

The *en banc* decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016) describes the burdens of proof that will be applicable in cases subject to the AIR-21 architecture. In order to prove a violation of the Act, Complainant must show, by a preponderance of evidence: (1) that he engaged in protected activity; and (2) that Respondent took an adverse employment action

[10] 49 U.S.C. § 20109(a).
[11] Pub. L. 110-53, 9/11 Commission Act of 2007, 212 Stat. 266 §1536.

against him, and (3) that his protected activity was a contributing factor in the adverse action. Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 77 FR 44127 (July 27, 2012); *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013) If the employee does not prove one of these elements, the entire complaint fails. *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013).

If Complainant proves by a preponderance of evidence that he engaged in protected activity, and that he suffered an adverse employment action, and if he also proves that his protected activity was a contributing factor in the decision to discipline him, then Complainant will have satisfied his burden of proof of unlawful discrimination. At that point, the burden of proof will shift to Respondent. Respondent may avoid liability if it proves by clear and convincing evidence that the 40-day suspension imposed on Complainant was the result of events or decisions independent of Complainant's participation in protected activity.

The clear and convincing standard is statutory.[12] Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092 at 6 (Jan. 31, 2011) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14 (ARB Jan. 31, 2006)). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *See* 5 C.F.R. § 1209.4(d). To prevail under this standard, a respondent must show that its factual contentions are highly probable - it is a burden of proof more demanding than the preponderance of the evidence standard, residing between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3rd Cir. 2013) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)); *DeFrancesco I,* ARB No. 10-11. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action; it is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco v. Union RR Co. II,* ARB No. 13-057 at 7-8 (citing *Speegle v. Stone & Webster Engineering Corp.*, ARB No. 13-074 at 6; *Williams*, ARB 09-092 at 5).

The requirement of clear and convincing evidence is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)); *see also DeFrancesco v. Union R.R. Co. [DeFrancesco II],* ARB No. 13-057 (Sept. 30, 2015) at 8. "The ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action . . . ." *Palmer*, ARB No. 16-035 at 57. "It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have." *Id.* (emphasis in original).

[12] 49 U.S.C. § 42121(b)(2)(B)(iv).

As the ARB explained in *Palmer*:

> The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.[13]

THE HOURS OF SERVICE ACT

Resolution of this case will require discussion and application of the Hours of Service Act, 49 U.S.C. § 21103. As is relevant to this case, the Hours of Service Act provides: "A railroad carrier and its officers and agents may not require a train employee to remain on duty for a period in excess of 12 consecutive hours."[14] The Hours of Service Act states that an employee's time on duty begins when the employee reports for duty, and ends when the employee is finally released from duty.[15] The Hours of Service Act also provides that "time spent performing any other service for the railroad carrier during a 24-hour period in which the employee is engaged in or connected with the movement of a train is time on duty."[16]

Shortly after the enactment of the Hours of Service Act (when train crews were limited to working 16-hour shifts), the Supreme Court considered the intent of Congress' when it created the law:

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[13] *Palmer*, slip opinion at 32.
[14] 49 U.S.C. § 21103(a)(2).
[15] 49 U.S.C. § 21103(b)(1).
[16] 49 U.S.C. § 21103(b)(3).

> . . . the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those intrusted to their care. It is common knowledge that the enactment of this legislation was induced by reason of the many casualties in railroad transportation which resulted from requiring the discharge of arduous duties by tired and exhausted men whose power of service and energy had been so weakened by overwork as to render them inattentive to duty, or incapable of discharging the responsible labors of their positions.
>
> To promote the end in view, so essential to public and private welfare, Congress, in this Hours of Service Act, provided the limitations named upon the hours of service. The act is remedial and in the public interest, and should be construed in the light of its humane purpose.[17]

STATEMENT OF FACTS

Complainant began working for Respondent in 1999.[18] At all times relevant to this matter, Complainant was a locomotive engineer.[19] On Thanksgiving Day (November 26), 2015, Complainant was assigned to Respondent's Train 275. According to the testimony at the hearing, trains in this "200 series" are "special trains" which carry valuable freight and which receive high priority from Respondent.[20] Early on that Thanksgiving morning, Complainant reported for work at Respondent's facility in Louisville, Kentucky. He then proceeded approximately 30 miles to Shelbyville, Kentucky to build Train 275.[21] The Shelbyville Mixing Center is where newly-manufactured automobiles are loaded onto railroad cars.[22] Thomas Combs was the conductor assigned to Train 275 on that day.

At all times relevant, Matthew Newcomb was Respondent's Assistant Trainmaster in Louisville, Kentucky.[23] On November 26, 2015, Newcomb had held his Assistant Trainmaster position for approximately 2 months.[24] On that day, Newcomb was the first-line supervisor of Complainant and of Thomas Combs.[25]

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[17] *Atchison, T & S.F. Ry. Co. v. United States*, 244 U.S. 336, 342-43 (1917).
[18] Tr. 68.
[19] *Id.* at 70.
[20] *Id.* at 271.
[21] *Id.* at 69.
[22] *Id.* at 270.
[23] *Id.* at 149.
[24] *Id.* at 150. Respondent noted in its opening statement that in November 2015 "Mr. Newcomb is a little young and a little inexperienced." *Id.* at 11.
[25] *Id.*

On November 26, 2015, Newcomb was "shadowing" Train 275, which meant that "you just follow [the train] around to make sure there were no issues, there were no delays or anything in the nature for that train."[26] While shadowing Train 275, Newcomb was initially situated on the top floor of a 4-story tower at the Shelbyville Mixing Center. Newcomb had begun shadowing Train 275 sometime between midnight and 1:00 am on November 26, 2015.[27] At about 7:00 am, Newcomb noticed that Train 275 was not moving. At some point thereafter, Newcomb exited the tower, and drove out to the locomotive of Train 275. As Newcomb testified:

> I climbed onto the locomotive, walked into the cab where Mr. Lancaster and Mr. Combs were. I asked them, you know, what was going on. Mr. Lancaster started talking about the moves they had to make to build the train, to get the train together. I said no, no, I meant more what's going on, why aren't we moving? And they said that the third shift utility man had went home and the first shift hadn't go there yet. So we had a discussion about how Mr. Combs, Thomas Combs, should have gotten on the ground, completed his work, you know, the utility man is just a tool, it's not a necessity to get the job done. So –
>
> Q. When you say "get on the ground," what does that mean?
>
> A. To get off the locomotive and to physically do it himself instead of waiting on the utility man.
>
> Q. Okay. So you're talking about building a train, so the engineer stays in the locomotive and the conductor and/or utility man are throwing switches and making sure things couple and things like that?
>
> A. Yes, sir, that's correct.
>
> Q. So that's what you mean by getting on the ground?
>
> A. Yes, sir.
>
> Q. All right. So what else do you remember from that conversation?
>
> A. It was just, you know, they kept saying how stupid it was that the utility man couldn't make overtime. It got pretty heated. Voices were raised, so I decided at that time I didn't want to delay it anymore. I didn't want to take their focus away from working safely, so I got off the locomotive and let them go ahead

[26] *Id.* at 157.
[27] *Id.* at 158.

and continue their work and get the train, you know, across the road without anymore delays.

Q. Was there any profanity in that conversation?

A. No, sir, not that I can remember.

Q. Did anybody refuse to discuss the incident or what was going on?

A. No, sir.

Q. So what did you decide to do after you got off the train?

A. After I got off the train I just -- I called Mr. Mason or Mr. Dominique Reese. And, you know, I was new in the -- I was new in the job, so I wanted to get some feedback, so I called Mr. Dominique Reese and asked him what I should do next, what steps I should take to help me investigate it.

Q. Who is Dominique Reese?

A. He was our former trainmaster. He was -- he was the lead trainmaster in Louisville Terminal at the time.

Q. And do you know where -- is he still employed by the railroad?

A. No, sir, he's not.

Q. Do you know where he lives?

A. I think -- I don't know a hundred percent, no, sir.

Q. All right. So you called Mr. Reese and what happened?

A. He said that I needed to obtain a written statement from them to get their side of the story.

Q. All right. And did you go back onto the locomotive to do that?

A. No, sir, I didn't.

Q. Why not?

A. I didn't want to delay it anymore, and I didn't want to take the focus off -- as heated as it had gotten before, I didn't want to, you know, take the focus away from safety, and I didn't want to delay the train anymore, so I decided to do it at a later time.

Q. All right. So when did you decide to get the statement?

A. The next day.[28]

Complainant's recollection of the November 26, 2015 conversation with Newcomb in the cab of Train 275 is somewhat different from that of Newcomb:

A. Mr. Newcomb got on the locomotive and started accusing Mr. Combs of delaying freight, and once I realized that he was accusing him of delaying freight, I intervened to try and [de-fuse] the situation, to let Mr. Newcomb know that we was not delaying freight and tried to explain to him what happened with the utility man and what the utility man gave us a job briefing about. And Mr. Newcomb didn't want to hear my side of the story. He just kept saying that we were delaying freight, that he was going to have to handle us for delaying freight that he needed to step down off the locomotive and make a phone call.

Q. And when you hear the term "handle you" on the railroad, what does that mean?

A. Discipline us.

Q. And as far as you know then did he get off the engine and go make the phone call?

A. Yes.

Q. And did he come back on the engine after that?

A. Yes.

Q. And what happened then?

[28] *Id.* at 160-161.

A. He said that we would -- that we could go ahead and finish building our train, but we were going to be handled for delaying freight, and we would talk later.[29]

Thomas Combs, the third person involved in the November 26, 2015 conversation in the cab of Train 275, also testified that Newcomb had accused the crew of Train 275 of delaying freight.[30]

On the following day, Friday, November 27, 2015, Complainant and Combs were again working together. Their workday began at 4:30 am.[31] Combs and Complainant were respectively the conductor and locomotive engineer of Respondent's Train 22ATA25. At approximately 3:45 that afternoon, Complainant and Combs were told that Newcomb would be driving out to the locomotive and picking them up.[32] Newcomb actually got there sometime between 3:45 and 3:55 pm.[33] Newcomb then drove Complainant and Combs to his office at the Louisville tower.[34] The drive took approximately 15 or 16 minutes.[35] When they were inside the facility, Newcomb instructed Complainant and Combs to each provide a written statement about what had happened with Train 275 the day before.[36]

There seems to be general agreement among the witnesses that it was approximately 4:15 pm when Newcomb gave the instruction that Complainant and Combs were to provide written statements about the events of November 26. Newcomb acknowledges that by the time he instructed Complainant and Combs to prepare written statements, they were nearly at the end of their respective 12-hour workdays. Newcomb admitted:

Q. Sir, when you went to pick Mr. Lancaster and Mr. Combs up on November 27th, you knew that their hours of service were coming up at 4:30 p.m. that day, correct?

A. Yes, sir, I did.

Q. So you knew that they had to be finished work at 4:30 p.m.?

A. Yes, sir.

Q. Right? Correct?

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[29] *Id.* at 70-71.
[30] *Id.* at 34.
[31] *Id.* at 52. RX 12 describes Complainant's workday on November 27, 2015. Complainant began work at 4:30 am and was removed from service at 5:06 pm.
[32] *Id.* at 69.
[33] *Id.*
[34] *Id.* at 76-77.
[35] *Id.* at 77.
[36] *Id.* at 78.

A. That's correct.[37]

Combs wrote a written statement as requested by Newcomb.[38] Combs' written statement described the events of November 26, 2015 and why Train 275 had been slowed in its movement. Combs went over his 12-hour Hours of Service Act limit while composing his written statement.[39]

Complainant did not make a written statement. Complainant testified:

> Q And what did you do?
>
> A I made Mr. Newcomb aware of our hours of service, and I would like to contact my Union rep to clarify if I'm allowed to fill the statement out or not, involving hours of service.
>
> Q. Do you recall you testified at the investigation hearing that was conducted regarding the discipline that happened after this?
>
> A. Yes.
>
> Q. And is it fair to say that in that testimony you actually asked Mr. Newcomb if you needed Union representation?
>
> A. Yes.
>
> Q. And then he said no?
>
> A. Yes.
>
> Q. Or words to that effect?
>
> A. Yes.
>
> Q. And then you asked, well, can I call someone; is that –
>
> A. Yes.
>
> Q. When you asked him if you could call your Union rep, what did Mr. Newcomb say?

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[37] *Id.* at 189-190. Combs testified that when the request for a written statement was made, he had about 20 minutes left before he reached his hours of service limit (Tr. at 32). Complainant said he had about 15 minutes left (Tr. at 114).

[38] CX 2. Combs read his statement into the record during the hearing. Tr. at 61-62.

[39] Tr. at 32.

A. He gave me permission to call him.

Q. Do you remember his exact words?

A. He just told me I could call him.[40]

Complainant's phone records[41] show a series of 4 telephone calls between Complainant and Travis Cochran, his union representative, occurring between 4:21 pm and 4:44 pm. Complainant testified that during the 4:34 pm call, Cochran told Complainant to go ahead and compose the written statement requested by Newcomb. Complainant testified that after this 4:34 pm call, he went to the office where he had last seen Newcomb, but Newcomb was not there. Complainant testified:

> Q. So what happens then? What's your next interaction with Mr. Newcomb?
>
> A. As I'm waiting in the doorway and Tom [Combs] continues to fill out his statement, Mr. Newcomb comes back and I say I talked to Travis Cochran and he says that I can fill out the statement, it's okay. And Mr. Newcomb instructs me to leave Norfolk Southern property, I'm removed from service.
>
> Q. When you hear the term from a management person saying you're removed from service, what does that tell you?
>
> A. That I'm off without pay.
>
> Q. Pending some kind of disciplinary action?
>
> A. Yes.[42]

Complainant was held out of service without pay until sometime after January 5, 2016. He was not paid for the 40 days he had been held out of service as a disciplinary sanction.[43] The parties have stipulated that Complainant lost $12,599.51 in gross wages because of this disciplinary action.[44]

THE POSITIONS OF THE PARTIES

The parties draw very different conclusions from the evidence adduced at the hearing. Complainant argues in his Post-Hearing Brief that he "had a subjectively and objectively

[40] *Id.* at 79.
[41] JX P.
[42] Tr. at 84.
[43] *Id.* at 90.
[44] *Id.* at 6.

reasonable belief that to provide the written statement as requested by Mr. Newcomb would cause him to exceed the hours on duty he was allowed under the [Hours of Service Act]."[45] Complainant argues that his refusal to provide a written statement to Newcomb was activity protected by the Act,[46] and that this refusal "triggered the adverse action and was a contributing factor to it."[47]

Respondent argues that Complainant did not engage in protected activity because "complying with Newcomb's instructions would not have actually violated Federal law."[48] Respondent's argument here is that there were 15 minutes left in Complainant's workday when Newcomb asked him for a written statement, and that if had Complainant had immediately obeyed Newcomb's direction, the requested statement could have been provided within the time remaining in Complainant's workday.[49]

Respondent further argues that Complainant did not engage in protected activity because Complainant "did not subjectively believe that complying with Newcomb's instructions would violate the [Hours of Service Act]."[50] Instead, Respondent argues, "[Complainant] refused to comply with Newcomb's instruction because he did not have union representation about a matter that could lead to discipline – a topic that is not covered by the [Act]."[51] Respondent also argues that it was not objectively reasonable for Complainant to believe that creating the written statement "would somehow violate Federal law."[52]

Respondent also argues that Complainant failed to prove that "anyone in [Respondent's] management had knowledge that [Complainant] refused to violate a Federal law, rule, or regulation related to railroad safety or security. [Complainant] never told Newcomb that the reason he refused to write a statement at 4:15 pm was his desire to avoid violating his hours of service. Rather, as explained above, the reason he repeatedly gave was the desire for union representation."[53]

Respondent argues that Complainant's alleged protected activity was not a contributing factor to his discipline.[54] Respondent here argues that Richard Lloyd was the person who

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[45] Complainant's Post-Hearing Brief at 8.
[46] *Id.* at 10.
[47] *Id.*
[48] Respondent's Post-Hearing Brief at 15.
[49] "Complying with Newcomb's instruction would not have violated Federal law because Newcomb asked Lancaster for a statement with 15 minutes remaining to work. Lancaster knew he had 15 minutes to comply with Newcomb's instruction." Respondent's Post-Hearing Brief at 16.
[50] Tr. at 17.
[51] *Id.* at 18. This binary analysis was the basis of a directed verdict motion made by Respondent at the close of Complainant's case-in-chief: "Your Honor, I know it's unusual but I would like to make a motion for a directed verdict in light of the testimony where he said that the reason he did not provide a statement was related to the discipline and not the hours of service." *Id.* at 147.
[52] *Id.* at 22.
[53] *Id.* at 24.
[54] *Id.* at 25.

decided to discipline Complainant, and that "Lloyd testified that hours of service had nothing to do with his decision" to discipline Complainant.[55]

Lastly, Respondent argues that it has proven by clear and convincing evidence that it would have taken the same disciplinary action against Complainant regardless of any alleged protected activity.[56] Respondent here describes the discipline given in allegedly comparable situations.

I will discuss the arguments advanced by counsel and the evidence believed to support those arguments.

MY DECISION-MAKING FRAMEWORK

The Act provides that "a railroad carrier engaged in interstate . . . commerce . . . may not . . . suspend . . . 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 refuse to violate . . . any Federal law, rule, or regulation relating to railroad safety or security."[57] In this case, the "Federal law" in question is the Hours of Service Act, 49 U.S.C. § 21103.

The whistleblower protection language of the Federal Rail Safety Act differs significantly from that of the Surface Transportation Assistance Act[58] (prohibiting whistleblower discrimination in the trucking industry) or AIR-21[59] (prohibiting whistleblower discrimination in the aviation industry). In my quotation of the Federal Rail Safety Act in the immediately preceding paragraph, I have italicized the language of the Federal Rail Safety Act which differs from that of the Surface Transportation Assistance Act or AIR-21.[60] My decisional framework in this case is substantially informed by the specific statutory language of the Federal Rail Safety Act.[61]

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[55] *Id.* at 26.
[56] *Id.* at 32.
[57] 49 U.S.C. § 20109(a)(2) (emphasis added).
[58] 49 U.S.C. § 31105.
[59] 49 U.S.C. § 42121.
[60] The National Transportation Security Act, 6 U.S.C. § 1142, contains whistleblower protection language similar to that of the Federal Rail Safety Act.
[61] In my closing remarks at the hearing, I noted the "good faith" language of 49 U.S.C. § 20109(a), and I specifically encouraged counsel to brief this issue. Tr. at 413.

I have cited *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016) earlier in this Decision and Order when discussing the general burden-shifting approach I am required to follow in this case. I now cite to the very specific instructions given by the ARB to ALJs in *Palmer* which I am to employ when I evaluate the existence of any causal relationship between a Complainant's alleged protected activity and the alleged adverse employment action suffered by him. My decisional framework includes fidelity to the ARB's causation analysis:

> We have said it many a time before, but we cannot say it enough: 'A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision.'' We want to reemphasize how low the standard is for the employee to meet, how 'broad and forgiving' it is. 'Any' factor really means *any* factor. It need not be 'significant, motivating, substantial or predominant'—it just needs to be *a* factor. The protected activity need only play some role, and even an '[in]significant' or '[in]substantial' role suffices.
>
> Importantly, if the ALJ believes that the protected activity *and* the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer's nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action. Since the employee need only show that the retaliation played some role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.[62]

The ARB has recently re-affirmed that there is a "low burden of proof commonly deemed to be sufficient to meet Complainant's burden of proof concerning the causal relationship between her protected activity and adverse action: a contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.' *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008)."[63]

It is not my task to agree or disagree with the routine personnel decisions made by Respondent. Respondent had the right to require Complainant and Combs to provide written statements about the alleged delay of freight incident involving Train 275 on November 26, 2015.[64] The sole focus of my decision-making in this case is whether Respondent's suspension

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[62] *Palmer*, slip op. at 53 (internal citations omitted).

[63] *Austin v. BNSF Railway Company*, ALJ No. 2016-FRS-13, ARB No. 2017-24 (ARB March 11, 2019).

[64] I expressed doubt during the hearing as to why written statements were being demanded from the crew of train 275 on November 27, 2015. It seemed to me that the reasons why Train 275 had been delayed on November 26 were known to Newcomb on November 26, and that written statements would only embellish facts already known.

of Complainant was unlawful. I will need to determine whether Respondent violated the whistleblower protection provisions of the Act when it punished Complainant for insubordination as a result of Complainant's initial refusal to provide the written statement demanded by Newcomb at approximately 4:15 pm on November 27, 2015.

I do not accept Respondent's argument that Complainant must demonstrate that the act of writing his statement must itself be a "safety-sensitive task,"[65] in order that Complainant's refusal to perform that task will be entitled to whistleblower protection. The whistleblower protection language of the Act ("a railroad carrier engaged in interstate . . . commerce . . . may not . . . suspend . . . 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 refuse to violate . . . any Federal law, rule, or regulation relating to railroad safety or security") may be triggered by evidence that Complainant refused in good faith to violate a Federal law "*relating* to railroad safety."

MY ASSESSMENT OF COMPLAINANT'S CREDIBILITY

Respondent argues: "[Complainant's] testimony establishes that he will say anything, however untrue, if he believes it will help him."[66] Respondent then devotes a substantial portion of its Post-Hearing Brief arguing that Complainant lacks credibility, and that I should not believe his testimony.[67]

As an example of Complainant's alleged dishonesty, Respondent says: "Combs appeared on [Complainant's] behalf at the December 3, 2018 hearing before the ALJ, but he did not corroborate [Complainant's] claim that [Complainant] mentioned concerns about hours of service."[68] I make the following observations about this argument: *First*, Complainant and Combs were not always in the same physical location after Newcomb directed them to compose their respective written statements. Combs was in an office writing his statement while Complainant was outside the building talking on his cell-phone to Travis Cochran, and then when Complainant spoke with Newcomb. Combs testified that he was in a "separate room" from where Complainant and Newcomb were talking.[69] Combs said he was concentrating on the preparation of his written statement and was not listening closely to the conversation between Complainant and Newcomb.[70] Respondent's argument overlooks the evidence suggesting that Combs was not always in a position to hear everything Complainant said. *Second*, Complainant and Combs each independently told Newcomb that they were close to their hours of service limits.[71] I do not believe it is terribly important whether Combs corroborated Complainant's

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Combs written statement about the events of November 26 seems to add little to what Newcomb had learned on his visit to the cab of Train 275 on the morning of November 26. Newcomb agreed that by November 27, there was no longer an open question about why Train 275 had been delayed the day before. Tr. at 203.

[65] Respondent's Post-Hearing Brief at 22.

[66] Respondent's Post-Hearing Brief at 28.

[67] *Id.* at 28 through 32.

[68] *Id.* at 29.

[69] Tr. at 33.

[70] *Id.* at 39-40; 49.

[71] Complainant's testimony is at pages 78, 109 and 115 of the hearing transcript. Combs' is at pages 32, 58-9 and 60.

testimony. What is important is whether Newcomb was aware that the hours of service of Complainant and Combs were about to expire, and that Newcomb nonetheless directed Complainant and Combs to write their statements. Newcomb admitted that he was aware that Complainant and Combs needed to conclude their respective workdays no later than 4:30 pm.[72] Combs testified that he clearly made Newcomb aware of the impending expiration of his hours of service. This testimony is in complete agreement with that of Complainant. I reject Respondent's allegation that Complainant testified falsely about this issue.

Respondent also charges that Complainant was untruthful when he testified at the hearing that Newcomb had given him permission to call Travis Cochran, his union representative.[73] I note initially that the question whether Complainant had permission to make this telephone call is a collateral question of no great importance in my decision-making. In its Post-Hearing Brief, Respondent states: "Newcomb disputes that he ever gave such permission (Tr. pp. 163-164). Newcomb must be credited."[74] Yet Newcomb did not testify on pages 163 or 164 of the transcript that he had refused Complainant's request to call Travis Cochran.

Respondent's sharp words about Complainant's credibility do not hold up to a careful consideration of the evidence, and I am far from convinced that I should wholly reject Complainant's testimony. To the contrary, on the most important factual questions presented to me for decision,[75] I find Complainant's testimony to be generally consistent with the testimony of the other witnesses, generally in line with the documentary evidence of record, and sufficiently credible to sustain his burden of proof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[76]

This matter has been assigned to me for approximately one year. During that time, I have ruled on Respondent's Motion to Dismiss, Respondent's Motion to Reconsider my denial of its Motion to Dismiss, Respondent's request for interlocutory appeal of my denial of the Motion to Dismiss and Respondent's Motion for Summary Decision. I believe I was fully conversant with this matter before the hearing began. I believe the transcript of the hearing accurately reflects that I was engaged and involved in the hearing itself. During the hearing, I observed the demeanor of the witnesses carefully, and I listened carefully to the testimony of those witnesses.

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[72] Tr. at 189-90.

[73] Respondent's Post-Hearing Brief at 29.

[74] *Id.* at 30.

[75] The most important factual questions on which Complainant bears the burden of proof are these: (1) What time did Complainant begin work on November 27, 2015? (2) What time did Newcomb first tell Complainant to begin writing a statement? (3) Was Newcomb aware that Complainant was approaching the end of this permissible hours of service when Newcomb instructed Complainant to write his statement? (4) Did Complainant refuse to comply with Newcomb's instruction, at least in part, because of a concern about the expiration of his hours of service? (5) Was Complainant's refusal done in good faith? (6) Was Complainant disciplined, at least in part, because he refused to compose the statement demanded by Newcomb? (7) Did Complainant suffer emotional distress damages? Issues 1, 2, 3 and 7 are not seriously challenged by contrary evidence presented by Respondent. On issues 4 and 5, the evidence presented by Respondent is insufficient to cause me to wholly reject the testimony of Complainant. In the context of this case, issue 6 is a mixed question of law and fact.

[76] The ARB has recently expressed a preference for ALJs including a "tightly focused findings of fact section" in our decisions. *Austin v. BNSF Railway Company*, ALJ No. 2016-FRS-13, ARB Case 2017-24 (ARB March 11, 2019) slip op. at 2, n3.

I have re-read the entire transcript of the hearing as part of my preparation of this Decision and Order. I have carefully reviewed all of the exhibits admitted into the record during the hearing. I have carefully considered all of the arguments made by counsel in their respective post-hearing briefs. My long engagement in this case has put me in a good position to evaluate all of the evidence, and to resolve conflicts in that evidence. I believe I am in a good position to evaluate the credibility of the witnesses who testified during the hearing.

I now make the following Findings of Fact and Conclusions of Law:

The Hours of Service Act is a "Federal law relating to railroad safety." The United States Supreme Court has observed:

> Congress enacted the Hours of Service Act (HSA) in 1907. The HSA's purpose is to promote railroad safety by limiting the number of hours a train crew may remain on duty and by requiring railroads to provide crew members with a certain number of off-duty hours for rest between shifts. In particular, the HSA provides that train employees may not remain on duty for more than 12 consecutive hours, and, having worked for that period, must be given at least 10 consecutive hours off duty.[77]

On Friday, November 27, 2015, Complainant and Combs reported for duty at 4:30 a.m.[78]

On November 27, 2015, Complainant was the locomotive engineer of Norfolk Southern Train 22ATA25 which traveled from Burnside, Kentucky to a location outside Louisville, Kentucky.[79] Combs was the conductor on that same train.

On November 27, 2015, Complainant and Combs were "engaged in the movement of a train" as that phrase is used in the Hours of Service Act.[80]

The duty of compliance with the Hours of Service Act falls on Respondent, not on Complainant.[81]

Respondent had a duty under the Hours of Service Act not to assign work to Complainant and Combs which would have required Complainant or Combs to work more than 12 hours on November 27, 2015.

The Hours of Service Act required Respondent to release Complainant and Combs from duty no later than 4:30 pm on November 27, 2015.

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[77] *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe R. Co.*, 515 U.S. 152, 153-154 (1996)(internal citations omitted).

[78] Tr. at 52.

[79] *Id.* at 76.

[80] 49 U.S.C. § 21103(b)(3). It appears Train 22ATA25 traveled approximately 40 miles on November 27, 2015 while Complainant was the locomotive engineer.

[81] The Hours of Service Act states: "A railroad carrier and its officers and agents may not require a train employee to remain on duty for a period in excess of 12 consecutive hours."

Respondent knew, or should have known, that it would cause a violation of the Hours of Service Act for Respondent to require Complainant or Combs to begin to perform any act (including creating any part of a written statement) before 4:30 pm on November 27, 2015, but where Respondent could have reasonably foreseen that Complainant and/or Combs would complete that required act only after 4:30 pm on November 27, 2015.

Newcomb had actual knowledge that Complainant and Combs were within 15 minutes of the end of their permitted hours of service at the time Newcomb first directed Complainant and Combs to begin writing their statements.[82]

Complainant[83] and Combs[84] each told Newcomb that they were at the very end of their respective 12-hour shifts when Newcomb first instructed them to write written statements. Complainant testified:

> Q. When Mr. Newcomb first asked you to give him a statement, what did he say and what did you say?
>
> A. He asked if -- he didn't ask. He told us we needed to fill out a statement.
>
> Q. Okay. And what did you say in response?
>
> A. I informed him of our hours of service, just as well as Tom [Combs] did, and asked him if I could call my Local Chairman.[85]

Combs similarly testified that he made Newcomb aware of his concern that his hours of service were about to expire.[86]

Newcomb testified at the December 2018 hearing that Complainant did not tell Newcomb that his hours of service were about to expire.[87] On this disputed fact, I find Complainant's testimony more believable that that of Newcomb. Complainant's testimony on this point is corroborated by the testimony of Combs, and I find that both Complainant and Combs told Newcomb that they believed their hours of service might expire if they were to begin composing their written statements. Moreover, I find that Newcomb was already well aware of the imminent expiration of Complainant's and Combs' hours of service even if he was not directly told that by Complainant and Combs.[88] Moreover, I find that Newcomb, as the first-line supervisor of

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[82] Tr. 189-90.
[83] *Id.* at 78, 109, 115.
[84] *Id.* at 32, 58, 60.
[85] *Id.* at 109. Earlier in his testimony, Complainant said: "I made Mr. Newcomb aware of our hours of service, and I would like to contact my union representative to clarify if I'm allowed to fill the statement out or not, involving hours of service." *Id.* at 78.
[86] *Id.* at 32, 58-59 and 60.
[87] *Id.* at 193.
[88] *Id.* at 189-90.

Complainant and Combs, had a duty to be aware of the time of day, the time when Complainant and Combs had begun their workdays of November 27, and at what time their hours of service limit would be reached. Newcomb should not have needed anyone to tell him that Complainant and Combs were very close to the end of their permissible workdays.

Combs went over his hours of service limit on November 27, 2015 because he obeyed Newcomb's instruction that he compose a written statement about the events of November 26, 2015.[89] I have reviewed Combs' written statement,[90] and I have listened to Combs' testimony about his creation of his statement. Based upon this evidence, I find it more probable than not that it would take a reasonable person more than 15 minutes to create a written statement describing the delay of freight issues involving Train 275 on November 26, 2015.

Respondent violated the Hours of Service Act on November 27, 2015 when Respondent required Combs to continue composing his written statement after 4:30 pm.

At the time Newcomb instructed Complainant and Combs to compose written statements, Newcomb did not explicitly inform Complainant and Combs that they must stop all work creating the documents at 4:30 pm.

As of November 26, 2015, Complainant correctly understood that the Hours of Service Act did not allow him to perform any work (other than taking action to end his workday) after he had been on duty for 12 hours on a day where he had been involved in the movement of a train.[91]

As of November 26, 2015, Newcomb had been trained on the Hours of Service Act,[92] and he correctly understood that the Hours of Service Act did not allow him to assign anyone who had been involved in the movement of a train to perform any work (other than taking action to end his workday) after he had been on duty for 12 hours.[93]

As of approximately 4:15 pm on November 27, 2015, Complainant had a subjective belief that he may go over his hours of service limit if he were to prepare the written statement demanded by Newcomb.

It was objectively reasonable for Complainant to be uncertain whether he could finish the written statement demanded by Newcomb before 4:30 pm. There is nothing in the record to suggest that preparing handwritten statements was a regular part of Complainant's job duties, or that he could have had any realistic means to estimate how long it would take him to create the statement.[94] Given the suggestion made by Newcomb on November 26, 2016 that Newcomb

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[89] *Id.* at 32. Complainant testified that Combs was still writing his statement when Complainant went to Newcomb's office after Complainant's 4:34 pm telephone conversation with Travis Cochran. *Id.* at 84.
[90] CX 2.
[91] Tr.at 72, 83.
[92] *Id.* at 154-55.
[93] *Id.* at 151.
[94] Respondent appeared to suggest at the hearing that the time it took Combs to read his statement out loud was indicative of the time it would have taken Combs to create the statement on November 27, 2015. Tr. at 62. I do not accept this suggestion. It ordinarily takes much longer to create a document than it does to read that same document

might impose discipline on the crew of Train 275 for delaying freight, it would have been objectively reasonable for Complainant to want to be certain that any written description he prepared would be entirely accurate and defensible, and it would thus have been objectively reasonable for Complainant at 4:15 pm to think it was likely that he would still be working on his written statement after 4:30 pm. It is undisputed that Combs actually exceeded his hours of service while composing his written statement.[95] Based on the amount of time it took Combs to create his statement, it is more likely than not that Complainant would have been working on his written statement after 4:30 pm even had Complainant started to write immediately after Newcomb instructed him to begin.

Credible evidence at the hearing demonstrated that Complainant initially refused to compose the written statement demanded by Newcomb because Complainant wanted to discuss with his union representative whether creating the statement would violate the Hours of Service Act.[96]

Credible evidence at the hearing demonstrated that Complainant initially refused to compose the written statement demanded by Newcomb on November 27, 2015 because Complainant held a subjective and objectively reasonable belief that he would likely exceed his hours of service if he were to begin composing the written statement after 4:15 pm.

Complainant testified that he told Newcomb that he wanted to call his union representative specifically to discuss hours of service issues arising out of Newcomb's demand for a written statement.[97] I find this testimony to be credible. Because I find this evidence to be credible, I find that Newcomb was actually aware that Complainant was engaged in protected activity when Complainant told Newcomb that he did not want to write the statement unless and until Complainant discussed the hours of service issues with his union representative. I specifically reject Respondent's argument that "[Complainant] never told Newcomb that the reason he refused to write a statement at 4:15 pm was his desire to avoid violating his hours of service,"[98] because I find the credible evidence to be otherwise.

At the time he was asked to compose the written statement, Complainant told Newcomb that he was at the end of his permitted hours of service for that day. As of 4:15 pm on November 27, 2015, Newcomb was actually aware that Complainant and Combs were at the end of their respective hours of service limits for that day. Despite his knowledge and training,[99] Newcomb nonetheless directed Complainant and Combs to take action likely to cause Complainant and Combs to go over their respective 12-hour limits.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Complainant's initial refusal to compose the written statement was a lawful,

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out loud. The best evidence available about the required time to write a statement describing the "delay of freight" issue is the fact that Combs was still writing his statement at 4:34 pm. Tr. at 84.

[95] Tr. at 32, 52-53.

[96] *Id.* at 78, 79, 109.

[97] *Id.*

[98] Respondent's Post-Hearing Brief at 24.

[99] Tr. at 154-55.

good faith act done by Complainant to refuse to violate a Federal law relating to railroad safety (the Hours of Service Act).

Sometime shortly after 4:34 pm on November 27, 2015, Complainant did offer to compose the written statement that Newcomb had demanded approximately 19 minutes earlier. After making this offer, Complainant was instructed by Newcomb to leave the workplace.[100] Complainant never provided Respondent with a written statement about the alleged delay of freight of November 26.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Complainant has proven by a preponderance of evidence that he engaged in protected activity under the Act on November 27, 2015 when he initially refused to compose the written statement demanded by Newcomb.

Newcomb and Shannon Mason made the decision to take Complainant out of service at approximately 4:35 pm on November 27, 2015. This decision by Newcomb and Mason caused Complainant to be immediately off work as of that date, and immediately interrupted his wage earnings as of that date.[101]

I do not agree with Respondent that it was Richard Lloyd who "made the decision to discipline Lancaster."[102] Lloyd may have ultimately made the decision to allow Complainant to return to duty after serving a 40-day suspension, but that decision was not made by Lloyd until January 5, 2016 – after Complainant had already been in a non-pay status for approximately 6 weeks.[103] There is no evidence that Lloyd was involved in the decision made at approximately 4:35 pm on November 27, 2015 to immediately remove Complainant from service. It is the disciplinary action taken by Newcomb and Mason on November 27, 2015 that I consider to be the retaliatory act prohibited by the whistleblower protection provisions of the Act.[104]

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Complainant suffered an adverse employment action when he was taken out of service by Respondent at approximately 4:35 pm on November 27, 2015, and when Complainant was thereafter disciplined by the imposition of a 40-day suspension.

Complainant was suspended for 40 days because he was found to have been insubordinate on November 27, 2015.[105] One of the insubordinate acts charged was Complainant's refusal to compose the written statement demanded by Newcomb.[106] I have

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[100] Ironically, the reason given for not allowing Complainant to write his statement at 4:34 pm was that Complainant's hours of service had run out at 4:30 pm. Tr. at 170.
[101] *Id.* at 94.
[102] Respondent's Post-Hearing Brief at 25.
[103] JX J.
[104] Newcomb acknowledged that he had essentially suspended Complainant without pay on November 27, 2015. Tr. at 169. This is the disciplinary action which caused Complainant immediate financial harm.
[105] JX J.
[106] *Id.* At the hearing, Respondent's witnesses uniformly testified that Complainant had been instructed to write this statement "not once, but three times." *Id.* at 332. The "three times" motif is illustrated further at pages 170, 355, 378, 396, 400, 402 and 403 of the hearing transcript.

previously determined that Complainant initially refused to provide the written statement because of his subjective, objectively reasonable and good faith concern that his hours of service would expire while he was writing the statement. I have previously found that Complainant's initial refusal to compose the written statement demanded by Newcomb was protected activity under the Act. Complainant's initial refusal to compose the statement was interpreted by Respondent as an act of insubordination, and Complainant was disciplined on the spot for that refusal.[107]

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Newcomb and Mason retaliated against Complainant in violation of the Act because Complainant had initially refused to compose the written statement demanded by Newcomb.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Complainant has proven by a preponderance of evidence that his protected act of refusing to compose the written statement demanded by Newcomb on November 27, 2015 was at least a contributing factor in Respondent's decision to impose discipline on Complainant.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I thus find that Complainant has prevailed at "Step 1" of the *Palmer* decision-making guidance.

At "Step 2" of the *Palmer* analysis, the burden of proof now shifts to Respondent. Respondent may still prevail if Respondent proves by clear and convincing evidence that it would have disciplined Complainant in the absence of the protected activity.

Respondent's Post-Hearing Brief argues that "[Respondent] has proven by clear and convincing evidence that it would have taken the same action against [Complainant] regardless of any protected activity."[108] Respondent says that "clear and convincing evidence establishes that [Respondent] would have issued [Complainant] at least a time-served suspension for insubordination regardless of the subject matter involved."[109] Respondent then examines alleged comparable situations where employees were dealt with more harshly that was Complainant for acts of insubordination.

At "Step 2" of the *Palmer* analysis, I am not looking at whether the discipline imposed on Complainant was disproportionate to the conduct in question, or whether the discipline imposed on Complainant was consistent with Respondent's past personnel practices. Rather, at Step 2, I am looking for "the existence of extrinsic factors that the employer can clearly and convincingly prove would independently lead to the employer's decision to take the personnel action at issue."[110] I might consider evidence that a complainant was really disciplined for something

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[107] JX C and D.
[108] Respondent's Post-Hearing Brief at 32.
[109] *Id.*
[110] *DeFrancesco v. Union R.R. Co. [DeFrancesco II]*, ARB No. 13-057 (Sept. 30, 2015), slip opinion at 6.

other than the protected activity in which the complainant was involved.[111] In other words, I am looking for proof that the causal link which I found at Step 1 does not truly explain why the adverse employment action was taken.

In its Post-Hearing Brief, Respondent suggests no alternative theory as to why Complainant was disciplined. There was no disciplinary investigation of Complainant pending as of November 26, 2015 in which Respondent was considering whether Complainant had engaged in some pre-November 26, 2015 misconduct. On November 26, 2015, Newcomb told Combs and Complainant that they might be "dealt with" for delaying Train 275, but neither were ever disciplined for delaying freight.[112] Respondent's Post-Hearing Brief unequivocally acknowledges that Complainant was disciplined for being insubordinate on November 27, 2015,[113] and Complainant was notified in writing that he was being disciplined for not composing the written statement demanded by Newcomb on November 27, 2015.[114] Respondent has not broken the chain of causation I found at Step 1.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Respondent has failed to come forward with any credible evidence showing that Complainant was given a 40-day suspension for some reason other than Complainant's initial refusal to compose the written statement demanded by Newcomb. Respondent's own evidence shows that Complainant was given a 40-day suspension for insubordination, and the alleged insubordinate act was Complainant's failure to start a job that he believed would cause him to violate the Hours of Service Act.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Respondent has failed to meet its burden of proof at Step 2 of the *Palmer* decisional framework.

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[111] *Palmer* instructs that at Phase 2 the question is: "in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway?" Slip opinion at 32. An example might suffice: Person A worked in the aviation industry. A had a long history of workplace absenteeism, and was on a strict performance improvement plan to address his attendance issues. On a particular day, A sends an email to his Congressman providing details of poor aircraft maintenance procedures by his employer and describes a maintenance department which generates falsified aircraft maintenance logs. Two days later, A's boss learns of the email sent by A to his Congressman. The boss goes to A's office to confront A, but A is not in his office and A has not yet been seen that morning by co-workers. Later that day, A is located at his home, and A is told that he is fired. A files an action claiming that he was fired because of the email he sent to a Member of Congress complaining about aviation safety. Employer says A was fired because of his violation of the performance improvement plan related to his attendance. If I were to find at *Palmer* Step 1 that A had engaged in protected activity, and had suffered an adverse employment action, and that the protected activity was a contributing factor in the disciplinary action, I would then move to Step 2. I would be required to ultimately find for employer if employer proved by clear and convincing evidence that it fired A for attendance reasons irrespective of A's participation in the protected activity.

[112] Tr. at 259.

[113] "Here, clear and convincing evidence establishes that [Respondent] would have issued [Complainant] at least a time-served suspension for insubordination regardless of the subject matter involved." Respondent's Post-Hearing Brief at 32. I note that Respondent's argument here misses the point. My focus at Step 2 in on causation. If Complainant was suspended in retaliation for engaging in protected activity (as I have found at Step 1), evidence that Complainant's suspension is consistent with Respondent's disciplinary actions in prior cases is not a defense at Step 2.

[114] JX J.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that I find that Complaint has prevailed on all liability issues, and that Respondent has failed to prove its affirmative defense. I therefore find that Complainant is entitled to an award of damages.

DAMAGES

The damages available to Complainant are described in the Act[115] and in the implementing regulations:

> If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. The order may also require the respondent to pay punitive damages up to $250,000.[116]

1. BACK PAY

The parties have stipulated to the amount of Complainant's gross wage loss for his 40-day suspension. Complainant is entitled to recover from Respondent twelve thousand five hundred ninety-nine dollars and fifty-one cents ($12,599.51) in lost wages plus appropriate interest.

2. EMOTIONAL DISTRESS DAMAGES

Complainant seeks an award of emotional distress damages. He cites the following as the best evidence of his mental state during the 40-day suspension:

> Q. Sir, while you were off for those 40 days pending the investigation, pending the determination of the investigation, can you tell us basically how you spent your days, how -- what did you do now that you weren't working?

[115] 49 U.S.C. § 20109(e).
[116] 29 C.F.R. § 1982.109(d)(1).

A. Spending more time with my kids and my fiancée.

Q. And how were you feeling about yourself in general with regard to work and your reputation at work?

A. I was a little bit angry about the whole situation.

Q. Why?

A. Because I had no income and I was solely relying on my fiancée's income.

Q. Did you feel that you were being treated fairly?

A. No.

Q. Did you -- were you concerned at all before you found out the, you know, the decision from the railroad when they said time served? Were you concerned at all that you might lose your career?

A. Yes.[117]

Complainant does not suggest a monetary figure which he believes would compensate him for these feelings.[118]

Complainant's testimony supports his assertion that he suffered emotional distress damages caused by his suspension. Complainant's testimony in this regard was not subjected to cross examination. I find Complainant's testimony about his emotional distress to be credible. Complainant's emotional distress was predominantly caused by his fear that he would permanently lose his job with Respondent. It appears that at the time of his suspension, Complainant was earning approximately $115,000 in wages as a locomotive engineer with Respondent.[119] He had been employed by Respondent since 1999.[120] The loss of a career in a high-paying occupation would certainly have been a concern. Some of the nine "comparable" disciplinary actions described on RX-29 may have been known to Complainant, and may well have supported Complainant's belief that he likely was going to be discharged from his position as a locomotive engineer with more than 15 years of seniority. I note that the uncertainty over Complainant's employment circumstances occurred over the holidays, which can often be a time of financial and other stress.

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[117] Tr. at 94.

[118] "Complainant will rely on the trier of fact to determine an amount that would be fair and reasonable compensation for this pain and suffering." Complainant's Post-Hearing Brief at 12.

[119] Complainant's 40-day suspension cost him 12,599.51 in damages – a rate of $314.98 per day. $314.98 times 365 days equals $114,970.53.

[120] Tr. at 68.

As to the severity of Complainant's damages, I note that Complainant did not seek counseling or medical assistance. No medications for depression or anxiety were prescribed.[121] There was no evidence that Complainant's relationship with his fiancée or with his children was damaged by his work situation. I heard no testimony that the loss of income suffered by Complainant caused the type of economic harm (foreclosure, repossession, loss of creditworthiness) which may be emotionally taxing. Complainant's suspension was relatively brief, and he was fully restored to the position he held before the unlawful suspension.

As to the duration of Complainant's damages, I find that Complainant's emotional distress began on November 27, 2015 and ended when he was told that he would be reinstated to his job on January 5, 2016.[122]

Based upon the record before me, I find an award of five thousand dollars ($5,000.00) to Complainant would be fully sufficient to make him whole for the emotional distress described by him during the hearing.

3. ENTITLEMENT TO PUNITIVE DAMAGES

Complainant asks me to order Respondent to pay $250,000.00 in punitive damages.[123] Respondent argues that there is no basis for the imposition of punitive damages.[124] In my consideration of punitive damage question, I will be guided by the ARB's decision in *Youngermann v. United Parcel Service, Inc.*, 2013 WL 1182311, ARB Case 11-056, ALJ Case 2010-STA-047 (ARB February 27, 2013). Under the *Youngermann* analysis, I am required first to determine whether an award of punitive damages is appropriate. If that question is answered in the affirmative, I will then perform a second analysis to determine the amount of punitive damages to be awarded.

At the first step of the punitive damage assessment in this case, I am primarily focused on the state of mind of those involved in the decision to take Complainant out of service on November 27, 2015. I will also evaluate the state of mind of any other persons who may have taken action(s) designed to discriminate against Complainant for his participation in activity protected by the Act. Phrases such as "reckless indifference" to, or "callous disregard" of, the federally-protected rights of Complainant describe in general terms the type of evidence that will indicate that an award of punitive damages is appropriate. I will also be looking for evidence of intentional violations of federal law(s).

The text of the 112-year-old Hours of Service Act is clear and unambiguous: "A railroad carrier and its officers and agents may not require a train employee to remain on duty for a period in excess of 12 consecutive hours." As discussed above, this statue was enacted by Congress to promote railroad safety. As is relevant to the actions of November 27, 2015, there is

[121] It is not necessary that a claimant in an FRS case seek mental health or medical assistance in order to be eligible for an award of emotional distress damages. Receiving such assistance may affect my assessment of the amount of emotional distress damages to be awarded.
[122] Tr. at 281.
[123] Complainant's Post-Hearing Brief at 15.
[124] Respondent's Post-Hearing Brief at 33.

no argument that both the locomotive engineer (Complainant) and the conductor (Combs) were responsible for the safe operation of the train they were moving across Kentucky.[125]

Newcomb testified that he had received management training on the Hours of Service Act.[126] Newcomb was aware that train crews involved in the movement of trains were limited to a 12-hour workday.[127] Newcomb understood before November 27, 2015 that it was a violation of the Act for him to discipline an employee who reasonably refused to violate a federal law, rule or regulation related to railroad safety.[128]

Newcomb was directed by his supervisor on November 26, 2015 to obtain written statements from Combs and Complainant about the alleged delay of Train 275.[129] Newcomb decided on his own authority not to obtain Combs's and Complainant's written statements on that day.[130] Newcomb decided instead to obtain the written statements on November 27.[131]

At the very end of the workday on November 27, 2015, when Newcomb finally instructed Combs and Complainant to compose their written statements, both Combs and Complainant informed Newcomb that they were at the end of their respective 12-hour shifts. Newcomb nonetheless insisted that the written statements be prepared. I believe Newcomb disregarded the clear language and obvious safety-related intent of the Hours of Service Act because Newcomb was being pressured by his direct supervisor to immediately obtain written reports from Combs and Complainant about the delay of Train 275. Shannon Mason[132] testified:

> Q. Okay. So let's move to November 27, 2015, which is the day after Thanksgiving. Were you made aware of an incident involving Mr. Lancaster?
>
> A. Yes, sir, I was.
>
> Q. And how were you made aware?
>
> A. Mr. Newcomb called me and informed me that he had, as planned, gone down and picked up Mr. Lancaster and his conductor and brought them back to the yard office for the purpose of getting a statement *that he should have gotten the day before, that we would have liked to have gotten the day before*. He brought them back to the yard office, asked Mr. Lancaster to fill

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[125] Tr. at 260.
[126] *Id.* at 151.
[127] *Id.*
[128] *Id.* at 155-56.
[129] *Id.* at 162.
[130] *Id.*
[131] *Id.*
[132] On November 26 and 27, 2015, Mason was the Assistant Division Superintendent for Respondent's Central Division, and had his office in Knoxville Tennessee. Tr. at 223. He was responsible for safety in the Division. *Id.* at 224. He was Newcomb's direct supervisor. *Id.* Newcomb considered Mason to be one of his "big bosses." *Id.* at 159. Mason said he was responsible for "teaching, coaching [and] training" Newcomb. *Id.* at 225.

out a statement. Mr. Lancaster refused to do so three times, and had actually exited the room or exited the building, left, grabbed his phone, walked out.

I talked to Mr. Newcomb about this, went over the particular details with him, and basically told Mr. Newcomb that, you know, given the situation that Mr. Lancaster had been insubordinate, refused to follow instructions on three different occasions and then had left the building, left the facilities, to remove him from service and put him off duty at whatever time it was he had left the building.[133]

Newcomb and Mason spoke at length about obtaining written statements from the crew of Train 275. Newcomb was certainly aware that Mason had wanted Newcomb to obtain the written statements of Combs and Complainant on November 26, and that Newcomb was pressured by Mason to make sure those statements were written on November 27. Mason's boss – Carl Wilson[134] -- was also demanding that the crew of Train 275 provide written statements about the delay of freight on Thanksgiving Day:

Q. I'm sorry, sir, and I may have -- it might be my mistake. I'm talking about what Mr. Newcomb did on the 26th, the day that this alleged delay of freight actually occurred. What was Mr. Newcomb's involvement with Mr. Lancaster and Mr. Combs?

A. I believe he had a conversation with the crew on that day.

Q. On the locomotive or around the locomotive, at least?

A. Yes, sir.

Q. And Mr. Mason testified earlier that it was appropriate then -- that was the appropriate time for Mr. Newcomb to request a written statement from those folks, but he didn't. Do you agree with that?

A. I'm not completely agreeable to that because, quite honestly, Shannon Mason made me aware that we had this delay of freight. I am a real stickler as far as requesting written statements. And I can tell you, I wanted a written statement. Right. So what

[133] Tr. at 227-28 (emphasis added).

[134] On November 26 and 27, 2015, Wilson was the Division Superintendent of Respondent's Central Division, and had his office in Knoxville, Tennessee. Tr. at 269. Wilson has more than 30 years of management service with Respondent. *Id.* at 264. He has been trained on the Hours of Service Act. *Id.* at 282, and was responsible for making certain that all other supervisors in the Division were properly trained on the Hours of Service Act. *Id.*

Mr. Mason said is that he believes that Mr. Newcomb should have just asked for a written statement there and then.

JUDGE BELL: On the 26th?

MR. REDDY: On the 26th. Thank you, Your Honor.

THE WITNESS: Well, that's fair, but I don't think that took place.[135]

I believe there was significant pressure on the inexperienced Newcomb to obtain written statements from Complainant and Combs about what had happened with Train 275 on November 26, 2015. I believe Newcomb consciously and deliberately put satisfaction of the demands of his supervisors for written statements ahead of his duty to obey and enforce a federal statute designed to keep railroads safe.

I find the language quoted immediately above of concern for another reason: Newcomb and Mason made the decision on November 27, 2015 to remove Complainant from his position as a locomotive engineer. In Mason's recounting of the facts leading up to his decision to take Complainant out of service on November 27, there is no discussion or apparent consideration of the fact that both Complainant and Combs had told Newcomb that they were at the end of their respective 12-hour workdays. The fact that Complainant had expressed concern to Newcomb about violating the Hours of Service Act does not seem to have even been considered by Newcomb and Mason when they decided to discipline Complainant.

Carl Wilson was the highest-ranking officer of Respondent to testify at the hearing. Wilson testified that if Complainant believed he would violate the Hours of Service Act by composing the written statement, Complainant should have brought this concern to Newcomb's attention.[136] I find that Complainant and Combs did, in fact, repeatedly tell Newcomb of their concerns that they would go over the 12-hour limit if they wrote the statements.[137] Newcomb does not seem to have been interested in hearing these concerns, and Newcomb pushed Complainant and Combs to write their statements despite being reminded that the Hours of Service Act should have imposed a hard stop on their workdays. Wilson testified that Complainant should have at least started to write his statement, and then stopped when he reached the end of his hours of service.[138] Yet it is undisputed that Newcomb did not give this instruction to Complainant and Combs.[139] I believe Wilson also testified that Complainant could have refused to compose the statement if he believed he would violate the Hours of Service Act in the process.[140] That is not what happened on November 27, 2015. Wilson was aware that Combs actually exceeded his hours of service for November 27, 2015 because he was forced to

[135] Tr. at 286.
[136] *Id.* at 304.
[137] *Id.* at 32, 58, 60, 78, 109, 115.
[138] *Id.* at 332-33.
[139] *Id.* at 58.
[140] *Id.* at 305. I acknowledge the ambiguity of Wilson's testimony at lines 4 through 6 of that page.

compose his written statement.[141] Wilson's theoretical ideas about what could have happened on November 27, 2015 are very different from what actually happened that day under Newcomb's direction and Mason's oversight.

RX 24 is an on-line training module titled "What Managers Should Know About Avoiding Illegal Retaliation." Newcomb testified that he had received training involving these materials.[142] One of the slides in RX 24 gives a hypothetical: "If Josh was fired because he reported what he knew or in good faith believed was an unlawful action by his employer to an enforcement agency, such as Hours of Service Act violation, this would be a classic case of 'whistleblower' retaliation by his employer."[143] The hypothetical cited in this slide is not precisely the situation that occurred on November 27, 2015, but it is close enough that Newcomb and the managers above him should have questioned whether possible whistleblower retaliation was playing out in real time before them late in the afternoon of November 27, 2015. Despite training apparently designed to sensitize Newcomb and those above him to the need to avoid whistleblower retaliation, Newcomb and those above him suspended Complainant for 40 days precisely because Complainant refused to write a statement until he obtained guidance about the Hours of Service Act from his union representative. Neither Newcomb nor any of his supervisors expressed any regret for their retaliatory acts towards Complainant.

The Hours of Service Act was well known to Newcomb and Mason at the time they suspended Complainant. The whistleblower protection provisions of the Federal Rail Safety Act were well known to Newcomb and Mason at the time they suspended Complainant. At 4:15 pm on November 27, 2015, both Complainant and Combs cautioned Newcomb that they were at the end of their workdays. Notwithstanding this base of knowledge, Newcomb directed Combs to write a statement that wound up putting Combs over his hours of service for the day. When Complainant initially refused to write saying specifically that he wanted to discuss hours of service issues with his union representative, Newcomb and Mason suspended Complainant.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Respondent intentionally violated the Hours of Service Act in the case of Combs, and the whistleblower protection provisions of the Federal Rail Safety Act in the case of Complainant.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Newcomb and Mason were recklessly indifferent to the right of Complainant to examine in good faith whether he was going to impermissibly exceed his hours of service if he were forced to compose the written statement demanded by Newcomb on November 27, 2015.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I find that Newcomb and Mason callously disregarded the safety considerations protected by the Hours of Service Act when Mason pressured Newcomb to demand the written statements at the very end of Complainant and Combs' workday on November 27, 2015.

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[141] *Id.*
[142] Tr. 212.
[143] RX 24 at 32.

Based upon the record before me, I find that Complainant is entitled to an award of punitive damages.

4. AMOUNT OF PUNITIVE DAMAGES

I must now determine the amount of punitive damages to be awarded. *Youngermann* reminds us that punitive damages are awarded to accomplish the twin aims of punishment and deterrence.[144] *Youngermann* also states that "[a]lthough a respondent's wealth alone cannot provide a basis for an otherwise unwarranted punitive damage award, it may be considered in determining the size of a suitable award."[145] I take official notice[146] that Norfolk Southern Corporation had approximately $11.5 billion in railway operating revenues in 2018 according to the SEC Form 10-K filed by Respondent on February 8, 2019.[147] Even an award of punitive damages at the maximum amount allowed by the Act and its regulations is unlikely to alone change the behavior of such a large corporation.

I base the size of the punitive damage award in this case by examining the extent to which Respondent seemed willing to disregard the safety-based crew service limitations mandated by the Hours of Service Act. Complainant (a locomotive engineer) testified that during his career he exceeded his permitted hours of service more than 50% of the days he worked.[148] Although I claim no expertise in the operation of a railroad, the legislative history of the Hours of Service Act suggests that fatigue on the part of a locomotive engineer presents safety issues to the locomotive engineer himself, his crew, his train, the freight he is carrying and the public at large. It find that this type of fatigue is precisely what the Hours of Service Act was enacted to address. I do not believe that a locomotive engineer's fatigue on a Monday night is addressed in any respect by allowing him an extra hour of rest on Tuesday morning.[149] Nor do I believe paying overtime to a tired locomotive engineer reduces in any way the crew fatigue risks explicitly targeted by the Hours of Service Act.

The following question was posed to Newcomb at the hearing:

> JUDGE BELL: Are you saying that violations of the Hours of Service Act at Norfolk Southern are commonplace?
>
> THE WITNESS: As far -- people working over 12 hours are, yes, sir. People being on duty over 12 hours are, yes, sir.[150]

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[144] 2013 WL 1182311 at *7.
[145] *Id.*
[146] 29 C.F.R § 18.84.
[147] http://yahoo.brand.edgar online.com/DisplayFiling.aspx?TabIndex=2&FilingID=13205368&companyid=5042&ppu=%252fdefault.aspx%253fcik%253d702165. Last visited March 12, 2019.
[148] Tr. at 134.
[149] Newcomb discusses "limbo time" – which Newcomb described as Respondent's practice of giving extra rest on, say, a Tuesday to a crew that exceeded its hours of service on the preceding Monday. Tr. 178-79.
[150] *Id.* at 179. Newcomb acknowledged that is "fairly common" for Respondent's crews to work more than 12 hours at a time. *Id.* at 178.

Mason also acknowledged that Respondent had "employees that work over 12 hours all the time, . . . it's not unusual at all."[151]

RX 21 is a list showing the occasions when Respondent's train crews worked in excess of 12 hours in a shift. This exhibit is only for a 3-month period,[152] and depicts crew activity for only one of Respondent's operating divisions.[153] RX 21 lists more than 675[154] occasions during this 3-month period in 2015 when Respondent determined that crews worked in excess of 12 hours. Some of these entries show crewmembers working more than 14 hours in a shift.

As Newcomb and Mason admitted, RX 21 confirms that violations of the Hours of Service Act were an almost-daily occurrence during the period when Complainant initially refused to compose the written statement demanded by Newcomb.

The Hours of Service Act was enacted to protect train crews and the public from the life-threatening risks posed by crew fatigue. Evidence of persistent and widespread violations of the Hours of Service Act by Respondent was presented at the hearing. Despite the considerable risks posed by railroad crew fatigue, no evidence was presented showing that Respondent had taken any type of action to reduce or eliminate violations of the Hours of Service Act. Respondent's witnesses expressed no interest whatsoever in obeying or enforcing the crew service limits which have been a prominent feature of federal railroad safety regulation for more than 110 years.

None of Respondent's witnesses acknowledged that there was anything inappropriate with Newcomb requiring Combs to exceed his hours of service on November 27, 2015. Respondent's witnesses expressed no recognition and no regret that Respondent had punished Complainant precisely because Complainant had questioned whether the Hours of Service Act permitted Newcomb to require Complainant to compose a written statement after 4:30 pm on November 27, 2015. Respondent's witnesses articulated no commitment to avoiding hours of service violations in the future.

Based upon my review of all of the testimony, admitted exhibits and the arguments of counsel, I impose punitive damages in the amount of twenty-five thousand dollars ($25,000.00) in order to punish Respondent for its unlawful suspension of Complainant on November 27, 2015, and in an attempt to deter Respondent from making such unlawful disciplinary decisions in the future.

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[151] *Id.* at 238.

[152] September 1, 2015 to November 30, 2015.

[153] *Id.* at 238-39.

[154] I did not count all of the lines on all of the pages. There are about 43 lines on the first page, and there are 16 pages of about the same number of lines (43 x 16 = 688). There may be fewer lines on the last page of the exhibit, so I rounded down. Shannon Mason suggests that this exhibit over-reports actual violations of the Hours of Service Act (Tr. at 240), but no other document showing actual violations of the Hours of Service Act was tendered during the hearing. I conclude from my review of RX 21 that Hours of Service Act violations in 2015 were common and persistent. This conclusion is corroborated by the testimony of Newcomb (Tr. at 97 and 178) and Mason (Tr. at 238).

ORDER

It is hereby **ORDERED**:

1. Respondent will pay Complainant back wages the amount of twelve thousand five hundred ninety-nine dollars and fifty-one cents ($12,599.51) plus interest on that amount from January 1, 2016 to be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and compounded daily. This payment is to be made in a lump sum and the wages will be subject to ordinary payroll deductions in effect at the time of the payment of these wages; and

2. Respondent will restore to Complainant any seniority lost because Complainant served a 40-day suspension; and

3. Respondent will submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating my award of back pay award to the fourth calendar quarter of 2015; and

4. Respondent will remove from Complainant's personnel file any reference to the 40-day suspension imposed on Complainant by Respondent. Respondent is prohibited from using evidence of the 40-day suspension in any future disciplinary proceeding, or in any other personnel action; and

5. Respondent will pay Complainant emotional distress damages in the amount of five thousand dollars ($5,000.00); and

6. Respondent will pay Complainant punitive damages in the amount of twenty-five thousand dollars ($25,000.00); and

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

8. SCHEDULE FOR ATTORNEY FEE PROCEEDINGS: On or before April 15, 2019, Complainant's counsel is directed to supply Respondent's counsel with: (1) the total number of hours spent by Complainant's counsel on the prosecution of this matter before OSHA and before the Office of Administrative Law Judges; and (2) the hourly rate sought by Complainant's counsel for the legal services performed; and (3) the total amount of expert witness fees (if any), and (4) the total amount of litigation costs incurred by Complainant. On or before April 30, 2019, counsel for Complainant and counsel for Respondent are to meet and confer (either in person or by telephone) to see if agreement can be reached as to the amount of attorney fees and expenses to be paid to Complainant. If no agreement is reached, Complainant's Motion for Attorney Fees and Litigation Costs must be postmarked on or before May 10, 2019. Respondent's Brief in Opposition must be postmarked by May 24, 2019. No reply will be permitted.

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

STEVEN D. BELL
Administrative Law Judge

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

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

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

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

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

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

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

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

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

SERVICE SHEET

Case Name: **LANCASTER_SCOTTY_v_NORFOLK_SOUTHERN_RAI_**

Case Number: **2018FRS00032**

Document Title: **DECISION AND ORDER**

I hereby certify that a copy of the above-referenced document was sent to the following this 28th day of March, 2019:

Digitally signed by RAYMOND WILKE
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