U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 December 2014

CASE NO.: 2013-FRS-14

IN THE MATTER OF

BEN WINCH,
Complainant,
vs.

CSX TRANSPORTATION INC.,
Respondent

DECISION and ORDER

Procedural History

This case comes under the Federal Rail Safety Act (FRSA),[1] as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.[2] The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

On 8 Jun 12, Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA). In the complaint, Complainant alleged that Respondent retaliated against him by firing him for reporting that he would be missing work in compliance with his doctor's orders. OSHA issued its decision on 17 Oct 12, dismissing the complaint. Complainant filed a timely objection, the case was referred to the Office of Administrative Law Judges and assigned to me. On 6 May 14, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

[1] 49 U.S.C. § 20109.
[2] Pub. L. No. 110-53 (Aug. 3, 2007).

My decision is based on the entire record, which consists of the following:[3]

Witness Testimony of
Complainant
Brian Killough
David Toth
David Ingolsby
Peter Burrus

Exhibits[4]
Complainant's Exhibits (CX) 1-15
Respondent's Exhibits (RX) 1-32

STIPULATIONS[5]

1. The allegations and parties come within the coverage of the Act.
2. To the extent complaints were made and objections filed, they were timely.

FACTUAL BACKGROUND

Complainant was employed by Respondent in 2004 and had a history of attendance and work availability problems. He was scheduled to work on 20 Jan 12, but called in on 19 Jan 12 to say he was ill and could not work that shift. Respondent removed him from the schedule for that day. On the morning of 20 Jan 12, he went to the doctor, who treated him and told him not to go to work. The next month, Complainant was charged with a serious safety violation and on 9 Feb 12, he reported to a road foreman that he was nauseous, distracted, and nervous. The foreman told him to go home. On 3 May 12, he was fired for violating Respondent's attendance and availability policies.

ISSUES IN DISPUTE AND POSITIONS OF THE PARTIES

Complainant maintains that he engaged in protected activity when he marked off duty because (1) he was sick and it would be unsafe to work and (2) he was following his doctor's orders. He argues that Respondent terminated him because of that protected activity in violation of the Act and seeks reinstatement, record expungement, back pay, compensation of his emotional distress, and punitive damages.

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[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[4] Counsel were cautioned that since a number of exhibits appeared to be *en globo* collections of records, Counsel must cite during the hearing or in their post-hearing briefs to the specific page of any exhibit in excess of 20 pages for that page to be considered a part of the record upon which the decision will be based. The same rule applies to the transcript deposition of any witness who also testified in person. Tr. 8-9.

[5] JX-1; Tr. 31.

Respondent initially responds that Complainant's complaint to OSHA alleged as a protected activity only that he was following doctor's orders. Respondent argues that since Complainant never alleged to OSHA that he engaged in a protected activity by marking off because he would be unsafe at work, that allegation is not ripe for adjudication. Respondent notes that Complainant marked off before he saw the doctor and could not have been following doctor's orders.[6]

Respondent also argues that notwithstanding his procedural failure, there is no evidence Complainant actually marked off because he had specifically considered the safety implications of going to work and therefore he was not engaging in protected activity. Respondent additionally submits that even in the absence of either alleged protected activity, it has still shown by clear and convincing evidence that it would have terminated him anyway.

Finally, Respondent argues that Complainant failed to mitigate his damages and is not entitled to back pay and failed to show any entitlement to compensation for emotional distress or punitive damages.

LAW

Prima Facie Case

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,[7] for reporting a work-related illness or injury,[8] for requesting medical or first aid treatment,[9] for refusing to work when confronted by a hazardous safety or security condition,[10] or for following orders or a treatment plan of a treating physician,[11] even if the treatment is unrelated to a work injury or illness.[12]

The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).[13] AIR 21 requires a complainant prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[14] If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.[15]

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[6] Moreover, Respondent argues notwithstanding the current binding interpretation of the Act by the Board, the treatment plan must relate to a work injury or lines. It similarly argues that reporting an unsafe condition based on the employees' non-work related illness or injury is likewise not protected.

[7] 49 U.S.C. §20109(b)(1)(A) (2011).

[8] *Id.* §20109(a)(4).

[9] *Id.* §20109(c)(2).

[10] *Id.* §20109(b)(1)(B).

[11] *Id.* §20109(c)(2).

[12] Bala v. Port Auth. Trans-Hudson Corp., ALJ No. 2010-FRS-26 (ARB Mar. 5, 2014). (Respondent concedes I am bound by this holding, but reserves the right to appeal the Board's interpretation to the Circuit).

[13] 49 U.S.C. §42121 (2011).

[14] 49 U.S.C. §42121(b)(2)(B).

[15] 29 C.F.R. §1979.109(a); *Hutton v. Union Pac. R.R. Co.*, ALJ No. 2010-FRS-20 (ARB May 31, 2013).

An aggrieved employee must file his initial complaint with the Department of Labor (OSHA) for investigation and initial decision.[16] Upon objection to that decision by either party, the case will be considered for *de novo* by the Office of Administrative Law Judges (OALJ).[17] Pleadings before the OALJ may be amended if "determination of a controversy on the merits will be facilitated thereby ... [and] if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint."[18] Leave to amend should be liberally granted.[19] The key inquiry is whether the facts change.[20] "The purpose of such leave is 'to facilitate decision on the merits, rather than on the pleadings or technicalities.'"[21]

Contributing Factor

In establishing that a protected activity was a contributing factor to a subsequent adverse action, it is not necessary to show that the employer was motivated by the activity or even gave any significance to the activity. To place the clear and convincing burden on a respondent, all a complainant need do is show that the employer knew about the protected activity and the protected activity was a necessary link in a chain of events leading to the adverse activity.[22] In short, in order to vindicate what has been interpreted as congressional intent to make it very difficult for employers to defend themselves against whistleblower complaints, the contributing factor analysis has become simply a question of "but for" factual causation.[23]

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[16] 49 U.S.C. §20109(d)(1); 29 C.F.R. §1982.103.
[17] 29 C.F.R. §1986.106.
[18] 29 C.F.R. §18.5(e).
[19] See e.g., *Evans v. U.S. Envtl. Prot. Agency*, ALJ No. 2008-CAA-003, slip op. at 11 (ARB July 31, 2012) (citations omitted).
[20] Cobb v. FedEx Corporate Services, Inc., ALJ No. 2010-AIR-24 (ARB Dec. 13, 2013).
[21] *Evans*, slip op. at 11 (citing *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000)).
[22] *Hutton v. Union Pac. R.R. Co.*, ALJ No. 2010-FRS-20, slip op. at 6-7 (ARB May 31, 2013). Indeed, it may well be that the protected activity was totally unrelated to the employer's articulated reason for the adverse action, as long as it was within the chain of cause in fact. For instance, an employee reports an injury and a subsequent investigation discloses employee misconduct that is unrelated to the report. If the employer takes adverse action solely because of the unrelated misconduct, the report was nevertheless a contributing factor. *See e.g.,* DeFrancesco v. Union R.R. Co., 2009-FRS-9 (ARB Feb. 29, 2012). Under the expansive reading of the statute, this may be true even if the unrelated misconduct took place after the protected activity. In other words, an employee who reports an injury, is given light duty and then is fired for punching his new supervisor would be able to show that but for his reported injury, he would have never engaged the new supervisor. The employer would then bear the clear and convincing burden.
[23] *Hutton,* ALJ No. 2010-FRS-20, slip op. at 7-8.

Respondent's Burden

However, simply because the protected activity was a link in the chain of events leading to the adverse action does not mean another independent chain of causation did not exist.[24] Even if a complainant is able to establish a factual link of causation between the protected activity and adverse action, an employer may still avoid liability by presenting clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity.[25] That evidentiary standard is more rigorous than the preponderance-of-the-evidence standard and denotes a conclusive demonstration that the thing to be proved is highly probable or reasonably certain.[26]

Damages

Authorized remedies include, where appropriate, abatement, reinstatement, back pay, compensatory damages, costs and attorney's fees, and punitive damages up to $250,000.[27]

Although there is a presumption in favor of reinstatement, it may not be required in cases where the employer can show it is impossible or impractical,[28] particularly where it would be impossible to have a productive and amicable working relationship,[29] or the complainant could not do his job without endangering others.[30]

An employee must attempt to mitigate his damages by diligently seeking employment and the employer is entitled to set off any income earned so as to avoid a double recovery.[31] However, the employer bears the burden of showing that the employee failed to mitigate back pay damages by seeking comparable employment.[32]

Compensatory damages may be awarded for emotional pain and suffering and for mental anguish.[33] However, emotional distress cannot be presumed and the complainant has the burden of proving the existence and magnitude of subjective injuries.[34] Punitive damages are warranted where the complainant shows the respondent acted with callous disregard of his rights.[35]

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[24] *Franchini v. Argonne Nat'l Lab.*, ALJ No. 2009-ERA-014, slip op. at 12 (ARB Sept. 26, 2012) (a true reason does not necessarily rule out other reasons).

[25] An apt parallel seems to be the inevitable discovery rule applied to evidence obtained in criminal cases. *See, e.g., Nix v. Williams*, 467 U.S. 431 (1984) (evidence otherwise inadmissible as "fruit of the poisonous tree" remains admissible if it would inevitably have been discovered by law enforcement through legal means).

[26] *DeFrancesco*, ALJ No. 2009-FRS-9, slip op. at 8.

[27] 29 CFR § 1982.105(a)(1).

[28] *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005).

[29] *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, ALJ No. 1993-ERA-024 (Sec'y Feb. 14, 1996).

[30] *Roadway Express, Inc. v. U.S. Dep't of Labor*, 495 F.3d 477, 486 (7th Cir. 2007).

[31] *Roberts v. Marshall Durbin Co.*, ALJ No. 2002-STA-35, slip op. at 17 (ARB Aug. 6, 2004).

[32] *Hobson v. Combined Transp., Inc.*, ALJ No. 2005-STA-35, slip op. at 6. (ARB Jan. 31, 2008).

[33] *DeFord v. Sec'y of Labor*, 700 F.2d 281, 288 (6th Cir. 1983) (ALJ No. 1981-ERA-1 (Sec'y Apr. 30, 1983)).

[34] *Blackburn v. Metric Constructors, Inc.*, ALJ No. 1986-ERA-4 (Sec'y Oct. 30, 1991).

[35] *Youngerman* v. *United Parcel Serv., Inc.*, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013) (internal citations omitted).

EVIDENCE

Complainant testified at hearing in pertinent part that:[36]

He is thirty-five and has lived in Addison, Alabama since he was nine. He has never lived in the Greater Birmingham metropolitan area. He graduated from Addison High School in 1997. He worked for Lee's Furniture building furniture with his hand and tools; Dowdle Gas installing and fixing heaters and checking gas lines; and Newman's Tree Service, cutting trees, clipping brush, raking, and stuff like that. He was never fired from any job until he worked for Respondent.

He started with Respondent the first part of February of 2004. When he applied for the job, he was living in Winston County. He had to go take a test in Georgia and pass it. He was invited for an interview, hired, and went to school to become a conductor. He successfully completed the conductor training school and went on to Birmingham for on-the-job training. Birmingham was his home terminal. The on-the-job training was around six months. They'd have him lined up to go work different jobs every day, shadowing more experienced employees. He worked only in the Transportation craft and never worked in the Maintenance of Way Department or as a railroad laborer.

When he completed that he was marked up on the extra board. He was still living in Winston County, about 75 or 80 miles from Respondent's rail yard in Birmingham. Depending on traffic, it was an hour and a half, or longer trip. It was about seven and a half years of working for Respondent that he was making the hour and a half commute to work. He never considered moving to Birmingham, because eventually one day he would have enough seniority to work in Decatur or Cullman and be only about 30 minutes from his house. The address of 24334 County Road 41 is where his parents have lived since he was nine years old and he still uses it as a mailing address.

While on the extra board, he worked at Yard Service in Birmingham. He was given two hour notice being required to report for work. He might work first shift, second shift, or third shift. He didn't have one day off. After about a year on the extra board, he got a bit of seniority and went to third shift for a while. Then he eventually got remote control-qualified, and worked second and third shifts. After a few years, he eventually went to Decatur.

The first regular job he got was in Birmingham. With a regular job, he was on a set schedule and set off days. He worked as a remote control operator in Birmingham for maybe five years. He worked second and third shifts. Once he got to Decatur there were times when he would still get bumped and had to go to Birmingham.

[36] Tr. 144-238.

All of the jobs that he has held from the time he was on the extra board until the time he was terminated involved working on or around moving trains. In Decatur, he did have to ride on the side of moving train cars and move at a speed during kicking procedures.

When he is kicking cars, he is moving almost at a pretty good jog. He had to be looking out for slip/trips or falls, debris hanging over boxcars, switches lined against him, oncoming trains, heavy equipment, and being alert at all times. There are close clearances. Respondent issues safety rules and has required safety training classes. He has taken and passed all those tests. The overriding principle at Respondent is to always take the safest course.

He marked off sick many times in his employment. He was terminated by Respondent in 2006 for some attendance issues, but rehired after about six months. When Respondent took him back in November of 2006, he signed a leniency reinstatement letter admitting the violations that he were accused of committing and saying any future violations of the same nature may result in termination.

He later received a letter charging him with a violation of the minimum availability requirements for the period 5 Jan 09 through 1 Mar 09.[37] He admitted to that violation and waived an investigation. He got a two-day overhead suspension and was placed at step two of the progressive discipline policy of the attendance plan. He waived the investigation to get less punishment and because the employee never wins at the investigation, anyway.

He was again charged in June of 2009 with violating the minimum availability requirements for the period 4 May 09 through 31 May 09. He waived investigation and admitted that he committed the minimum availability violation.[38] He got a three-day actual suspension for that violation.

He was charged again with violating the minimum availability requirements 5 Oct 09 through 1 Nov 09.[39] He again waived investigation admitted the violation. He got a two-day overhead suspension.[40]

He had another minimum availability violation related to the period 4 Jan 10 through 31 Jan 10. He waived investigation and admitted to the violation.[41] He was told he had progressed to the third and final step of the absenteeism policy, and any future absenteeism violations may result in dismissal.

He had a dirt bike accident that took him out of work for several weeks in 2011. He had an excuse from Dr. Horsley for that. Respondent approved of it and didn't count it as a violation of the availability policy.

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[37] RX-11.
[38] RX-13.
[39] RX-14.
[40] RX-15.
[41] RX-16.

He was scheduled to work on 20 Jan 12 in a remote job in Birmingham, but he was feeling sick, with nausea, diarrhea, vomiting, body aches, chills, and fatigue that had started the day before. It would not have been safe for him to work around moving trains. The night before he was to work, he contacted crew callers and told them he needed to be marked off sick. He was still sick the next morning at the call time. When he marked off sick that night, he thought he was taking the safest course. By marking off sick, he was reporting a hazardous safety condition. There are all those heavy trains and if you're out there sick, worrying about throwing up or diarrhea, you're going to hurt yourself or someone else out there.

When he marked off sick on 19 Jan 12, he just called the crew caller, gave his name and ID number said he needed to be marked off sick. He did not say that by coming to work, he would be putting himself and others at risk and it was a safety concern. He did not describe his symptoms in any way to the crew caller. They just want the name and ID and how to mark it off, so they can fill the vacancy.

He called the crew caller about 2015 on 19 Jan 12. His shift would have commenced at roughly 0630 the next morning, so the call time for that shift, would have been about 0430. At that time, since he had not marked back up as available to work, his shift was handed to somebody else and he couldn't mark back up for that shift.

That morning around 0800, he went to his family doctor, Dr. Stacey Horsley, in Double Springs, Alabama. He was living in Double Springs at the time. Dr. Horsley examined him, did a blood test, made her diagnosis, gave him prescriptions, and told him to drink plenty of fluids, and take off work for two days. That all took about an hour. He got the prescription filled, took the medicine, drank the fluids, and stayed off work. He began to feel better, but it still would not have been safe for him to have been working. He wouldn't have been focused and able to perform his job safely. He didn't want to hurt co-workers, the public, or property.

He was aware that Respondent counted unexcused absence days due to sickness as non-compensated absences against an employee under their policy at that time. He tried to get his sick day on 20 Jan 12 excused, by contacting Brian Killough and having Dr. Horsley fax information to him. He attended the investigation and heard Mr. Toth state that he had sent Dr. Horsley's records to Division management twice before the hearing was held.

On 9 Feb 12, he reported to a road foreman that he was nauseous, nervous, and distracted, because of being charged with the third serious. The foreman told him to stay away from moving equipment and go home. The foreman didn't say for the absence to be excused, he had to go to an Emergency Room or Urgent Care Center.

He was not charged with the 20 Jan 12 absence until he marked off sick with respect to 9 Feb 12. If Respondent had excused the absence of 20 Jan 12, he would have only had one uncompensated absence during that four-week period. Respondent did not excuse his absence on 20 Jan 12 and he got a termination letter.[42] At the time that he received that letter, there were no other disciplinary charges pending against him. Any questions about riding on the end of tank cars, leaving cars unattended, or dismounting moving equipment, had been resolved and Respondent could not reopen them.

He never had any missed calls during the three years before he was fired. Other than the one for the time period of 16 Jan 12 to 12 Feb 12, he had no violations of the minimum availability requirements between 30 Jul 10 and 17 Feb 12. He had been disciplined for attendance before 30 Jul 10 due to going to the doctor. He was never notified by Respondent that he had to seek medical care from either an Emergency Room or an Urgent Care Center if he wanted to be certain that an absence due to illness was excused for purposes of the attendance policy. He has never seen a bulletin about that and first learned about it when he was charged. He lives closer to Dr. Horsley's clinic than an Emergency Room or an Urgent Care Center. He has greater confidence in her to provide good medical care. He has been seeing her for probably two years for various problems and she held him out of work for medical conditions before 20 Jan 12. He sent Respondent her medical records and certificates not to work and they never refused to accept them or charged him with violating the minimum availability policy.

When he got the termination letter he was at his mother's house in the kitchen. He just tore it open and started reading it. He saw what the decision was and got frustrated and started shaking, worrying about his future and wondering why Respondent would do that to him. He has bills to pay like everybody else and thought he had a good career job. It was the longest time that he had ever been at a company that he enjoyed and that was taken away. He was hoping that maybe one day, they would review it and put him back to work.

He was discharged by Respondent by a letter dated 3 May 12. He did not make any attempt to look for a new job through October 2012. He was worried about money, but had some unemployment. He also thought that since he was also terminated by Respondent in 2006 for some attendance issues, but rehired after about six months, they would do the same thing again. So, for a while he expected that Respondent would come around, and take him back. When they didn't, it bothered him and he was having problems paying bills. He didn't think he had transferrable skills. He was stressed and depressed. He hasn't seen any doctors for depression, though. He doesn't have any insurance to go to a doctor.

[42] CX-5.

In November 2012, he contacted his former employer, Newman Tree Service, but they didn't have any work for him. He did nothing further after contacting Newman Tree Service in November of 2012 to look for a job until January or February of 2013, when he contacted employment agencies. He tried to find work through the State of Alabama and unemployment agencies and hiring agencies. He went to the Career Center at Wallace State and a community college in Cullman County. He filled out his work history and skills. They put it on a computer and tried to help match a job. He has gone six or eight times, but never gotten any calls from the Career Center saying that they had a job opportunity. He consulted with Quality Staffing and APSCO five or six times each. It's kind of like the same process. When he was deposed in August 2013, he had been to the unemployment agencies, but hadn't applied to any actual businesses.

He hasn't gotten any job interviews. He also checked with his former employers, but they didn't offer him a job. He tried TOPRAY, Webwell, Newcorp, 3M, Serta Mattress, Babcock Furniture, and Rayhal in Cullman and Decatur, but none had an opening. He has asked friends.

He now works for Wadey Burns, rebuilding a house. He started working for Burns the middle or end of February 2014 and gets $150.00 a day. He works three to five days a week depending on the weather. It's the first job that he was able to find since being fired. The job will last probably to the end of May.

All of the things he was asked to do for Respondent he could still do for another employer. He has not sought employment with another railroad, because there are none close to his house. Other than Respondent, he knows of no railroad that has an on-duty point within 60 miles of where he lives. He doesn't want to commute three hours or more every work day for the rest of his life. Had the termination not occurred, his seniority would have been sufficient to put him in Decatur, about 30 miles from his house. He knows of two employees who have been fired by Respondent and as far as he knows, neither of them got hired by any other railroad. He is not aware of anyone who lost their job at a railroad and applied for another job at another railroad.

He does not get The Birmingham News or have a computer at his house or his parents' house. He has never ever worked as a track laborer. That is not an equivalent job to a conductor. He has never worked at a job that manufactured rail cars or track components. CX-7 is his 2011 W-2 Form from Respondent. His total earnings that year were $41,664.00. He did not work the full year, losing probably a week or two because of a dirt bike accident. Had he not lost that time, his earnings would have been over $42,000. Since he was terminated in May of 2012, he got some unemployment and made about $3000 from working. He didn't start looking for jobs until last year, because Respondent would overview his case, realize he had the doctor's notes and excuses, and put him back to work.

He wants to go back to work at Respondent with full seniority and full benefits, back pay with interest, the record of this discipline removed from his record, and compensation for the stress that he has been under. It's been stressful, knowing that he can't work. Work's been hard to find. He enjoyed working at Respondent, spent time there, and had some good friends. All that's gone. He doesn't have a good paycheck any more. Good jobs are hard to find and he doesn't know if he'd ever find one with pay as good as that. He doesn't have a future and benefits anymore. He would like punitive damages to punish Respondent and make it less likely for them to do this to others.

He has no legal training. After he was fired he retained a lawyer who filed a complaint with the Occupational Safety and Health Administration. He doesn't remember what the lawyer specifically did with OSHA and doesn't believe he has seen RX-29 before. He also knows his lawyer replied with some stuff to OSHA. He has never seen RX-30 before. He recalls his lawyer telling him on the phone that OSHA had made a determination about his case. He doesn't know if he has ever seen RX-31 before. He does not know and has never spoken to anyone named Michael Taylor.

Brian Killough testified at hearing in pertinent part that:[43]

He has lived in Jefferson County his whole life. He was born in 1974. He graduated Pinson Valley High School in 1993, but, never actually graduated college. He has been employed by Respondent since October of 1997. He was hired out of Birmingham in the Maintenance of Way Department to work from Cullman to Nashville. The Maintenance of Way Department works on track structure, repairing track or adding new track. It also sometimes called the Track Department. His first job in that department was as a trackman or laborer.

After about a year and a half he applied for a transfer to a trainman position in the Transportation Department. That is the department with the employees who perform switching, and moving the train from point A to point B. He has been in that department ever since 1999. His home terminal is Birmingham. The Birmingham district goes from Birmingham to Montgomery and Birmingham to Nashville. They actually have two yards, one in Tarrant/Birmingham, and one in Decatur.

He started in the Transportation Department as a trainman. That is a broad position and covers the switchman, brakeman, conductors, remote control operators or RCOs, and utility workers. The RCOs run the locomotive from the ground via a little green box.

At one time, the switching was performed with switch engines that were controlled by locomotive engineers inside the switching units, taking instructions from the men on the ground on when and where to move. Since the remote control technology has been implemented, the men on the ground are actually wearing little belt packs around their waist and controlling the locomotive. There is no longer a locomotive engineer on the train for yard service. They still have engineers when going over-the-road and going over public road crossings. Ninety-nine percent of his service has been in-yard.

[43] Tr. 62-144.

The positions that he has held as a conductor, a trainman, a switchman, and an RCO, are the same positions that Complainant held. The yard service he performed is the same kind of service that Ben Winch performed. There are several different jobs that a trainman does, but, the main objective is to process cars, build trains, get them ready to leave, work and switch local industries, and deliver loads or empties, and pick up loads or empties from customers.

Respondent has safety rules that apply to Transportation employees like him and Complainant. They are all trained in the rules. The job involves a lot of walking in close proximity to moving rail cars, lifting, climbing, holding onto the side of boxcars for an extended period of time, and riding on the side of rail cars while they're moving. RCOs not only have to operate the locomotive to get the cars moving, they also have to hold the cut lever up, which detaches the cars from the cut, and allows them to roll down the track. The lever is a handle that lifts the pin that keeps the knuckle in place. When the cut lever is pulled up, the pin lifts, allows the knuckle to open up, and the cars to separate. If the train was moving, but then stops, the cars that were connected separate from the cut that's stopped. That's what they consider a kick and is something that Respondent does in places to perform switching in daylight, and in dark. There's a lot of activities where an employee is going to be working in close proximity to moving equipment. He doesn't think it's safe for an employee performing the work that they perform to be working around moving equipment with symptoms of nausea, vomiting, diarrhea, body aches, chills, weakness, and headaches. It's an unforgiving environment. Leaving rail cars unsecured and unattended on a track, dismounting moving equipment or riding the front end of a tank car during a shove is not taking the safe course, either.

Respondent is a closed shop and all conductors, trainmen, switchmen and RCO's belong to the former United Transportation Union. It merged with Sheet Metal workers and it's called SMART. Both he and Complainant belong to Local 847. They meet in Gardendale, Alabama. The representatives of the men in Local 847 are elected and he has been elected to local chairman, legislative rep, delegate, and secretary for the General Committee. The local chairman settles the grievances and acts as the employee's representative in hearings and investigations when an employee has been charged or accused of committing any rules violations. He has been the Local chairman going on six years. The Local has somewhere around 200 members.

He is familiar with the collective bargaining agreement and System Notice 108. System Notice 108 is not a part of the collective bargaining agreement. He is familiar with Respondent's safety rules and safety policies. They are not part of the collective bargaining agreement.

When the Railroad brings charges against an employee for allegedly violating a rule or a policy, such as System Notice 108, the union gathers information concerning the incident, prepares for the hearing, and/or tries to work out of the situation prior to the hearing. Not all charges result in a formal disciplinary hearing, and they try to avoid those. They have discussions with the carrier or railroad officials concerning the incident, the charged employees, and whoever actually put the charge in the computer that generated the charge letter. They try to find out what the facts are on the employee's side and if there's any help they can give him.

He has represented the employee in around 100 of these hearings and has been able to work something out and avoid a hearing in probably twice as many. A waiver is a document that the employee would sign, admitting that he done what the Railroad said he done. And in exchange, he gets a lesser suspension. In his experience, when an employee refuses a waiver, the hearing takes place, and discipline will be assessed. 99 percent of the time, the discipline is double what it would have been with the waiver. Every such case he has seen resulted in dismissal, if the policy allows dismissal.

Respondent does have progressive discipline policies known as the IDPAP. A first serious safety violation typically is handled by way of suspension or very rarely something less than that. Three serious violations within a three-year period make the employee subject to discipline up to and including dismissal.

With respect to attendance, Respondent also pursues progressive discipline. The first and second steps are coaching, the third step is a two-day suspension that is held over the head of the employee, but is not actually executed. The fourth step of the attendance policy is the first that an employee can actually face time on the street in the form of up to a five-day suspension. If there is another violation at that point the employee is subject to discipline up to, and including, discharge. But by that time, there would be five minimum availability violations within a three year period.

When Complainant was accused of a minimum availability violation in January and February of 2012, he was already at the final stage of the progressive discipline policy and subject to discipline up to, and including discharge.

He agrees that individuals who go through the discipline process for missed calls are processed the same way as individuals who have minimum availability requirements are processed. They have coaching at the first step, coaching at the second step, two-day overhead suspension, followed by five-day actual suspension, and then at the last step, they are subject to discipline up to, and including discharge. Under the progressive discipline policy, the company has to find a violation each time in order to fulfill that step. That includes admitting guilt, via a waiver.

Respondent's attendance policy, System Notice 108 dated 18 Jan 11,[44] was in effect when Complainant was terminated. It says, Available time includes all compensated time off and any other mark offs provided by law, [45] but he has never been trained by Respondent regarding what mark offs are provided by law.

Employees mark off sick by calling in to Crew Availability. When an individual marks off sick, he is not permitted to mark back up as available for work for 12 hours unless his turn does not get up. If his turn does not get out, he's allowed to mark up prior to his 12 hours. The regular assignment stays virtually null and void, because it's 16 hours between shifts.

Since Complainant was on a regular job, with standard hours and standard days off, once he calls in sick and Respondent calls in a replacement for him, he can't call back and say he's better and wants to come in. Employees should notify the Railroad as soon as possible to allow them sufficient time to fill the vacancy from the extra board. They don't do that until two hours before start time because someone could change their mind about marking off before then. Employees on the extra board who do that go to the bottom of the list. So if the shift starts at 6:30, the call is at 4:30.

He was involved in the attendance charge that was brought against Complainant in a charge letter from Crane Jones dated 17 Feb 12.[46] Complainant was charged with having violated that attendance policy from 16 Jan 12 through 12 Feb 12. Before this charge letter was sent, he had already become involved in trying to avoid a charge being brought against Complainant for absences during that period of time. He tried to secure any type of documentation to give to the Respondent to solidify why Complainant marked off. When an employee marks off, Respondent wants to know why; whether the employee was sick, and if so, why. There have been many instances that Respondent would cancel an investigation when he supplied documentation like CX-1. Complainant actually marked off the night before 20 Jan 12, on 19 Jan 12. Complainant never said that Respondent called him the morning of 20 Jan 12 and told him to get to work.

He gave CX-1 to Respondent's availability specialist, David Toth twice before Complainant was subjected to a formal disciplinary hearing. He deals with Mr. Toth on a regular basis on attendance matters and routinely sends him documents like CX-1. On occasion, he has sent Mr. Toth just the office notes of a doctor and that has been enough to have investigations and disciplinary investigation hearings be cancelled for employees charged with System Notice 108 violations. On the third page of CX-1, he added the ID 571915. It is Complainant's ID number.

Complainant was not subjected to any action after his absence on 20 Jan 12. It was not until he had the 9 Feb 12 absence that scrutiny was triggered. He didn't do anything other than fax the paperwork, because there were no charges at the time.

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[44] CX-2.
[45] CX-2.
[46] CX-3.

RX-27 is the same document as CX-1 that he received and faxed to Respondent. RX-27 is a fax cover sheet directed to his attention by Family Health Associates. He recalls receiving a fax from the physician's office on or about 20 Jan 12. He has a fax machine at his house with a 205-681-2392 number. He faxed the cover sheet along with the two pages of treatment notes from the physician's office to David Toth on 20 Jan 12. There was no fax of the doctor's notes that is the third page of CX-1. He thought he did, but hadn't reviewed these documents until today. He agrees that the only thing that was faxed to David Toth on 20 Jan 12 were the pages that are RX-27.

He has been told that office notes alone are not good enough and that a Certificate to Return to Work is required. Office notes alone, in his experience, will not cancel an investigation. Respondent wants actual proof that the employee showed up at the doctor, what your illness was, and/or Emergency Room excuses. The first two pages of CX-1 are not enough to get an investigation cancelled, but with the third page, he would think so.

Respondent will cancel an investigation for Urgent Care or Emergency Room excuses with just the note. If the third page of CX-1 said Urgent Care or Emergency Room, Respondent would cancel it without getting all the other information. If it's just a regular doctor visit, they would only very rarely cancel it. Usually in instances at step three of absentee investigations like Complainant's, they would not. Whether or not they got that special "You're off" form or not, doesn't matter.

Regular doctor's appointments are not going to get excused, no matter what paperwork is offered, but ER and acute care/chronic visits are excused; and sometimes with just the note, but always with the missing work.

If Dr. Horsley's note said Winston County Urgent Care Center instead of saying Family Health Associates, the absence would have been excused. If the Certificate for Return to Work had said Winston County Urgent Care Center instead of Family Health Associates, that would have been enough alone to have gotten the investigation that was held against him cancelled. The same would be true if it had said Winston County Emergency Room instead of Family Health Associates.

Respondent has never issued a bulletin that says, "If you go to an Emergency Room or an Urgent Care Center, we will excuse an absence based on just a Certificate for Return to Work form." It is not in the operating rules anywhere.

CX-1 says off work two days. He doesn't recall anyone from Respondent telling him after he had sent Dr. Horsley's records to them either time that they were having trouble reading the plan or the notes. He sent them twice, because sometimes they don't get through. When he doesn't hear anything, he will fax them again.

Because Respondent wasn't going to drop it for a regular doctor's appointment, he didn't really ever expect them to drop the charge, but was just doing what he could for Complainant. He didn't think it would make any difference, but had to try. These documents were also presented at the formal investigation held on 3 Apr 12 as an exhibit and were included with the other exhibits as part of the transcript.

In early 2012, Complainant had some other charges, but he doesn't remember the exact dates. He recalls Complainant facing a Serious-2 for dismounting moving equipment and a Serious-3 for leaving rail cars unsecured and unattended on a track. He recalls trying to coordinate the hearings related to the Serious-2, the Serious-3, as well as the attendance violations, so that they all occurred on 8 Mar 12. However, he then asked to have the hearing related to the minimum availability violation postponed until 3 Apr 12. He wanted to delay the availability hearing to give the Division a chance to review the information again prior to holding the hearing and get them to drop the charge.

The tank car and hand brake incidents were heard on 8 Mar 12. On 20 Mar 12, he sent a second fax to Respondent. In the 14 days between the fax and the hearing, nobody from Respondent ever called to say they couldn't read the fax. RX-28 is the second set of documents he faxed to Mr. Toth on 20 Mar 12. It also included the two pages of treatment notes from the physician and the Certificate to Return to School or Work. He probably got the third page of RX-28 by telling Complainant he needed to get an excuse, because what initially was provided to the carrier, the treatment notes, were not sufficient.

He did not think Respondent would approve the visit anyway, because he's never seen them excuse a regular doctor's visit at the point that the employee was already up for dismissal. He had seen them take doctor's notes for less than dismissal cases. If Complainant had zero history, Respondent might have taken a doctor's excuse. But, since Complainant had a history of absences, Respondent wasn't going to take a regular doctor's note, even if it has the miss-work form. When Respondent has an employee who has an unexcused, uncompensated absence, and they are seeking to have it excused, Respondent considers the record, in determining whether that absence will be excused.

The Division management, Crane Jones and Pete Burrus, had the power to cancel an investigation whenever they wanted to. He has never seen any guidelines that the Division management is required to follow in assessing medical records for the purpose of determining whether or not to excuse an absence. It's at their discretion. Mr. Toth never responded to as far as whether the Division gave him an answer. Mr. Truesdale told him the investigation would take place. That meant the absence excuse for 20 Jan 12 was not excused.

A company official conducts the hearing, rules on objections, and decides what will be allowed to be presented. The employee does not have the right to compel or the power to compel witnesses to attend or compel the Railroad to produce certain documents. The Railroad makes the decision about whether the employee who's been accused is guilty of a violation or not and decides what punishment.

Between the time that Complainant was charged with not meeting the minimum availability requirements and the formal hearing he talked to David Toth and Complainant's local manager at the time, Mike Truesdale. He told Truesdale he had sent in documents and that Mr. Toth had the documents and sent them along to Division. He asked Mr. Truesdale to intervene, and see if he could get an answer out of Division whether these were going to be sufficient or not. He can't say how many times he spoke to Mr. Toth. He'd go back and forth via e-mail and phone conversations.

He represented Complainant at the investigation and presented Dr. Horsley's records. Mr. Toth was a witness via phone and identified 20 Jan 12 and 9 Feb 12 as dates the employee was unavailable during the 28-day period. Those were the only absences that were discussed at the formal hearing and the only days that he was charged with violating the policy by marking off sick. Respondent considers sick days and personal days as non-compensated. Those are days that the employee is not paid but not counted against the employee, as unauthorized absences either.

Respondent did not offer any evidence at the investigation to suggest that Complainant was not sick on 20 Jan 12. He did have a train master witness testify that he would not want an employee working sick. No one suggested otherwise or really questioned that Complainant was sick and told by the doctor to stay off work. Respondent tells its employees to always take the safe course. He doesn't think it is safe to report to work with vomiting, diarrhea, body aches, chills, and the other symptoms that are mentioned in Dr. Horsley's note.

Once the hearing was closed, he was aware that it would be Mr. Burrus who would be deciding the discipline. He didn't call Mr. Burrus because Mr. Burrus has always wanted them to go through the local management.

The ruling from the hearing was termination. But based on System Notice 108 it takes two days in a 28-day period to be in violation of policy. Excusing either of those sickness absences would have put him in compliance.

The average earnings of craft members today in Complainant's job is between 60 and 65, not counting benefits. If Complainant had not been terminated, he would have had enough seniority to hold a full-time job in Decatur and would not have been subjected to any layoffs or furloughs between 3 May 12 and today.

When he went into the hearing related to the minimum availability violation on 3 Apr 12, he was aware that Complainant had been previously discharged. It is common for a leniency reinstatement to tell the individual that if they have further violations of a similar nature, they're going to be subject to discharge. When an employee takes a leniency reinstatement, he gives up his arbitration rights and any appeal under the Railway Labor Act, but not his employee protections under the Federal Rail Safety Act.

He has never had training on the employee protections afforded by the Federal Rail Safety Act.

David Toth testified at hearing in pertinent part that:[47]

He has never worked as a conductor, trainman, brakeman, or RCO. He started with Respondent as a crew caller to be the person that would get called by employees to tell him they're sick. He would mark them off, as they requested. He did not interview them about their symptoms or tell them that if they want to get an absence excused for sickness, they need to go to an Emergency Room or an Urgent Care Center.

He is now a crew availability specialist for Respondent. He monitors the attendance and availability of train and engine employees. Attendance would be the entire work history of the employee. Availability deals with the availability of the employee to work assignments. He is not a policy-maker. He has never met Complainant in person.

RX-3 is a snapshot of an employee's work history out of the main frame system and is the type of record that he looks at to determine day-to-day availability or attendance. Page 225 says that on 15 Dec 11 at 0730, the employee was crewed as the CGOKY101 train foreman. The status code B indicates that the employee was working. There was a call-up at 0730 and a tie-up at 1417. That means that Complainant worked that particular shift with that particular train. For 18 Dec 11 at 1933 hours, it shows a layoff for personal business. It indicates that for 18 Dec 11, Complainant requested a personal business day at 1933 hours, to continue for 24 hours. The affected employee ID is the employee who worked instead of the employee who had marked off.

The entry for 19 Jan 12 shows a layoff at 2013 hours for a sick request. At 0630 hours, the YR10R foreman job was worked by 249571 in Complainant's place.

On 26 Jan 12, there is a layoff at one minute past midnight for daily vacation. On 11 Feb 12, two minutes past midnight, there is a layoff for a personal day. On 14 Feb 12, there's a PN code at 0846. Complainant requested a personal day, but it was not approved. An employee can request and be granted as many personal business days as the company decides to allow. If they are not approved, they get the PN code. If they are approved, they get the PB code. Each personal business request depends on the manpower situation, how many trains are operating at a given time, and whether they have the proper T and E available for those assignments.

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[47] Tr. 239-266.

System Notice 108 that originated in July of 2010 was the attendance policy that was in effect for Respondent during January 2012. It says where an employee is unavailable for a non-compensated reason for more than one day within a 28-day period, the employee is subject to review. Each Monday begins a new 28-day period and the 28th day would be the Sunday prior to each Monday. Respondent considers an employee whose absence due to illness as being unavailable for a non-compensated reason, if there is lost work associated with that day. If the employee works at all during a day, it's a compensated day.

The only non-compensated days for Complainant during the period of time from 20 Jan 12 to 12 Feb 12 were 20 Jan 12 and 9 Feb 12. Complainant was marked off sick on both of those days and neither of those absences were excused. If either of those absences had been excused, Complainant would not have been in violation of the attendance policy and could not have been disciplined for that four-week period. Once an absence for illness is excused, that absence no longer counts as a date that that employee was unavailable for a non-compensated reason.

He sometimes receives medical records from employees who have been sick, gone for medical attention, and are seeking to have their absences excused. He has seen absences excused based on surgery records and Emergency Room records. He is not able to excuse the absences based on personal physician records in his capacity, but he has at times seen that they were excused by Respondent.

He has forwarded information like this to Division management before, and been advised that there was not going to be an investigation held, because the absence had been excused. There have been times when primary care physicians' notes were accepted, but he doesn't recall what the diagnosis was. That did not happen often.

Respondent has told him what absences he is allowed to excuse. He can excuse a visit to a hospital Emergency Room. If Complainant's medical records had said Winston County Emergency Room, they would have been sufficient to excuse his absence on 20 Jan 12. If Dr. Horsley had named her practice the Winston County Urgent Care Center, rather than Family Health Associates, her records alone would have been sufficient to excuse the absence for that day. When it says something other than Hospital Emergency Room or Urgent Care Center, he has to forward it up the ladder to Division management in Nashville, Tennessee.

When he sends the records to Nashville he doesn't make a recommendation, but he can short-stop it, and just cut it off if it's an ER or an acute care. If Complainant's 20 Jan 12 paperwork had been from an ER or acute care he would have overridden that single day by itself and it would be excused before the second day even came in.

In 2012, he twice sent records from Dr. Horsley to Division management in Nashville.

On 20 Jan 12 and again in March 2012 he got records faxed from Brian Killough. CX-1 are records from Dr. Horsley's office for 20 Jan 12. The January 20th absence and the notes received the same day stopped with him. He sent them later, before a formal hearing was held on 3 Apr 12. He participated in that hearing by telephone and stated that he had forwarded those records to Division management first on 14 Feb 12, which was the day at the end of the four-week period with two absences.

He saw some information on the second page, but was not able to make it out as much as the information on the first page, but it didn't really make any difference, since it wasn't an ER or acute care. At some point, he did receive the third page and knew that the doctor had recommended that Complainant miss work for 20 and 21 Jan 12. He never heard anything from Division management either time after he forwarded the documents.

Complainant did not lose any work on 21 Jan 12. There was a displacement for him for the assignment that he was holding.

They have annual online training on the employee protections under the Federal Rail Safety Act. He has not been trained that an employee who is absent due to an illness is a protected activity or that an employee whose doctor says that he is not physically able to work is a protected activity.

David Ingolsby testified at hearing in pertinent part that:[48]

He has been Respondent's assistant vice president of Labor Relations for nine years. He administers, negotiates and handles all disputes related to labor contracts. Respondent has 26,000 contract employees across thirteen unions. Respondent worked with the United Transportation Union to implement and administer the minimum availability requirements. They had a number of questions and Respondent responded in writing.[49] Respondent explained in early January of 2011 that, in handling employees who fail to comply with the attendance standards during a 28-day review period, Respondent would consider the complete attendance and work history, as well as any extraordinary issues that may relate to the particular instance of absenteeism that caused the employee to be subject to review under the standards.

Two non-compensated absences within a 28-day period subject an employee to review under this policy. The first unexcused non-compensated absence during a 28-day rolling period is in essence a free day with no accountability for that. Respondent looks at the entire context of an employee's history and makes a decision on that second day absence. That leads to a judgment call made by the manager to excuse or hold the employee accountable under the policy. If someone had a clean attendance history, with no priors or very few priors, the Division manager would most likely possibly excuse that absence.

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[48] Tr. 267-294.
[49] RX-4.

The progressive discipline as it relates to attendance has at first two coaching steps for employees, warning them and encouraging them to improve their performance and attendance. The third step would call for a two-day suspension that's held in abeyance, not really executed. The next step would be a five-day suspension and the final step would be that the employee would be subject to dismissal.

If someone had enough violations that they were at step three of the policy, the entire record would be looked at. A pattern of poor attendance certainly would be a factor in making the decision on that incident. Employees have major life events that occur that may impact their attendance and managers have discretion to consider those. For example, a sick child or house burn down would be considered and factored into the equation when dealing with an attendance issue.

Individuals who are disciplined under the attendance policy for missing calls have the same five progressive steps of discipline.

Respondent has general policies that address retaliation. Respondent's Code of Ethics is one guiding principle that would point toward no retaliatory actions. It is prohibited to take action against someone who reports a safety concern or is following a licensed doctor's treatment plan, even if the doctor is a primary care physician.

He played no role in charging Complainant, reviewing Dr. Horsley's records, or deciding not to excuse the 20 Jan 12 absence. He was not aware that an absence was not being excused, even though Complainant's doctor said not to work. He played no role in conducting the formal hearing or in deciding what discipline to assess against Complainant. He was not involved in this case specifically. He does not get involved in specific cases. He knows nothing about any of the specifics of Complainant's case.

Respondent never issued a bulletin that said if an employee wants to have an absence for illness excused, he needs to go to an Emergency Room or an Urgent Care Center, but there is some information regarding that in the Q & A's, which the unions could transmit to their members. He thinks also System Notice 108 was a notice of that policy.

System Notice 108 says that available time includes all mark offs provided by law. That's specifically addressing the rail safety requirement that employees have 48 hours off after six straight work days, and 72 hours off after seven straight work days. It could also include the FMLA and other changes in the law that might occur.

Respondent wants to give the employee credit for an emergency situation. If they have a serious medical condition that causes them to go to the Emergency Room and/or be hospitalized, then Respondent is not going to touch them. The policy comes from a labor agreement that was negotiated because the union really wanted to protect that employee that had that serious medical issue from absenteeism handling. So, they negotiated an agreement that said if it's an Emergency Room, hospitalization, Urgent Care type situation, it must be serious.

A regular doctor's office visit might be more prone to be abused by an employee. So, Respondent deals with acute care and Emergency Room totally different than it deals with a regular doctor's visit. With a regular doctor's visit, Respondent won't look so much at whether or not it was legitimate visit, but rather at the entire attendance history of the individual, to see if he had trouble being available for work.

There is also long-term medical. If an employee is off over seven days, he'd have to bring some medical documentation to substantiate the medical reason, even if it was from a regular doctor.

Peter Burrus testified at hearing in pertinent part that:[50]

He is Respondent's assistant vice president of Network Operations and Locomotive Management. He has been in that title about a year. Before that he was the Division manager, Nashville Division for about seven years. He was the Nashville Division manager in and about early 2012. He was responsible for the safety, service, and productivity of the Nashville Division. That included employee discipline. He was familiar with Complainant's circumstances and made the decision to dismiss him.

Respondent has two policies. One deals with disciplinary policy relating to safe and operating rule compliance. It's called the IDPAP policy. The other policy deals with employee attendance. There are multiple steps within each policy. Within the attendance policy, Respondent has a couple of different attempts at coaching, counseling, and attempting to correct the employee's behavior. Then, there are essentially three different steps of progressive discipline to help correct employee behavior prior to dismissal.

When someone is charged with a minimum availability violation, they're entitled to an impartial, fair investigation to determine the facts. The company manager is the investigating officer. He brings in witnesses for both sides. Both sides present facts in a way that turns into a transcript. The transcript eventually comes to him or one of his direct reports for reviewing and determining the facts based on what's presented. He has to determine whether or not the charge letter is supported by the documents and witness.

Marking off means an employee called and said he is not coming in. Generally speaking, employees are not allowed to mark off two or more non-compensated days within a 28-day period. The second non-compensated absence in a 28-day period is going to generate a charge letter that says two non-compensated days within 28 days means Respondent will now consider the next step of discipline for attendance purposes. An investigation is held, the record is closed, and the transcript is created. He first looks to see if the employee did in fact mark off for more than one non-compensated day in that 28-day period.

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[50] Tr. 295-329.

It's rare, but there have been some times where he has excused a non-compensated mark off. Typically, that was based on an employee's record. If an employee had a clean record and this was the first time through the absenteeism policy, Respondent tries to give multiple opportunities to change behavior. He has also excused an absence if there was an extreme family circumstance or something like that was substantiated by documentation. There was a Labor Relations brief that was sent out about that. He doesn't recall the exact verbiage, but remembers the word extraordinary. It had to be a special, unique circumstance.

In Complainant's case he read the transcript, reviewed the exhibits, and determined Complainant had two uncompensated absences within a 28-day period. Complainant sent in some medical evidence, but he found nothing indicating some sort of extraordinary event. Based on Complainant's extensive absenteeism record, he didn't see anything that sort of met the requirements for excusal.

RX-32 is Complainant's employee history. He reviewed it in determining whether or not he would excuse the absence. Complainant was at step three in the current disciplinary process, but had also previously been dismissed for the same thing. Respondent had brought him back under a leniency reinstatement to give him another chance and provide him another opportunity to correct his behavior. In other words Complainant was previously discharged for minimum availability, reinstated, and then had worked his way back to be at the brink of discharge again. Complainant also had some fairly extensive safety records, but predominantly, it was the poor attendance.

He did read the transcript and look at all the exhibits, including what he could read of the doctor's note, which was largely illegible to him. He really couldn't determine what Complainant should be excused for from the doctor's note. He does remember that Complainant had testified that he said he was nauseous. He never called Complainant's doctor to explain the note. He has no formal medical training, and never asked anyone in Respondent's medical department about it, but would not have expected Complainant to come to work that day in that condition. But, the attendance plan takes circumstances like that into account. They are allowed to mark off sick one day a month. They also have several other means to be off under their union contract. Moreover, the absenteeism policy is fairly lenient and gives multiple steps over a period of time, if employees go through some sort of temporary illness.

He first made the determination that he wasn't going to excuse the 20 Jan 12 absence. That meant Complainant had violated the attendance policy, so he determined what step Complainant was currently in in the absenteeism program. Once he determined that Complainant was at step three, which is dismissal level, he issued the decision to dismiss Complainant.

He did not discharge Complainant because he believed Complainant reported a hazardous safety condition or was following a physician's treatment plan. He dismissed Complainant because of Complainant's long-term, repetitive absenteeism issues.

Complainant's extensive absenteeism record and his previous dismissal had taught Complainant what the absenteeism policy required, what Respondent's choices are, and how he could mark off within that period. Complainant knew very well what the absenteeism policy required and made his own choices on how to layoff in that period. He did not give the medical information a whole lot of weight. Even assuming Complainant was absolutely sick and had no business going to work, the system is designed to give him one day off sick every 29 days and he was also entitled to vacation days, personal leave days, and other means of being off.

Doctor Stacy Horsley testified at deposition and her records show in pertinent part that:[51]

She is a family practice physician and started seeing Complainant as one of her patients in 2011. Over time, she became aware that he worked for the railroad and had to be around moving trains. She treated him after he had a dirt bike accident in June 2011, and he had to miss some work because of it. He presented on 20 Jan 12 with complaints of nausea, body aches, chills, fatigue, and headache. Based on the results of her examination and a blood test, she concluded that he had acute gastroenteritis. She prescribed an anti-nausea medication, told him to stay hydrated, and took him off work for two days. She did not think he should be around moving equipment and it would be unsafe for him to work on or around trains. He didn't require a follow up appointment unless he got worse, and that was the last time she has seen him. She never communicated with Respondent about this absence or his treatment.

Terry Wrather testified at deposition in pertinent part that:[52]

He has worked for Respondent for 36 years. In February of 2012 he was a senior road foreman and oversaw six road foremen. Engineers, remote control operators, and conductors/switchmen fall under his supervision. That included performing at least 100 operations tests each month. With the other senior staff in Decatur, there were 300 tests given per month. The tests are unannounced.

Safety is critical and if someone is ill he should get a medical note saying so and for Respondent to review. The staff in Jacksonville reviews the note to decide if the employee is safe to come back. An employee with diarrhea, aches, headache, and vomiting who has been told by his doctor to stay away from work would not be focused on his job and unsafe.

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[51] CX-1-2; 9.
[52] CX-13.

He knew Complainant in Decatur. On 8 Feb 12, he was in the yard and discovered Complainant had failed to secure cars in the required fashion. He talked to Complainant about it and Complainant was disciplined for the failure. The next day, Complainant came into his office and said that his nerves were shot, his stomach was upset, and he didn't feel like he could work. Complainant said he had personal things going on and didn't think he could work safely. He said he wasn't sick and didn't need to go to the doctor, but was nervous and needed to go home. He told Complainant to just finish up his trip card and go home.

Complainant didn't want to be marked off as sick, and asked about taking a vacation or personal day, but he explained that there was no other option for marking off in the middle of a shift. He did not fill out the form for when an employee gets sick on the job. He did call crew management and tell them he released Complainant for illness. He did not call the medical staff about Complainant or call Complainant later to see if Complainant was ok.

Adam Jones testified at deposition in pertinent part that:[53]

He replaced Peter Burrus as the division manager for Respondent's Nashville Division. Before that, he was the assistant division manager for about 14 years. The senior road foreman reports to the division manager. He dealt with day to day operations and management, including making the work environment safe. Safety is a top priority and sick employees who are legitimately sick should not come to work and not have it held against them.

Respondent published a system-wide attendance policy that was in place in January and February of 2012.[54] It stated that employees who were not available for non-compensated reasons other than rest and required time off for two or more days in any rolling four week period would be subject to review. Non-compensated means not paid for that time. Marking off sick is non-compensated. He could see telling a vomiting and sick employee to go home and marking off as sick.

Depending on the case, marking off sick may be investigated by the division and reviewed by Jacksonville to decide whether to take any disciplinary action. He can cancel an investigation. He is not sure who in Jacksonville does the review or how they do it, but he has seen cases of marking off sick being excused. He doesn't know if anyone has been terminated for a medical/illness mark-off. He would be concerned about the safety of such an employee.

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[53] CX-11.
[54] CX-1.

If an employee had a ruptured appendix and missed 30 days for emergency surgery and hospitalization, they would not even investigate it, since it's clearly documented. An employee who has a note to miss work because of pneumonia might be investigated.

He probably looked at Complainant's records if they were sent to division, but he doesn't remember it. When looking at a case, he weighs the employee's history and doesn't try to rely on the doctor's recommendation. An employee with a history of problems would be more likely to be investigated.

Respondent does have training on the Act, but he can't recall when he had it.

Respondent's policies and records state in pertinent part that:[55]

Safety is paramount. Employees who sustain off-duty injuries that affect the performance of their duties must report those injuries to their supervisors prior to reporting for duty. The position of train conductor is a safety sensitive one and involves operating heavy equipment, coupling and uncoupling cars, operating switches and placing cars for makeup and break down of trains.

On 31 May 06, following a formal investigation, Complainant was fired by Respondent for violating its minimum availability policies. On 17 Nov 06, Respondent reinstated Complainant, based on Complainant's concession that he did violate the policy and understood that any further violations could result in his dismissal.

In June 2008, Complainant waived a formal investigation into an operations safety violation and was assessed 30 days actual suspension.

On 13 Mar 09, Complainant notified that he was subject to a formal investigation for violating minimum availability policies between 5 Jan 09 and 1 Mar 09.

In June 2009, Complainant waived a formal investigation for violating minimum availability policies between 4 May 09 and 31 May 09 and was assessed a three day actual suspension.

In November 2009, Complainant waived a formal investigation for violating minimum availability policies between 5 Oct 09 and 1 Nov 09 and was assessed two days of overhead suspension for six months.

In March 2010, Complainant waived a formal investigation for violating minimum availability policies between 4 Jan 10 and 31 Jan 10. He was assessed five days of actual suspension and informed that the next violation could result in dismissal.

[55] CX-2-6, 8; RX-1-6, 8-23.

On 30 Jul 10, Respondent implemented a revised attendance policy. Employees who are unavailable for non-compensated reasons other than rest and required time off for two or more days in any rolling four week period are subject to review. Non-compensated does not include vacation, personal leave, personal business, or other time off required by law.

Reviews consider prior incidents within the previous three years. The first and second reviews within the three year window may result in coaching letters. The third through fifth reviews in that window lead to investigations and up to (1) 2 days suspension (suspended for 6 months), (2) 5 days suspension, and (3) dismissal. In conducting a review, Respondent will consider the employees complete attendance and work history, along with any extraordinary issues related to the specific period of uncompensated unavailability.

Employees with unavailability because of documented hospitalization, emergency room, or urgent care clinic treatment will be excused from any further review. A physician's note alone will not automatically excuse the employee from further review, but will be a factor considered along with the employee's history. The division manager or assistant manager may excuse the uncompensated unavailability if the circumstances warrant. An employee with the flu, for example, who is too sick to work, but not sick enough to justify a trip to the emergency room or urgent care clinic should obtain permission to mark off as unavailable for personal reasons. If the employee is unable to do so, he can obtain a physician's note. The note will be considered along with his history in deciding how to address his unavailability.

On 10 Jan 12, Complainant waived a formal investigation into an operations safety violation and was assessed 5 days actual suspension.

On 31 Jan 12, Respondent notified Complainant that he would be subject to an investigation on 8 Feb 12 for violating operational safety standards on 24 Jan 12.

On 14 Feb 12, Respondent notified Complainant that he would be subject to an investigation on 22 Feb 12 for violating operational safety standards on 7 Feb 12.

On 17 Feb 12, Respondent notified Complainant that he would be subject to an investigation on 22 Feb 12 for violating the attendance policy by having two or more non-compensated unavailable periods during the period of 16 Jan 12 through 12 Feb 12.

On 3 Apr 12, following a formal investigation on 8 Mar 12, Complainant was assessed 30 days actual suspension for the 7 Feb 12 violation of operational safety standards.

On 3 May 12, following a hearing on 3 Apr 12, Complainant was terminated for violating Respondent's attendance policy.

OSHA's case file shows in pertinent part that: [56]

> Complainant filed a complaint with OSHA in June of 2012. The complaint factually alleged that Complainant was sick on 20 Jan 12, went to his doctor, was diagnosed with acute gastroenteritis and ordered not to work for two days. It further alleged that in compliance with those orders, Complainant missed work on 20 Jan 12 and that absence ultimately was a contributing factor in his subsequent termination. Based on those facts, Complainant's counsel argued in that initial filing that Respondent violated 49 U.S.C. §20109(c)(2), which prohibits employers from disciplining employees for following doctor's orders or treatment plan.
>
> Respondent's answer to OSHA did not question whether or not Complainant marked off because he was following doctor's orders. Instead, it argued that 49 U.S.C. §20109(c)(2) does not apply to cases where the treatment was not connected to a work related illness or injury and even if it did, it would have taken the same action even in the absence of Complainant following the orders.
>
> Complainant responded to that answer, arguing that 49 U.S.C. §20109(c)(2) does apply to cases where the treatment was not connected to a work related illness or injury. In making that argument, Respondent cited legislative concern that impaired workers can endanger passengers or other employees and cited statements from one of Respondent's trainmasters that he wouldn't want someone with the symptoms Complainant had on the job. Complainant closed by noting that his claim was a textbook violation of 49 U.S.C. §20109(c)(2).
>
> Respondent's sur-reply revisited its argument that 49 U.S.C. §20109(c)(2) does not apply to cases where the treatment was not connected to a work related illness or injury and even if it did, it would have taken the same action even in the absence of Complainant following the orders.
>
> It its decision, OSHA noted that the alleged protected activity was for calling in sick and missing work per Complainant's doctor's orders. OSHA appeared to have assumed the protected activity, but found that Respondent had a legitimate non-retaliatory basis for terminating Complainant.

Complainant's tax records show in pertinent part that: [57]

> He earned $41,664.08 working for Respondent in 2011.

Birmingham News ads show in pertinent part that: [58]

> Railroad operators were offering positions from May through October 2013.

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[56] RX-7; 29-31. (Since this is a *de novo* proceeding, I considered this information only as it related to Respondent's argument that the hazardous condition claim was not made before OSHA and therefore not ripe for adjudication.)
[57] CX-7.
[58] RX-26 at pp. 80-88.

Norfolk Southern postings show in pertinent part that: [59]

It was looking for conductors in December 2013.

DISCUSSION

The fundamental relevant facts are neither particularly complex nor significantly disputed. Complainant had a history of disciplinary actions for failure to comply with Respondent's availability policies.[60] As of January 2012, because of that history, one more violation could lead to Complainant's dismissal. On 19 Jan 12, Complainant had nausea, body aches, chills, fatigue, and headache. Since he was scheduled to work on 20 Jan 12, he called in to say he was ill and needed to mark off. Respondent removed him from the schedule for 20 Jan 12. On the morning of 20 Jan 12, he went to his primary care provider, who treated him and gave him written instructions not to go to work on 20 or 21 Jan 12.[61]

According to Respondent's policy, since Complainant was not hospitalized and did not go to an emergency room or urgent care clinic, whether or not his mark off would count as one of two uncompensated unavailable shifts in a 30 day period was at the discretion of Respondent's management. Until there was a second uncompensated shift, however, the question was moot.

On 7 Feb 12, Complainant was accused of a third serious operational safety violation and on 9 Feb 12, he reported to a road foreman that he was nauseous, nervous, and distracted because of that pending charge. The foreman told him to stay away from moving equipment and go home. That absence was uncompensated, and along with the 20 Jan 12 mark off, was the second in a 30 day period, triggering a review for availability noncompliance. After a hearing, Respondent considered Complainant's entire history and elected to fire him.

Liability

Protected Activity

Upon those facts, Complainant submits that he had two activities protected under the Act: (1) complying with a doctor's treatment plan and (2) refusing to work in an unsafe condition. Respondent first answers that he failed to include the treatment plan claim in his complaint to OSHA and it may not be considered here. It then submits that his mark off for 20 Jan 12 preceded his doctor's visit and had nothing to do with a subsequent order to stay off work that day.

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[59] RX-26 at p. 89.

[60] Complainant also had a history of at least some operational and safety violations.

[61] Complainant appears not have been scheduled to work on 21 Jan 12 and in any event did not mark off.

Treatment Plan Claim

It is clear that at the time Complainant marked off and was removed from the work schedule for 20 Jan 12, he had not yet seen a doctor, much less received a treatment plan or orders to follow. Consequently, when he marked off, he was not following doctor's orders or a treatment plan. His claim that by marking off, he was engaging in a protected activity under that subsection of the Act is dismissed.[62]

Hazardous Condition Claim

Failure to Plead at OSHA

The record strongly suggests that while the case was before OSHA, neither side was aware (or fully appreciated the significance) of the fact that Complainant did not see his doctor or receive her orders until after he had already marked off. Complainant's Counsel focused exclusively on 49 U.S.C. §20109(c)(2). Respondent followed his lead and both sides seemed to assume that if 49 U.S.C. §20109(c)(2) applies to cases where the treatment was not connected to a work related illness or injury, Complainant's mark off was protected activity. Thus, neither party addressed the issue and OSHA did not decide whether the mark off might be a protected activity under §20109(b) (hazardous condition).

However, after Complainant demanded a *de novo* formal hearing and was asked to file a complaint detailing his protected activity, he added a new legal theory, which was that by marking off, he was reporting and refusing to work in a potentially hazardous condition. Respondent included in its answer a boilerplate defense that Complainant had failed to exhaust its administrative remedies, but did not specifically address the new legal theory under §20109(b).

The fundamental facts remain the same that were alleged and investigated: Complainant marked off as sick and was fired. The differentiation is the legal theory, which in turn does implicate some contextual factual distinctions. Before OSHA, Complainant argued only that in marking off, he was following doctor's orders. When the case came before the OALJ and it appeared that the facts might not support that theory, Complainant added the legal theory that by marking off, he was reporting and refusing to work in a hazardous condition.

[62] Of course, it remains true that after he marked off, Complainant did get a treatment plan, which he did follow, and of which Respondent was aware. However, he wasn't working anyway at that point, and even under the Board's expansive interpretation of contributing factor and narrow interpretation of the clear and convincing defense, there is no evidence that any additional compliance (beyond the previously completed mark off) with his doctor's orders played any factor at all in the review and termination. In fact, Respondent specifically discounted the note in deciding to discipline Complainant. Indeed, Complainant does not even make that argument.

The question raised by Respondent is whether Complainant is allowed to now advance a new legal theory that was never mentioned before OSHA. In truth, that new legal theory does implicate a factual question not presented by the previous theory: whether Complainant reasonably believed that it would have been unsafe for him to go to work. However, that issue was clearly integrated with the fact that the doctor ordered him to stay off work.

Significantly, both legal theories are based on the same facts that caused Complainant to believe he had been wronged in the first place. He was fired for missing work, even though he was sick and could not work safely and had a doctor's note saying so. The hazardous condition claim, although not pursued or even raised before OSHA, remains reasonably within the scope of the factual complaint.

Respondent is correct in observing that it never had an opportunity to litigate that theory before OSHA. Respondent would also be justified in noting that a more complete and thorough understanding of the facts of the case may have prompted Complainant's Counsel to fully appreciate the timeline, anticipate possible proof problems, and add the hazardous conditions alternative cause of action from the outset.

Nonetheless, there is no indication that Respondent's ability to litigate the case was prejudiced to any significant degree by the addition of that theory. Indeed, the main prejudice to Respondent by allowing Complainant to proceed on the new legal theory would be loss of the windfall of obtaining a dismissal based on a distinction between two subsections within the same statute that clearly addresses the alleged facts. Dismissing Complainant's complaint in this instance because his counsel may have misapprehended the timeline and picked the wrong subsection of the statute would not facilitate the determination of the controversy on the merits. Accordingly, the motion to dismiss the §20109(b) is denied.

Reasonable Belief of a Hazardous Condition

Although Respondent questions whether Complainant consciously went through a risk assessment to decide whether it would be safe for him to go to work while he was sick, no one suggested that he was malingering or that in any event it would have been safe to go to work with his symptoms. The weight of the evidence shows that it was reasonable for Complainant to conclude that it would have been unsafe to go to work. Therefore, marking off sick was a protected activity under §20109(b).

Contributing Factor & Respondent's Burden

Respondent's insistence that Complainant's record exclusive of his 19 Jan 12 mark off more than justified his termination is supported by the weight of the record. However, the weight of the record also supports the conclusion that but for the 19 Jan 12 mark off, there would have been no incident prompting Respondent to review his entire history and decide to terminate him. In short, the 19 Jan 12 mark off[63] was the precipitating factor that resulted in his firing and it is impossible for Respondent to establish by a preponderance, much less clear and convincing evidence, that it would have fired him even in the absence of the mark off.

[63] When combined with the subsequent absence.

Damages

Complainant seeks reinstatement, record expungement, back pay, compensation of his emotional distress, and punitive damages.

Reinstatement and Records Correction

Respondent did not suggest that reinstatement or records correction is inapplicable in this case. The presumption is that reinstatement is appropriate and I grant the request for reinstatement and records correction.

Back Pay

Complainant takes his annual wages from 2011 from Respondent ($41.664.00), divides them by 52 and argues that he was earning $802.23 per week. He then submits that in spite of his best efforts he has been unable to obtain any consistent employment, earning only $3,000 while building a house in February to May of 2014. Consequently, he seeks back pay of $802.23 per week since the date of his termination, less the $3,000. Respondent opposes any back pay, arguing that he failed to mitigate his damages by looking for alternative jobs.

Complainant's testimony was the primary source of evidence related to his mitigation efforts. He testified that after being fired in May 2012, he did not make any attempt to look for a new job.[64] He expected that Respondent would come around and take him back, since that's what they did in 2006, about six months after firing him. He said that after an unsuccessful contact with his former employer, Newman Tree Service, in November 2012, he did nothing until January or February of 2013. He added that he tried to find work through the State of Alabama, unemployment agencies, and hiring agencies, going six or eight times, but never got any calls from the Career Center saying that they had a job opportunity. He also described having gone to Quality Staffing and APSCO five or six times each.

He admitted that when he was deposed in August 2013, he had been to the unemployment agencies, but had not applied to any actual businesses. He further testified that he had checked with friends and was working three to five days a week helping rebuild a house and had been paid $150 per day since the middle or end of February 2014. He said it was the first job that he had been able to find since being fired and expected it to last probably to the end of May.

Complainant conceded that all of the things he was tasked to do for Respondent he could still do for another employer and that he had not sought employment with another railroad, because there are none close to his house. He noted that other than Respondent, he knew of no railroad that has an on-duty point within 60 miles of where he lives. He added that he did not want to commute three hours or more every work day for the rest of his life and explained that had he not been fired, his seniority would have been sufficient to put him in Decatur, about 30 miles from his house. He said he knows of two employees who have been fired by Respondent and were not hired by any other railroad, but doesn't know if they applied. Finally, he said that he does not get The Birmingham News or have a computer.

[64] His testimony was inconsistent on how long he waited to start looking for work. He said October of 2012, but then said last year (2013).

The burden is on Respondent to assert and prove that Complainant failed to mitigate the damages of his lost wages. However, the record clearly shows that Complainant did not search for other work at all for an extended period. Even when he did look for work, his search was lackluster at best. His excuses that he did not get the Birmingham News, has no computer, and was not willing to keep the same commute he had before are indicia of the effort he put into finding other work. The evidence clearly shows he did not engage in a diligent search for employment in an effort to mitigate his damages. The claim for back pay is denied.

Compensatory Damages

Complainant suggests that $30,000 would be reasonable compensation for the distress he has suffered. Respondent cites the absence of any medical treatment as evidence of his limited distress and argues that the claim for distress should be denied. The absence of any medical care is some evidence of the degree of distress, as is the fact that Complainant was not so distressed about his financial situation that he looked diligently for other income. Nonetheless, he was in fact terminated in violation of the Act and it is more than likely that he suffered the distress of some degree of some concern and frustration. I find that $8,000 is an appropriate award for emotional distress.

Punitive Damages

Whether punitive damages are appropriate depends on whether Respondent acted with callous disregard for Complainant's rights, whether the violation was a result of any deliberate corporate policy, and whether punitive damages are an appropriate deterrent. While Respondent is correct in arguing that Complainant's history may well have justified his termination in general, under its disciplinary system, the precipitating factor (upon the addition of the stress related mark off) was Complainant's decision to mark off when going to work might have endangered others. His action was specifically what the Act was designed to protect.

On the other hand, Respondent's response appears to me not to be a result of a motive to discourage ill and unsafe workers from calling in sick, but rather the consequence of a disciplinary system that may have been agreed to by collective bargaining, but led to a nonsensical result. Had Complainant gone to an acute care clinic and received exactly the same medical advice his primary care physician gave him, he would not have been reviewed for termination.[65] That is strong evidence that Respondent's actions were not specifically aimed at punishing Complainant for calling in sick. Nonetheless they did have that effect and I find $5,000 in punitive damages is reasonable.

[65] At least until and if his previous history repeated itself.

ORDER

Accordingly, it is hereby **ORDERED** that Respondent:

1. Offer reinstatement to Complainant to his former position without loss of benefits or other privileges, retroactive to 11 Jun 13.
2. Expunge Complainant's record of any reference to his employment rejection and amend it to show he successfully completed his probationary period and has been in good standing since.
3. Pay Complainant $8,000 in compensatory damages.
4. Pay Complainant $5,000 in punitive damages.
5. Complainant's Counsel may file a petition for attorney fees and costs no later than 45 days after the receipt of this decision. Respondent shall file any objections within 30 days of receipt of said petition and Complainant's Counsel shall file any reply within 15 days of receipt of any objections.

SO ORDERED, this 4th day of December, 2014 in Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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

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

SERVICE SHEET

Case Name: WINCH_BEN_v_CSX_TRANSPORTATION_I_

Case Number: **2013FRS00014**

Document Title: **Decision and Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 4th day of December, 2014:

Digitally signed by LAURA CRADDOCK
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