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Issue Date: 26 August 2010

CASE NO. 2009-FRS-00003

In the Matter of

NICOLE ANDERSON,
Complainant,

v.

AMTRAK,
Respondent.

Appearances: Fredric A. Bremseth, Esq.
Thomas W. Geng, Esq.
Bremseth Law Firm, P.C.
for Complainant

Barry Johnsrud, Esq.
Peter Nohle, Esq.
Jackson Lewis LLP
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER

Introduction

This is a claim under the employee protection provisions of the Federal Rail Safety Act (the "Act").[1] Complainant filed a timely complaint with the Secretary of Labor on November 7, 2007, alleging that Respondent retaliated against her by imposing discipline because she reported a work-related injury. She also contends that Respondent violated the Act when it delayed medical treatment for the injury. Following an investigation, the Occupational Safety and Health Administration found reasonable cause to believe that Respondent had violated the Act. Respondent timely appealed. The case is before me *de novo*.

[1] 49 U.S.C. § 20109, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, §1521.

On June 16 and 17, 2009, I held a duly-noticed hearing in Seattle, Washington. The parties were represented by their respective counsel of record. Complainant testified on her own behalf. She called as witnesses co-workers Aaron Sanders, John Lane, Darcel Prescott, and Michael Ayers. She also called her union representatives Philippe Brunelle and Ed Holm. Amtrak called labor/management official Patrick Gallagher and two managers, Safety Coordinator David Redding and Yard Superintendent Jeff Duncan. I admitted numerous exhibits.[2] I allowed and now admit the post-hearing submission of the deposition testimony of General Manager Michael F. Mullins (Administrative Law Judge Exhibit 4) and a stipulated transcript of an OSHA investigator's interview of Mr. Duncan (Complainant's Exhibit 24). Each party submitted a closing brief. That completed the evidentiary record.

Issues

1. Did Respondent retaliate against Complainant for reporting a work-related injury? Yes. Complainant showed that her report of the injury was a contributing factor in Respondent's decision to terminate her employment (later reduced to a 30-day suspension). Respondent failed to show by clear and convincing evidence that it would have disciplined her regardless of her report.

2. Does Complainant raise a cognizable claim that Respondent delayed or interfered with her medical care? No. Congress established the relevant employer obligations only after Amtrak responded to Complainant's request for medical attention. The legislation does not apply retroactively.

3. What are Complainant's remedies? After initially terminating the employment, Amtrak reinstated Complainant with 30 days' loss of pay. Complainant is entitled to back wages for the 30 days, which amounts to $2,000. She is also entitled to lost wages in the amount of $266.67 for a post-reinstatement 4-day suspension. She is entitled to compensatory damages of $60,000. Finally, Amtrak must pay Complainant $100,000 in punitive damages in the light of its conscious disregard of its statutory obligations.

Findings of Fact

Complainant has been a coach cleaner for Respondent since the fall of 2000. Tr. 42-43; ALJ 1 at 2. Coach cleaners remove trash, clean bathrooms and windows, and restock supplies in the interiors of train cars. Tr. 43-44; ALJ 1 at 2.

In Seattle, Amtrak coach cleaners generally drive together in a pick-up truck to the depot, board a train, and perform their duties. Tr. 140. Once the coach cleaners gather the trash into bags,

[2] I refer to the hearing transcript by page number as "Tr." At the hearing, I admitted into evidence Complainant's Exhibits 1 through 24, inclusive, excepting Exhibit 22, which I excluded ("C.Ex."), and I admitted Respondent's Exhibits A through II, inclusive ("R.Ex.") Tr. 9-10, 207, 392, 410, 502, 513 605. I admitted the parties' factual stipulations as ALJ.Ex. 1, the parties' stipulated exhibit list as ALJ.Ex. 2, and the parties' statement of disputed facts and contentions as ALJ.Ex. 3. Tr. 5-6.

they generally leave it on the platform for laborers to dispose of. *Id*. But at least once weekly (and perhaps as often as once daily), there are no available laborers, and the coach cleaners put the trash bags in the pick-up to dump elsewhere.[3] Tr. 45, 141. Generally, they park the pick-up adjacent to the platform so they can throw the trash bags into the truck bed without stepping off the platform. Tr. 108. Tr. 141.

The area where the coach cleaners park is set twelve inches lower than the level of the train platform. Tr. 50. It's made up of uneven rock and ballast and has small potholes and cracks. ALJ Ex. 1 at 3; Tr. 157-59, 164, 215, 249, 493-95. Although Yard Superintendent Duncan didn't dispute this description, he said that the surface was "not unreasonably" dangerous and was similar to other work areas. Tr. 493-95. Amtrak's managers knew the condition of the parking area and that the coach cleaners parked there, yet they had not repaired or resurfaced the area for years. ALJ Ex. 1 at 3.[4]

While Complainant was doing her job on October 1, 2007, no laborer was available, and she had to put the trash bags into the back of the pick-up so it could be dumped elsewhere. ALJ Ex. 1 at 3; Tr. 41. As she described it, the truck bed that day was so full that she couldn't throw the trash bags from the platform onto the truck.[5] Tr. 109. Instead, she lifted and carried a trash bag in each hand and stepped off the platform down the twelve inches to the ballast and rock parking area.[6] Tr. 41; ALJ Ex. 2 at 3. As she stepped down, she twisted her ankle and fell to the ground. Tr. 46, 48-49. She sat there a minute, got up, threw the trash bags in the back of the truck, sat down in the truck, and took off her boot. *Id.* She later said that she'd been cautious and watched where she was going as she stepped off the platform but twisted her ankle anyway. Tr. 49, 126-27. She denied there was a safer path down to the truck. Tr. 127.

Complainant testified that none of her co-workers was there when she twisted her ankle, but they soon arrived. Tr. 52. Consistent with this, co-worker Sanders testified that he and another co-

[3] Complainant said that there were no laborers available about once weekly. Yard Superintendent Duncan and one of Complainant's co-workers said that it was more frequent, closer to once daily (the last train at 4:00 p.m.) plus weekends. Tr. 169, 453-54. The difference is immaterial: Regardless of the exact frequency with which the coach cleaners had to get the trash from the platform into the pick-up truck, it remains that it was one of Complainant's job duties and that Amtrak's managers knew this and knew the working conditions in the parking area.

[4] After Complainant's union representatives complained to Washington state officials, on April 2, 2008, the Washington Department of Labor and Industries investigated and issued findings concerning another rail yard about a mile from the site of Complainant's accident. C.Ex. 16; C.Ex. 17; ALJ Ex. 1 at 6. State investigators found potholes, standing water, concrete chunks and other debris, which presented a tripping hazard and concluded that Amtrak failed to ensure safety. *Id.* Although this was at a different location from the accident site, its condition was much as the testimony describes the parking area where Complainant was injured, and Mr. Duncan said that area was similar to other such areas. This shows that Amtrak's Seattle managers were not as attentive to the safety of ground conditions as Amtrak's policy (*viz.* highest priority to employee and customer safety) and Washington state law require.

[5] Complainant's co-worker Mr. Sanders could still throw his trash bags because, as he explained, he is taller with longer arms. Tr. 171, 176.

[6] Co-worker Tana Miller gave two irreconcilable renditions of the accident, one of which conflicts with Complainant's account. First, Ms. Miller denied seeing the accident. *See* R.Ex. EE. Then she said that she'd seen the accident and that Complainant was also carrying a vacuum cleaner and cleaning equipment along with the two garbage bags. I discuss these below and reject Ms. Miller's statements in their entirety.

worker (Ms. Reeder) arrived to find Complainant sitting in the truck in tears with her ankle swollen to the size of a softball. Tr. 148, 150. Complainant told them about the accident. Tr. 149-50. They got in the truck, Ms. Miller joined them, and they drove to the train yard. ALJ Ex. 1 at 3; Tr. 50.

When they arrived, Mr. Sanders went in and got Yard Superintendent Duncan and Complainant's direct supervisor, Tom Walker, who both came out to the truck. ALJ Ex. 1 at 3; Tr. 52, 152. Complainant and Mr. Duncan have a somewhat – although not entirely – different recollection of the events that followed.

Complainant testified that she was very upset, in pain, and crying. Tr. 52. According to her, Mr. Duncan asked if she was reporting an injury, to which she responded yes. Tr. 54. But according to Complainant, that was not the end of it. Instead, Mr. Duncan asked her if she was sure, to which she again responded yes, that her ankle hurt, and that she needed to go to the doctor. ALJ Ex. 1 at 3; Tr. 54. Complainant states that Mr. Duncan then told her that if she drove herself to the doctor and didn't report the accident, she wouldn't have to take a drug test. Tr. 54. Complainant said she persisted with her request for a doctor, to which Messrs. Duncan and Walker responded by standing there a minute and then walking back into the office. Tr. 55. Complainant said she felt intimidated and confused and believed that Mr. Duncan didn't want her to report the injury. Tr. 56.

Mr. Sanders said he overheard much of this conversation. He estimated that Messrs. Duncan and Walker asked Complainant at least five times whether she wanted to report an injury. Tr. 153-54. He corroborated that, far from telling Complainant that she was required to report the injury, they suggested that she go to her own doctor and not report the injury. Tr. 154. He said that Complainant's response was that she wasn't able to drive and couldn't go to her own doctor. Tr. 154. He said there "may have been a little hint of intimidation."[7] Tr. 155.

Complainant estimated that 15 to 20 minutes passed before Mr. Walker reemerged from the office to drive her to a clinic the company uses. Tr. 56-57. On arrival, they found the clinic closed and went to a different medical facility. Tr. 57; C.Ex. 1 at 1. X-rays were negative, which indicated that the injury was a sprain. Tr. 58; 66; C.Ex. 1 at 1.

Complainant testified that during this process she cooperated and answered her managers' questions. Tr. 58. After leaving the hospital, she returned to the office and filled out an accident report. Tr. 59. On it, she described the accident as: "[I] was carrying garbage to the truck. I stepped down from the platform and twisted my ankle." ALJ Ex. 1 at 4; C.Ex. 1 at 1. She stated as the cause: "stepping on the rocks" and described the injury as a sprained ankle. *Id.* Complainant didn't remember filling out any other paperwork. Tr. 60.

For his part, Mr. Duncan didn't dispute that he asked Complainant whether she was reporting an injury; he said it was his usual practice under such circumstances to ask that question. Tr. 422. He agreed that Complainant looked upset. Although the parties stipulate that Complainant's

[7] Mr. Sanders said the remaining co-workers, Ms. Miller and Ms. Reeder, were not present for this conversation. Tr. 157.

ankle was swollen and that she obviously had been injured, Mr. Duncan said that he didn't notice. ALJ Ex. 1 at 3; Tr. 446. He said that when he asked if she were reporting an injury, her answer was, "Can't you see my fucking foot?"[8] Tr. 446. According to Mr. Duncan, that was when he took Mr. Walker back to the office to get a packet of blank accident forms for Mr. Walker to take along with Complainant to the clinic. Tr. 446-48.

Mr. Duncan said that he could have been disciplined as a manager had he asked Complainant multiple times if she were reporting an accident, and he denied doing it. Tr. 446-47. He denied suggesting that Complainant drive her own car. He denied that it took 15 to 20 minutes to get the packet of blank forms but conceded that it was a "matter of minutes." Tr. 447-48; 469. He admitted that the clinic Mr. Walker drove to was closed but said it was Mr. Walker who chose the clinic, that clinic was where they usually went, and he (Mr. Duncan) didn't know it would be closed. Tr. 448.

Amtrak policy requires a manager such as Mr. Duncan to let his boss know of any injury, no matter whether serious or not. Tr. 449-50. As soon as the documentation is ready (which might take longer when more medical care is required), Mr. Duncan must send an email synopsis to his boss in Oakland (and his boss' boss in Wilmington, Delaware). Tr. 449-50. This particular time, however, he delegated this duty to Mr. Walker, who got the information for the paperwork, briefed Mr. Duncan, and sent the email to Mr. Duncan's manager. Tr. 448-50; R.Ex. Q.

When asked at trial if anything struck him the next morning when he saw the accident report that Complainant filled out, Mr. Duncan testified:

> The absence of sharing information, the absence of witnesses, the vague description of the incident . . . carrying garbage to the truck, how many bags, which hands, stepping from the platform. It raised a lot of questions.
>
> * * *
>
> What platform? What track? You know, again, I've got to speak to the absence of witnesses . . .. [Ms. Anderson] works within a group, and at that time of day at the depot, you know, [that] there was no witnesses I found very hard to believe.
>
> * * *
>
> Q: Why did you find it hard to believe there would be no witnesses?
>
> A: Again, Ms. Anderson would be working within a group of employees, four employees, in a . . . crew-cab-type service body truck, cleaning a train, not to mention that it's at a depot with several other Amtrak employees, managers, and . . . passengers getting on trains.

[8] Complainant testified that she was in pain and didn't remember asking Mr. Duncan, "Can't you see my fucking foot," or him asking her if she wanted medical attention. Tr. 124. Amtrak did not argue that any inferences or conclusions should be drawn from Complainant's use of rather robust language. Under the circumstances of a painful injury, an obviously swollen ankle, and that Complainant's co-workers had just asked Mr. Duncan to come out because Complainant had been injured, I find Complainant's choice of language, if she used it, immaterial.

Q: . . . What was your reaction to the response, "stepping on rocks," to what caused the accident?

A: Well, just that. It's – it's vague. What rocks? Where?

* * *

Q: You knew it happened at King Street Station, right?

A: Yes.

Q: Were you familiar with the – the general practices of the group –

A. Yes.

Q: – as they would go and clean the coaches there?

Tr. 451-53. But with Complainant off work with the injury, Mr. Duncan did not ask her for additional information at that time. Tr. 452.

In an alert to employees the next day, Mr. Duncan stated that Complainant's injury was "very preventable" and that basic safety requires a person to watch where she is walking. R.Ex. R. According to Mr. Duncan, he was able to reach these conclusions within one day and prior to any investigation for four reasons: (1) at Amtrak, all injuries are preventable, (2) he had the information that Mr. Walker provided, (3) there were inconsistencies in the injury report, and (4) his past dealings with Complainant. Tr. 457.

Complainant was off work for two weeks and returned to light duty work. ALJ Ex. 1 at 4; Tr. 66; C.Ex. 2. After a few more days, on October 25, 2007, her doctors released her without restriction and she returned to full duty. C.Ex. 3.

Applicable company policies, handbooks, and rules. Amtrak policy sets employee and customer safety as a high priority. ALJ Ex. 1 at 2. The Company acknowledges that it must provide employees with a safe workplace, including at the yard where the accident occurred. *Id.* at 2, 4. It must provide leadership to prevent accidents and holds itself accountable for safety. *Id.* at 4.[9] Because it acknowledges that, "Slips, trips and falls are common sources of injury and may occur when simply walking," it mandates that "walking surfaces and floors should be designed, built and maintained for safety." *Id.* The Company provides online safety training to managers, including an explanation of the policy and guidance on how to handle an injury. R.Ex. C at 43. It also provides workers with a safety handbook, guidance on avoiding falls, and a handbook for coach cleaners. *See* R.Ex. G, H, and J.[10]

Amtrak requires employees to report all on-the-job injuries and forbids managers from retaliating when employees report. R.Ex. A at 2. The Company provides an alternative to the employee's

[9] The Company states as "aspirational fundamentals" that: (1) all injuries are preventable; (2) all risk can be reduced or eliminated; (3) prevention of injuries and accidents is the responsibility of each employee; (4) effective training is essential for excellent safety performance; (5) safety is a condition of employment; and (6) safety is an essential element of Amtrak business. R.Ex. C at 97.

[10] The safety handbook notes that yards can be uneven and present tripping hazards so workers must be watch for hazards on the ground such as uneven footing. R.Ex. G at 2; Tr. at 166.

direct supervisor to report violations of its policies on work-related injuries and provides whistleblower protection for employees who report violations. ALJ Ex. 1 at 2.

Managers must investigate on-the-job injury reports according to a prescribed, detailed procedure.[11] R.Ex. B at 1; R.Ex. C. When an injury is reported, the manager must assess the seriousness of the injury, notify the proper responder, assist the worker in getting to a recommended medical facility, report to a Company hotline, and complete certain forms. R.Ex. A at 3-4.[12] An Accident Investigation Committee (to include at least three managers) must be organized and an investigative report completed within three days. R.Ex.B at 1-2. Drug and alcohol testing may be considered under certain circumstances. *Id.*

The Company undertakes to keep its managers trained in the required investigative procedures. R.Ex. C. The purpose of the investigation is not to assess blame or assign discipline; it is to "determine the facts, to analyze these facts, and when appropriate, to recommend reasonable, practical actions designed to avoid recurrence." R.Ex. C at 3. As Complainant knew, employees must cooperate in the investigation. *Id.* at 2; R.Ex. C at 3.[13]

Injury rates affect managers' performance evaluations: a higher injury rate reflects poorly on the manager's performance. Tr. 398. Amtrak sets a goal of no more than a certain number of injuries for each person-hour worked in a department. Tr. 435-36. The Company's setting a goal of a limited number of injuries rather than none is consistent with Mr. Duncan's view that an expectation for a "perfect year" would be a "delusion" – or at least it must be recognized that accidents will happen. Tr. 437. As Mr. Duncan testified: "Considering the size and scale, the sheer weight and mass of the equipment we're maintaining, [the work] is inherently very risky." *Id.*

Meeting the safety goal is a factor in managers' salary increases, including Mr. Duncan's. Tr. 435. Performance in this area is one of four factors, about twenty percent of a manager's evaluation. Tr. 441-43. To get an annual pay increase, a manager must perform at the highest or "excellent" level in each performance area, including safety. Tr. 443. Mr. Duncan testified that he has never missed a raise because of failing to meet the safety goal. Tr. 443-44.

The collective bargaining agreement. Complainant is a member of the Joint Council of Carmen, Helpers, Coach Cleaners and Apprentices union. ALJ Ex. 1 at 2. The collective bargaining agreement establishes a progressive disciplinary procedure. *Id.*; Tr. 411. Its aim is not to fire employees, but to educate them constructively; discipline should not be a tool of intimidation or

[11] The investigative procedure requires the investigator to secure the scene, identify witnesses, interview them, analyze the facts and, if there is a serious injury, determine the cause. R.Ex. C at 4-5. The investigator must then determine whether anything needs to be corrected or whether additional training, changes in process, or controls are needed to prevent recurrence. *Id.* at 8. The corrective action should occur and the report be distributed. *Id.* Nothing in the process speaks to discipline.

[12] The forms are an injury/illness report; the employee's personal statement; a medical information and consent form; and an accident investigation form used to determine potential causes and recommend corrective action. R.Ex. A at 3-4.

[13] Company policy also requires managers to facilitate medical treatment for injured employees, not interfere with or discourage treatment. ALJ Ex. 1 at 1.

harassment. Tr. 411. As Mr. Duncan testified, suspension and termination are the ultimate disciplinary tools. Tr. 563. Generally, if a suspension is assessed, it is deferred and not imposed if for the next six months the employee doesn't break any other disciplinary rule. R.Ex. D at 23.

If the Company contemplates discipline, it must give notice of intent within 30 days of the incident that gives rise to the discipline. ALJ Ex. 1 at 2. A meeting with union representatives and the worker follows, at which the Company specifies the discipline it proposes and there generally is an effort at an informal resolution. *Id.* This can involve a "waiver" process, whereby the worker waives the investigation and grievance process and admits to at least some responsibility, and the Company imposes lesser discipline. Tr. 132. According to a union representative, employees often sign waivers because they fear harsher discipline if they pursue the full process. Tr. 256. As discussed below, Mr. Duncan confirmed that it is the Company's practice to impose harsher discipline when the worker declines the waiver process. *See* Tr. 511.

Failing informal resolution at the meeting, the Company gives notice of a "formal investigation." ALJ Ex. 1 at 2. The Company must conclude the investigation within 15 days and must decide on the discipline to be imposed within another 15 days. *Id.*

The investigation takes the form of a hearing before a Company official known as a "hearing officer." Management and union representatives question employees (not under oath) and can present other information, and the hearing officer writes a decision. If the hearing officer finds a rule violation, the matter returns to the employee's manager (here Mr. Duncan) to set the discipline; the hearing officer doesn't determine how severe the discipline is. If dissatisfied, the union may grieve the discipline to an Amtrak labor/ management official. *See* R.Ex. BB. The grievance procedure has still further steps that didn't come into play here. R.Ex. D at 23.

The safety investigation. Amtrak's manager accountable for safety within Complainant's department is Mr. Duncan. Tr. 396. If a failure to maintain a safe workplace results in an injury, it could reflect negatively on his performance evaluation. Tr. 397. Yet under his direction and despite the Company's strongly worded policy commitment to employee safety, the required safety investigation in this instance was at best perfunctory and inadequate.

As discussed above, Mr. Duncan had already given Complainant's co-workers significant findings he'd reached about the accident before the investigation began. Neither he nor anyone at Amtrak established the Accident Committee that Company policy requires. Mr. Duncan's manager directed him to conduct a reenactment of the accident. Tr. 530-31. Mr. Duncan delegated this duty to Mr. Walker, who failed to do it. *Id.* As Mr. Duncan candidly admitted at trial:

> Q. Was there a reenactment that was performed?
>
> A. Not to my expectation.
>
> Q. Was there any kind of a reenactment?
>
> A. Yeah, I saw that there was something that happened. I wouldn't describe it as a reenactment . . ..

> Q. So the totality of the reenactment was that Mr. Sanders drove the truck in, showed Mr. Walker where the ankle twist occurred?
>
> A. Yeah, that's my understanding.
>
> Q. And did you discipline or reprimand Mr. Walker for not performing a proper reenactment?
>
> A. No, I didn't . . . [although] ultimately, his inability to perform led to his termination.

Tr. 534-35. This is consistent with Complainant's testimony that Mr. Walker never asked her to participate in a reenactment, and Mr. Sander's testimony that all he did was show Mr. Walker where the accident occurred. Tr. 138, 160-61.

Mr. Duncan also put Mr. Walker in charge of the safety investigation itself. Tr. 454. Although Mr. Walker complained that the workers weren't cooperating, Tr. 455, nothing on the record shows that he made any effort to investigate other than to interview Ms. Miller, whom the Company eventually disciplined for giving dishonest responses; and to ask Mr. Sanders to point out the location where the accident happened. Tr. 160, 165-66, 530. There's no evidence that he questioned Complainant other than while she was getting medical care and filling out forms on the day of the accident. In all, Mr. Duncan admitted at trial that, as with the reenactment, Mr. Walker failed to perform an adequate investigation. Tr. 529. Company policy requires an investigative report; there is no indication that Mr. Walker gave Mr. Duncan anything that could fairly be described as such as report. Yet Mr. Duncan testified that he didn't know at the time that Mr. Walker had failed to conduct an adequate investigation. *Id.*[14]

The disciplinary process: notice of intent. On October 19, 2007, General Foreman Jeremy van Dress issued a notice of intent to impose discipline on Complainant under the collective bargaining agreement in connection with her accident on October 1. C.Ex. 4. He specified three charges, namely:

- Violation of a safety rule that provides: "While walking, LOOK AHEAD and stay clear of any opening, or tripping, or falling hazard. If you must look to the side or rear of the direction you're moving, STOP while doing so. Use caution when walking on slippery and uneven surfaces." R.Ex. E at 11; C.Ex. 4 at 2.

- Violation of a "standard of excellence," which requires employees to perform their duties properly and in accordance with the standards set for the job, including remaining alert. R.Ex. I; C.Ex. 4 at 8.

- Violation of the safety standard that requires employees to "understand and comply with all safety requirements" related to their positions, including "using plain common sense"

[14] When there are serious accidents, the safety coordinator investigates. Tr. 375. He did not do that here; rather, as he generally does with more routine accidents, he arranged a meeting outside the disciplinary process to "discuss and have a renewed focus on safety with the employee." Tr. 414-15. The implication is that, in the safety coordinator's view, Complainant's twisted ankle was not a serious accident.

and being aware of their work area and "what they can do to ensure their own safety and that of others." *Id.*[15]

In the notice, Mr. van Dress set a meeting for October 24, 2007, and notified Complainant that she was entitled to union representation. ALJ Ex. 1 at 4.

Complainant testified that Mr. Duncan handed her the notice of intent on her first day back at work, October 19, 2007. Tr. 67, 128-29. According to her, when she asked why the Company was doing this, Mr. Duncan stated that "they are only allowed three injuries" per year and that higher management had directed him to be more aggressive with discipline. Tr. 67-69. Complainant testified that Mr. Duncan asked her nothing further; she did not refuse to cooperate with him. Tr. 69.

Mr. Duncan's testimony differs. *See* Tr. 470-75. He testified that when he spoke to Complainant on her first day back, he'd asked Mr. van Dress to prepare the notice but Complainant hadn't yet received it. Tr. 474. He said it was standard procedure to send notices of intent by FedEx, which would provide proof of delivery. Tr. 470-71. The union conceded that it received its copy by FedEx. Tr. 224, 251.[16] According to Mr. Duncan, he spoke to Complainant that day because he felt she wasn't being forthright about the accident, and he wanted more information. Tr. 474. He testified that she said nothing and appeared agitated. Tr. 474-75.

Since the notice was dated October 19, 2007, if it went by FedEx and not by hand from Mr. Duncan, Complainant couldn't have had it by the time she and Mr. Duncan spoke: the conversation was also on October 19; she therefore couldn't have questioned him about it or elicited the responses to which she testified. Yet, despite Amtrak's express purpose in using FedEx to verify delivery, it didn't offer a printout of the FedEx tracking record or any other documentation showing delivery to Complainant. Other discipline-related documents Amtrak sent Complainant showed the FedEx tracking number on the face of the document; the notice of intent did not. *Cf.*: C.Ex. 7 (notice of formal investigation); C.Ex. 8 (notice of postponement of formal investigation). I can only conclude that, general practice aside, Complainant's statement that Mr. Duncan hand-delivered the notice to her more likely than not is correct. I also reach this finding because, as I discuss below, I doubt Mr. Duncan needed more information from Complainant, and he had assigned the investigation to Mr. Walker and wasn't doing it himself. I therefore conclude that the conversation probably was about as Complainant described it.

Post-notice meeting and settlement discussion. Whatever Mr. Duncan and Complainant might have said on October 19, 2007, the informal conference went forward as scheduled. Mr. van Dress and Mr. Duncan were there for the Company, and union representatives Philippe Brunelle and Ed Holm accompanied Complainant. Tr. 70. Mr. Duncan spoke for the Company.

[15] All employees must sign a receipt for a copy of the "Standards of Excellence" and affirm that they should read it and that they understand that a failure to follow it may result in disciplinary action. *Id.* at 11.

[16] Complainant's co-worker Mr. Sanders confirmed that when he got notices of intent, they came by FedEx. Tr. 189.

The meeting was contentious. Mr. Duncan proposed a 30-day suspension without pay. Tr. 71, 209, 479. According to Complainant, Mr. Duncan said his bosses told him to discipline more aggressively. Tr. 72. Mr. Brunelle confirmed Mr. Duncan's wanting to impose discipline aggressively and being inflexible about the 30-day suspension. Tr. 231-33. Mr. Holm said the same and added that Mr. Duncan didn't offer to defer the suspension as generally happens. Tr. 253-55. He recalled that when he asked Mr. Duncan why he was making a big deal of this case, Mr. Duncan responded, "Luck of the draw." Tr. 279. Mr. Holm was unaware of anyone ever getting suspended for a twisted ankle. Tr. 252.

Mr. Duncan's testimony about the meeting differs considerably. He said it was the union that escalated when it characterized the Company's demand for a 30-day suspension as a "travesty" and asking, "How dare the company pursue discipline here?" Tr. 478. According to Mr. Duncan, unlike the usual intent meeting, Complainant didn't offer any additional information about the incident. Tr. 478. He denied being inflexible about the 30-day suspension and said that the union representatives knew that the deferral was automatic. Tr. 479-80. Mr. Holm, however, disputed this, stating that many times management did not defer suspensions despite the provision in the collective bargaining agreement. Tr. 254. Mr. Duncan said that the union offered no counter-proposal to the 30-day suspension. Tr. 480. He didn't dispute his "luck of the draw" remark but said that he was responding to a question about how Complainant's reporting an injury would affect his record as a manager, not to the extent of discipline to be imposed on Complainant. Tr. 542.

As there was no informal resolution at this initial meeting, the Company proceeded to the next step of the disciplinary process.

The "formal investigation." This step provides a hearing at which management and the union present facts that a "hearing officer" considers. The hearing officer is an Amtrak employee. Here it was Patrick Gallagher, who had been an Amtrak employee for 37 years, the past seven as a hearing officer. Tr. 339.

On November 15, 2007, Mr. Gallagher conducted the formal investigation hearing. ALJ Ex. 1 at 5; C.Ex. 12. Complainant, Mr. Walker, and Tana Miller answered questions; although present, Mr. Duncan did not provide a statement or answer questions. C.Ex. 12; ALJ Ex. 1 at 5. The information adduced was:

- Complainant said the accident happened when she'd finished her last train, was going to the truck to return to the yard, and injured her ankle when she stepped off the platform onto the parking lot. ALJ Ex. 1 at 6.

- Mr. Walker admitted that Complainant reported the injury and stated where exactly and how it happened. ALJ Ex. 1 at 5-6. He said that Amtrak was properly maintaining the parking lot. *Id.* at 6. He never said that Complainant violated any rule, nor did he offer any other evidence that she had done anything wrong. *Id.* at 5.

- Ms. Miller said she saw Complainant carry a vacuum cleaner and cleaning supplies in addition to the two bags of garbage when she had the accident. C.Ex. 12 at 11; ALJ Ex. 1 at 6. Complainant did not challenge this at that time.[17] C.Ex. 12; Tr. 110-11. Tr. 111.

Five days later, on November 20, 2007 at 6:31 a.m., an Amtrak employee involved in the process emailed Mr. Duncan: "Only charge #3 was sustained. I could send out the decision today if you want. I need a discipline please. Thanks, Collette." An hour later, at 7:31 a.m., Mr. Duncan responded by email, "Termination effective immediately." R.Ex. Y.

Later that day, Mr. Gallagher's decision issued. As the email to Mr. Duncan indicated, Mr. Gallagher concluded that the Company had not shown enough on either of its first two allegations (that Complainant didn't look where she was going or perform her duties up to the standards of excellence). C.Ex. 13 at 1. On the third allegation, he found that Complainant had failed to exercise common sense: she knew the condition of the parking lot surface and, accepting Ms. Miller's statement, had stepped down carrying a vacuum cleaner, tools, and large garbage bags; this prevented her from balancing properly or breaking her fall. *Id.* As Mr. Gallagher explained at trial, common sense required Complainant to put down the bags, step down, then turn back and pick them up from the platform. Tr. 368.

The termination. On the same day (November 20, 2007), Mr. Duncan wrote to Complainant to state that her employment was terminated immediately. C.Ex. 14. The sole reason was Mr. Gallagher's decision (which it appears from the timing he hadn't yet read). *Id.* Amtrak gave Mr. Duncan authority to set the discipline independently and finally; he was not required to and usually did not consult with human resources or the labor relations departments. Tr. 514-15. Once he sent this letter out, the termination was complete.

Commenting on the fact that the discipline was harsher than what he'd demanded earlier in the disciplinary process, Mr. Duncan said that was always the case if the process had to go forward through the "formal investigation" hearing; when the employee doesn't agree to resolve the matter voluntarily, increased discipline is a consequence. Tr. 511. He admitted that he hadn't considered whether a termination would tend to intimidate employees and discourage them from

[17] There is much to bring Ms. Miller's account into doubt, and to the extent Amtrak offers it for the present case, I reject it as unreliable hearsay. (Although generally admissible, hearsay is inadmissible if unreliable.) First Ms. Miller told Mr. Walker that she did not see Complainant fall. R.Ex. EE; Tr. 484. Only later did she give the report at the formal investigation, which was inconsistent both with what Complainant said and with what Ms. Miller herself had said. Moreover, Mr. Sanders said that Ms. Miller didn't arrive at the scene until after he and Ms. Reeder arrived, and both of them had come after the accident already had happened. When it considered Ms. Miller's inconsistent statements, Amtrak disciplined her for dishonesty.

Although Ms. Miller's statements are unreliable, the Amtrak hearing officer at the formal investigation hearing didn't know that and concluded that Complainant had been carrying a vacuum cleaner and cleaning equipment as well as the two garbage bags when she stepped off the platform. He had refused to allow Mr. Sanders and Ms. Reeder to give information because neither had witnessed the accident. That meant he never heard Mr. Sanders explain that Ms. Miller only arrived later. Aware of this, at some point Amtrak might have questioned the hearing officer's decision: While it might defy common sense to step down twelve inches onto uneven rock and ballast while carrying a vacuum cleaner, other cleaning equipment, and two trash bags, it might be different with the trash bags alone. There is no indication that Amtrak reevaluated the hearing officer's decision in the light of its finding that Ms. Miller was dishonest.

reporting accidents. Tr. 567. Responding to a series of leading questions from defense counsel about whether retaliation had anything to do with the termination, Mr. Duncan testified: "None whatsoever"; "Absolutely not"; "None whatsoever"; and "None whatsoever." Tr. 514. Answering other leading questions, he denied harassing or intimidating employees because they reported injuries. Tr. 439. He cited five examples of workers he didn't discipline after they sustained workplace injuries. Tr. 503-508. According to Mr. Duncan, each of these injured workers cooperated in the investigation and took personal responsibility. *Id.*

On the other hand, both union representatives and Complainant testified that they didn't know of Amtrak's firing any employee for a twisted ankle, and Amtrak offered no evidence that it had terminated any other employee for having a similar accident. Tr. 164, 213, 252. Although Mr. Duncan offered no reasons in the termination letter other than Mr. Gallagher's report, at trial he added more, namely: Complainant had failed to take responsibility for her role in the accident, and significantly, had not cooperated in the investigation. Tr. 486, 523. He also pointed to Complainant's disciplinary history. Tr. 486. The facts going to these additional, *post hoc*, reasons follow.

"Stonewalling" on the investigation. Despite Mr. Duncan's repeated testimony that he was seeking additional information from Complainant, it is unclear what he wanted. He knew where the accident happened; if it wasn't clear from what Complainant reported, Mr. Walker established the location with Mr. Sanders, took photographs, and showed them to Mr. Duncan. *See* below. Mr. Duncan knew the condition of the parking area, that coach cleaners sometimes have to put trash bags into the truck, and that Complainant twisted her ankle while stepping off the platform to do that. He knew that she was carrying two trash bags (plus perhaps whatever Ms. Miller reported). He knew that Complainant denied being aware of any witnesses, and if there were any, Mr. Walker should have identified them during the investigation. He knew that Complainant's ankle was very swollen and that there'd been no fracture. What else was there that Complainant was supposed to report on the ankle accident?

Mr. Duncan also pointed to two prior incidents that he said showed stonewalling. Tr. 457-66. The first involved Ms. Reeder, who left early and arranged a cover-up by having someone else clock her out. Tr. 458-59. Mr. Duncan asked her three co-workers, one of whom was Complainant, about it, but none came forward with any information.[18] Tr. 461. As Mr. Duncan explained, "They were all clocking out at the same time, and there was at least one person who knew." Tr. 461-62. He issued a notice of intent to discipline to all of them but rescinded the notices when Ms. Reeder admitted to the misconduct on the condition that he not pursue anyone else. Tr. 132, 462.

The second incident involved damage to a Company vehicle that Mr. Sanders had been driving. Tr. 464. According to Mr. Sanders, the vehicle was a new truck, and Mr. Duncan had warned him that if he dented it, his job was on the line. Tr. 162-63. At some point there was some damage discovered,[19] and Mr. Duncan brought disciplinary charges against Mr. Sanders for failing to report it. Tr. 182. As Complainant was part of the same work crew, Mr. Duncan

[18] At trial, Complainant denied clocking out any other employee. Tr. 99-100.

[19] Mr. Duncan could not recall at the time of trial what the damage was. Tr. 466.

questioned her; according to Mr. Duncan, Complainant responded, "Why are you even asking me?" Tr. 465. He met with the entire work group and still was unable to get any information. Tr. 465-66.[20] Mr. Duncan testified, this was not surprising, "because the allegiance is to the co-worker, maybe the union. I don't know." Tr. 466.[21]

Complainant's disciplinary history. By the time of Mr. Duncan's decision to terminate Complainant's employment on November 20, 2007, Amtrak had disciplined her only once in nearly four years. R.Ex. K. On September 18, 2006, Amtrak gave Complainant a verbal warning for failing to supply a car. *Id.* The next most recent discipline was on January 31, 2004, another verbal warning, this one related to attendance. *Id.*[22]

Filing of the present action. On November 14, 2007, prior to Mr. Gallagher's findings and Mr. Duncan's termination decision, Amtrak received notice from federal OSHA that Complainant had filed the present complaint. *See* C.Ex. 10, 11. She in fact had filed on November 7, 2007. ALJ Ex. 1 at 5. OSHA updated the notice on November 27, 2007 (after the termination) to add more allegations. *See* C.Ex. 15. But it appears, and I find, that Mr. Duncan did not receive the initial notice until November 22, 2007, two days after he terminated Complainant's employment. Tr. 489; *see* R.Ex. AA.[23] It was not until then that he mentioned in an email that he'd received notice, and it appears from the email that he had just received it. *Id.* Complainant offered nothing to refute this inference.

Grievance of Mr. Duncan's decision. No longer working, Complainant went to the next step in the grievance procedure for review of Mr. Duncan's decision. ALJ Ex. 1 at 6. On January 8, 2008, a labor relations manager reviewed the rule violation and Complainant's disciplinary history. He reduced the discipline to a 30-day suspension without loss of seniority. R.Ex.BB at 4. Complainant did not pursue the grievance process any further. ALJ Ex. 1 at 6.

Complainant's post-reinstatement working conditions. Complainant believes that after she returned to work, Amtrak managers campaigned to ostracize her. She testified that a couple co-workers told her that management warned them not to be seen talking to her, as she is a target

[20] Mr. Sanders testified that he didn't know how the truck was damaged. Tr. 183. He said he signed a waiver to avoid risking his job. Tr. 189.

[21] Mr. Duncan never charged Complainant with insubordination. Tr. 524. He admitted that, although Complainant had a duty to answer his questions, an allegation of insubordination wouldn't be sustained. Tr. 523.

[22] In addition to a formal disciplinary record submitted as Respondent's Exhibit K, Respondent also placed into evidence what appears to be Mr. Duncan's supervisor's desk file with a different disciplinary history for Complainant, this one created and kept by Mr. Duncan. R.Ex. L; Tr. 432. The desk record includes allegations that apparently were not pursued plus some record of counseling. Amtrak does not contend, and nothing on the record shows, that its policy or practice is to disregard an employee's actual disciplinary record when setting discipline and instead rely on a supervisor's informal desk file. Mr. Duncan never pointed to his desk file as relevant to his decision to terminate. I conclude that the Company's decision to terminate didn't rely on the desk file. Even if Mr. Duncan did consider information in his desk file, there is little additional material there to rationalize the degree of discipline imposed beyond the considerations to which he testified, such as the two incidents cited in the text above.

[23] Union representative Mr. Brunelle wrote earlier to OSHA on October 26, 2007 to complain about Amtrak's proposed 30-day suspension. C.Ex. 5; Tr. 80, 225. It appears that OSHA did not notify Amtrak of Mr. Brunelle's complaint or investigate at that time; rather, it told Mr. Brunelle that Complainant could file a complaint if she chose. C.Ex. 7.

and is being watched. Tr. 84. At trial, fellow coach cleaner Mike Ayers testified that Mr. van Dress warned him not to associate with Complainant because she has a "target on her back." Tr. 612.

Complainant also believes that Amtrak has continued to retaliate with further discipline. It suspended her for four days for being late to a safety meeting (October 1, 2008). Tr. 85, 87. She testified that employees arrive late to these meetings all the time without being disciplined, although she conceded that on this occasion a late co-worker also was sent home. Tr. 85-87. Complainant signed one of the "plea-bargain"-type waivers under protest. Tr. 134. She says that she feels intimidated because Respondent has lots of rules and there are many ways a manager can write up employees if they want to. Tr. 89.

Complainant also asserts there's been an effect on her co-workers. News of her termination spread among her co-workers, who called her to ask what happened. Tr. 78. Mr. Sanders testified that Amtrak's terminating Complainant's employment left him feeling intimidated about reporting at least smaller injuries. Tr. 165. Coach cleaner Darcell Prescott testified that what happened to Complainant intimidated her about reporting her injury. Tr. 599.[24]

[24] Complainant offered evidence of certain events after her termination and reinstatement to imply an ongoing Company pattern and practice to dissuade workers from reporting injuries on threat of discipline. What I found most significant in this was Amtrak General Foreman Mike Mullin's testimony that the Company has known that, on a long-standing basis, employees have rumored among themselves that reporting an injury could lead to termination. ALJ Ex. 5 at 25, 28. Mr. Mullin said that management had attempted to dispel the rumor, because, "it's nothing but a rumor and there's no basis." *Id.* But he did not explain how terminating Complainant's employment for twisting her ankle was consistent with an effort to dispel the rumor.

The pattern evidence was no more than mildly suggestive, and I draw no inferences from it; it wasn't enough to persuade me one way or the other. It came in as follows:

- Machinist and former Amtrak foreman John Lane testified that he'd heard of managers intimidating or telling individuals not to report injuries with comments such as: "If your pursue this, we can charge you with an accident, whether it was inattentive to duties, or something like that." Tr. 297. He gave as an example the case of a laborer (Mr. Omerobic) and said that Amtrak managers had told him to advise Mr. Omerobic against filing an injury report because the report would be late, and his boss was ready to discipline him for the late filing. Tr. 294, 300-01; s*ee* ALJ.Ex. 5 at 22-23. (Company documents show that on March 18, 2009, Mr. Omerobic reported the injury and said that it had occurred two days earlier on March 16, 2009. R.Ex. GG.) General Foreman Mullin denied this and said they'd told Mr. Lane to assure Mr. Omerobic that he wouldn't be disciplined; he also said that another manager had already assured Mr. Omerobic that he wouldn't be disciplined. Tr. 289; ALJ.Ex. 5 at 6, 25, 34.
- Coach cleaner Darcel Prescott, said during the summer of 2009 she had a ganglion cyst from repetitive motion and gave Mr. Duncan a light duty notice. Tr. 591-92; R.Ex. II. According to Ms. Prescott, Mr. Duncan told her to report this as an illness rather than an injury. Tr. 594. I infer little from this. It's insufficiently clear from the record that Ms. Prescott related her repetitive motion condition to the workplace**.**
- Former coach cleaner Mike Ayers said that when he first started, a trainer told him that during the 90-day probationary period, he might not want to get hurt or to "work through" any injury, as he'd probably lose his job if he got injured. Tr. 607, 609, 614. He said, though, that the same applied after the probationary period. Tr. 610. But on cross-examination, Mr. Ayers moderated the trainer's comment as not so much a threat as it was advice to "be careful, don't get hurt," and that the Company expects workers to report injuries. Tr. 616-17. He said that the people who said he'd probably lose his job if injured were other employees talking amongst themselves. Tr. 618. I take Mr. Ayers' testimony to confirm that of Mr.

Damages. Complainant missed 45 days of work until Amtrak reinstated her. It paid her for 15 of those days, leaving the 30 days of unpaid suspension. Tr. 82. Complainant also testified about the emotional toll the termination took on her and her family. She felt "upset," "devastated," and "shocked." Tr. 77. She had a one-year-old child at home. Tr. 79. It was around the holidays: "I was just upset – I mean, the day before Thanksgiving, through the holidays, Christmas for my kids. The holidays were ruined pretty-much." Tr. 79-80.

Analysis and findings on disputed facts. I reject Mr. Duncan's testimony that when he fired Complainant he was not retaliating because she'd reported a workplace injury. Other than his self-serving denials, the evidence to the contrary essentially is limited to five examples of other injured workers whom he didn't discipline.

The contrary evidence is legion. Mr. Duncan's doesn't dispute that he routinely asks injured workers if they are reporting an injury. As injury reports are mandatory, what could be the purpose of this when Mr. Duncan knows of the injury other than to suggest that the worker not report it? I credit Complainant's testimony that, after her co-workers went in to get Mr. Duncan because of Complainant's injury, and with that injury being obvious to anyone who looked, Mr. Duncan asked Complainant repeatedly if she was reporting an injury and suggested that she take herself to the doctor. Mr. Sanders corroborated this, and it's consistent with Mr. Duncan's admitted practice to ask an injured worker if they're reporting an injury. Complainant reasonably took this as a suggestion that she not report the injury.[25]

Although Company policy requires a particularized investigation of any reported injury, Mr. Duncan reached conclusions about what happened by the next day, well before any investigation; he advised Complainant's co-workers that the accident had been preventable and that Complainant should have watched where she was going. (Of course, Amtrak's hearing officer rejected the contention that Complainant failed to watch.) Mr. Duncan reached his premature conclusions based primarily on what Complainant told Mr. Walker and put in her accident report, yet he has repeatedly criticized the information that Complainant supplied as too vague, not forthcoming, and examples of "stonewalling." If the information was so vague and unreliable, how could Mr. Duncan have used it to decide what happened and advise Complainant's co-workers? Mr. Duncan disbelieved Complainant's statement that she was unaware of any witnesses. Why not then wait for the investigator to find those witnesses and interview them?

Mullins, who said there was a long-standing rumor among the workers that, if you report an injury, you'll get fired.

[25] I do not simply accept Mr. Sanders' statements at face value. Mr. Sanders is a fellow union employee with Complainant and might have some antipathy toward Mr. Duncan because of the incident involving the damage to the truck Mr. Sanders had been driving. Yet Mr. Sanders has to continue to work under Mr. Duncan's management, and that would discourage him from testifying against Amtrak or Mr. Duncan. In all, I find Mr. Sanders generally credible.

Mr. Duncan showed little regard for the investigation when it did happen. He delegated it to a subordinate and did so little to supervise it that he claims to have had no idea that both the investigation and the reenactment were inadequate. If he was setting discipline in good faith, he would have reviewed the investigative results in detail with Mr. Walker and would have discovered that there had been essentially no reenactment and no investigation. He didn't do that. Neither Mr. Duncan nor anyone else at Amtrak established the Accident Committee as Company policy requires.

Given Mr. Duncan's demand for a 30-day suspension during informal discussions with the union and his ultimate decision to terminate, I accept Complainant's and her union representatives' testimony that Mr. Duncan was uncompromising about the suspension and stated that this was because it was Complainant's apparent misfortune to have an accident when someone in management (whether Mr. Duncan or others above him) had decided that it was time to make a point.

To a great extent, I must accept this explanation because Amtrak has offered no other tenable explanation for Mr. Duncan's decision to terminate the employment; for that matter, the Company has not justified the reinstatement with a 30-day suspension. Amtrak offers not a single case nationwide in its entire history when it terminated an employee who accidentally stepped onto rocks and ballast and twisted her ankle (or anything similar) – or that it imposed a 30-day suspension for this. I reject any notion that similar events have never occurred in Amtrak's long history, and Amtrak never suggested that this was a singular event.

Amtrak has never contended that Complainant engaged in any intentional misconduct;[26] at the "formal investigation" Mr. Walker offered no evidence that Complainant had done anything wrong; Amtrak's hearing officer rejected Mr. Duncan's contention that Complainant was not watching where she was going or failed to perform her duties adequately; Mr. Duncan stated nothing in the termination letter as a basis for his decision beyond what the hearing officer found; Mr. Duncan conceded that the surface condition of the parking lot was dangerous (although not "unreasonably"), and it was Amtrak's responsibility to maintain a safe workplace; and he admitted to the OSHA investigator that Complainant was no more than 51 percent responsible, apparently leaving the rest of the responsibility to Amtrak for failure to maintain a safe workplace. C.Ex. 24 at 24. Mr. Duncan supposedly reached the decision to terminate on the basis of the hearing officer's findings, but he did so without having read them; he'd simply been told that the hearing officer had upheld the Company only on its third allegation (failure to use common sense).

Amtrak's safety officer has additional procedures to follow in serious accidents; he treated this as a non-serious accident and didn't follow those procedures. That means that Amtrak terminated the employment of a seven-year employee for a non-serious, unintentional accident in which no

[26] During the OSHA investigation, Mr. Duncan seems to have admitted that Amtrak had significant responsibility for Complainant's accident. He told the OSHA investigator that Complainant was only 51 percent responsible for twisting her ankle. C.Ex. 24 at 24. At trial, he attempted to explain this away by stating that he was giving essentially a facetious answer to a silly question, but a record of the interview is in evidence, and Mr. Duncan was not being facetious or joking in any way. Tr. 573; C.Ex. 23. *Compare* other parts of the interview in which there is joking and laughter. *See, e.g.,* C.Ex. 23; C.Ex. 24 at 44.

one other than Complainant was injured, Complainant had fully recovered with little medical attention or loss of work, and there had been no alcohol or drugs to aggravate the situation.

Mr. Duncan's *post hoc* additional explanations for the termination fail, not only as after-thoughts, but also as unfounded. Complainant had a nearly spotless disciplinary record for the past four years. I find nothing lacking about the information that she supplied on the accident report forms. What she stated is typical of what I've seen on such forms, and she was filling out the form on the same evening as the accident, when she'd been in considerable pain and had just received medical care. Mr. Duncan admitted that he knew the location where Complainant was working at the time of the accident and knew how the coach cleaners did their work. I have no doubt that he understood what happened to the full extent that he should have been able to understand it based on the forms Complainant was asked to complete. Contrary to Mr. Duncan's assertion, there were no inconsistencies in Complainant's report. The fact that Complainant has three co-workers on her team doesn't suggest that any of them would have been on the platform with her when the accident happened; their duties were primarily inside the rail car, not on the platform.

Mr. Duncan's contention that Complainant refused to cooperate in the investigation borders on the ludicrous. As discussed above, there essentially was no investigation. If Mr. Duncan really felt that he needed more information about what happened, he would have insisted on detailed information from Mr. Walker based on the reenactment that upper management had required. Instead, he did next to nothing to follow up on the reenactment. If he had, he'd have realized at the time that all Mr. Walker did was ask Mr. Sanders where the accident occurred and then take a few photos. If Mr. Duncan felt stymied by Complainant's purported stonewalling, he also would have insisted on detailed information from Mr. Walker on the investigation. He would have learned that Mr. Walker did almost nothing on that as well. Instead, Mr. Duncan didn't discover this until much later. If Mr. Duncan genuinely felt that Complainant was stonewalling, he failed to develop the information he needed the meet Amtrak's espoused heavy emphasis on safety.

Finally, I reject Mr. Duncan's reliance on Complainant's being among a group of workers who "stonewalled" in two previous investigations. Although Mr. Duncan threatened disciplinary action in those two earlier incidents, he did not pursue it. On the contrary, he admitted that, had he charged Complainant with insubordination, he would not have been able to sustain the charge. Although Mr. Duncan could infer that at least some Amtrak employee collaborated with Ms. Reeder by clocking her out, he never developed anything from which to identify Complainant as that person or to show that she knew who'd done it. The other incident, involving damage to the truck, is more reminiscent of Captain Queeg's quest for missing strawberries in the *Caine Mutiny* than the management of a national railway. I am aware of no reason to assume that Complainant knew how the truck was damaged or was withholding information. At best, this could have played only a very minor role in Mr. Duncan's decision to terminate; it doesn't explain the decision in any substantial way.

I do not suggest that Complainant's testimony was entirely credible. Her explanation for not disputing Ms. Miller's statement at the formal investigation hearing is difficult to accept. When Ms. Miller said that Complainant was also carrying a vacuum cleaner and cleaning equipment

when she twisted her ankle, Complainant and her union representatives could readily have had Complainant deny this. Yet Complainant remained silent.

But I find this of little relevance to Mr. Duncan's decision to terminate. In particular, Mr. Duncan had already assigned blame to Complainant well before any of this; he assigned blame on the day after the accident and before any investigation. The hearing officer accepted Ms. Miller's statement and still did not find merit to the Company's first two allegations, including the allegation that Complainant failed to perform her duties properly. Mr. Duncan said that he based his decision on the hearing officer's findings; even when he added more reasons after the termination, he did not point to Complainant's carrying more than the two trash bags or not disclosing that she was carrying more. The Company found out that Ms. Miller's stories were inconsistent and disciplined her for dishonesty. It knew that the hearing officer thought Complainant lacked common sense when she stepping off the platform carrying everything Ms. Miller said she was carrying. Yet it didn't reevaluate the suspension in the light of finding Ms. Miller dishonest. Overall, Complainant was generally credible, and on the findings that I made above concerning Mr. Duncan's motivation, my focus was heavily on what Mr. Duncan said and did, not what Complainant said and did.

Discussion

I. Retaliation for Reporting Workplace Injury and Filing Whistleblower Complaint.

As it applies here, the Federal Rail Safety Act makes unlawful a railroad carrier's[27] discharge or suspension of an employee if it is "due, in whole or in part," to the employee's lawful, good faith notice to the carrier of a work-related personal injury or her filing a whistleblower complaint related to railroad safety. 49 U.S.C. §20109(a)(3) and (4). 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"), 49 U.S.C. §42121, *et seq.* *See* 49 U.S. §20109(d).

The burdens established in AIR 21 cases require a complainant to prove by a preponderance of the evidence that: (1) she engaged in a protected activity or conduct; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. §42121(b)(2)(B). If she meets this burden, she 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. 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

A. Complainant's Protected Activity.

[27] Amtrak does not dispute that it is a covered railroad carrier under the Act.

Complainant asserts that she engaged in two protected activities: (1) reporting her work-related injury, and (2) filing a whistleblower complaint with OSHA. Respondent concedes that Complainant's report of the workplace injury was a protected activity, and I find that it was. Filing a whistleblower complaint is also protected; the Act expressly protects it. 49 U.S.C. § 20109(a)(3).

B. Respondent's Knowledge.

Work-related injury. It is undisputed that Complainant reported the injury to two Amtrak managers, Mr. Duncan and Mr. Walker, on the day the accident happened. As the report was made to Amtrak, Amtrak had knowledge of it. Complainant has satisfied her burden to show knowledge on the injury report claim.

OSHA Complaint. A complainant is required to establish by a preponderance of the evidence that the respondent knew of his protected activity. *Jeter v. Avior Technologies Operations, Inc.*, ARB Case No. 06-035 (ARB: Feb. 29, 2008), slip op. at 8-9; *Rooks v. Planet Airways, Inc.*, ARB Case No. 04-092 (ARB: June 29, 2006), slip op. at 6-8. A basis to impute knowledge to a corporate employer, standing alone, generally is not enough; rather, the complainant must show that the decision-makers who took the alleged adverse actions were aware of the protected activity. *See Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028 (ARB: Jan. 30, 2004), slip op. at 11. Thus, in AIR 21 cases, "Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment 'because' the employee has engaged in protected activity." *Id.* at 14, *citing Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996). The Federal Rail Safety Act similarly provides that the adverse action must be "due to" the employee's engaging in protected activity. 49 U.S.C. §20109(a).

Complainant has not established that Mr. Duncan was aware of her OSHA complainant when he decided to terminate the employment. Respondent received the notice of Complainant's filing a complaint on November 14, 2007, but Complainant offers nothing to show that Mr. Duncan was aware of the filing until November 22, 2007, when he wrote an email about it. As I have found it more likely than not that Mr. Duncan didn't know of the OSHA complaint until after his decision to terminate, Complainant has failed to meet her burden on this claim, and it fails.[28] I therefore continue the analysis only as to Complainant's theory that Respondent retaliated because she reported a workplace injury.

C. Complainant suffered an adverse employment action.

Respondent concedes that Complainant suffered an adverse employment action when Mr. Duncan terminated her employment, even as later modified to a 30-day suspension. As the

[28] Although it is difficult to imagine that when the labor relations manager reduced the discipline to a 30-day suspension on January 8, 2008, he didn't know of Complainant's OSHA complaint, Complainant offered no evidence that he had such knowledge. As much as common sense suggests the contrary, Complainant did not meet her burden to show timely knowledge on the labor relations manager's part.

statute expressly includes terminations and suspensions in its list of adverse actions, I conclude that Complainant has met her burden on this element.

D. Complainant's Protected Activity Contributing to Respondent's Decision to Terminate Her Employment.

A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action. *Marano v. U. S. Dept. of Justice*, 2 F.3d 1137 (Fed. Cir. 1993). A complainant is not required to provide direct evidence of discriminatory intent; she may satisfy her burden through circumstantial evidence. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009); *see Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). In circumstantially-based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

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

The temporal proximity here is beyond question but is of limited import. Amtrak doesn't dispute temporal proximity or point to an independent intervening event. But the reason that Amtrak gives for its action – Complainant's lack of common sense at the time of the accident – happened equally close in time to the discipline and, if accepted, could account for the adverse action. Amtrak cannot point to any *remoteness* in time as evidence to sever any connection between Complainant's injury report and the termination, but beyond that, the *proximity* in time between the two events proves little.

I therefore turn to broader considerations. I discussed in detail above why I reject Mr. Duncan's denials of any retaliatory motivation. I observed that his decision failed to take into account the Company's failure to maintain a safe workplace; was based on a judgment he made about Complainant's responsibility before any investigation (despite Company policy which requires the investigation); reflected his comments to Complainant at the time of the injury that readily could discourage a report (despite Company policy to the contrary); his failure to supervise the reenactment that Amtrak upper management required in this particular case; his failure to supervise the investigation; the inadequacy of both the reenactment and the investigation; his

failure to show any similar cases when he also terminated the employment; Amtrak's failure to show any similar cases even if under a different manager; that Mr. Duncan stated as the reason for the termination the hearing officer's findings that he hadn't read or been briefed on; his later offer of additional reasons beyond what he put into the termination letter, when those reasons have little substance; and his mischaracterization of his statement to the OSHA investigator that Complainant was only 51 percent responsible for what happened.[29]

Weighing against this is only Mr. Duncan's word and the fact that he could recall five times when a subordinate had an injury, and he didn't discipline them. Mr. Duncan's word is insufficient in the face of so many facts to the contrary; his inability to cite a single instance when any other employee was fired for anything like what happened here is enough to refute the evidence that, in the course of his career as a manager at this level of authority, he could think of five times when he didn't discipline an injured employee.

But that is not all. Amtrak policy and practices have created an environment that tends to motivate managers such as Mr. Duncan to discourage employees' reports of injury. Amtrak policy is to deny pay raises to managers whose workers have accidents beyond a certain frequency. Amtrak tells its managers and workers that all injuries are preventable and that the prevention of injuries and accidents is the responsibility of the employee. True, these are termed, "aspirational goals," but Mr. Duncan seems to have applied them as more than aspiration when he found that Complainant's accident was preventable, that she didn't watch where she was going, and that she had to take responsibility for the accident or suffer termination. Amtrak tells its managers and employees that the Company is responsible to provide a safe workplace and that employee and customer safety are of high priority, but it took State government intervention to provide minimally acceptable safety in a nearby rail yard, and yet Company managers took no responsibility when someone was injured in a similar yard. All of this points to additional motivation that Mr. Duncan would have to discourage Complainant (and others) from reporting injuries.

In all, I find, more likely than not, that Complainant's protected activity was a contributing factor in Mr. Duncan's decision to terminate the employment.

E. Respondent Has Failed To Show It Would Have Terminated Anyway.

Once Complainant has shown that her protected activity was a contributing factor to the adverse employment action, Respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 577 (7th ed. 1999). As a general proposition, proof that an employer's "explanation is unworthy of credence" is persuasive evidence of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000).

[29] Mr. Duncan said at trial that he was joking. But the recording of the interview shows that he was not.

Evidence that any given misconduct or performance failure would, standing alone, lead to termination could take many forms. These include established written policies than mandate or at least suggest termination under the circumstances; established practices, such as a fair and honest, good faith, and complete investigation was conducted and substantiated the alleged misconduct or performance failure; examples of similarly situated employees whose employment also was terminated; a showing of the seriousness of the event in the context of the employer's business needs (*e.g.*, theft, dishonesty, or disclosure of company trade secrets) or the health and safety of its employees (*e.g.*, fighting or bringing weapons to work) or similar factors; citation to the collective bargaining agreement's provisions on termination; and practices in place to safeguard against discriminatory or retaliatory acts (such as requiring the human resources or legal department to conduct an independent review of the termination decision).

On all these, Amtrak has offered little or nothing. It points to no similarly situated employees treated the same. It didn't follow its own procedures for reenactment and investigation. Its safety coordinator didn't treat the accident as serious. The Company points to nothing in the collective bargaining agreement that identifies Complainant's conduct as a reason for termination. Although independent Company personnel conduct a disciplinary hearing under the collective bargaining agreement, Amtrak left it to Mr. Duncan to decide independently on the level of discipline; there was no check against possible improper motive. There's no evidence that any Amtrak manager took into account that terminating an employee for accidentally twisting her ankle would tend to discourage workers from reporting injuries, despite the statutory mandate protecting, and the Company policy requiring, such reports. Far from clear and convincing, Amtrak offered next to no evidence to show that it would have terminated Complainant's employment even had she not reported the injury.

II. No Liability for Delaying or Interfering with Prompt Medical Treatment.

Complainant asserts that on October 1, 2007, Mr. Duncan and Mr. Walker delayed or interfered with her medical treatment when it took them too long to get blank accident forms, and when Mr. Walker then took her to a closed clinic. But it wasn't until a year after these alleged events, in October 2008, that Congress amended the Act to prohibit carriers from denying, delaying, or interfering with medical treatment. 49 U.S.C. § 20109(c)(1), (2). Complainant's claim therefore raises issues of retroactivity.

There is a strong presumption against retroactive application of laws. *Landgraf v. USA Film Prods.*, 511 U.S. 244, 265 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . .." *Id.* The question is "whether the new provision attaches new legal consequences to events completed before its enactment."[30] *Id.* at 269. If Congress has expressly stated that a statute applies retroactively, there is no need for further analysis. *Id.* at 280. But otherwise,

[30] Thus, when intervening statutes authorize or affect prospective relief, the application of the statute is not retroactive. 511 U.S. at 273. Similarly, changes in jurisdiction are not retroactive. *Id.* at 274. Changes in procedure often may be applied in a manner that does not raise issues of retroactivity. *Id.* at 275.

> The court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id.

In the present case, Congress included no express language in the amendment to establish retroactive application. Were the amendment applied, it would impose new duties with respect to a conduct that was complete at the time the amendment was enacted. Any such application would therefore be retroactive and inconsistent with long-standing considerations of fairness. I decline to apply the amendment retroactively and therefore find Complainant's claim based on a violation of it without merit.

III. Remedies

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

A. Reinstatement and Back pay.

Complainant is entitled to reinstatement and back pay since the date of termination. Respondent voluntarily reinstated Complainant effective 30 days after the termination. Complainant is entitled to back pay for the 30 days.

There is also the four-day suspension that Mr. Duncan imposed because Complainant was late to a safety meeting. Complainant said that employees are not subjected to such suspensions for this reason, and Amtrak offered no evidence that it had ever before suspended an employee for four days in similar circumstances or that otherwise justified the suspension under Company rules, practices, or policies. While I could take this as evidence of further retaliation, it appears more likely that Mr. Duncan imposed such extraordinary discipline in the light of Complainant's history in 2007 of the 30-day safety-related suspension that is the subject of this dispute.[31] As I have found the 30-day suspension unlawful, the four-day suspension in its wake must also be remedied.

[31] Had I found that Mr. Duncan imposed the 4-day suspension out of pique that Amtrak had reduced the earlier termination to a 30-day suspension (or as continued retaliation for Complainant's injury report), I would have seen this as a basis for greater punitive damages. Given the remoteness in time between the events, however, that is not my finding.

The evidence shows that Complainant would have been paid $2,000 for the 30 days during the first suspension.[32] To this I add $266.67 for the 4-day suspension (assuming pay at the same rate). This totals a back pay award of $2,266.67, to which Respondent must add interest at the statutory rate from the date of the termination to the date paid.[33] To make Complainant whole, Respondent must expunge any negative references in its records (including without limitation Complainant's personal file and any managers' desk files) to Complainant's injury, her report of the injury, and her complaint about Respondent's failure to comply with the Act.

B. Compensatory Damages

To some extent, Complainant's emotional losses were lessened when Amtrak reduced the discipline from a termination to a 30-day suspension. But the Supreme Court has made clear in an employment retaliation case that this isn't enough to insulate the employer from compensatory damages. *See Burlington Northern v. White,* 548 U.S. 53 (2006). Even when an employer makes an employee whole for lost wages, which Amtrak did not do here, it does not make the employee whole emotionally. *Id.* at 72. Thus, in *White,* even when the employer never terminated the employee but only suspended her until it recalled her after 37 days with full back pay, *id.* at 58-59, the Court observed:

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

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

In the present case, Complainant had lost her job entirely. She offered testimony similar to that in *White.* She told of the emotional toll in feeling "upset," "devastated," and "shocked." Tr. 77. She had a one-year-old child at home. Tr. 79. As in *White,* the termination was at the holidays: "I was just upset – I mean, the day before Thanksgiving, through the holidays, Christmas for my kids. The holidays were ruined pretty-much." Tr. 79-80.

The *White* trial was in 2000. Complainant's termination was seven years later, with an inflated dollar. She had no expectation of getting her job back; Amtrak had terminated it. Keeping in mind the award of $43,500 in *White,* I award compensatory damages of $60,000.

C. Punitive Damages

[32] Neither side provided documentary evidence of the wage loss. I rely on Complainant's testimony, which Amtrak did not dispute.

[33] It appears that the suspension did not include a loss of seniority for the 30-day suspension. But if it did, Complainant is entitled to the restoration of that lost seniority.

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

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

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

Johnson at 29, citing the Restatement (Second) of Torts, §908 (1979). *Accord*, *Pogue v. United States Dept. of the Navy*, 87-ERA-21, (D&O on Remand Sec'y April 14, 1994).[34]

I lay much of the responsibility for the unlawful actions here at the doorstep of Amtrak as a corporation. Despite its many policy statements about the importance of safety, Amtrak failed here in no small part because of its personnel policies and practices. It is not for me to tell Amtrak how to run a railroad, and I'm not going to presume that I know better how a business should manage its employees. But certain practices aimed at compliance with the nation's many anti-discrimination, anti-retaliation, and labor/management laws are so well known among America's corporate leaders that Amtrak's failure to have such practices in place (at least as it played out in this case) has to raise questions.

Specifically, Amtrak apparently had no procedure to be sure, before terminating a seven-year employee, that a proper investigation was done and a disciplinary decision reached consistent with the treatment of past similar cases. Amtrak gave a second-line manager, who was dealing with the daily problems of relationships with union workers, no specific guidance on the level of discipline to impose, and had no review to assure against an improper termination. One would think that a corporation with the resources and experience of Amtrak would require a human resources manager or a lawyer to review any termination (especially of a non-probationary employee) to assure compliance with the many legal requirements that attach to such adverse actions, especially when, as here, a federal statute clearly is implicated.

[34] For corporate defendants, the acts of an agent can be imputed to the employer for purposes of punitive damages when, among other facts, the principal authorized the act and the manner in which it was done; the agent was a managerial employee acting in the course and scope of employment; or if the principal or a managing agent ratified or approved the act. *Kolstad v. American Dental Assn.*, 527 US 526, 539 (1999) (42 U.S.C. §1981), *citing* Restatement (Second) of Agency, § 217 C. Here, I find a basis for punitive damages in both Mr. Duncan as a manager and Amtrak as a corporation for its conscious disregard of the likely results of certain of its policies and practices.

I accept that Amtrak has a huge responsibility to keep accidents and injuries to a minimum while workers operate and are around hazardous machinery that must move people and heavy freight across an enormous variety of terrain and distances. But to lead a manager to think that all accidents can be prevented and that the prevention of accidents is the employee's responsibility creates a situation like this one where the manager is invited to overreact. The result would differ if Amtrak policy required closer case-by-case scrutiny of actual accidents, but there is an emphasis on overall numbers of injuries irrespective of whether they were reasonably preventable. Amplify this with a threat to the manager's salary, again without any attention to the case-by-case particulars of actual injuries and accidents, and the Company has created an impetus for the manager to discourage reports of injuries. Admittedly, it is easier to count the number of accidents among the workers who report to a given manager than to look into the particular circumstances of those accidents when assessing the manager's performance. But given the Congressional mandate that railroads may not retaliate against workers who report injuries, Amtrak needs to do more to assure managers that they will not suffer reduced performance ratings and loss of pay raises if accidents or injuries are reported and arise out of conditions for which the manager isn't responsible.

Similarly, establishing an elaborate injury investigation regime that is expressly not directed at discipline but only at determining the cause and circumstances of an accident in the hopes of avoiding recurrences is a worthy endeavor. But when it's coupled with disciplinary proceedings under a collective bargaining agreement, how is an employee to feel comforted by the opportunity to report retaliation through a separate channel and assurances that retaliation for reports of injuries won't be tolerated? To the employee, the safety investigation and the disciplinary "formal investigation" are of a piece.

Although Amtrak's upper management who – when Complainant pursued a grievance – reviewed the termination found that Mr. Duncan had gone too far, there is nothing to show that Amtrak took any steps to discipline him or even train him on how to handle future reports of injuries. *See* ALJ Ex. 1 at 4-5 (no discipline). Amtrak has not shown that it has reinforced with Mr. Duncan that the requirement for an investigation is real; that the investigation precedes a determination of fault and doesn't follow it; that when the Company is partly at fault for hazardous conditions, that's relevant when evaluating an accident or assessing discipline; and that any discipline following an injury report must take into account the railroad's obligation not to discourage such reports.[35]

Amtrak's conduct reflects a degree of conscious disregard for how its practices obstruct Congress' mandate in the Federal Rail Safety Act. Punitive damages are appropriate to correct and deter this conduct. They are to alert corporate leadership that it needs to do it better.[36] I assess punitive damages in the amount of $100,000.

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[35] To the extent that Complainant's management is ostracizing her, that is a further basis for punitive damages. I will reach no determination on this disputed fact. But were it to continue, it could be a basis for another retaliation claim.

[36] I take official notice of the United States House of Representatives committee report citing tactics that railroads use to prevent employees from reporting injuries. *See* C.Ex. 19. The report generally addresses the underreporting

Conclusion and Order

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

- Respondent will expunge Complainant's personnel file of any disciplinary record or negative references related to her October 1, 2007 injury accident.

- Respondent will amend its disciplinary records to show no more than a verbal warning in connection with Complainant's being late to a safety meeting and will expunge the 4-day suspension.

- Respondent will pay Complainant back pay in amount of $2,666.67, plus interest from the date of termination until the date of payment at the rate prescribed in 28 U.S.C. §1961.

- Respondent will pay Complainant $60,000 in compensatory damages.

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of workplace injuries but highlights a 2007 report by the Committee on Transportation and Infrastructure that focused on railroad employees' reports of injuries. C.Ex. 19 at 24. That report cites:

- **"Risky" employee assessments**: Employees are placed in disciplinary jeopardy by being assigned points for safety incidents, rule infractions, and injuries regardless of the cause, often before an investigation is done.
- **Targeting employees for increased monitoring and testing**: Injured employees are "targeted" for close supervisor scrutiny, where minor rule infractions result in employee termination following injuries.
- **Supervisors discouraging employees from filing accident reports**: Front-line supervisors often try to subtly prevent employees from filing injury reports and/or lost workday reports in an attempt to understate or minimize on-the-job injury statistics.
- **Supervisors attempting to influence employee medical care**: Railroad supervisors are often accused of trying to accompany injured employees to their medical appointments to try to influence the type of treatment they receive. In addition, they try to send employees to company physicians instead of allowing them to choose their own treatment providers. . . .
- **Supervisor compensation**: Some companies base management compensation upon performance bonuses, which can be based in part upon recordable injury statistics within their supervisory area.

C.Ex. 19 at 24-25 (emphasis in the original). The report concluded that:

> Today's railroad regulatory environment is more oriented toward assigning blame to a single individual, without a thorough examination of the underlying causes that led that single individual to commit an error. This approach is apparent in both railroad internal investigations of injury accidents, as well as FRA regulatory reports.

Id. at 25.

The record in this case reflects that Amtrak engaged in a number of these practices, including discouraging Complainant from filing an injury report, attempting to influence her medical care, tying supervisor compensation with reportable injury statistics, and blaming workers without looking at the underlying causes of the particular, individual injury. At this point, Amtrak is on clear notice that these practices exist; any continuing failure to remedy them could amount to further and additional conscious disregard of its obligations.

- Respondent will pay Complainant $100,000 in punitive damages.

- Respondent will pay Complainant's reasonable attorney's fees and costs, including expert witness fees.

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

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF REVIEW PROCEDURE: Review of this Decision and Order is by the Department of Labor's Administrative Review Board. *See* Secretary's Order, paragraph 5.c.15, 75 Fed. Reg. 3924 (Jan. 25, 2010) (effective Jan. 15, 2010). As the Secretary has not established regulatory procedures for appeal, the parties should take notice of the parallel procedures under AIR 21, to which the Federal Rail Safety Act refers for procedural rules. *See* text, *supra.* To facilitate any appeal, this Office will forward this Decision and Order and the administrative file to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210.

In AIR 21 cases, a party seeking appellate review 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. A Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; or if filed in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1979.110(a). The Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objection not specifically raised. See 29 C.F.R. § 1979.110(a).

Under AIR 21, 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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

Also under AIR 21, 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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).