IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TIMOTHY J. WALLENDER,

Plaintiff,

vs. No. 2:13-cv-2603-dkv

CANADIAN NATIONAL RAILWAY CO., ILLINOIS CENTRAL RAILROAD, WISCONSIN CENTRAL, ANDREW MARTIN, AND KEITH CREEL,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGEMENT

On August 5, 2013, the plaintiff, Timothy J. Wallender ("Wallender"), a former trainmaster at Harrison Yard located in Memphis, Tennessee, filed this whistleblower lawsuit against three railroad defendants - Canadian National Railway Company ("Canadian National"), Illinois Central Railroad ("Illinois Central"), Wisconsin Central – and two individual defendants - Andrew Martin ("Martin"), and Keith Creel ("Creel"), alleging that the defendants violated the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A(a), by discharging Wallender for his assistance in an investigation of fraud at Harrison Yard. (Am. Compl. ¶¶ 9, 56-58, ECF No. 38.)[1] On February 25, 2014, the court granted

[1]Wallender initially filed a whistleblower complaint with the Secretary of Labor on January 3, 2013, and the Secretary did

Wisconsin Central's motion to be dismissed from this suit for lack of personal jurisdiction. (ECF No. 51.) The parties have consented to the jurisdiction of the United States Magistrate Judge. (ECF No. 35.)

Now before the court are the August 1, 2014 motions for summary judgment filed by defendants Canadian National, Illinois Central, and Creel, (Defs.' Mot. for Summ. J., ECF No. 61.), and defendant Martin, (Martin's Mot. for Summ. J., ECF No. 62.)[2] On September 5, 2014, Wallender filed responses in opposition to both summary judgment motions, (ECF Nos. 75, 76), and on September 26, 2014, the Defendants filed replies, (ECF Nos. 83, 84, 86, 87). For the reasons set forth below, the motions for summary judgment are granted.

I. UNDISPUTED FACTS

The court finds that the following facts are undisputed for the purposes of these motions for summary judgment.

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not issue a final decision within 180 days of the filing of that administrative complaint. (Am. Compl. ¶ 1, ECF No. 38.) Accordingly, Wallender proceeded to this court pursuant to 18 U.S.C. § 1514A(b), which states that "if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," a person may seek *de novo* review in the appropriate district court. *See also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1163 (2014).

[2]Martin's motion for summary judgment incorporates Canadian National, Illinois Central, and Creel's motion for summary judgment. Therefore, the court will consider the common grounds together and refer to the defendants collectively as "Defendants."

A. Background on Wallender's Employment with Canadian National and Illinois Central

Wallender started working as a trainmaster at Harrison Yard in Memphis, Tennessee in October of 2007 and remained there until his termination on September 30, 2012. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶¶ 5, 54, ECF No. 75-1.) Harrison Yard is owned and operated by Illinois Central. (*Id.* ¶ 2.) Illinois Central is an indirectly owned subsidiary of Canadian National, and Illinois Central and Canadian National consolidate their financial statements. (*Id.*; Canadian National's Answer ¶¶ 5–6, ECF No. 40; Illinois Central's Answer ¶¶ 5–6, ECF No. 41.) Canadian National is a publicly held corporation that indirectly owns railroads in some states in the United States. (*Id.* ¶ 1; Am. Compl. ¶ 2, ECF No. 38; Canadian National's Answer ¶ 2, ECF No. 40.) Creel was the Chief Operating Officer of Canadian National from January 2010 until February 2013. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 3, ECF No. 75-1.) Martin has been a General Superintendent with Illinois Central since 2010, and his job is to ensure the safety, on-time train performance, and overall performance of his territory, which extends from Fulton, Kentucky to Jackson, Mississippi. (*Id.* ¶ 4.)

Harrison Yard is a switching facility that contains numerous tracks and switches. (Canadian National's Answer ¶ 11,

ECF No. 40.) When trains arrive at Harrison Yard with railcars that have different destinations, the railcars have to be uncoupled, sorted by destination, and assembled into new trains for departure. (*Id.*) As a trainmaster, Wallender managed the day-to-day operations of the terminal and ensured that trains arrived and departed on time and with the proper cars. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 7, ECF No. 75-1.) Wallender supervised train crews, engineers, conductors, and yardmasters, and he worked with dispatchers and clerks, often giving them instructions. (*Id.*) Wallender also had office duties, which included reviewing reports regarding issues such as the status of trains and cars, the availability of train crews, and checking delays on computer. (*Id.*)

At all times relevant to this proceeding, Wallender reported to the Assistant Superintendent, who reported to Martin, the General Superintendent of Harrison Yard. (*Id.* ¶ 8.) Martin in turn reported to the General Manager, and in 2012, the General Manager for the Southern Region was John Klaus "Klaus". (*Id.*; Pl.'s Resp. to Martin's Statement of Undisputed Facts ¶ 3, ECF No. 76-1.) In 2012, Klaus reported to Jim Vena ("Vena"), the Senior Vice President for the Southern Region. (Pl.'s Resp. to Martin's Statement of Undisputed Facts ¶¶ 2-3, ECF No. 76-1.) Vena reported to Creel, the Chief Operating Officer of Canadian National. (*Id.*)

Canadian National and Illinois Central maintain a Code of Business Conduct (the "Code"), which requires employees to promptly report any violations, including activities the employee believes violate the integrity of the company. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 9; ECF No. 75-1.) The Code requires that the employees maintain the integrity of company financial records and it includes contact information for an ombudsman to provide impartial guidance regarding any potential violation of the Code. (*Id.*) Wallender never contacted the ombudsman and he testified that he did not violate the Code because he did not deal with financial records or financial statistics. (*Id.*)

During his employment, Wallender participated in the employee share investment program that allowed him to buy shares of Canadian National stock; Wallender did not divest himself of all his shares of stock until November of 2012, approximately two months after his September 30, 2012 termination. (*Id.* ¶ 62.) Wallender admits that he does not know if Canadian National's annual reports mentioned train speed or dwell time. (*Id.* ¶ 63.) Wallender states that he visited financial websites that discussed Canadian National stock, but does not know if those websites mentioned train speed or dwell time, and he does not know how financial analysts make recommendations on stock. (*Id.*) Wallender cannot identify any shareholder who

made a decision about buying Canadian National stock based on dwell time, train speed, accident reports, or velocity. (*Id.* ¶ 64.) Wallender also does not know whether dwell time went up or down while he was in Memphis or if misreporting of dwell time would affect company expenses. (*Id.*)

B. Train Operating Metrics

Canadian National and Illinois Central use more than one hundred operating metrics internally to gauge and improve the efficiency of operations. (*Id.* ¶ 10.) "Train Speed" is a measure of how quickly a train gets from one point to another, usually from one terminal to another. (*Id.*) "Dwell time" is a measure of how long a car stays in a terminal. (*Id.*) "Terminal velocity" measures train speed as well as how quickly the railroad is turning the cars on the train. (*Id.*) The arrival and departure of cars in Memphis is normally tracked by an automatic equipment identification scanner ("AEI scanner"). (*Id.* ¶ 14.) When a scanner is not working property, a clerk or trainmaster may manually depart or arrive a train by using the computer code Work Order Command ("WOC"), a practice that is known as "WOCing" or "walking" a train. (*Id.*)

Canadian National and Illinois Central run various reports to determine whether they are meeting operating goals, and one of such reports is the "24-hour report." (*Id.* ¶ 12.) The 24-hour report is a daily internal snapshot of all the cars in each

terminal that have been in that terminal in excess of twenty-four hours. (*Id.*) Canadian National and Illinois Central attempt to ensure that the total cars in a yard in excess of twenty-four hours are under a certain number. (*Id.* ¶ 15.) Trainmasters are responsible for moving trains in and out of the yard on time, (*Id.* ¶ 12), and if too many cars are on the 24-hour report, trainmasters, assistant superintendents, or superintendents may have to give an explanation on the daily conference call, (*Id.* ¶ 15). The 24-hour report is not public data but it serves to allow management to detect potential car movement problems and prevent future problems. (*Id.* ¶ 12.)

The above-mentioned efficiency metrics are used on a daily basis to determine the health of the operation and how well terminals are operating. (*Id.* ¶ 11.) The integrity of the metrics is critical to Canadian National and Illinois Central because inaccurate numbers impede management's ability to fix problems. (*Id.*) Hence, Canadian National has a Business Support Group ("BSG"), which regularly monitors or audits the operating metrics reported at Canadian National and Illinois Central terminals. (*Id.* ¶ 16.) The BSG uses the Service Reliability System ("SRS"), which tracks more than fifty different types of actions that occur throughout the railroad on a daily basis, such as arriving and departing trains in a yard, changing the order of cars on a train, transferring trains

between yards, mechanical status changes, switching and humping cars, and placing cars into or taking them out of repair shops. (*Id.* ¶¶ 16-23; Defs.' Mot. for Summ. J, Decl. of Barker ¶ 5, ECF No. 61-3.)

The BSG runs various programs in the SRS to determine the accuracy of reporting of operational metrics. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 18, ECF No. 75-1.) Among other programs, the SRS runs programs to generate the following reports: (1) every six hours the SRS runs a report to determine whether cars are placed in the correct status,[3] (*Id.* at 19); (2) the SRS regularly runs a report that compares train arrival and departure times and flags unusual activity, (*Id.* ¶ 20); and (3) the SRS runs a report that compares AEI scanner data with manual train departures that have the WOC code, (*Id.* ¶ 21). The BSG uses the data generated by the SRS programs to identify certain employee reporting patterns that might indicate inappropriate manipulation of data or a misunderstanding of company practices. (*Id.* ¶ 23.) On average, more than 500,000 car events are reported in the system on any given day. (*Id.* ¶ 22.) If the manually generated events, which comprise approximately 60% of the total events reported, appear out of

[3]A "car status" is a code that describes either the location, condition, or both, of any car within the companies' network. (*Id.* ¶ 17.)

the ordinary, the BSG reviews the specifics of those transactions more closely. (*Id.*)

Canadian National reports dwell time, train speed, and cars on-line metrics to the Association of American Railroads ("AAR") and to the Surface Transportation Board ("STB"). (*Id.* ¶ 13.) Unlike financial data, which the Securities and Exchange Commission ("SEC") requires public companies to report, railroads are not required to publish these metrics to the SEC. (*Id.*) Railroads are also not required to publish information about derailments to the SEC. (*Id.*) The train speed, the dwell time, and other big operating metrics, are shared with investors in quarterly stock market conference calls. (Defs.' Reply ¶ 6, ECF No. 86.)[4]

Further, the train speed, dwell time, and cars on-line metrics are included in a publication located in a section of Canadian National's website entitled "Shareholder Resources."

[4]Wallender asserted in his Statement of Additional Facts that the train performance metrics information was shared with investors in quarterly stock market conference calls. (Pl.'s Statement of Additional Facts 31, ¶ 6, ECF No. 75-1.) Canadian National, Illinois Central, and Creel agreed that some efficiency metrics were sometimes shared with investors on conference calls but denied that the record supports this statement. (Defs.' Reply ¶ 6, ECF No. 86.) However, the deposition of Assistant Superintendent Paul Bourzikas ("Bourzikas") supports this statement. (Pl.'s Resp. to Defs.' Mot. for Summ. J., Ex. C at 76, ECF No. 75-4.) Bourzikas stated that he "dialed into [Wall Street calls] quarterly," and that in these calls the train speed, dwell time, and other big operating metrics will be reported. (*Id.*) Therefore, the court finds no good faith dispute as to this fact.

(*Id.* ¶ 7.) This subsection of the Canadian National's website states:

> The railroad performance measures are reported weekly. These measurements represent only some of the indicators of railroad performance. Please be advised that you should not rely solely on this information as an indication of [Canadian National's] overall performance, financial or otherwise, as it may be misleading when viewed in isolation.

(Pl.'s Resp. to Defs.' Mot. for Summ. J., Ex. J, ECF No. 75-11.) According to the website, Canadian National provides these metrics "to allow consistent comparison of [its] performance with other Class 1 railroads." (*Id.*) Lastly, in a letter that Creel wrote to operating leaders on February 21, 2012, he stated:

> We have an obligation to our customers and shareholders to continue our pursuit of "Service Excellence." In doing so we cannot fool ourselves by manipulating data – that is not how we will improve as a company. We will improve by ensuring we have accurate data to identify opportunities and/or recognize positive performance trends.

(Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 1, ECF No. 86.)

The parties agree that there have been instances of individuals misreporting one or more performance metrics. (Defs.' Reply ¶ 10, ECF No. 86.)[5] The Canadian National's BSF

[5]It is unclear, however, how often these instances occurred. The Defendants maintain that they are isolated. (Defs.' Reply ¶ 10, ECF No. 86.) Although Wallender does not quantify the misreporting, he states that the manipulation of the train

monitoring system has not identified any system-wide misreporting, (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 25, ECF No. 75-1); rather, the system has discovered a few accidental as well as intentional instances of misreporting. (*Id.*; Defs.' Mot. for Summ. J., Decl. of Barker ¶¶ 8-9, ECF No. 61-3).[6] A handful of unusual events have no effect on the metrics overall because it is such a small portion of the total number of events reported. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 24, ECF No. 75-1.)[7] The number of the

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performance metrics that falsely show how efficiently the railroad is operating was happening across the railroad system, in Canada, Wisconsin, Chicago, Memphis, Mississippi, and the terminus in Louisiana. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶¶ 26, 59; ECF No. 75-1.)

[6]Although Wallender denies this assertion, the court finds that there exists no good faith dispute. In support of his denial, Wallender states that the manipulation of the train performance metrics was happening across the railroad system, in Canada, Wisconsin, Chicago, Memphis, Mississippi, and the terminus in Louisiana. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶¶ 26, 59; ECF No. 75-1.) The Defendants, however, assert that there have been isolated instances of misreporting of performance metrics. (Defs.' Reply ¶ 10, ECF No. 86.) Even if manipulation of train metrics were happening at the locations that Wallender has listed, that alone does not contradict the fact that the monitoring process has not detected any system-wide misreporting. Wallender has not presented any evidence to dispute the assertion that Canadian National's BSG monitoring system has not identified any system-wide misreporting.

[7]Wallender again attempts to deny this statement by stating that the manipulation of the train performance metrics was happening in other locations, however, such assertion is not sufficient to refute the fact that the unusual events flagged by the BSF had no effect on the metrics overall.

suspicious car reporting events detected by the BSG's monitoring system would not be sufficient to change the numbers submitted to the AAR regarding cars on line, industry train speed, and dwell time. (*Id.* at 26.)[8] Wallender stated in his deposition that he believed the misreporting of train metrics constituted shareholder fraud. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 12, ECF No. 86.)

C. Reporting Irregularities and Wallender's First Formal Warning

The Defendants agree that there have been prior instances of individuals misreporting one or more performance metrics. (*Id.* ¶ 10.) In 2009, Creel ordered an audit after he received allegations of improper car reporting occurring in a Montreal rail yard. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 27; ECF No. 75-1.) As a result of this investigation, two superintendents were demoted and one was dismissed because they had engaged in misreporting. (*Id.*) In addition, these employees and others lost their bonuses for the year, while some employees were relocated to different facilities. (*Id.*) Creel also ordered the creation of a team to proactively look for other acts of misreporting. (*Id.*)

[8]As stated above, Wallender's assertion that the manipulation of the train performance metrics was happening in other locations is not sufficient to refute the fact that the number of suspicious car reporting generated by the BSF was not sufficient to change the number submitted to the AAR.

Wallender admits in his deposition that he regularly improperly arrived and departed trains by WOCing them. (*Id.* ¶ 29.) As a trainmaster, Wallender was required to spend time in the Yard managing employees; nevertheless, he spent the majority of his time in the control tower working on various reports. (*Id.*) In his deposition, Wallender stated that he was good at manipulating numbers and reports to make reporting metrics look good artificially, and he did so on a regular basis. (*Id.*) Wallender also repeatedly instructed clerks to improperly WOC trains. (*Id.*) Wallender encouraged the practice of keeping cars off the 24-hour report even when the number of cars on the report was not unduly high. (*Id.*)[9]

In 2011, Shelley Boomhower ("Boomhower"), a company manager, conducted an audit at the Memphis Yard, where she was told by Vincent, a clerk who worked in Memphis, that Wallender had been instructing him and other clerks to improperly WOC trains out of the Yard. (*Id.* ¶ 30.) Vincent also told Boomhower that Wallender was instructing him to hide cars and to improperly WOC trains in and out of the Yard to restart dwell time. (*Id.*) Per Boomhower's instructions, Vincent reported other instances in which he was improperly directed to WOC a

[9]Wallender, however, alleges that he was directed by Martin and Vena to improperly report the railroad performance metrics. (*Id.* ¶¶ 29, 32.) The Defendants deny this allegation. (Defs.' Reply ¶¶ 30-32, ECF No. 86.) Therefore, this issue is in dispute.

train to his supervisor Steve Redmond ("Redmond"). (*Id.* ¶ 31.) Redmond, in turn, informed Martin about Wallender's conduct. (*Id.*) On December 30, 2011, Martin sent a letter to Wallender stating that Wallender provided false information regarding car reporting on December 13, and 14, 2011, and as a result he was suspended from duty on the days of January 1, and 2, 2012. (Defs.' Mot. for Summ. J., Ex. 5 at 49, ECF No. 61-7.)[10] In this letter, Martin warned Wallender that further instances of misconduct could result in termination of his employment. (*Id.*)

On February 21, 2012, Creel sent a letter to all operating leaders and clerical staff, including Wallender, concerning reports of improper car reporting. (*Id.* ¶ 36.) In this letter, Creel stated:

> I am extremely disappointed to learn about these reporting infractions. We are better than that at [Canadian National]. Ensuring accurate reporting is the only way we can depend on our measures to identify opportunities and/or operational challenges that need to be addressed. Ensuring accurate reporting is the only way we can protect [Canadian National's] credibility with our customers in moving the freight they trust us to move, and subsequently they expect to be billed accurately and fairly for this service. Regardless of any false perceptions that may exist in the field, for the record clearly understand that this

[10]Despite this letter, Wallender maintains that he was never disciplined, (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 32, ECF NO. 75-1), because Martin had Wallender serve his suspension on his days off, (Wallender Dep. 195; ECF No. 61-7). Regardless of how Wallender served his suspension, the letter from Martin to Wallender clearly shows that Wallender was disciplined. Therefore, the issue of whether Wallender was disciplined on December 30, 2011 is not in dispute.

> type of behavior is not condoned. It cannot and will not be tolerated.

(Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 36; ECF No. 75-1.)

Following Creel's letter, in February of 2012, the Operations Manager, Chad Becker ("Becker"), came to Memphis to investigate possible misreporting. (*Id.* ¶ 33.) Becker interviewed Wallender who admitted that he falsely entered data to show that trains departed earlier than they physically departed so they would not be on the 24-hour report. (*Id.*) Becker communicated to Wallender that the practice was wrong, but Wallender did not change his behavior in response to his instructions. (*Id.* ¶¶ 33, 35.) Further, Wallender did not tell Becker or anyone else that Martin instructed him to misreport train data or WOC a train that had not left the yard. (*Id.* ¶ 35.)

D. Wallender's Participation in Rothwell's Investigation of Martin

In July of 2012, Assistant Superintendent Paul Bourzikas complained to Human Resources about Martin, alleging perceived mistreatment and misreporting. (*Id.* ¶ 38.) Shortly thereafter, Clerk Toby Lehman ("Lehman") emailed a complaint about Martin to Vena, alleging mistreatment and reporting violations. (*Id.* ¶ 39.) Human Resources Director Allan Rothwell ("Rothwell") was sent from Chicago to Memphis to

investigate both sets of allegations. (*Id.* ¶ 40.) Rothwell interviewed Bourzikas, Martin, Lehman, Trainmasters Chris Carlson, Ledric Jenkins ("Jenkins"), Guy Goar ("Goar"), and Wallender, and clerk Connie Wacaster. (*Id.* ¶ 40.)

Goar and Jenkins provided information to Rothwell about misreporting of car information or derailments and about perceived inappropriate conduct by Martin. (*Id.* ¶ 42.) Wallender turned over to Rothwell a number of emails and a voice recording of Martin, as evidence that Martin directed Wallender to engage in reporting violations. (*Id.* ¶ 41; Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 13, ECF No. 86.) Most of the emails pre-dated Creel's February 21, 2012 letter, and none of Wallender's emails or written correspondence to Rothwell mentioned shareholder or investor fraud. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 41, ECF No. 75-1.)

At the conclusion of the investigation, Rothwell prepared a report to Vena addressing areas of concern with Martin's behavior. (*Id.* ¶ 43.) Rothwell was unable to substantiate Wallender's allegation that Martin was currently instructing employees to misreport train data. (*Id.*) Nevertheless, Vena considered the report and determined that Martin's conduct in other areas warranted discipline. (*Id.*) Martin was issued a disciplinary letter that addressed areas where he needed to change his behavior. (*Id.*)

On August 16, 2012, Vena traveled from Chicago to Memphis to deliver the letter to Martin and ensure that he received the message. (*Id.* ¶ 44.) As late as June 2012, Vena had directed the supervisors, including Wallender, to early arrive a train in order to get the train off train speed when the train was immediately outside the yard. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 26, ECF No. 86.)[11] However, once in Memphis, Vena met with the trainmasters and stressed that from that time forward, they must not WOC trains in or out of the Memphis Yard but must instead use the AEI scanners. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 44, ECF No. 75-1.) Wallender was not present when Vena met with the trainmasters because he was not in town and in his deposition he stated that he was never informed about what Vena said. (*Id.* ¶¶ 44, 46.)

[11]Wallender puts forth Bourzikas's deposition testimony in support of his allegation that as late as June 2012, Vena had directed supervisors to early arrive trains to get them off train speed. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 26, ECF No. 86.) However, as Defendants note, Bourzikas agrees that Vena had instructed the employees do so when a train was "just outside the yard." (Bourzikas's Dep. 77, ECF No. 86-6.) Further, Bourzikas also states that he never himself walked a train when it was outside of Aulon station, and he is not aware of anyone else that did so. (Bourzikas's Deposition 72, ECF No. 61-13.)

After Vena met with the trainmasters, Martin also met with them, including Wallender. (*Id.* ¶ 45.)[12] Following his discipline, Martin made a statement to Wallender and other trainmasters to the effect, "For every one thing you have on me, I got ten things on you." (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 15, ECF No. 86.) Rothwell asked Wallender if he wanted to make a complaint about the statement and Wallender stated that he did not. (*Id.*)

E. Wallender's Termination and Subsequent Developments

In August of 2012, Chris Zarozny ("Zarozny") became Assistant Superintendent in Memphis, Tennessee. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 47, ECF No. 75-1.) At approximately 2:00 or 3:00 a.m. on September 18, 2012, train M342 "died" — meaning the crew running the train had exhausted their hours of service — approximately ten miles outside Harrison Yard, between the Leewood and Aulon stations. (*Id.* ¶¶ 49-50.) Wallender instructed clerk Kevin McHone ("McHone"), who was shadowing him that evening as an assistant trainmaster, to record that the train had arrived in the Harrison Yard at midnight, when it had not. (*Id.* ¶ 50.)

[12]The Defendants state that Martin met with Wallender to discuss expectations going forward. (*Id.* ¶ 45.) Wallender does not dispute that Martin met with him; however, he states that during this meeting Martin told Wallender and the other trainmasters and clerks to continue to manipulate train metrics. (*Id.*)

On the morning of September 18, 2012, Zarozny reviewed the SRS system and noticed that it indicated that train M342 had arrived in Harrison Yard even though the train was not physically in the Yard. (*Id.* ¶ 48.) Zarozny reported the incident to Martin, who told Zarozny that they needed to inform Klaus. (*Id.* ¶ 51.) After reporting the situation to Klaus, Klaus removed Martin from the process and Martin had no further involvement in the investigation. (*Id.*; Pl.'s Resp. to Martin's Statement of Undisputed Facts ¶ 4, ECF No. 76-1.)[13] Klaus placed Wallender on administrative leave pending an investigation and reported the incident to Vena. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 51, ECF No. 75-1.) Rothwell was again dispatched to Memphis to investigate the incident. (*Id.* ¶ 52.) Wallender admitted to Rothwell that he had directed that the train be WOCed into the Yard. (*Id.*) After the investigation, Rothwell reported the results to Creel,

[13]The Defendants maintain that Martin had no further involvement in the investigation or ultimate disciplinary action. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 51, ECF No. 75-1; Pl.'s Resp. to Martin's Statement of Undisputed Facts ¶ 5, ECF No. 76-1.) Wallender denies that Martin was not involved in the decision to terminate Wallender because Martin told employees in Memphis that he got Wallender fired. (Pl.'s Resp. to Martin's Statement of Undisputed Facts ¶ 5, ECF No. 76-1.)

Vena, and Klaus, who made the decision to terminate Wallender's employment for misreporting train data.[14] (*Id.* ¶ 53.)

Although as late as June 2012, Vena had directed the supervisors to early arrive trains when the train was immediately outside the yard for the purpose of getting them off train speed, (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 26, ECF No. 86), the train that Wallender early arrived was approximately ten miles outside the yard, (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 49, ECF No. 75-1). Wallender states that he never received warning to stop misreporting from Vena's August 16, 2012 trip to Memphis. (*Id.* ¶ 46.) However, Wallender had been warned to restrain from misreporting by: (1) his December 30, 2011 disciplinary action, (Defs.' Mot. for Summ. J., Ex. 5 at 49, ECF No. 61-7); (2) Creel's February 21, 2012 letter to the operating leaders, (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 33, ECF No. 75-1); and (3) his conversation with Becker in February of 2012, (*Id.* ¶¶ 36-37).

According to Klaus, if Wallender "had never been coached or been reprimanded, or suspended and it was a single event, and he didn't know better," then Wallender would not have been

[14] If Wallender had not arrived the train early in the terminal, but had just reported that the train had died and that he did not have a crew to bring it in, he would not have been penalized. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 28, ECF No. 86.)

terminated. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 29, ECF No. 86.) However, given Wallender's prior disciplinary action on December 30, 2011 for the same type of infraction and his prior warnings, Creel considered Wallender's actions to be egregious misconduct. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶¶ 53-54, ECF No. 75-1.) Wallender's termination happened approximately one month after Rothwell's August 2012 investigation, in which Wallender turned over the emails and recording of Martin. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 17, ECF No. 86.)

During his investigation into Martin in August 2012, in addition to Wallender, Rothwell also interviewed Trainmasters Goar and Jenkins who provided damaging information regarding Martin. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 42, ECF No. 75-1.) Goar still continues to work for Illinois Central and has been promoted, while Jenkins, Bourzikas, and Lehman all continued to work for Illinois Central until they voluntarily quit. (*Id.*) Lehman admitted at his deposition that he did not experience retaliation after making his report. (*Id.*) In August of 2013, Zarozny, who had previously been warned against misreporting, was dismissed from service after he instructed a clerical employee to engage in a reporting violation. (*Id.* ¶ 28.) In 2013, a trainmaster in Memphis also received discipline for misreporting. (*Id.*)

II. ANALYSIS

A. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland Cnty. Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The moving party has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the non-moving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

In response, the non-moving party must go beyond the pleadings and present significant probative evidence to demonstrate that there is more than "some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993); *see also LaPointe*, 8 F.3d at 378. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported

motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247—48 (1986); *LaPointe*, 8 F.3d at 378.

In deciding a motion for summary judgment, the "[c]ourt must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993)(quoting *Anderson*, 477 U.S. at 251—52). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Patton*, 8 F.3d at 346; *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

However, to defeat a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 252; *LaPointe*, 8 F.3d at 378. Finally, a court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Anderson*, 477 U.S. at 255; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Sarbanes-Oxley Act

In this whistleblower complaint, Wallender alleges that the Defendants violated the SOX's whistle-blower protection provision, 18 U.S.C. § 1514A(a), by discharging him because he provided information and assisted in an investigation regarding conduct that he reasonably believed constituted mail, wire, securities fraud, violation of S.E.C. rules or regulations, and violations of federal laws relating to fraud against shareholders. (Am. Compl. ¶ 56, ECF No. 38.) Specifically, Wallender alleges that Martin, the General Superintendent at Harrison Yard and Wallender's boss, required him to "engage in a series of schemes that fraudulently manipulated" the railroad's terminal dwell statistics. (*Id.* ¶¶ 20-22.) The remaining defendants, Wallender argues, sanctioned the practice of misreporting this train data, protected Martin from being fired, disciplined, and ultimately fired Wallender in retaliation for his blowing the whistle on Martin's misconduct. (*Id.* ¶¶ 28-32.)

Congress enacted the Sarbanes-Oxley Act to "safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1161 (2014). Section 1514A of title 18

of SOX is intended to "protect[] employees when they take lawful acts to disclose information or otherwise assist in detecting and stopping actions which they reasonably believe to be fraudulent." *Bechtel v. Admin. Review. Bd.*, 710 F.3d 443, 446 (2d Cir. 2013)(internal quotation marks and ellipsis omitted).

Section 1514A of SOX states that an action brought for *de novo* review in a district court "shall be governed by the legal burdens of proof set forth in [49 U.S.C. § 42121(b)]" which provides that the plaintiff bears the burden of showing by a preponderance of evidence that protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B). If the plaintiff meets his burden of establishing a *prima facie* case, then the employer may avoid liability if it can demonstrate "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); *Riddle v. First Tenn. Bank, Nat. Ass'n*, 497 F. App'x 588, 596 (6th Cir. 2012); *Sussberg v. K-Mart Holding Corp.*, 463 F. Supp. 2d 704, 712 (E.D. Mich. 2006); *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003; ALJ No. 2007-SOX-005, slip op. at 11 (Dep't of Labor Sept. 13, 2011);[15] *see also* 29 C.F.R. § 1980.109(b).

[15]This case is available at http://employmentlawgroupblog.com/wp-content/Menendez.pdf.

1. *Prima Facie Case*

Section 1514A of SOX provides, in pertinent part, that:

> (a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78*c*), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> . . .
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

18 U.S.C. § 1514A(a).

The Sixth Circuit has explained that to prevail on a SOX whistle-blower protection claim, a plaintiff must prove by a preponderance of evidence that: (1) he engaged in a protected

activity; (2) the defendant knew that the plaintiff engaged in such activity; (3) the plaintiff suffered an unfavorable personnel action; and (4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. *Riddle*, 497 F. App'x at 594 (citing *Walton v. Nova Info. Sys.*, No. 3:06-CV-292, 2008 WL 1751525, at *7 (E.D. Tenn. Apr. 11, 2008)); *accord Bechtel*, 710 F.3d at 447 (internal quotations and citation omitted); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009)(quotation omitted); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351-52 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)(citations omitted); 29 C.F.R. § 1980.104(e)(2)(listing the *prima facie* elements as stated in Department of Labor regulations). At the summary judgment posture, a plaintiff need only demonstrate that a rational factfinder could determine that the plaintiff has made his *prima facie* case. *See Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 441 (S.D.N.Y. 2013).

a. Protected Activity

In order to receive the whistle-blower protections of SOX, Wallender must have provided information which he reasonably believed constituted a violation of one of the six enumerated categories of misconduct contained in 18 U.S.C. § 1514A, which are: (1) mail fraud; (2) wire fraud; (3) bank fraud; (4)

securities fraud; (5) violations of any rule or regulation of the SEC; or (6) violations of any provision of federal law relating to fraud against shareholders. *See Riddle*, 497 F. App'x at 595 (citing *Allen*, 514 F.3d at 476–77). The Sixth Circuit, relying on an administrative decision by the U.S. Department of Labor's Administrative Review Board ("ARB") called *Platone v. FLYI, Inc.*, ARB Case No. 04–154, 2006 WL 3246910, at *8 (Dep't of Labor Sept. 29, 2006), held in *Riddle* in August of 2102 that a plaintiff's actions must "definitively and specifically" relate to one of the listed categories of violations within § 1514A(a)(1). *Riddle*, 497 F. App'x at 595 (citing *Allen*, 514 F.3d at 476–77 (citing *Platone*)). However, the ARB, sitting *en banc*, in May 2011 took issue with *Platone's* "definitive and specific" standard, finding that such a heightened standard is in conflict with the legislative intent and plain language of SOX to protect "all good faith and reasonable reporting of fraud." *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 WL 2517148, at *15 (Dep't of Labor May 25, 2011). Instead, the ARB adopted a "reasonable belief" standard.

Courts generally will defer to an agency's interpretation of a statute if (1) "Congress has not directly addressed the precise question at issue," and (2) the agency's interpretation "is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467

U.S. 837, 843 (1984). *Chevron* deference is appropriate when it is obvious from "statutory circumstances that Congress would expect the agency to be able to speak with the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Congress explicitly delegated to the Secretary of Labor authority to enforce § 1514A by formal adjudication. 18 U.S.C. § 1514A(b)(1)(A). The Secretary in turn delegated her enforcement authority to the ARB. *See* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Generally, a statutory delegation of adjudicative power also signals a delegation of interpretive authority by Congress that merits *Chevron* deference. *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of . . . adjudication that produces . . . rulings for which deference is claimed."). Accordingly, the Sixth Circuit has held that, "when an agency adopts a particular interpretation of a statute through an adjudication . . . that interpretation normally would be entitled to *Chevron* deference." *Mid-Am. Care Found. v. N.L.R.B.*, 148 F.3d 638, 642 (6th Cir. 1998)(citation omitted).

While the Sixth Circuit did not discuss *Sylvester* in *Riddle* (which was decided after *Sylvester)* or indicate in *Riddle*

whether it intended to adopt or reject the ARB's new interpretation of protected activity in *Sylvester*, this court finds that the ARB's standard for protected activity announced in *Sylvester* is reasonable and therefore merits *Chevron* deference.[16] *Accord Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014)(concluding that the ARB's reasoning in *Sylvester* is reasonable and merits dereference); *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109 (5th Cir. 2014)(adopting the *Sylvester* standard); *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1131-32 & n.7 (10th Cir. 2013)(recognizing but making no determination on the adoption of *Sylvester*); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d

[16]In adopting the new standard the Third Circuit noted:

> The fact that the ARB reconsidered and abandoned the "definitive and specific" standard does not preclude our deference to the reasonable belief standard it subsequently announced in *Sylvester.* In *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Court explained that "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Id.* at 981, 125 S.Ct. 2688. The Court elaborated that "if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* (internal quotation marks omitted). Here, the ARB thoroughly explained why it reversed the course it previously set in *Platone. See Sylvester,* 2011 WL 2165854, at *14–15. Therefore, *Chevron* deference applies.

Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013).

Cir. 2013)(adopting *Sylvester*); *Taylor v. Fannie Mae*, No. 11-CV-01189 (RCL), 2014 WL 4219553, at *3 (D.D.C. Aug. 25, 2014)(same); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 136 (D.P.R. 2014)(same); *Leshinsky*, 942 F. Supp. 2d at 443 (same); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 298 n.3 (D. Conn. 2012)(partially adopting *Sylvester*).

The ARB clarified in *Sylvester* that "the critical focus is on whether the employee reported conduct that he or she *reasonably believes* constituted a violation of federal law," and "not whether that information 'definitively and specifically' described one or more of those violations." *Sylvester*, 2011 WL 2517148, at *17. A plaintiff can have a reasonable belief even if he "fails to allege, prove, or approximate specific elements of fraud." *Id.* at *20; *Wiest*, 710 F.3d at 132 (stating that a plaintiff fulfills his duty under SOX when he "identif[ies] conduct that falls within the ample bounds of the anti-fraud laws"); *accord* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg 52104-01 (Aug. 24, 2004) (noting that the purpose of a protected report is not to expose illegality, but to "trigger an investigation to determine whether evidence of discrimination exists"). Thus, although the complaint need not definitively and specifically relate to one of the enumerated

categories, "the complaint must still generally address or relate to one of the enumerated categories of corporate fraud set forth in [§ 1514A]." *Clark v. Wells Fargo Home Mortg.*, ALJ Case No. 2012-SOX-00003, slip op. at 16 (Aug. 9, 2012);[17] *Sylvester*, 2011 WL 2517148, at *22.

i. Whether the Conduct Reported by Wallender Generally Relates to One of the Enumerated Categories

The Defendants argue that Wallender did not engage in protected activity because Wallender's discussions with Rothwell regarding Martin's train misreporting in which Wallender turned over emails and a voice recording of Martin did not definitively and specifically relate to securities or shareholder fraud. (Defs.' Mem. of Law in Supp. of Summ. J. 4, ECF No. 61-1.) Having adopted the ARB's interpretation in *Sylvester*, the court finds that Wallender's report to Rothwell need not definitively and specifically describe the violation asserted; rather Wallender need only have a reasonable belief that the reported conduct related to one of the violations listed in §1514A. *See Sylvester* at *16-17. Thus, contrary to the Defendants' assertion, Wallender need not identify any federal law relating to fraud against shareholders that Defendants violated. *Sylvester*, 2011 WL 2517148, at *20 ("[A] complainant need not

[17]The ALJ's decision is available here: http://www.oalj.dol.gov/Decisions/ALJ/SOX/2012/CLARK_ANDREW_v_WELLS_FARGO_HOME_MOR_2012SOX00003_(AUG_09_2012)_153321_CADEC_SD.PDF.

prove a violation of the substantive laws . . . ."); *see also Villanueva*, 743 F.3d at 109-10 ("An employee need not cite a code section he believes was violated in his communications to his employer, but the employee's communications must identify the specific conduct that the employee believes to be illegal." (quoting *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008)); *see also Riddle v. First Tenn. Bank*, No. 3:10-CV-0578, 2011 WL 4348298, at *6 (M.D. Tenn. Sept. 16, 2011)("Nevertheless, though reasonable belief is required, because SOX is intended to foster a corporate culture that encourages internal vigilance against corporate wrongdoing, a plaintiff need not show an actual violation or quote a code section he believes was contravened." (citing *Fraser v. Fiduciary Trust Co. Intern.*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006))). In the present case, Wallender did not cite to a specific law during his interview with Rothwell in August 2012; nevertheless, Wallender has identified specific conduct on the part of Martin which he asserts he reasonably believed it was illegal.

Further, the Defendants argue that the conduct reported by Wallender was too minor to breach the materiality threshold required in an allegation of securities fraud, and consequently, it was not reasonable for Wallender to believe that the incidents he reported to Rothwell could have a material effect on the Canadian National's financial condition or

shareholder value. (Defs.' Mem. of Law in Supp. of Summ. J. 5-8, ECF No. 61-1.) The Defendants' argument is again foreclosed by *Sylvester* because Wallender does not have to identify specific elements of a securities law violation, or otherwise "quantify the effect of the wrongdoing the [defendant] committed." *Sylvester*, 2011 WL 2517148, at *21.[18]

Noting in *Sylvester* that nothing in § 1514A contains an independent materiality requirement, the ARB held that "we do not impose a materiality requirement on the communication that the complainants contend is protected activity." *Id.* at *21 (citing *Welch*, 536 F.3d at 276). Thus, Wallender need not allege, prove or proximate that the misreporting of the train data "satisfies securities law 'materiality' standards, was done intentionally, was relied upon by shareholders, and that the shareholders suffered a loss because of the irregularity." *Id.* In other words, Wallender does not need to prove or approximate the specific elements of a securities law violation in order to show that he had a reasonable belief of a violation of the enumerated statutes. *Id.* at *20.

[18]The specific elements of a securities law violation which, prior to *Sylvester*, were required for a showing of shareholder fraud, are: (1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Sylvester*, 2011 WL 2517148, at *20 (citing *Day v. Staples, Inc.*, 555 F.3d 42, 55-56 (1st Cir. 2009); *see also Riddle*, 497 F. App'x at 596.

Further, the Defendants argue that train reporting information is operational data, not financial data, and thus it is attenuated from the financial status of the company. (Defs.' Mem. of Law in Supp. of Summ. J. 8, ECF No. 61-1.) However, the activity reported need not necessarily directly involve financial information. For instance, in *Sylvester*, the complainants alleged that the defendants committed fraud in the form of failing to disclose clinical data to shareholders in an attempt to maximize the profits of the company, which in turn affected shareholder value. *Sylvester*, 2011 WL 2517148, at *2-4. Specifically, the complainants in *Sylvester* alleged that the defendant withheld clinical data "to maximize short-term revenue from the tarnished clinical study at the expense of the long-term financial performance of the company . . . at a time when he knew that disclosure of this fraudulent data would have significantly reduced [the company's] revenue and reputation." *Id.* at *4. The Administrative Law Judge ("ALJ") dismissed the complaints, but the ARB reversed, finding that the complaint sufficiently pled protected activity under SOX because they "describe[d] how the allegedly fraudulent activities relate[d] to the financial status of the company" and also "state[d] that those activities relate[d] to one or more of the six enumerated categories of violations in SOX Section [1514A]." *Id.* at 22.

Although the plaintiff need not report financial data to qualify for SOX protection, the ARB noted in *Sylvester* that "[i]t may well be that a complainant's complaint concerns such a trivial matter," in terms of its relationship to the fraud asserted, "that he or she did not engage in protected activity under [§ 1514A]." *Sylvester*, 2011 WL 2517148, at *21. When promulgating rules that implemented section 806 of SOX, the Department of Labor's Occupational Safety and Health Administration ("OSHA") considered public comments expressing concern that under the SOX's description of protected activity, "employees might be able to bring claims based on ordinary business and employment disputes that the statute was not intended to address." Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 FR 52104-01 (Aug. 24, 2004). Commentators suggested, therefore, that § 1514A "provide that to be protected, a reported violation must affect as much as 3% of a company's revenue before it is considered an issue that would implicate the securities laws." *Id.* OSHA declined to adopt a hardline rule noting that the determination whether "employee disclosures concerning alleged corporate fraud are protected under Sarbanes-Oxley will depend on the specific facts of each case." *Id.*

Although Wallender alleges in his complaint that he made reports regarding mail fraud, wire fraud, bank fraud, violation of SEC rules, and shareholder fraud, it appears that the focus of Wallender's allegations is his claim of shareholder fraud.[19] In support of this claim, Wallender has alleged that the misreporting of efficiency and performance metrics and derailments constitutes a betrayal of the company's obligation to its shareholders. (Pl.'s Resp. to Defs.' Mot. for Summ. J. 7-8, ECF No. 75.)

Wallender relies on Creel's February 21, 2012 letter to the operating leaders which states that the company has an obligation to shareholders to provide accurate data and that accurate data helps in identifying opportunities and recognizing positive performance trends. (*Id.*) Wallender also relies on a statement published in a section of Canadian National's website entitled "Shareholder Resources," which states that Canadian National's performance measures are one of the tools the shareholders can use to assess the company's performance. The Defendants agree that some efficiency metrics are sometimes shared with investors on conference calls, and Wallender has put forth deposition testimony by another employee, Bourzikas, that

[19] To the extent Wallender contends he reported conduct constituting securities fraud, the analysis herein would be the same for securities fraud.

the train performance metrics information is shared with investors in quarterly stock market conference calls.

Wallender also alleges in his complaint that by intimidating employees into not reporting accidents, Canadian National reduces its financial exposure to personal injury lawsuits under the Federal Employers' Liability Act. (Am. Compl. ¶ 34, ECF No. 38.) Wallender has attached to his complaint reports by two different securities analysts which demonstrate that a company's train speed and dwell time are used to compare that company's efficiency to its peers. (*Id.* ¶¶ 16-17 & Exs. B, C.) Thus, Wallender alleges by manipulating these statistics, Canadian National and Creel have "benefitted from inflated prices for Canadian National's shares." (*Id.* ¶¶ 34, 25.)

Drawing all inferences in favor of Wallender, the court finds that Wallender has sufficiently pled a generalized connection between the reported activity and the financial status of the company. As required by *Sylvester*, Wallender has described that misreporting of train statistics has the effect of making the train performance data seem more efficient and has stated that such activity betrays Canadian National's obligation to its shareholders. *See Sylvester*, 2011 WL 2517148 at *3-4, 21-22 (finding that covering up clinical research fraud could affect the financial status of the company); *see also Gladitsch*

v. Neo@Ogilvy, No. 11 Civ. 919, 2012 WL 1003513, at *1, *7 (S.D.N.Y. Mar. 21, 2012) (holding that a complaint was sufficient under § 1514A where it alleged that defendants had deliberately overbilled the defendants' largest client and that the overbilling could be detrimental to that business relationship in addition to "crippl[ing] shareholder confidence" through the reporting of "artificially inflated revenues"); *cf. Nielsen*, 762 F.3d at 222 (finding that the plaintiff's allegation that an employee failed to review fire safety designs constituted a trivial matter in terms of its relationship to shareholder interests); *Clark*, ALJ Case No. 2012-SOX-00003, slip op. at 16 (finding that the plaintiff's allegation that the defendants engaged in fraud by telling him to record telephone meetings as face-to-face meetings when documenting sales call did not fall into any of the categories of corporate fraud).

Thus, the court cannot decide as a matter of law that the connection between train metrics manipulation and the financial health of the company is "such a trivial matter" that it does not qualify for protection under § 1514A. *Sylvester*, 2011 WL 2517148, at *21.

ii. Whether Wallender Had a Reasonable Belief

Even though the complained-of conduct could fall within the bounds of shareholder fraud, in order to constitute protected activity under § 1514A, Wallender must have reasonably believed

that Martin's conduct he complained of violated any law relating to shareholder fraud by satisfying a two-prong test. The ARB has "interpreted the concept of 'reasonable belief' to require a complainant to have a subjective belief that the complained-of conduct constitutes a violation of relevant law, and also that the belief is objectively reasonable." *Sylvester*, 2011 WL 2517148, at *12 (citations omitted).[20] A reasonable but mistaken belief that respondent's conduct constitutes a violation of the applicable law can constitute protected activity. *Id.* at *14; *Van Asdale*, 557 F.3d at 1002.

A belief is objectively reasonable when a reasonable person "'in the same factual circumstances with the same training and experience as the aggrieved employee,'" would believe that the conduct implicated in the employee's communication could rise to the level of a violation of one of the enumerated provisions in section 1514A. *Sylvester*, 2011 WL 2517148, at *12 (quoting *Harp*, 558 F.3d at 723); *see also Wiest*, 710 F.3d at 132.

[20]This interpretation has been widely accepted by courts. *See, e.g.*, *Lockheed Martin Corp.*, 717 F.3d 1121, 1132 (10th Cir. 2013); *Wiest v. Lynch*, 710 F.3d 121, 130 (3d Cir. 2013); *Fraser v. Fiduciary Trust Co. Int'l*, 396 F. App'x 734, 735 (2d Cir. 2010); *Gale v. U.S. Dep't of Labor*, 384 F. App'x 926, 929 (11th Cir. 2010); *Pearl v. DST Sys., Inc.*, 359 F. App'x 680, 681 (8th Cir. 2010); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1000 (9th Cir. 2009); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42, 54 (1st Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 275 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). *See also Riddle v. First Tenn. Bank*, No. 3:10-CV-0578, 2011 WL 4348298, at *6 (M.D. Tenn. Sept. 16, 2011).

The ARB observed in *Sylvester* that often the determination of "objective reasonableness" is a mixed question of law and fact. *Sylvester*, 2011 WL 2517148 at *12 (citing *Allen*, 514 F.3d at 477-78; *Welch*, 536 F.3d at 277-78 n.4). Accordingly, the objective reasonableness of an employee's belief "'should be decided as a matter of law only when no reasonable person could have believed[] that the facts amounted to a violation.'" *Id.* at *13 (citing *Livingston*, 520 F.3d at 361). "'[I]f reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law.'" *Id.*

An employee can form an objectively reasonable belief based on his employer's representations. In *Parexel Int'l Corp. v. Feliciano*, No. 04-CV-3798, 2008 WL 5101642 (E.D. Pa. Dec. 3, 2008), the court denied the defendant's motion for judgment as a matter of law based, *inter alia*, on evidence that the plaintiff relied upon the employer's representations to form a belief that defendant's conduct constituted mail fraud, wire fraud, or shareholder fraud. *Id.* at *3. Similarly, in *Sequeira v. KB Home*, 716 F. Supp. 2d 539 (S.D. Tex. 2009), the court found that plaintiff's belief that his employer was engaged in shareholder fraud was objectively reasonable given his superiors' representations that a spreadsheet, which the plaintiff believed

was based on incorrect information, was used for Sarbanes-Oxley compliance. *Id.* at 552.

The Defendants argue that Wallender's belief was not objectively reasonable but some of the cases relied on by the Defendants are not persuasive because they were either decided prior to the *Sylvester* case and thus misstate the applicable standard or the courts did not apply the standard promulgated in *Sylvester*. *See Livingston*, 520 F.3d at 3545 (requiring that the plaintiff have reasonably believed that the defendant made a material misrepresentation with the requisite scienter in order to qualify for SOX whistleblower protection); *Leak v. Dominion Res. Servs.*, ALJ Case No. 2006-SOX-12, 2006 WL 5676804, at *9 (May 12, 2006)(requiring that protected activity include reporting of financial data); *Miller v. Stifel, Nocolaus & Co., Inc.*, 812 F. Supp. 2d 975, 987-88 (finding that non-financial lapses are not SOX violations).

In another case relied on by the Defendants, *Brondyke v. Bridgepoint Educ., Inc.*, 2014 U.S. Dist. LEXIS 58161 (S.D. Iowa Apr. 25, 2014), the plaintiff reported that the Vice President's executive assistant was using the Vice President's password to approve expenses. *Id.* at *6. The plaintiff Brondyke believed that the assistant's actions violated internal computer use polices, but she did not believe that either the assistant or the Vice President was attempting to defraud the company's

shareholders and she "concede[d] she had no factual basis upon which to suspect fraud on shareholders." *Id.* at *9. The district court found it "important that Brondyke herself admitted that she did not ever believe a fraud or other SOX violation was occurring." *Id.* at *21. This factor, along with other factors such as Brondyke's extensive professional experience, her lack of investigation of the fraud, her concession that she had no factual basis to suspect a SOX violation, led the court to conclude that Brondyke's subjective belief was not objectively reasonable. *Id.* at *23-24.[21]

Wallender, unlike Brondyke, has not conceded that he had no factual basis upon which to suspect fraud; on the contrary, Wallender stated in his deposition that he believed he was reporting shareholder fraud to Rothwell based on representations by Canadian National. Wallender asserts that his belief that the misreporting of the train performance data constitutes shareholder fraud is reasonable in light of Canadian National's representations. Wallender points to Creel's February 21, 2012 letter to the operating leaders, which stated in part that the employees had an obligation to the shareholders to refrain from manipulating data. Wallender also relies on a subsection in Canadian National's website entitled "Shareholder Resources,"

[21]Although *Brondyke* is a post-*Sylvester* case, the court adhered to the "definitively and specifically" standard. *Id.* at *19.

which states that the railroad performance measures are among the indicators of Canadian National's "overall performance, financial or otherwise." If Wallender believed that the train statistics influenced investment decisions by shareholders, it is not implausible that he believed Martin's conduct constituted fraud on shareholders. *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 530 (S.D.N.Y. May 8, 2014)(finding that it was not implausible for the plaintiff to believe that defendant's conduct of failing to disclose details of its risk management practices, which would "affect the actions taken by the board of directors and logically influence investment decisions by shareholders," constituted fraud on shareholders).

Wallender further maintains that given his status as a "trainmaster" and his lack of knowledge about the company's financials, it is objectively reasonable for him to believe that misreporting train data constituted shareholder fraud. Wallender's background "does not indicate any particular expertise which would make it objectively unreasonable" for him to believe that misreporting of train statistics constituted shareholder fraud. *Barker*, 888 F. Supp. 2d at 299 (D. Conn. 2012); *Sylvester*, 2011 WL 2517148, at *12 (noting that had the plaintiff been a legal expert, it might not have been objectively reasonable); *cf. Harkness v. C-Bass Diamond, LLC.*, 2010 WL 997101, at *6 (D. Md. Mar. 16, 2010)(granting summary

judgment to defendant where plaintiff, a lawyer with twenty years of experience, "had the resources available to her," but failed to conduct any "legal research to ascertain the applicability of various laws").

Finally, Wallender relies on the deposition testimony of Assistant Superintendent Bourzikas in which he states that the employees were pushed to misreport train data, such as derailments, car movements, and train report, (Bourzikas's Deposition 132, ECF No. 61-13), and that there was a big push to increase train speed and velocity, (Bourzikas's Deposition 77, ECF No. 86-6). Bourzikas also stated that the train metrics are reported in Wall Street calls and that he himself usually dialed into those calls quarterly. (Bourzikas's Deposition 76, ECF No. 75-4.) This evidence makes it plausible that another similarly-situated employee with similar knowledge could believe that misreporting train data could rise to the level of shareholder fraud. Thus, considering the evidence in a light most favorable to Wallender, a reasonable jury could find that Wallender had an objectively reasonable belief that misreporting train data violated a law regarding shareholder fraud.

Defendants also argue that Wallender lacked a subjective belief that the misreporting of train data constituted shareholder fraud. Defendants argue that Wallender had himself engaged in the practice of misreporting for years without

reporting or attempting to cease the practice and that such behavior shows that he did not have a subjective belief that he was engaging in shareholder fraud. (Defs.' Mem. of Law in Supp. of Summ. J. 8–9, ECF No. 61-1.) Further, Defendants point out that Wallender admitted to not knowing how efficiency metrics relate to shareholder decisionmaking and he remained a Canadian National stockholder himself up to the time of his discharge. (Defs.' Mem. of Law in Supp. of Summ. J. 9, ECF No. 61-1.)

In addition to having an objectively reasonable belief, Wallender must also have an actual, good faith, subjective belief that that the "conduct complained of constituted a violation of [shareholder fraud]." *Sylvester*, 2011 WL 2517148, at *12. Irrespective of whether Wallender reported a violation of relevant law, "'[i]t would make no sense to allow [Wallender] to proceed if he himself did not hold the belief required by the statute . . . .'" *Leshinsky*, 942 F. Supp. 2d at 447 (citing *Livingston*, 520 F.3d at 352).

In *Gauthier v. Shaw Group, Inc.*, 2012 WL 6043012, a post-*Sylvester* case, the plaintiff Gauthier performed an audit of a nuclear steel supplier and discovered that the supplier shipped defective steel. *Id.* at *1. Gauthier alleged that his employer tried to cover up the audit report's conclusion, and after Gauthier reported his concerns, he was terminated. *Id.* at *1-2. Granting the defendant's motion for summary judgment, the court

found that the Gauthier was "subjectively concerned not with securities violations, but of lapses under nuclear safety regulations." *Id.* at *6. Therefore, Gauthier failed to allege any conduct by the defendants relating to a fraud against shareholders. *Id.* [22]

In *Gale v. United States Department of Labor,* 384 F. App'x 926, (11th Cir. 2010), the Eleventh Circuit found that the plaintiff lacked subjective belief where he admitted at his deposition that he "did not actually believe that [defendant's] activities were illegal or fraudulent" and where plaintiff "made several other statements indicating his lack of a subjective belief." *Id.* at 930. Similarly, in *Brondyke*, 2014 U.S. Dist. LEXIS 58161, at *20, the court found that the plaintiff Brondyke lacked subjective belief because she agreed in her deposition that she did not believe the conduct she complained of was fraudulent.

Wallender's admission that he had engaged in misreporting for a long time as well as his decision to remain a stockholder is contrary to a subjective belief that identical conduct by Martin constituted a violation of law. Nevertheless, Wallender

[22]Gauthier also premised his SOX claim on a theory that the fraudulent audit violated certain regulations and could have a financial impact on the company. *Id.* at *5 n.3. Without considering this argument, the court held that even if true, Gauthier still lacked the requisite objective and subjective belief that the defendant's behavior constituted fraud. *Id.*

has presented sufficient evidence to raise a possibility that he had a subjective belief that fraud was taking place. Unlike the plaintiffs in *Gauthier* and *Gale*, Wallender stated in his deposition that he subjectively believed that Martin's conduct constituted shareholder fraud and that he went along with it because he was directed by Martin, Vena and others to improperly report the railroad performance metrics. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 29, ECF No. 75-1.) He further stated that he specifically told Rothwell that he was reporting fraud on shareholders, (Pl.'s Resp. to Defs.' Mot. for Summ. J, Ex. E at 118, 128, ECF No. 75-6), and, unlike Gauthier whose subjective concern was safety, Wallender asserts that he blew the whistle on the fraud because he no longer wanted to participate in defrauding and misleading shareholders, (*Id.* at 108-109; Am. Compl. ¶ 32, ECF No. 38).

Although Wallender concedes that he does not know how financial analysts make recommendations on stock and cannot identify any shareholder who made a decision about buying company stock based on dwell time or other statistics, Wallender need not have such specific information to form a belief that the manipulation of data was illegal. Wallender has presented evidence of company representations that efficiency affects shareholder value and it is plausible given his lack of knowledge about financial valuations to have a subjective belief

that manipulating train data would have an overall adverse effect on the financial status of the company. Plus, as discussed above, Wallender does not need to specifically allege, prove or proximate that the misreporting of dwell time or other statistics "was relied upon by shareholders, [or] that shareholders suffered a loss because of the irregularity." *Sylvester*, 2011 WL 2517148, at *21.

Lastly, the Defendants raise the argument that Wallender's report to Rothwell was not made in good faith but it was self-interested because he provided information to Rothwell only when his back was against the wall. (Defs.' Mem. of Law in Supp. of Summ. J. 9, ECF No. 61-1.) However, the record shows that Wallender had compiled the information he provided to Rothwell over some time; thus, he did not suddenly decide to point his finger at Martin in order to protect his own wrongdoing. Although whistleblower statutes are not meant to protect employees who blow the whistle on their own misconduct, Wallender maintains that he blew the whistle on Martin's own misreporting of train data and Martin's orders to the other trainmasters to engage in similar behavior. Taking this evidence in the light most favorable to the plaintiff, Wallender has set forth specific facts to demonstrate that there is a genuine dispute of material fact over whether he subjectively

and in good faith believed the conduct he reported constituted shareholder fraud.

b. Defendants' Knowledge of Wallender's Protected Activity

The second element of a *prima facie* case requires the plaintiff to prove that the employer knew he engaged in a protected activity. The employee need only make a protected disclosure to an individual "with supervisory authority over" him. 18 U.S.C. § 1514A(a)(1)(C). "Once an employee's supervisor has actual knowledge of the protected activity, that knowledge is attributed to the ultimate decision-maker." *Leznik v. Nektar Therapeutics, Inc.*, ALJ Case No. 2006-SOX-00094, 2007 WL 5596626, at *8 (Nov. 16, 2007)(citing *Deremer v. Gulf Coast*, ALJ Case No. 2006-SOX-2 at 61-62 (June 29, 2007); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1378 (N.D. Ga. 2004)("To permit an employer to simply bring in a manager to be the 'sole decision-maker' for the purpose of terminating a complainant would eviscerate the protection afforded to employees by Sarbanes-Oxley.")).

The Defendants have not argued in their summary judgment motions that they lacked knowledge of Wallender's role in Martin's investigations. It is undisputed from the record that Creel was concerned with misreporting at Illinois Central and that he sent Rothwell to investigate. Therefore, it is more

likely than not that Canadian National, Illinois Central and Creel had knowledge of Wallender's reports to Rothwell. As to Martin's knowledge, it is undisputed from the record that after Rothwell's investigation Martin made a statement to the effect, "For every one thing you have on me, I got ten things on you." (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 15, ECF No. 86.) It may be inferred from this statement that Martin was aware of Wallender's reports to Rothwell. Accordingly, Wallender has come forth with sufficient evidence from which a jury could infer that all the defendants, including Martin and Creel, were aware of Wallender's protected activity.

c. Unfavorable Personnel Action

The third element of a *prima facie* case of a SOX claim requires that plaintiff show that the employer took an unfavorable employment action against the employee. 49 U.S.C. § 42121(b). Employers are barred from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee because of the employee's protected activity. 18 U.S.C. § 1514A(a). It is undisputed that Wallender was terminated by Canadian National — via Creel, Vena, and Klaus — from his position as a trainmaster on September 30, 2012, and this action is *per se* an adverse personnel action. *Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461 CW, 2012 WL 2708517, at *16 (N.D. Cal. July 6,

2012)(stating that the ARB considers actions such as termination of employment, suspensions, and demotions as "*per se* adverse" (citing *Williams v. Am. Airlines, Inc.*, ARB Case No. 09-018, at 15 n.75 (2010))). Thus, Wallender has established this element of a *prima facie* case as to defendants Canadian National and Creel.

Martin maintains that he is entitled to summary judgment on the ground that Creel, Vena, and Klaus were the sole decision-makers and that he had no involvement in the decision to terminate Wallender. (Martin's Mot. for Summ. J. 2, ECF No. 62-1.) SOX makes clear that the misconduct it protects against is not only that of a publicly traded company itself, but also that of "any officer, employee, contractor, subcontractor, or agent of such company," who retaliates or otherwise discriminates against the whistleblowing employee. *See* 18 U.S.C. § 1514A(a). Thus, each defendant named in the complaint: (1) must have actual knowledge that the employee engaged in protected activity; (2) must have been "materially involved in the decision to take the unfavorable personnel action;" and (3) there must be a nexus between the protected activity and the adverse action that the named defendant took. *Leznik*, 2007 WL 5596626, at *11. In his motion for summary judgment, Martin challenges whether Wallender can establish the second prong,

that is, that Martin was materially involved in the decision to terminate him.

Wallender admits that after the September 18, 2012 incident was reported to Klaus, Martin was removed from the process and had no involvement in the investigation or ultimate disciplinary decision to terminate Wallender. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 51, ECF No. 75-1.) Wallender, however, maintains that Martin did not inform Wallender of Vena's August instructions to stop WOCing trains into the Yard. (Pl.'s Resp. To Martin's Mot. for Summ. J. 3, ECF No. 76.) Further, Wallender maintains that Martin had instructed him to keep engaging in misreporting and then turned Wallender in for doing exactly as he had been instructed. (*Id.* at 3-4.) Moreover, it is undisputed that Martin told Wallender that for every one thing they had on him, he had ten things on them. (*Id.* at 3.) This evidence, Wallender argues, leads to the inference that Martin wanted Wallender terminated. (*Id.* at 4.)[23]

[23]Wallender also relies on Bourzikas's deposition testimony in which he states that one or more unidentified declarants told Bourzikas that Martin had told them that he got Wallender fired. (*See* Bourzikas's Deposition 47, 49-50, ECF No. 84-1.) Bourzikas's statement presents a double-hearsay issue, and to be admissible, each separate statement must either be excluded from the hearsay definition or fall within a hearsay exception. *See United States v. Gibson*, 409 F.3d 325, 337 (6th Cir. 2005). The first level of hearsay is Martin's statement to the unidentified declarants that Martin got Wallender fired. This statement qualifies for admissibility under Federal Rule of Evidence 801(d)(2)(A) because it was made by Martin and offered against

In essence, Wallender's claim against Martin does not focus on Martin's involvement in the ultimate decision to terminate Wallender, but it is based on Martin's conduct leading to Wallender's violation of the policy and Martin's decision to

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Martin. The second level of hearsay is the unidentified declarant's statement to Bourzikas regarding what Martin told them. This statement may be admissible as non-hearsay under Federal Rule of Evidence 801(d)(2)(D), which provides that a statement is not hearsay if it is offered against a party and is "was made by the party's agent or employee on a matter within the scope of that relationship." The critical question is therefore whether there is evidence that the unidentified declarants were speaking on a matter within the scope of their employment.

In making this determination, the court must consider the contents of the statement, but the statement does not by itself establish the existence of the relationship under Rule 801(d)(2)(D). *See* Fed. R. Evid. 801 advisory committee's notes, 1997 Amendment. The court must additionally consider "circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement." *Id.* There is nothing on the record to suggest the identity of the declarants or whether their statement was in the scope of their employment. Therefore, the statement is inadmissible hearsay. *See Back v. Nestle USA, Inc.*, 694 F.3d 571, 578 (6th Cir. 2012)(stating that if the plaintiff "had presented other outside evidence sufficient to satisfy Rule 801(d)(2)(D)'s scope requirement, the statement would be admissible" hearsay"). The proponent of the evidence has a "heavy burden . . . to satisfy evidentiary and trustworthiness requirements," and Wallender has not met this heavy burden with regards to Bourzikas's statement. *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988). Because this evidence is inadmissible at trial as hearsay, it cannot be used to survive a motion for summary judgment. *See Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009)(stating that to survive a properly supported motion for summary judgment, a non-movant must "make [his] case with a showing of facts that can be established by evidence that will be admissible at trial"); *Carden*, 850 F.2d at 1002 (stating that the plaintiff who sought to admit the statement had the burden to identify the unknown declarants and to establish that the statement he made was within the scope of their employment).

report Wallender's actions on September 18, 2012 to Klaus, which resulted in Wallender being placed on administrative leave, undergoing an investigation, and his eventual termination. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 51, ECF No. 75-1.)

Taking the evidence in the light most favorable to Wallender, the court finds that there is a genuine issue of fact whether Martin had any material involvement in the chain of Wallender's unfavorable employment actions. It is unclear at this stage whether being put on administrative leave followed by an investigation qualifies as an "unfavorable personnel action." The SOX's whistleblower protection covers a "'very broad spectrum of adverse action[s].'" *Wiest*, 15 F. Supp. 3d at 560 (adopting and quoting the ARB's interpretation of "unfavorable personnel action" in *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, 2011 WL 4915750, at *9 (Dep't of Labor Sept. 13, 2011)). A plaintiff alleging retaliation "need only demonstrate that [the allegedly retaliatory] activity would deter a reasonable person from engaging in protected activity . . . and [the allegedly retaliatory activity] can extend beyond tangibility and ultimate employment actions." *Id.* (citation and internal quotation marks omitted). The ARB has also stated that "the term 'adverse actions' refers to unfavorable employment actions that are more than trivial" actions such as

"petty slights," "minor annoyances," "personality conflicts" and "snubbing by supervisors and coworkers." *Guitron*, 2012 WL 2708517, at *16 (citing *Williams*, ARB Case No. 09-018, at *14). Given the broad spectrum of adverse actions, it is a question of fact whether being placed on administrative leave constitutes an unfavorable personnel action. *Cf. Guitron*, 2012 WL 2708517, at *17 (finding that being placed in administrative leave constituted an unfavorable personnel action).

There is also a genuine dispute of fact whether Martin provided material involvement to the decision to put Wallender on administrative leave which was followed by an investigation and the ultimate termination of Wallender. There is some evidence that Martin held retaliatory animus toward Wallender, and construing the inferences in Wallender's favor, there is a genuine dispute as to whether Martin's conduct led to any unfavorable actions taken towards Wallender. *See Leznik*, 2007 WL 5596626, at *12 (finding a genuine issue of fact regarding a named defendant's material involvement where he consulted with management about the timing and reasons for the plaintiff's termination but did not participate in the final decision to terminate the plaintiff); *cf. In re Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Case Nos. 07-021, 07-022, 2009 WL 2844805, at *6 (Dep't of Labor Aug. 31, 2009)(finding that the defendant who investigated the plaintiff and prepared a report —

but otherwise there was no evidence of any retaliatory intent — was not a decision maker in the termination of plaintiff's employment).

The remaining defendant Illinois Central's role in the decision to terminate Wallender is not straight-forward. Illinois Central is a non-publicly held subsidiary of Canadian National, a publicly held corporation. Nevertheless, because the two entities consolidate financial statements, Illinois Central is also covered by SOX's whistleblower provisions. *See* 18 U.S.C. § 1514A (stating that the whistleblower provisions apply to a publicly traded company "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company."); *see also Wiest*, 15 F. Supp. 3d at 571 (noting that a subsidiary may be subject to SOX's whistleblower provisions on an agency theory).

Creel, Vena, and Klaus, who collectively made the decision to terminate Wallender, are all employees of Canadian National. Martin is the only individual employed by Illinois Central, and, given his position as General Superintendent, he may be treated as Illinois Central's proxy. *See In re Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149, 2006 WL 3246904, at *10 (Dep't of Labor May 31, 2006)("As President of Holdings, Robbins was 'indisputably within that class of an employer organization's officials who may be treated as the

organization's proxy.'" (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998)); *see also Wiest*, 15 F. Supp. 3d at 572-73 (finding that a subsidiary could be held liable based on its high officials' retaliatory conduct). Because it is disputed whether Martin, an Illinois Central proxy, was materially involved in the decision to terminate Wallender, there is also a genuine dispute of fact as well as to whether Illinois Central was materially involved in the decision to terminate Wallender.

d. Contributing Factor to Termination

Defendants maintain that Wallender's SOX claim fails because he cannot establish the fourth element of a *prima facie* case of a SOX violation - that his protected activity was a contributing factor in his termination. (Defs.' Mem. of Law in Supp. of Summ. J. 11, ECF No. 61-1.) In support of this assertion, the Defendants contend that Wallender's termination was legitimately based on his history of misreporting and discipline. (*Id.*) Defendants argue that his intervening misconduct of arriving the train early defeated the inference that his protected conduct contributed to his termination. (Defs.' Mem. of Law in Supp. of Summ. J. 13, ECF No. 61-1.)

To establish a *prima facie* case under § 1514A, Wallender must show that his protected activity "was a contributing factor in the unfavorable personnel action" taken by each of the named

defendants. 49 U.S.C. § 42121(b)(2)(B); *see also Riddle*, 497 F. App'x at 594 (citations omitted); *Bury v. Force Prot., Inc.*, No. CA 2:09-1708-DCN-BM, 2011 WL 2935916, at *1 ((D.S.C. June 27, 2011). As the Tenth Circuit explained in *Lockheed Martin*, 717 F.3d at 1136, and the ARB explained in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB Case No. 04-149, 2006 WL 3246904, at *13 (Dep't of Labor May 31, 2006), the contributing factor standard is significantly more lenient than other causal standards. "A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Klopfenstein*, 2006 WL 3246904, at *13 (citation and internal quotation marks omitted); *see also Lockheed Martin*, 717 F.3d at 1136; *Wiest v. Lynch*, 15 F. Supp. 3d 543, 564 (E.D. Penn. Apr. 16, 2014)("[T]he governing standard requires only that the protected activity be "a contributing factor" in, not the impetus for, the adverse action . . . .").

The plaintiff need not show that protected activity was a significant, motivating, substantial, or predominant factor in the adverse personnel action; "but rather may prevail by showing that the [defendant's] reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Bechtel v. Competitive Techs., Inc.*, ARB Case No. 09-052, 2011 WL 4889269, at *7 (Dep't of Labor Sept. 30, 2011)(citation and internal quotation marks

omitted. Wallender can succeed by "providing either direct or indirect proof of contribution." *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, 2012 WL 1143309, at *6 (Dep't of Labor Mar. 28, 2012)(citation and internal quotation marks omitted); *Bechtel*, 2011 WL 4889269, at *7. Circumstantial evidence or indirect proof of contribution "may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, shifting explanations for an employer's actions, and more." *Bechtel*, 2011 WL 4889269, at *7.

Generally, "the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation; this indirect or circumstantial evidence can establish causation in a whistleblower retaliation case." *Zinn*, 2012 WL 1143309, at *6. In *Riddle*, the Sixth Circuit held that a four-month period between the alleged protected activity and the plaintiff's termination was insufficient to constitute evidence that supported retaliation; nevertheless, the court left open the possibility that a "strong[er temporal proximity might] carry the day by itself." *Riddle*, 497 F. App'x at 596; *Leshinsky*, 942 F. Supp. 2d at 450 ("[W]here a plaintiff relies solely on temporal proximity to prove causation, the protected activity and the plaintiff's termination must be 'very close.'" (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001))); *Barker*, 888 F. Supp. 2d at 300-01 (holding that a two-month

period between the protected activity and the adverse employment action was sufficient to satisfy the causation requirement of a *prima facie* case); *Collins*, 335 F. Supp. 2d at 1379 (finding that a fourteen-day temporal proximity was sufficient to suggest at the summary judgment stage that protected activity was a contributing factor to the unfavorable personnel action).

The ARB has been more lenient and has held that a longer temporal proximity may be sufficient circumstantial evidence to prove that the protected activity contributed to the adverse action. *See Zin*, 2012 WL 1143309, at *7 ("[A] temporal proximity of seven to eight months between protected activity and adverse action may be sufficient . . . ."); *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, slip op. at 3-4, 11 (Dep't of Labor Feb. 28, 2011)(temporal proximity of ten months between complainant's reporting activity and her subsequent adverse action was circumstantial evidence of causation).[24]

Wallender states that he was terminated on September 30, 2012, approximately one month after he reported Martin's conduct to Rothwell. Such close temporal proximity could in itself establish a nexus between Wallender's protected conduct and his termination. Therefore, there is a genuine issue of fact whether the one-month temporal proximity suffices to establish a

[24]The ARB's holding is available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/10_050.SOXP.PDF.

causal connection between the protected activity and Wallender's adverse employment actions.

In addition to the arguments presented by all the defendants, Creel also argues that summary judgment must be granted to him because he did not have any retaliatory animus toward Wallender. (Defs.' Mem. of Law in Supp. of Summ. J. 20, ECF No. 61-1.) Creel insists that Wallender's protected activity was not one of the factors that motivated Creel to terminate Wallender. Wallender, on the other hand, alleges that Creel had animus toward Wallender for reporting Martin's conduct because Creel himself encouraged the practice of misreporting.

Creel has presented extensive evidence that he discouraged misreporting and had issued prior warnings and discipline to the employees who manipulated train metrics. To rebut this evidence, Wallender has merely alleged that Creel gave Martin *carte blanche* authority to manipulate train metrics. This conclusory allegation standing alone is insufficient to suggest animus on the part of Creel. Nevertheless, as stated above, the evidence of one-month temporal proximity is sufficient circumstantial evidence to create a genuine factual dispute as to whether Creel's decision to terminate Wallender was motivated in part by Wallender's protected activity.

As to Martin, timing is not the sole indicium on which Wallender relies to support causation. There is undisputed

evidence in the record that indicates that Martin demonstrated retaliatory animus toward Wallender subsequent to Wallender's report to Rothwell by stating that, "For every one thing you have on me, I got ten things on you." (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 15, ECF No. 86.) From this evidence, it could be inferred that Martin's decision to report Wallender to his superiors, which culminated in the decision to terminate Wallender, was in part motivated by Martin's retaliatory animus toward Wallender. *See Bechtel*, 2011 WL 4889269, at *10 (considering evidence in the record that the defendant demonstrated retaliatory animus to find a causal nexus between the employee's protected activity and the termination of his employment). This evidence in conjunction with the evidence of temporal proximity creates a genuine issue regarding causation as to Martin and Illinois Central.

Defendants further contend that Wallender's history of misreporting and discipline shows that his termination was legitimately based on his pattern of misconduct. (Defs.' Mem. of Law in Supp. of Summ. J. 11, ECF No. 61-1.) Defendants argue that his intervening misconduct of arriving the train early in September of 2012 defeated the inference that his protected conduct in August of 2012 contributed to his termination. (Defs.' Mem. of Law in Supp. of Summ. J. 13, ECF No. 61-1.) The ARB explanation of the contributing factor test

in its recent decision in *Fordham v. Fannie Mae*, ARB Case No. 12-061 (Dep't of Labor Oct. 9, 2014) provides guidance in analyzing the Defendants' argument.[25]

The ALJ in *Fordham* weighed plaintiff Fordham's circumstantial evidence of contributory causation against defendant Fannie Mae's evidence of legitimate, non-retaliatory reasons for Fordham's termination. *Id.* at slip op. 21. The ARB reversed and held that "the determination of whether the complainant has met his burden under SOX of proving 'contributing factor' causation does not involve the weighing of the respondent's evidence of lawful, non-retaliatory reasons for its action." *Id.* Therefore, the ALJ committed error and "ran afoul of the governing statute's legal imperative that . . . the respondent's evidence of legitimate, non-retaliatory reasons for its action is subject to a higher burden of proof than the preponderance of the evidence standard required of the complainant for proving 'contributing factor' causation." *Id.*

Thus, at this *prima facie* stage, "[a]n employer's legitimate business reasons may neither factually nor legally negate an employee's proof that the protected activity contributed to an adverse action." *Id.* at slip op. 24. The employer must put forth such proof at the next stage, to show by

[25]The ARB's decision in *Fordham* is available at: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/12_061.SOXP.PDF.

clear and convincing evidence that it would have taken the same personnel action regardless of the employee's protected activity. *Id.*

The ARB's decision in *Fordham* forecloses the Defendants' argument that Wallender's misconduct severs the causal connection between his participation in Rothwell's investigation of Martin and his discharge a month later. At this stage of the proceeding, the Defendants' "legitimate business reasons may neither factually or legally negate" Wallender's proof that the protected activity was a contributing factor to his termination. *Id.* Taking this evidence in the light most favorable to Wallender as the non-movant and considering that Wallender need only show by a preponderance of the evidence that his protected activity was a factor that contributed to his termination, a reasonable jury could determine that Wallender's protected activity was a contributing factor in his termination.

2. *Termination Regardless of Protected Activity*

If the plaintiff meets his burden of establishing a *prima facie* case by a preponderance of evidence, then the employer may avoid liability if it can demonstrate "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B)(iv); *Riddle*, 497 F. App'x at 596; *Sussberg v. K-Mart Holding Corp.*, 463 F. Supp. 2d 704, 712 (E.D.

Mich. 2006). This burden-shifting framework is distinct from the *McDonnell Douglas* burden-shifting framework applicable to Title VII claim and other types of employment retaliation claims. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008); *Walton v. Nova Info. Sys.*, No. 3:06-CV-292, 2008 WL 1751525, at *7 (E.D. Tenn. Apr. 11, 2008); *Fordham*, ARB Case No. 12-061, at slip op. 27 (stating that the SOX burden-shifting framework replaced *McDonnell Douglas* burden of proof standards).[26]

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[26]Under the *McDonnell Douglas* burden-shifting framework, once the plaintiff makes a *prima facie* case of discrimination, the defendant must offer sufficient evidence of a legitimate, nondiscriminatory reason for its action. If the defendant meets its burden, it is then up to the plaintiff to show by a preponderance of evidence that the proffered reason is a pretext for unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996) *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012). There are two distinct differences between the two frameworks.

First, under the *McDonnell Douglass* framework, the defendant must present sufficient evidence of a legitimate and nondiscriminatory reason for the adverse personnel action. On the other hand, under the SOX framework, while the defendant's "proffered business reasons for its personnel decision is relevant to the inquiry, [the defendant's] legal burden . . . is to prove by clear and convincing evidence that it would have taken the same unfavorable action in the absence of protected activity." *See Bechtel v. Competitive Techs., Inc.*, ARB Case No. 06-010 at slip op. 6 (March 26, 2008), *available at* http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/06_010.SOXP.PDF.

Second, the ARB has clarified that under § 1514A of SOX, once the defendant presents clear and convincing evidence that it would have made the same personnel decision regardless of the protected activity, the plaintiff cannot overcome it with

To defeat summary judgment under this framework, Wallender need not convince this court that will he prevail, but rather he must show that a genuine dispute exists as to whether the record clearly and convincingly demonstrates that the adverse action would have been taken in the absence of his protected behavior. *See Leshinsky*, 942 F. Supp. 2d at 441. The circumstances of his termination make this burden insurmountable for Wallender. The Defendants have presented clear and convincing evidence that they "'made a reasonably informed and considered decision,'" and would have terminated Wallender regardless of his protected behavior. *Riddle*, 497 F. App'x at 597 (*quoting Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598-99 (6th Cir. 2007)). The Defendants have presented particularized facts showing that they decided to terminate Wallender only after he

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evidence that the proffered reason is a pretext for unlawful discrimination. *Id.* at slip op. 6-7; *see also Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 448-49 (2013); *Zinn*, 2012 WL 1143309, at *6 (stating that by placing on plaintiff the burden to prove that the defendant's reasons for the adverse personnel action are pretext for retaliation, the ALJ conflated the SOX burden of proof standard with the Title VII burden of proof, which SOX § 1514A replaced). Thus, the defendant's burden under § 1514A to demonstrate by *clear and convincing* evidence that the employer would have taken the same favorable personnel action in the presence of the protected behavior is heavier than its burden under the *McDonnell Douglas* framework, "thereby making summary judgment against plaintiffs in Sarbanes-Oxley retaliation cases a more difficult proposition." *Leshinsky*, 942 F. Supp. 2d at 441; *Fordham*, ARB Case No. 12-061, at slip op. 37 ("Congress unambiguously sought to benefit [SOX] whistleblowers by altering the existing burdens of proof).

consistently engaged in misreporting train metrics and had been repeatedly warned about such practice.

The evidence is overwhelming that Canadian National takes misreporting of train data seriously and frequently takes measures to prevent and punish it. Canadian National has in place monitoring and auditing systems to prevent manipulation of train data. Canadian National's BSG — Business Support Group — regularly monitors and audits the operating metrics reported at Canadian National and Illinois Central terminals to identify inappropriate manipulation of data. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶¶ 16, 23, ECF No. 75-1.) In addition to the BSG monitoring system, Canadian National also conducts audits when it becomes aware of specific allegations of misreporting. (*Id.* ¶ 27.) For instance, Canadian National conducted an audit in Memphis in 2011, (*Id.* ¶ 30), conducted an investigation in Memphis in February of 2012, (*Id.* ¶ 33), and conducted another investigation in Memphis in July of 2012, (*Id.* ¶ 40). Further, Canadian National has often warned employees to not engage in misreporting. For instance, on February 21, 2012, Creel sent letters to all operating leaders to put them on notice of the consequences of misreporting. (*Id.* ¶ 36.) On

August of 2012, Vena met with the trainmasters and stressed that they must not WOC trains in or out of Memphis. (*Id.* ¶ 44.)[27]

Wallender was frequently warned about misreporting. Wallender received a written warning in December 30, 2011 which stated that further instances of misconduct could result in termination. (Defs.' Mot. for Summ. J., Ex. 5 at 49, ECF No. 61-7.) Despite this warning, Wallender regularly improperly arrived and departed trains by WOCing them, he improperly kept cars off the 24-hour report, he manipulated numbers and reports to make reporting metrics look good artificially, and he repeatedly instructed clerks to improperly WOC trains. (*Id.* ¶ 29.) Wallender was again instructed by Becker that manipulating data was wrong, and he admits that he did not change his behavior after his meeting with Becker. (*Id.* ¶¶ 33, 35.) Wallender received additional orders to stop the practice in February of 2012 from Creel, who informed all operating leaders that improper reporting train data was unacceptable and would be dealt with seriously. (*Id.* ¶ 36.) On September 18, 2012, Wallender instructed McHone to falsify the information regarding the location of the train by showing it had arrived in the Yard at midnight, when it had not, which led to his ultimate termination. (*Id.* ¶ 50.)

[27]Wallender was not present in this meeting. (*Id.*)

In his memorandum in opposition to the summary judgment motions, Wallender does not specifically argue that a genuine dispute of material fact exists as to whether the Defendants would have terminated Wallender in the absence of his protected behavior. Nevertheless, the court construes that the following allegations were put forth by Wallender to show a dispute as to the Defendants' reason for terminating him.

Wallender alleges that it was common practice at Harrison Yard to list a train as having arrived before it was physically in the yard, and, therefore, in essence the Defendants' proffered reason for his termination was pretextual. (Am. Compl. ¶ 42, ECF No. 38). Wallender asserts that he was directed to improperly report railroad performance metrics by Martin, Vena, and others, and he was terminated for doing exactly as he had been instructed. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 29, ECF No. 75-1; Pl.'s Resp. to Defs.' Mot. for Summ. J. 17, ECF No. 75.)

Wallender, however, has not adduced evidence that supports his assertion of the alleged common practice of WOCing a train early. Wallender relies on Bourzikas's deposition testimony that as late as June 2012 Vena instructed the trainmasters to WOC trains into the terminal, but the same deposition shows that such practice was allowed only if the trains were right outside of the terminal. (Bourzikas Dep. 77, ECF No. 86-6.) Bourzikas

also states that he is not aware of anyone, including himself, who WOCed a train when it was outside of the Aulon station. (*Id.* at 72.) Wallender WOCed a train that was approximately ten miles outside of Harrison Yard, and there is no evidence that this had ever been an accepted practice, even prior to June 2012.

As to Wallender's argument that his was directed by others to improperly report train metrics, it is undisputed that Wallender was aware he was engaging in a forbidden practice. Even if the court were to accept that Wallender's intentional misreporting was excused initially because he was following orders, the evidence clearly shows that Wallender's conduct was not excused after: (1) he was formally disciplined on December 30, 2011; (2) received Creel's memorandum to the operating leaders on February 21, 2012; and (3) his conversation with Becker in February, 2012. Given all these warnings, Wallender's continuing dependence on Martin's alleged encouragement to misreport the train data is unreasonable and far-fetched. Moreover, after disclosing Martin's misreporting to Rothwell and believing Martin's conduct amounted to shareholder fraud, Wallender engaged in the very same misconduct.

Having received repeated warnings against misreporting train metrics, Wallender cannot hide behind the assertion that he was following orders. Whistleblower provisions are not

"intended to be used by employees to shield themselves from the consequences of their own misconduct or failures." *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999); *see Kahn v. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995)(rejecting "[plaintiff's] attempt to hide behind his protected activity as a means to evade termination for non-discriminatory reasons"); *Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 804 (11th Cir. 2011)(citing *Trimmer*). The evidence is clear and the court is convinced that Wallender received sufficient warnings regarding misreporting of train data and in fact knew that WOCing a train into the terminal would be unacceptable.

Wallender also argues that the discipline he received on December 30, 2011, was a sham because his suspension was scheduled for days that he was already scheduled to be off duty and Martin was going to "forget" to tell the personnel department that Wallender had been suspended. (Am. Compl. ¶ 30, ECF No. 38.) Consequently, Wallender maintains that because did not have a prior disciplinary action against him, he would not have been terminated for the September 18, 2012 incident of WOCing a train into the terminal. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 53, ECF No. 75-1.)

The record does not support Wallender's argument. Wallender relies on Klaus's deposition testimony to suggest a

dispute, however, Klaus states in his deposition that if Wallender "had never been coached or been reprimanded, or suspended and it was a single event, and he didn't know better," then Wallender would not have been terminated. (Defs.' Reply to Pl.'s Statement of Additional Facts ¶ 29, ECF No. 86.) Because Wallender was "coached" by Creel's February 21, 2012 letter and warned by Becker to refrain from misreporting, it can be inferred that Wallender would still have been terminated even in the absence of his December 30, 2012 suspension. "Absent intentional discrimination, federal courts do not sit as a 'super personnel department reviewing the wisdom or fairness of the business judgments made by employers.'" *Riddle v. First Tenn. Bank*, No. 3:10-CV-0578, 2011 WL 4348298, at *9 (M.D. Tenn. Sept. 16, 2011)(quoting *Hutson v. McDonnell-Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1996)).

Wallender's subjective belief that he was not disciplined on December 30, 2011 is not material to the pertinent question of whether the Defendants have presented "clear and convincing evidence of [their] belief that [Wallender] had been insubordinate and was subject to discharge." *Kim v. Boeing Co.*, 487 F. App'x 356, 357 (9th Cir. 2012); *see also Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 801-02 (11th Cir. 2011)(quoting *Moore v. Sears, Roebuck and Co*,, 683 F.2d 1321, 1323 n.4 (11th Cir. 1982)("[F]or an employer to prevail the jury need not

determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory."). The December 30, 2011 letter clearly shows that the Defendants believed in good faith that Wallender was insubordinate and that he was subject to termination. The Defendants' subsequent warnings reinforce the fact that they believed that Wallender was engaged in misreporting. It is undisputed from the record that the Defendants considered Wallender's actions to be "egregious misconduct from a habitual offender," and that they terminated him based on such belief. (*See* Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 53, ECF No. 75-1.)

Wallender alleges in conclusory fashion that Canadian National has an unwritten policy of retaliating against whistleblowers. (*Id.* ¶¶ 33-35.) In support of this assertion, Wallender attaches to his complaint an email from Martin regarding a safety inspection, which states that "All Focus, Flagged and less than 2 years employees" were the main focus of attention. (*Id.* ¶ 33.) Wallender alleges that "focus" and "flagged" employees are those employees who have reported accidents or engaged in other whistleblower activities. (*Id.*) Wallender provides no support for this allegation, and thus, his conclusory statements without factual support are insufficient

to defeat a summary judgment motion. *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009).

Additionally, Wallender's allegation regarding Canadian National's policy of retaliation against whistleblowers is not supported by any evidence. It is an undisputed fact that deficiencies in Wallender's conduct were noted prior to his engagement in protective activity for which Wallender was formally disciplined on December 30, 2011, seven or eight months before his alleged protective conduct. Thus, Wallender's prior record of disciplinary conduct undermines his argument that the second disciplinary action towards him for the same conduct was taken in retaliation for his engagement in protective conduct. *Cf. McEuen v. Riverview Bancorp, Inc.*, No. C12-5997 RJB, 2013 WL 6729632, at *4 (W.D. Wash. Dec. 19, 2013)(finding that retaliation could be inferred given that the plaintiff presented evidence that deficiencies in her performance were not noted until after she reported the fraudulent conduct of her supervisors).

The evidence is clear that the Defendants did not retaliate against any of the other employees who were involved in Martin's investigation. Trainmaster Goar, who participated in the Rothwell investigations, continues to work for Illinois Central and has been promoted. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 42, ECF No. 75-1.) Jenkins, Bourzikas, and

Lehman all continued to work for Illinois Central until they voluntarily quit. (*Id.*) Lehman stated in his deposition that he did not experience retaliation after making his report regarding Martin. (*Id.*) Further, Vincent, who exposed Wallender's misreporting, has experienced no subsequent discipline. (*Id.* ¶ 31.) Moreover, Wallender did not initiate the investigation into Martin's misreporting in July and August 2012. Rather, Lehman and Bourzikas filed complaints about Martin and reporting violations. As pointed out above, neither were retaliated against and both continued to work for Illinois Central. *See Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987)(finding that the employer's reason for termination was truthful because there was no pattern of retaliation against employees who engaged in protected activity).

The court is convinced that a reasonable jury could not agree with Wallender's retaliatory theory at trial. Given the lack of evidence as to the existence of a retaliatory policy or evidence that the Defendants retaliated against other employees who participated in Martin's investigation, there is no reasonable basis for the jury to believe Wallender's theory for his termination.

Lastly, Wallender alleges that the Defendants would not have fired Wallender in the absence of the protected conduct,

because "the defendants have repeatedly proved they are not genuinely sincere or serious about being ethical." (Am. Compl. ¶ 57, ECF No. 38.) As an example, Wallender states that the Defendants are not serious about corporate ethics because they failed to fire Martin who continued to commit reporting fraud, and instead fired Wallender. (*Id.*) The undisputed evidence, however, shows that Rothwell was unable to substantiate allegations that Martin was instructing employees to misreport train data, but nevertheless, Martin was issued significant penalties for his conduct in other areas. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 43, ECF No. 75-1.) The court cannot double guess the results of Martin's investigation because, as stated above, the court does "not sit as a super-personnel department that reexamines an entity's business decisions." *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)(quotation omitted); *see also Riddle*, 2011 WL 4348298, at *9 (quoting *Hutson v. McDonnell-Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1996)).

There is undisputed evidence in the record that Canadian National has taken many disciplinary actions when allegations of misreporting were substantiated. For instance, Canadian National demoted two superintendents and dismissed one as a result of the misreporting. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts ¶ 27, ECF No. 75-1.) In August of 2013,

Zarozny — the Assistant Superintendent in Memphis — who had previously been warned against misreporting, was dismissed from service after he instructed a clerical employee to engage in a reporting violation. (*Id.* ¶ 28.) In 2013, another trainmaster in Memphis also received discipline for misreporting. (*Id.*) Given that other employees who did not engage in SOX reporting have been discharged for similar misconduct, Wallender's termination was not "unreasonable or disparate." *Fredickson v. Home Depot U.S.A. Inc.*, ALJ Case No. 2007-SOX-13, at slip op. 13 (ALJ July. 10, 2007);[28] *see also Johnson v. Stein Mart, Inc.*, 440 F. App'x 795, 801-03 (11th Cir. 2011)(finding that the employer presented clear and convincing evidence that it would have terminated the employee because, *inter alia*, the employee offered no proof of other non-SOX-reporting employees who were treated more favorably than she was).

Taking all evidence in the light most favorable to Wallender, the court finds that the Defendants have established by clear and convincing evidence that they would have terminated Wallender regardless of any protected activity on his part. *See Johnson*, 440 F. App'x at 801-03 (noting that employer presented clear and convincing evidence that it would have terminated the

[28]The ALJ's decision is available here: http://www.oalj.dol.gov/Decisions/ALJ/SOX/2007/FREDRICKSON_ROGER_v_THE_HOME_DEPOT_INC_2007SOX00013_(JUL_10_2007)_092740_CADEC_SD.PDF.

employee because the employee's performance deficiencies and failure to improve were amply corroborated); *Guitron v. Wells Fargo Bank, N.A.*, No. C 10-3461 CW, 2012 WL 2708517, at *17 (N.D. Cal. July 6, 2012)(holding that plaintiff's inferior performance, subordination, and lack of evidence that others who performed similarly were not disciplined were clear and convincing evidence that the employer would have terminated plaintiff in the absence of protected activity); *Zinn v. Am. Commercial Lines Inc.*, ARB Case No. 13-021, at slip op. 6-9 (Dep't of Labor Dec. 17, 2013)(holding that the employee's pattern of misconduct was clear and convincing evidence that the employer would have discharged her in the absence of protected activity)[29]; *Giurovici v. Equinix, Inc.*, ARB Case No. 07-027, at slip op. 8 (Dep't of Labor Sept. 30, 2008)(stating that the employer's evidence that the plaintiff's "deteriorating job performance and insubordination established that it would have fired [the plaintiff] even if he had engaged in protected activity.").[30] *Halloum v. Intel Corp.*, ARB Case No. 04-068, 2006 WL 618383, at *6 (Dep't of Labor, Jan. 31, 2006)(holding that an employee's action of knowingly violating company policy was

[29]The ARB's decision is available here: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/13_021.SOXP.PDF.

[30]The ARB's decision is available here: http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/07_027.SOXP.PDF.

clear and convincing evidence that the company would have discharged the employee regardless of any protected activity); *Galinsky v. Bank of Am., Corp.*, ALJ Case nos. 2011-SOX-010, 2007-SOX-076, at slip op. 16-17 (May 31, 2011)(holding that the employer presented clear and convincing evidence that it would have terminated the plaintiff because the plaintiff was knowingly violating company policy as stated in handbook).[31]

III. CONCLUSION

For the foregoing reasons, the Defendants' motions for summary judgment are granted.[32]

IT IS SO ORDERED this 10th day of February, 2015.

s/ Diane K. Vescovo
Diane K. Vescovo
Chief United States Magistrate Judge

[31]The ALJ's decision is available here: http://www.oalj.dol.gov/Decisions/ALJ/SOX/2011/GALINSKY_BORIS_v_BANK_OF_AMERICA_CORP_2011SOX00010_(MAY_31_2011)_145640_CADEC_SD.PDF.

[32]Because the court did not consider any testimony from Wallender's experts, it was not necessary for the court to rule on the Defendants' motions to exclude the expert testimony of Boris Onefater and Ralph Hellmold prior to ruling on the motions for summary judgment. (ECF Nos. 64, 66.) In light of the grant of summary judgment, the motions are now moot.